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CASES REPORTED.

	Page		Page
Aberdeen & R. R. Co., Fayetteville St. Ry. v. (N. C.)	345	Atlantic & B. R. Co., Kirkland v. (Ga.)	23
Abrams v. State (Ga.)	497	Atlantic & N. C. R. Co., Hill v. (N. C.)	854
Adams, Thompson v. (W. Va.)	668	Atlantic & N. C. R. Co., Ives v. (N. C.)	74
Etna Life Ins. Co., Hagins v. (S. C.)	323	Atlantic & N. C. R. Co., Ruffin v. (N. C.)	86
A. F. Messick Grocery Co., Stanford v. (N. C.)	815	Augusta Drug Co., Glenn v. (Ga.)	1032
Alabama Great Southern R. Co. v. Davis (Ga.)	1046	Baggett v. Edwards (Ga.)	250
Albright-Prior Co. v. Pacific Selling Co. (Ga.)	251	Bailey, Carolina & T. S. R. Co. v. (N. C.)	778
Alderman & Sons Co., Wilson Lumber Co. v. (S. C.)	447	Baker, Mann v. (N. C.)	102
Aldrich v. Aldrich (S. C.)	887	Balkcom v. State (Ga.)	477
A. Leffler & Sons v. Union Compress Co. (Ga.)	927	Baltimore & O. R. Co. v. Lee (Va.)	1
Allen v. Burch (N. C.)	354	Banking, Loan & Trust Co., Yarrowborough v. (N. C.)	296
Allen v. State (Ga.)	478	Bank, Johnson v. (W. Va.)	394
Allred v. State (Ga.)	178	Bank of Minden v. Long (Ga.)	915
Alsobrooks, State v. (N. C.)	1047	Bank of Morganton v. Hay (N. C.)	811
Anderson, City of Laurens v. (S. C.)	136	Bank of Rocky Mount v. Floyd (N. C.)	95
Anderson, Downing v. (Ga.)	184	Bank of Spartanburg v. Mahon (S. C.)	529
Anderson v. Prince (W. Va.)	656	Banks v. J. S. Schofield's Sons Co. (Ga.)	939
Anderson v. Wilkins (N. C.)	272	Banks, State v. (W. Va.)	739
Anderson v. Wyche (Ga.)	19	Bare v. Crane Creek Coal & Coke Co. (W. Va.)	907
Anderson Phosphate & Oil Co., Burton v. (S. C.)	217	Barnes, Peacock v. (N. C.)	99
Anslay v. Farley (Ga.)	180	Barrett v. Brewer (N. C.)	414
Anthony v. State (Ga.)	479	Barrick, State v. (W. Va.)	652
App v. App (Va.)	672	Barrineau v. Stevens (S. C.)	309
Applicants for License, In re (N. C.)	635	Beard v. Southern R. Co. (N. C.)	505
Armour & Co. v. Ross (S. C.)	815	Beaudrot v. State (Ga.)	592
Armstrong, Eames v. (N. C.)	406	Becton v. Dunn (N. C.)	101
Armstrong v. Ross (W. Va.)	895	Bee, Ritchie County Bank v. (W. Va.)	380
Arrington v. Arrington (N. C.)	1047	Bell, Brinkley v. (Ga.)	187
Arvondale & C. R. Co., Spies v. (W. Va.)	464	Bell v. Forsyth (Ga.)	230
Ashley v. Kanawha Valley Traction Co. (W. Va.)	1016	Bell v. Gress Mfg. Co. (Ga.)	1043
Askew v. Hogansville Cotton Oil Co. (Ga.)	921	Bell v. State (Ga.)	476
Assurance Co. of America, Cozart, Eagles & Carr v. (N. C.)	411	Belvin, Burton v. (N. C.)	71
Atlanta, Draper v. (Ga.)	929	Benedetto, Quaglini v. (Ga.)	938
Atlanta Ice & Coal Co. v. Mixon (Ga.)	237	Bennett v. Atlantic Coast Line R. Co. (Ga.)	177
Atlanta, K. & N. R. Co. v. Shippen (Ga.)	1031	Bennett v. Best (N. C.)	84
Atlanta & C. Air Line R. Co., Hayes v. (N. C.)	437	Bennett v. Commonwealth (Va.)	698
Atlanta & C. Air Line R. Co., Miller v. (N. C.)	430	Berry v. Southern R. Co. (Ga.)	239
Atlantic Coast Line, Dewey v. (N. C.)	292	Bessemer City Cotton Mills, Ivey v. (N. C.)	613
Atlantic Coast Line R. Co., Bennett v. (Ga.)	177	Bessemer City Cotton Mills, Ormand Min. Co. v. (N. C.)	700
Atlantic Coast Line R. Co., Brick v. (N. C.)	194	Best, Bennett v. (N. C.)	84
Atlantic Coast Line R. Co., Caldwell v. (S. C.)	131	Betchman v. Seaboard Air Line Ry. Co. (S. C.)	140
Atlantic Coast Line R. Co., Cannaday v. (N. C.)	836	Betts v. Raleigh (N. C.)	145
Atlantic Coast Line R. Co., Commonwealth v. (Va.)	572	Biles v. Seaboard Air Line R. Co. (N. C.)	512
Atlantic Coast Line R. Co., Drawdy v. (S. C.)	444	Binyard v. State (Ga.)	498
Atlantic Coast Line R. Co., Hiers v. (S. O.)	457	Bird v. United States Leather Co. (N. C.)	727
Atlantic Coast Line R. Co., Hudson v. (N. C.)	103	Black's Adm'r v. Virginia Portland Cement Co. (Va.)	587
Atlantic Coast Line R. Co., Milhous v. (S. C.)	764	Blackwell v. Ramsey-Brisben Stone Co. (Ga.)	968
Atlantic Coast Line R. Co., Wilson v. (N. C.)	257	Biedsoe v. Columbia Mills Co. (S. C.)	886
Atlantic Product Co. v. Dunn (N. C.)	299	Bilizzard, Ex parte (W. Va.)	913
Atlantic & B. R. Co., Brown v. (Ga.)	24	Blue, McKeithen v. (N. C.)	235
Atlantic & B. R. Co. v. Hattaway (Ga.)	21	Blue Ridge Light & Power Co. v. Tutwiler (Va.)	539
		Blue Ridge R. Co., Cole v. (S. C.)	126
		Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co. (N. C.)	442
		Board of Education of Greenville County, Greenville College for Women v. (S. C.)	132
		Board of Education of Tennille v. Kelley (Ga.)	238
		Board of Water Com'rs of City of Charlotte, Creighton v. (N. C.)	511
		Bohan, Walpert v. (Ga.)	181
		Bohanon, State v. (N. C.)	797

	Page		Page
Born Steel Range Co., Southern R. Co. v. (Ga.)	173	Chattahoochee Lumber Co., Home Ins. Co. of New York v. (Ga.)	11
Bourne v. Sherrill (N. C.)	799	Chenoweth v. Keenan (W. Va.)	991
Bowden v. State (Ga.)	499	Cherokee Tanning Extract Co. v. Western Union Tel. Co. (N. C.)	777
Bowles, De La Perriere v. (Ga.)	1030	Cherry v. Cape Fear Power Co. (N. C.)	287
Bowman's Ex'r v. Roller (Va.)	4	Chesapeake & O. R. Co. v. Farrow's Adm'r (Va.)	569
Bragg v. State (Ga.)	232	City Bank, Sigwald v. (S. C.)	109
Brand v. Lawrenceville (Ga.)	967	City Council of Augusta v. Dosier (Ga.)	234
Brandon v. Pritchett (Ga.)	241	City of Asheville v. Wachovia Loan & Trust Co. (N. C.)	800
Braswell, Bunn v. (N. C.)	85	City of Hickory v. Southern R. Co. (N. C.)	840
Braswell, Skinner v. (Ga.)	914	City of Laurens v. Anderson (S. C.)	136
Braxton County Court, State v. (W. Va.)	382	Clarke, Shenandoah Land & Anthracite Coal Co. v. (Va.)	561
Breeden v. Peale (Va.)	2	Clem v. Given's Ex'r (Va.)	567
B. R. Electric Co., Southern Exp. Co. v. (Ga.)	254	C. L. Groves & Co., Thurmond v. (Ga.)	915
Brewer, Barrett v. (N. C.)	414	Cline, Chambers v. (W. Va.)	999
Brick v. Atlantic Coast Line R. Co. (N. C.)	194	Cobb v. Johnson (Ga.)	935
Brinkley v. Bell (Ga.)	187	Cole v. Blue Ridge R. Co. (S. C.)	126
Briscoe, J. S. Martin & Son v. (N. C.)	732	Collins Bag Co., Peters Grocery Co. v. (N. C.)	90
Broadwell v. Morgan (N. C.)	340	Columbia Mills Co., Bledsoe v. (S. C.)	886
Brooks, Godfree & Dellinger v. (Ga.)	938	Commissioners of Stokes County, Jones v. (N. C.)	427
Brown v. Atlantic & B. R. Co. (Ga.)	24	Commonwealth v. Atlantic Coast Line R. Co. (Va.)	572
Brown v. Howard & Whitehead (Va.)	682	Commonwealth, Bennett v. (Va.)	698
Brown v. Southerland (N. C.)	108	Commonwealth, Hatcher & Shaw v. (Va.)	677
Browne, Lovelace v. (Ga.)	1041	Commonwealth, Jones v. (Va.)	679
Bryan, Williamson v. (N. C.)	77	Commonwealth, Winchester & S. R. Co. v. (Va.)	692
Bryant v. Ridgway (Ga.)	932	Connelly v. Connelly (Ga.)	916
Bunn v. Braswell (N. C.)	85	Conner v. Seaboard Air Line R. Co., two cases (S. C.)	216
Burch, Allen v. (N. C.)	354	Conner, Wheeling Ice Storage Co. v. (W. Va.)	982
Burnett, State v. (N. C.)	72	Connor, State v. (N. C.)	787
Burton v. Anderson Phosphate & Oil Co. (S. C.)	217	Continental Ins. Co., W. P. Parker & Co. v. (N. C.)	717
Burton v. Belvin (N. C.)	71	Conwell, Neal v. (Ga.)	936
Burton v. O'Neill Mfg. Co. (Ga.)	933	Cooley, Williams v. (Ga.)	917
Bussey v. Charleston & W. C. R. Co. (S. C.)	163	Corbin v. Durden (Ga.)	30
		Cotton v. Highland Park Mfg. Co. (N. C.)	358
Cabot, Hardman v. (W. Va.)	756	Cowden, Keiner v. (W. Va.)	649
Cain v. Daly (S. C.)	110	Cowdrey v. Greenlee (Ga.)	918
Caldwell, Ex parte (W. Va.)	910	Cox v. Macon R. & Light Co. (Ga.)	232
Caldwell v. Atlantic Coast Line R. Co. (S. C.)	131	Cox & Dantzler, Dantzler v. (S. C.)	774
Callaway, Irvin v. (Ga.)	1039	Cozart, Eagles & Carr v. Assurance Co. of America (N. C.)	411
Callaway & Truitt v. Southern R. Co. (Ga.)	22	Crane Creek Coal & Coke Co., Bare v. (W. Va.)	907
Callaway & Truitt v. Southern R. Co. (Ga.)	23	Craven, Martin v. (Ga.)	962
Cameron Pottery Co., Golding Sons Co. v. (W. Va.)	396	Crawford v. Roney (Ga.)	499
Camper, Thompson v. (Va.)	674	Creighton v. Board of Water Com'rs of City of Charlotte (N. C.)	511
Cannaday v. Atlantic Coast Line R. Co. (N. C.)	836	Cress v. State (Ga.)	491
Cannon, Ex parte (S. C.)	325		
Cantwell, State v. (N. C.)	820	Daly, Cain v. (S. C.)	110
Cape Fear Power Co., Cherry v. (N. C.)	287	Daniel v. State (Ga.)	472
Cape Fear & N. R. Co., Knott v. (N. C.)	150	Dantzler v. Cox & Dantzler (S. C.)	774
Carger v. Macon R. & Light Co. (Ga.)	914	Davis, Alabama Great Southern R. Co. v. (Ga.)	1046
Carleton v. Yadkin R. Co. (N. C.)	429	Davis v. Evans (N. C.)	344
Carney v. Rease (W. Va.)	729	Davis v. Keen (N. C.)	359
Carolina Cent. R., McCoy v. (N. C.)	270	Davis v. Northwestern R. Co. (S. C.)	526
Carolina Portland Cement Co. v. Turpin (Ga.)	925	Davis, Parish v. (Ga.)	1032
Carolina & T. S. R. Co. v. Bailey (N. C.)	778	Davis v. Roller (Va.)	4
Carpenter, Gaither v. (N. C.)	625	Davis, Sutton v. (N. C.)	844
Carpenter, Riley v. (N. C.)	628	Davis v. Wall (N. C.)	350
Carr, Kinsey v. (W. Va.)	1004	Davison v. Smith (W. Va.)	466
Carter v. Southern R. Co. (S. C.)	771	Deas v. Sammons (Ga.)	170
Carter v. State (Ga.)	477	De La Perriere v. Bowles (Ga.)	1030
Case, Foster v. (Ga.)	921	Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.)	330
Castilow v. Castilow (W. Va.)	592	Detwiler, State v. (W. Va.)	654
Castles v. Lancaster County (S. C.)	115	Dewey v. Atlantic Coast Line (N. C.)	292
Catawba Power Co., Green v. (S. C.)	125	Dillon, International Harvester Co. v. (Ga.)	1034
Caudell v. Caudell (Ga.)	1028	Dorsey v. State (Ga.)	479
C. A. Webb & Co. v. Trustees of Morgan-ton Graded School (N. C.)	719	Douglas County Co-Operative Store, Lewis v. (Ga.)	1047
Chalkley, Charles Holmes Mach. Co. v. (N. C.)	524	Downing v. Anderson (Ga.)	184
Chambers v. Cline (W. Va.)	999	Doyle v. Hill (S. C.)	446
Chambers, Southern R. Co. v. (Ga.)	37		
Chapple v. State (Ga.)	471		
Charles Holmes Mach. Co. v. Chalkley (N. C.)	524		
Charleston & W. C. R. Co., Bussey v. (S. C.)	163		
Charleston & W. C. R. Co. Talbert v. (S. C.)	188		

	Page		Page
Doxier, City Council of Augusta v. (Ga.)	234	Georgia R. R., Shaw v. (Ga.)	960
Drake, Patterson v. (Ga.)	175	Georgia R. & Banking Co., Pickens v. (Ga.)	171
Draper v. Atlanta (Ga.)	929	Georgia R. & Electric Co., Hughes v. (Ga.)	229
Drawdy v. Atlantic Coast Line R. Co. (S. C.)	444	Giles v. State (Ga.)	405
Dublin v. State (Ga.)	487	Given's Ex'r, Clem v. (Va.)	567
Du Bose v. Gladden (S. C.)	152	Gladden, Du Bose v. (S. C.)	152
Duckworth v. Mull (N. C.)	850	Gladstein, Levin v. (N. C.)	371
Duffy v. Fidelity Mut. Life Ins. Co. (N. C.)	79	Glasgow, Wayt v. (Va.)	536
Duffy v. Fidelity Mut. Life Ins. Co. (N. C.)	1047	Glenn v. Augusta Drug Co. (Ga.)	1032
Duke v. Norfolk & W. R. Co. (Va.)	548	Glover, Hawes v. (Ga.)	62
Dunaway v. Hodge (Ga.)	483	Glover v. State (Ga.)	403
Dunn, Atlantic Product Co. v. (N. C.)	299	Glover v. State (Ga.)	592
Dunn, Becton v. (N. C.)	101	Godfree & Dellinger v. Brooks (Ga.)	933
Durden, Corbin v. (Ga.)	30	Golding Sons Co. v. Cameron Pottery Co. (W. Va.)	396
D. W. Alderman & Sons Co., Wilson Lumber Co. v. (S. C.)	447	Goodin v. State (Ga.)	503
Dyas v. State (Ga.)	488	Gordon v. Johnson (Ga.)	489
Eaker v. Western Union Tel. Co. (S. C.)	129	Graham v. West (Ga.)	931
Eames v. Armstrong (N. C.)	405	Grant v. State (Ga.)	471
East Carolina R. Co., Jones v. (N. C.)	147	Graybeal, State v. (W. Va.)	398
East Carolina Stone & Const. Co., Keel v. (N. C.)	826	Green v. Catawba Power Co. (S. C.)	125
East Coast Cedar Co., East Lake Lumber Co. v. (N. C.)	304	Green v. Freeman (Ga.)	45
East Lake Lumber Co. v. East Coast Cedar Co. (N. C.)	304	Green v. Green (N. C.)	818
Edgerton & Edgerton v. Games (N. C.)	145	Green, McAfee v. (N. C.)	828
Edwards, Baggett v. (Ga.)	250	Greenlee, Cowdrey v. (Ga.)	918
Ellington v. State (Ga.)	403	Greenville College for Women v. Board of Education of Greenville County (S. C.)	132
Ellis, Lemly v. (N. C.)	629	Greenwood Hardware Co., Walter A. Wood Mowing & Reaping Co. v. (S. C.)	973
Emerson, Ledford v. (N. C.)	969	Greer, Paulk v. (Ga.)	943
Equitable Life Assur. Society, Fludd v. (S. C.)	762	Gress Mfg. Co., Bell v. (Ga.)	1043
Evans, Davis v. (N. C.)	344	Griffin v. Griffin (S. C.)	317
Evans v. Forsyth (Ga.)	490	Griggs v. State (Ga.)	179
Everett & Son v. M. Ferst's Sons & Co. (Ga.)	916	Groves & Co., Thurmond v. (Ga.)	915
Fairmont & C. Traction Co., Morrison v. (W. Va.)	669	Gum, Sullivan v. (Va.)	535
Faison, Hatcher v. (N. C.)	284	Hackney, Perry v. (N. C.)	289
Farley, Anasley v. (Ga.)	180	Hagins v. Aetna Life Ins. Co. (S. C.)	323
Farrow's Adm'r, Chesapeake & O. R. Co. v. (Va.)	569	Hairston v. United States Leather Co. (N. C.)	847
Fayetteville St. Ry. v. Aberdeen & R. R. Co. (N. C.)	345	Hall, State v. (N. C.)	306
Ferguson Contracting Co., Williams & Davison Co. v. (W. Va.)	1011	Hall v. Stulb (Ga.)	172
Ferguson, J. A. Middlebrooks & Co. v. (Ga.)	34	Hamilton v. Stephenson (Va.)	577
Ferst's Sons & Co., J. Everett & Son v. (Ga.)	916	Hancock v. Western Union Tel. Co. (N. C.)	82
Fidelity Mut. Life Ins. Co., Duffy v. (N. C.)	79	Harber & Bro. v. Nash (Ga.)	928
Fidelity Mut. Life Ins. Co., Duffy v. (N. C.)	1047	Harbin v. State (Ga.)	1046
Fidelity & Deposit Co., Rich & Bros. v. (Ga.)	336	Harby v. Southern R. Co. (S. C.)	760
Field v. State (Ga.)	502	Hardman v. Cabot (W. Va.)	756
Fitzgerald v. State (Ga.)	482	Harmer, Jones v. (W. Va.)	657
Floyd, Bank of Rocky Mount v. (N. C.)	95	Harrington v. Harrington (N. C.)	409
Fludd v. Equitable Life Assur. Soc. (S. C.)	762	Harris v. Neal (W. Va.)	740
Foot v. Kelley (Ga.)	1045	Harrison v. Western Union Tel. Co. (N. C.)	435
Ford v. Southern R. Co. (S. C.)	448	Harrison v. Western Union Tel. Co. (S. C.)	450
Forsyth, Bell v. (Ga.)	230	Harrisonburg Harness Co. v. National Furniture Co. (Va.)	679
Forsyth, Evans v. (Ga.)	490	Harris v. Howard (Ga.)	59
Foster v. Case (Ga.)	921	Hart v. Lewis, Shore & Co. (Ga.)	189
Foster v. Turnbull (Ga.)	925	Hasseltine v. Southern R. Co. (S. C.)	142
Fountain, Woody v. (N. C.)	425	Hatcher v. Faison (N. C.)	234
Franklin, Strange v. (Ga.)	943	Hatcher & Shaw v. Commonwealth (Va.)	677
Frederick v. State (Ga.)	1044	Hattaway, Atlantic & B. R. Co. v. (Ga.)	21
Freeman, Green v. (Ga.)	45	Hawes v. Glover (Ga.)	62
Frierson v. Jenkins (S. C.)	890	Hay, Bank of Morganton v. (N. C.)	811
Frisbee, State v. (N. C.)	722	Hay v. People's Mut. Benev. Ass'n (N. C.)	623
Fry, Matthews v. (N. C.)	787	Hayes v. Atlanta & O. Air Line R. R. (N. C.)	437
Fuller v. State (Ga.)	1047	Haynes v. North Carolina R. Co. (N. C.)	516
Gainesville, Martin v. (Ga.)	499	Haynes, State v. (S. C.)	118
Gaither v. Carpenter (N. C.)	625	Headley v. Hoopengartner (W. Va.)	744
Games, Edgerton & Edgerton v. (N. C.)	145	Helms v. Western Union Tel. Co. (N. C.)	831
Gantt, Ex parte (S. C.)	892	Henderson Elevator Co. v. North Georgia Mill Co. (Ga.)	50
Garden, Raymond v. (Ga.)	944	Henderson, State v. (S. C.)	117
Gaskins v. State (Ga.)	1045	Henrico County v. Richmond (Va.)	683
Gauley Coal Land Ass'n v. Spies (W. Va.)	903	Herndon v. State (Ga.)	176
General Supply Co. v. Hunn (Ga.)	957	Herring v. Wilton (Va.)	546
		Hicks v. Hicks (N. C.)	106
		Hicks v. Naomi Falls Mfg. Co. (N. C.)	411
		Hiers v. Atlantic Coast Line R. Co. (S. C.)	457
		Highland Park Mfg. Co., Cotton v. (N. C.)	358
		Highland Park Mfg. Co., Shaw v. (N. C.)	433
		High Point Trunk & Bag Co., Jarrett v. (N. C.)	338

	Page		Page
Hill v. Atlantic & N. C. R. Co. (N. C.)	854	Kelner v. Cowden (W. Va.)	649
Hill, Doyle v. (S. C.)	446	Kendall v. Wells (Ga.)	41
Hill, Morisey v. (N. C.)	193	Kent v. Kent (Va.)	564
Hodge, Dunaway v. (Ga.)	483	Kessler v. Pearson (Ga.)	963
Hodge, State v. (N. C.)	626	Kimberly v. Howland (N. C.)	778
Hodge, State v. (N. C.)	791	Kincaid, State v. (N. C.)	647
Hodges, Long v. (Ga.)	916	King v. Southern R. Co. (Ga.)	963
Hodgin v. Southern R. Co. (N. C.)	413	Kinsey v. Carr (W. Va.)	1004
Hogansville Cotton Oil Co., Askew v. (Ga.)	921	Kirkland v. Atlantic & B. R. Co. (Ga.)	23
Hohenstein v. State (Ga.)	238	Knight v. Suddeth & Crenshaw (Ga.)	31
Holland v. Seaboard Air Line R. Co. (N. C.)	835	Knott v. Cape Fear & N. R. Co. (N. C.)	150
Holland v. Williams (Ga.)	1023	Kuhn, Postal Telegraph-Cable Co. v. (Ga.)	967
Hollingsworth, National Union Bank v. (N. C.)	809	La Bianca's Adm'r, Low Moor Iron Co. v. (Va.)	532
Hollingsworth v. Skelding (N. C.)	212	Lancaster County, Castles v. (S. C.)	115
Holloway v. Holloway (Ga.)	191	Lane Bros. Co. v. Seakford (Va.)	556
Holmes Mach. Co. v. Chalkley (N. C.)	524	Lane, Park Land & Imp. Co. v. (Va.)	690
Home Ins. Co. of New York v. Chattahoochee Lumber Co. (Ga.)	11	Langford, State v. (S. C.)	120
Hooker, Swilley v. (Ga.)	31	Lanier v. State (Ga.)	496
Hoopengartner, Headley v. (W. Va.)	744	Lathan v. Western Union Tel. Co. (S. C.)	134
Hot Springs Lumber & Mfg. Co. v. Revercomb (Va.)	580	Lauchheimer & Sons v. Jacobs (Ga.)	55
Howard, Harris v. (Ga.)	59	Lawrenceville, Brand v. (Ga.)	967
Howard v. State (Ga.)	239	Lawton v. Seaboard Air Line R. Co. (S. C.)	128
Howard & Whitehead, Brown v. (Va.)	682	Ledford v. Emerson (N. C.)	969
Howington v. Madison County (Ga.)	941	Lee, Baltimore & O. R. Co. v. (Va.)	1
Howland, Kimberly v. (N. C.)	778	Leesville Mfg. Co. v. Morgan Wood & Iron Works (S. C.)	768
Hudgins v. State (Ga.)	492	Leffler & Sons v. Union Compress Co. (Ga.)	927
Hudson v. Atlantic Coast Line R. Co. (N. C.)	103	Lemly v. Ellis (N. C.)	629
Hughes v. Georgia R. & Electric Co. (Ga.)	229	Levin v. Gladstein (N. C.)	371
Hull v. Roxboro (N. C.)	351	Lewis v. Douglas County Co-Operative Store (Ga.)	1047
Hulvey v. Roberts (Va.)	585	Lewis, Shore & Co., Hart v. (Ga.)	189
Hunn, General Supply Co. v. (Ga.)	957	Lewis, State v. (N. C.)	600
Hunter v. State (Ga.)	1044	Lightner v. State (Ga.)	471
Hutchinson, Ogletree v. (Ga.)	179	Lightner v. State (Ga.)	477
Hutto v. Southern R. Co. (S. C.)	445	Linebarger v. Linebarger (N. C.)	709
		Lockhart Mills, Rice v. (S. C.)	160
Ice v. Maxwell (W. Va.)	899	Long v. Bank of Minden (Ga.)	915
Indianapolis Brewing Co., Springer v. (Ga.)	53	Long v. Hodges (Ga.)	916
Inman, Palmer v. (Ga.)	229	Long v. Mitchell (Ga.)	1033
International Harvester Co. v. Dillon (Ga.)	1034	Loudermilk v. Stephens (Ga.)	956
Irvin v. Callaway (Ga.)	1039	Louisville & N. R. Co., Stonega Coke & Coal Co. v. (Va.)	551
Irvin v. Porterfield (Ga.)	946	Lovelace v. Browne (Ga.)	1041
Irvin v. Spratlin (Ga.)	1037	Lovelady v. Roberts & McClure (Ga.)	915
Isley v. Virginia Bridge & Iron Co. (N. C.)	416	Low Moor Iron Co. v. La Bianca's Adm'r (Va.)	532
Ives v. Atlantic & N. C. R. Co. (N. C.)	74		
Ivey v. Bessemer City Cotton Mills (N. C.)	613	McAfee v. Green (N. C.)	828
Ivey v. Rome (Ga.)	1034	McClung v. Price (W. Va.)	996
		McCoy v. Carolina Cent. R. (N. C.)	270
Jacobs, M. H. Lauchheimer & Sons v. (Ga.)	55	McCrimmon v. State (Ga.)	481
J. A. Middlebrooks & Co. v. Ferguson (Ga.)	34	McDonald v. State (Ga.)	235
Jarrett v. High Point Trunk & Bag Co. (N. C.)	338	McDonald's Adm'r, Norfolk & W. R. Co. v. (Va.)	554
Jaudon, Phoenix Furniture Co. v. (S. C.)	308	McDowell County Bank v. Wood (W. Va.)	753
Jenkins, Frierson v. (S. C.)	890	McElvey, Savannah Electric Co. v. (Ga.)	192
J. Everett & Son v. M. Ferst's Sons & Co. (Ga.)	916	McGill Bros. v. Seaboard Air Line R. Co. (S. C.)	216
Johnson v. Bank (W. Va.)	394	McKeithen v. Blue (N. C.)	285
Johnson, Cobb v. (Ga.)	935	McKenna, Susong v. (Ga.)	236
Johnson, Gordon v. (Ga.)	489	McKenzie, Miller & Co. v. (Ga.)	952
Johnson v. Johnson (N. C.)	341	Macon B. & Light Co., Carger v. (Ga.)	914
Jones v. Commissioners of Stokes County (N. C.)	427	Macon B. & Light Co., Cox v. (Ga.)	232
Jones v. Commonwealth (Va.)	679	Macon B. & Light Co., Primus v. (Ga.)	924
Jones v. East Carolina R. Co. (N. C.)	147	Madison County, Howington v. (Ga.)	941
Jones v. Harmer (W. Va.)	657	Mahon, Bank of Spartanburg v. (S. C.)	529
Jones v. State (Ga.)	171	Mahon, Spencer v. (S. C.)	321
Jones v. Western Union Tel. Co. (S. C.)	318	Mann v. Baker (N. C.)	102
Jones, Whitehouse v. (W. Va.)	730	Marable v. Southern R. Co. (N. C.)	355
J. S. Martin & Son v. Briscoe (N. C.)	782	Marion County Lumber Co. v. Tilghman Lumber Co. (S. C.)	337
J. S. Schofield's Sons Co., Banks v. (Ga.)	939	Martin v. Craven (Ga.)	962
		Martin v. Gainesville (Ga.)	499
Kanawha Valley Traction Co., Ashley v. (W. Va.)	1016	Martin v. Patillo (Ga.)	240
Keel v. East Carolina Stone & Const. Co. (N. C.)	826	Martin & Son v. Briscoe (N. C.)	782
Keen, Davis v. (N. C.)	359	Matthews v. Fry (N. C.)	787
Keenan, Chenoweth v. (W. Va.)	991	Matthews, State v. (N. C.)	342
Kelley, Board of Education of Tennille v. (Ga.)	238	Mauck v. Rosser (Ga.)	32
Kelley, Foote v. (Ga.)	1045	Mauldin v. Southern Shorthand & Business University (Ga.)	922
Kelly v. State (Ga.)	482	Maxwell, Ice v. (W. Va.)	899

	Page		Page
Memory, Seaboard Air Line R. Co. v. (Ga.)	15	Palmer v. Inman (Ga.)	229
Merrimon v. Southern Paving & Construction Co. (N. C.)	366	Pardon v. Paschall (N. C.)	365
Messick Grocery Co., Stanford v. (N. C.)	815	Parish v. Davis (Ga.)	1032
Metropolitan Life Ins. Co., Thaxton v. (N. C.)	419	Park v. State (Ga.)	489
M. Ferst's Sons & Co., J. Everett & Son v. (Ga.)	916	Parker, Ex parte (S. C.)	122
M. H. Lauchheimer & Sons v. Jacobs (Ga.)	55	Parker v. State (Ga.)	329
Middlebrooks & Co. v. Ferguson (Ga.)	34	Parker & Co. v. Continental Ins. Co. (N. C.)	717
Middle States Loan, Bldg. & Const. Co., Stuckey v. (W. Va.)	906	Park Land & Imp. Co. v. Lane (Va.)	690
Middleton & Ravenel, Price v. (S. C.)	156	Parks v. Parks (Ga.)	176
Milbourn v. Atlantic Coast Line R. Co. (S. C.)	764	Parks v. Southern R. Co. (N. C.)	701
Miller v. Atlanta & C. Air Line R. Co. (N. C.)	439	Paschall, Pardon v. (N. C.)	385
Miller v. Saxton (S. C.)	310	Patillo, Martin v. (Ga.)	240
Miller v. State (Ga.)	405	Patterson v. Drake (Ga.)	175
Miller & Co. v. McKenzie (Ga.)	952	Paul, Roller v. (Va.)	558
Miller & Higdon, Seward & Co. v. (Va.)	681	Paulk v. Greer (Ga.)	943
Mitchell, Long v. (Ga.)	1033	Peacock v. Barnes (N. C.)	99
Mitchell, Rawlins v. (Ga.)	958	Peale, Breeden v. (Va.)	2
Mitchiner v. Western Union Tel. Co. (S. C.)	222	Pearson, Kessler v. (Ga.)	963
Mixon, Atlanta Ice & Coal Co. v. (Ga.)	237	Pedrick v. Raleigh & P. S. R. Co. (N. C.)	877
Moore v. Moore (Ga.)	950	Pennsylvania Casualty Co., Raburn v. (N. C.)	296
Moore, Smith v. (N. C.)	275	Pennsylvania Fire Ins. Co., Delaware Ins. Co. v. (Ga.)	330
Moore v. State (Ga.)	327	People's Mut. Benev. Ass'n of North Carolina, Hay v. (N. C.)	623
Moore, Ward v. (W. Va.)	743	Perkins v. State (Ga.)	501
Morgan, Broadwell v. (N. C.)	340	Perry v. Hackney (N. C.)	289
Morgan v. Morgan (W. Va.)	389	Peters Grocery Co. v. Collins Bag Co. (N. C.)	90
Morgan Wood & Iron Works, Leesville Mfg. Co. v. (S. C.)	768	Peterson v. South & W. R. R. (N. C.)	618
Morisey v. Hill (N. C.)	193	Philadelphia Const. Co., Slocumb v. (N. C.)	196
Morrill, Shackleford v. (N. C.)	82	Phillips, Strickland v. (S. C.)	453
Morrison v. Fairmont & C. Traction Co. (W. Va.)	669	Phoenix Furniture Co. v. Jaudon (S. C.)	308
Morrison v. New Haven & Wilkerson Min. Co. (N. C.)	611	Pickens v. Georgia R. & Banking Co. (Ga.)	171
Morrison v. Teague (N. C.)	521	Piggott, Underwood Typewriter Co. v. (W. Va.)	664
Moss v. State (Ga.)	481	Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. (N. C.)	422
Mott v. Western Union Tel. Co. (N. C.)	363	Planters' Cotton Oil Co. v. Western Union Tel. Co. (Ga.)	495
Mull, Duckworth v. (N. C.)	850	Plunkett v. Supreme Conclave, Improved Order of Heptasophs (Va.)	9
Mullikin, Savannah Electric Co. v. (Ga.)	945	Poling v. Poling (W. Va.)	993
Mullins, Puckett v. (Va.)	676	Porterfield, Irvin v. (Ga.)	946
Mullins v. Shrewsbury (W. Va.)	736	Postal Telegraph-Cable Co. v. Kuhn (Ga.)	967
Naomi Falls Mfg. Co., Hicks v. (N. C.)	411	Poteet v. Western Union Tel. Co. (S. C.)	113
Napier Bros., Roberts v. (Ga.)	914	Price, McClung v. (W. Va.)	996
Nash v. State (Ga.)	405	Price v. Middleton & Ravenel (S. C.)	150
Nash, W. T. Harber & Bro. v. (Ga.)	928	Primus v. Macon R. & Light Co. (Ga.)	924
National Furniture Co., Harrisonburg Harness Co. v. (Va.)	679	Prince, Anderson v. (W. Va.)	656
National Union Bank v. Hollingsworth (N. C.)	809	Pritchett, Brandon v. (Ga.)	241
Neal v. Conwell (Ga.)	936	Providence Cotton Mills, Tillinghast, Styles Co. v. (N. C.)	621
Neal, Harris v. (W. Va.)	740	Puckett v. Mullins (Va.)	676
Neal & Co., Weaver v. (W. Va.)	909	Pullman Co. v. Schaffner (Ga.)	933
Nero v. State (Ga.)	404	Quaglino v. Benedetto (Ga.)	938
Nethken, State v. (W. Va.)	742	Raburn v. Pennsylvania Casualty Co. (N. C.)	296
New Haven & Wilkerson Min. Co., Morrison v. (N. C.)	611	Raleigh, Betts v. (N. C.)	145
Newman v. Newman (W. Va.)	377	Raleigh & P. S. R. Co., Pedrick v. (N. C.)	877
Norfolk & W. R. Co., Duke v. (Va.)	548	Ramsey-Brisben Stone Co., Blackwell v. (Ga.)	968
Norfolk & W. R. Co. v. McDonald's Adm'r (Va.)	554	Randolph, Seaboard Air Line R. Co. v. (Ga.)	47
Norteman, Town of Fulton v. (W. Va.)	658	Ranford v. Southern R. Co. (Ga.)	183
North Carolina R. Co., Haynes v. (N. C.)	516	Rawlins v. Mitchell (Ga.)	958
North Fork Lumber Co. v. Southern R. Co. (N. C.)	781	Ray v. State (Ga.)	1046
North Georgia Mill. Co., Henderson Elevator Co. v. (Ga.)	50	Raymond v. Garden (Ga.)	944
Northwestern R. Co., Davis v. (S. C.)	528	Rease, Carney v. (W. Va.)	729
Novelty Hat Mfg. Co. v. Wiseberg (Ga.)	923	Reed v. Southern R. Co. Carolina Division (S. C.)	218
Nunn, Wilcher v. (Ga.)	924	Revercomb, Hot Springs Lumber & Mfg. Co. v. (Va.)	580
Ogletree v. Hutchinson (Ga.)	179	Reynolds, Southern R. Co. v. (Ga.)	1039
Ogletree v. Ogletree (Ga.)	954	Rice v. Lockhart Mills (S. C.)	160
Olive, Seaboard Air Line R. Co. v. (N. C.)	263	Richard v. State (Ga.)	1044
O'Neill Mfg. Co., Burton v. (Ga.)	933	Richmond, Henrico County v. (Va.)	683
Ormand Min. Co. v. Bessemer City Cotton Mills (N. C.)	700	Rich & Bros. v. Fidelity & Deposit Co. (Ga.)	336
Pacific Selling Co., Albright-Prior Co. v. (Ga.)	251	Ridgway, Bryant v. (Ga.)	932
		Riley v. Carpenter (N. C.)	628

	Page		Page
Ring, State v. (N. C.)	194	Singer Mfg. Co. v. Summers (N. C.)	522
Ritchie County Bank v. Bee (W. Va.)	380	Sipe v. Taylor (Va.)	542
R. L. Neal & Co., Weaver v. (W. Va.)	909	Skelding, Hollingsworth v. (N. C.)	212
Roanoke R. & Lumber Co., Sawyer v. (N. C.)	84	Skinner v. Braswell (Ga.)	914
Roberts, Hulvey v. (Va.)	585	Skipper v. Seaboard Air Line R. Co. (S. C.)	454
Roberts v. Napier Bros. (Ga.)	914	Slocumb v. Philadelphia Const. Co. (N. C.)	196
Roberts v. Roberts (N. C.)	721	Smith, Davisson v. (W. Va.)	466
Roberts v. Southern R. Co. (N. C.)	509	Smith v. Moore (N. C.)	275
Roberts & McClure, Lovelady v. (Ga.)	915	Smith v. State (Ga.)	475
Roller, Bowman's Ex'rs v. (Va.)	4	Smith v. State (Ga.)	1024
Roller, Davis v. (Va.)	4	Smith Premier Typewriter Co. v. Rowan Hardware Co. (N. C.)	417
Roller v. Paul (Va.)	558	Soloman v. Wilmington Sewerage Co. (N. C.)	300
Rome, Ivey v. (Ga.)	1034	Southerland, Brown v. (N. C.)	108
Roney, Crawford v. (Ga.)	499	Southern Bell Telephone & Telegraph Co., Young v. (S. C.)	765
Rosenthal v. State (Ga.)	497	Southern Exp. Co. v. B. B. Electric Co. (Ga.)	254
Ross, Armour & Co. v. (S. C.)	315	Southern Oil Co., Talbott v. (W. Va.)	1009
Ross, Armstrong v. (W. Va.)	895	Southern Paving & Construction Co., Merimon v. (N. C.)	366
Ross, State v. (S. C.)	977	Southern R. Co., Beard v. (N. C.)	505
Rosser, Mauck v. (Ga.)	82	Southern R. Co., Berry v. (Ga.)	239
Rowan Hardware Co., Smith Premier Typewriter Co. v. (N. C.)	417	Southern R. Co. v. Born Steel Range Co. (Ga.)	173
Roxboro, Hull v. (N. C.)	351	Southern R. Co., Callaway & Truitt v. (Ga.)	22
Ruddell v. Seaboard Air Line R. Co. (S. C.)	528	Southern R. Co., Callaway & Truitt v. (Ga.)	23
Ruffin v. Atlantic & N. C. R. Co. (N. C.)	86	Southern R. Co. Carolina Division, Reed v. (S. C.)	218
Rumsey v. State (Ga.)	167	Southern R. Co., Carter v. (S. C.)	771
Ryan, Western Union Tel. Co. v. (Ga.)	21	Southern R. Co. v. Chambers (Ga.)	37
Sammons, Deas v. (Ga.)	170	Southern R. Co., City of Hickory v. (N. C.)	840
Sansom v. Wolford (W. Va.)	1020	Southern R. Co., Ford v. (S. C.)	448
Savannah Electric Co. v. McElvey (Ga.)	192	Southern R. Co., Harby v. (S. C.)	760
Savannah Electric Co. v. Mullikin (Ga.)	945	Southern R. Co., Hasseltine v. (S. C.)	142
Sawyer v. Roanoke R. & Lumber Co. (N. C.)	84	Southern R. Co., Hodgin v. (N. C.)	413
Saxton, Miller v. (S. C.)	310	Southern R. Co., Hutto v. (S. C.)	445
Schaffner, Pullman Co. v. (Ga.)	933	Southern R. Co., King v. (Ga.)	985
Schofield's Sons Co., Banks v. (Ga.)	939	Southern R. Co., Marable v. (N. C.)	355
Scott, State v. (N. C.)	69	Southern R. Co., North Fork Lumber Co. v. (N. C.)	781
Scott, State v. (N. C.)	270	Southern R. Co., Parks v. (N. C.)	701
Seaboard Air Line R. Co., Betchman v. (S. C.)	140	Southern R. Co., Ranford v. (Ga.)	183
Seaboard Air Line R. Co., Biles v. (N. C.)	512	Southern R. Co. v. Reynolds (Ga.)	1039
Seaboard Air Line R. Co., Conner v., two cases (S. C.)	216	Southern R. Co., Roberts v. (N. C.)	509
Seaboard Air Line R. Co., Holland v. (N. C.)	835	Southern R. Co. v. Simmons (Va.)	459
Seaboard Air Line R. Co., Lawton v. (S. C.)	128	Southern R. Co., Tucker v. (S. C.)	154
Seaboard Air Line R. Co., McGill Bros. v. (S. C.)	216	Southern R. Co., Williams v. (Ga.)	948
Seaboard Air Line R. Co., v. Memory (Ga.)	15	Southern Shortland & Business University, Mauldin v. (Ga.)	922
Seaboard Air Line R. Co. v. Olive (N. C.)	263	South & W. R. R. Peterson v. (N. C.)	618
Seaboard Air Line R. Co. v. Randolph (Ga.)	47	Spencer v. Mahon (S. C.)	321
Seaboard Air Line R. Co., Ruddell v. (S. C.)	528	Spies v. Arvondale & C. R. Co. (W. Va.)	464
Seaboard Air Line R. Co., Shaw v. (N. C.)	713	Spies, Gauley Coal Land Ass'n v. (W. Va.)	903
Seaboard Air Line R. Co., Skipper v. (S. C.)	454	Spooner, Weeks v. (N. C.)	432
Seaboard Air Line R. Co., Thomason v. (N. C.)	198	Spratlin, Irvin v. (Ga.)	1037
Seaboard Air Line R. Co., Thomason v. (N. C.)	205	Springer v. Indianapolis Brewing Co. (Ga.)	53
Seaboard Air Line R. Co., Young v. (S. C.)	225	Stanford v. A. F. Messick Grocery Co. (N. C.)	815
Seakford, Lane Bros. Co. v. (Va.)	556	Starr v. State (Ga.)	478
Seale v. State (Ga.)	472	State, Abrams v. (Ga.)	497
Seward & Co. v. Miller & Higdon (Va.)	681	State, Allen v. (Ga.)	478
Shakelford v. Morrill (N. C.)	82	State, Allred v. (Ga.)	178
Shaw v. Georgia R. R. (Ga.)	960	State v. Alsobrooks (N. C.)	1047
Shaw v. Highland Park Mfg. Co. (N. C.)	433	State, Anthony v. (Ga.)	479
Shaw v. Seaboard Air Line R. Co. (N. C.)	713	State, Balkcom v. (Ga.)	477
Shearer v. Taylor (Va.)	7	State v. Banks (W. Va.)	739
Shelton's Will, In re (N. C.)	705	State v. Barrick (W. Va.)	652
Shenandoah Land & Anthracite Coal Co. v. Clarke (Va.)	561	State, Beaudrot v. (Ga.)	592
Shepard v. Western Union Tel. Co. (N. C.)	704	State, Bell v. (Ga.)	476
Sheppard, State v. (N. C.)	146	State, Binyard v. (Ga.)	498
Sherrill, Bourne v. (N. C.)	799	State v. Bohanon (N. C.)	797
Shippin, Atlanta, K. & N. R. Co. v. (Ga.)	1031	State, Bowden v. (Ga.)	499
Shrewsbury, Mullins v. (W. Va.)	738	State, Bragg v. (Ga.)	232
Shubert v. State (Ga.)	1045	State v. Braxton County Court (W. Va.)	382
Shuler v. State (Ga.)	496	State v. Burnett (N. C.)	72
Sigwald v. City Bank (S. C.)	109	State v. Cantwell (N. C.)	820
Simmons, Southern R. Co. v. (Va.)	459	State, Carter v. (Ga.)	477
Simmons v. State (Ga.)	479	State, Chapple v. (Ga.)	471
Simmons, Talman v. (W. Va.)	991	State v. Connor (N. C.)	787
Simmons, Wells v. (W. Va.)	990	State, Cress v. (Ga.)	491
		State, Daniel v. (Ga.)	472
		State v. Detwiler (W. Va.)	654
		State, Dorsey v. (Ga.)	479
		State, Dublin v. (Ga.)	487

	Page		Page
State, <i>Dyas v. (Ga.)</i>	489	Stevens, <i>Barrineau v. (S. C.)</i>	309
State, <i>Ellington v. (Ga.)</i>	408	Stocks v. State (Ga.).....	478
State, <i>Field v. (Ga.)</i>	502	Stokes v. Stokes (Ga.).....	1028
State, <i>Fitzgerald v. (Ga.)</i>	482	Stonega Coke & Coal Co. v. Louisville & N. R. Co. (Va.).....	551
State, <i>Frederick v. (Ga.)</i>	1044	Strange v. Franklin (Ga.).....	943
State v. <i>Frisbee (N. C.)</i>	722	Strickland v. Phillips (S. C.).....	453
State, <i>Fuller v. (Ga.)</i>	1047	Stuckey v. Middle States Loan, Bldg. & Const. Co. (W. Va.).....	996
State, <i>Gaskins v. (Ga.)</i>	1045	Stulb, Hall v. (Ga.).....	172
State, <i>Giles v. (Ga.)</i>	405	Stutler, State v. (W. Va.).....	906
State, <i>Glover v. (Ga.)</i>	403	Suddeth & Crenshaw, Knight v. (Ga.).....	31
State, <i>Glover v. (Ga.)</i>	592	Sullivan v. Gum (Va.).....	535
State, <i>Goodin v. (Ga.)</i>	503	Summers, Singer Mfg. Co. v. (N. C.).....	522
State, <i>Grant v. (Ga.)</i>	471	Supreme Conclave, Improved Order of Heptasophs, Plunkett v. (Va.).....	9
State v. <i>Graybeal (W. Va.)</i>	398	Susong v. McKenna (Ga.).....	236
State, <i>Griggs v. (Ga.)</i>	179	Sutton v. Davis (N. C.).....	844
State v. <i>Hall (N. C.)</i>	806	Swift v. State (Ga.).....	478
State, <i>Harbin v. (Ga.)</i>	1043	Swilley v. Hooker (Ga.).....	81
State v. <i>Haynes (S. C.)</i>	118	Talbert v. Charleston & W. C. Ry. (S. C.).....	138
State v. <i>Henderson (S. C.)</i>	117	Talbott v. Southern Oil Co. (W. Va.).....	1009
State, <i>Hernndon v. (Ga.)</i>	176	Tallman v. Simmons (W. Va.).....	991
State v. <i>Hodge (N. C.)</i>	628	Taylor, Shearer v. (Va.).....	7
State v. <i>Hodge (N. C.)</i>	791	Taylor, Sipe v. (Va.).....	542
State, <i>Hohenstein v. (Ga.)</i>	238	Taylor v. State (Ga.).....	474
State, <i>Howard v. (Ga.)</i>	239	Teague, Morrison v. (N. C.).....	521
State, <i>Hudgins v. (Ga.)</i>	492	Thaxton v. Metropolitan Life Ins. Co. (N. C.).....	419
State, <i>Hunter v. (Ga.)</i>	1044	Thomason v. Seaboard Air Line R. Co. (N. C.).....	198
State, <i>Jones v. (Ga.)</i>	171	Thomason v. Seaboard Air Line R. Co. (N. C.).....	205
State, <i>Kelly v. (Ga.)</i>	482	Thomas, State v. (S. C.).....	898
State v. <i>Kincald (N. C.)</i>	647	Thompson v. Adams (W. Va.).....	668
State v. <i>Langford (S. C.)</i>	120	Thompson v. Camper (Va.).....	674
State, <i>Lanier v. (Ga.)</i>	496	Thurmond v. C. L. Groves & Co. (Ga.).....	915
State v. <i>Lewis (N. C.)</i>	600	Tilghman Lumber Co., Marion County Lumber Co. v. (S. C.).....	337
State, <i>Lightner v. (Ga.)</i>	471	Tillinghast, Styles Co. v. Providence Cot- ton Mills (N. C.).....	621
State, <i>Lightner v. (Ga.)</i>	477	Toliver v. State (Ga.).....	478
State, <i>McCrimmon v. (Ga.)</i>	481	Town of Fulton v. Norteman (W. Va.).....	658
State, <i>McDonald v. (Ga.)</i>	235	Tri-State Mill. Co., Woodard & Woodard v. (N. C.).....	70
State v. <i>Matthews (N. C.)</i>	342	Trotman, State v. (N. C.).....	599
State, <i>Miller v. (Ga.)</i>	405	Trustees of Morganton Graded School, C. A. Webb & Co. v. (N. C.).....	719
State, <i>Moore v. (Ga.)</i>	327	Tucker v. Southern R. Co. (S. C.).....	154
State, <i>Moss v. (Ga.)</i>	481	Turnbull, Foster v. (Ga.).....	925
State, <i>Nash v. (Ga.)</i>	405	Turpin, Carolina Portland Cement Co. v. (Ga.).....	925
State, <i>Nero v. (Ga.)</i>	404	Tutwiler, Blue Ridge Light & Power Co. v. (Va.).....	539
State v. <i>Nethken (W. Va.)</i>	742	Underwood Typewriter Co. v. Piggott (W. Va.).....	664
State, <i>Park v. (Ga.)</i>	489	Union Compress Co., A. Leffler & Sons v. (Ga.).....	927
State, <i>Parker v. (Ga.)</i>	329	United States Leather Co., Bird v. (N. C.).....	727
State, <i>Perkins v. (Ga.)</i>	501	United States Leather Co., Hairston v. (N. C.).....	847
State, <i>Ray v. (Ga.)</i>	1046	Vanderford v. State (Ga.).....	1025
State, <i>Richard v. (Ga.)</i>	1044	Virginia Bridge & Iron Co., Isley v. (N. C.).....	416
State v. <i>Ring (N. C.)</i>	194	Virginia Portland Cement Co., Black's Adm'r v. (Va.).....	587
State, <i>Rosenthal v. (Ga.)</i>	497	Virginia State Ins. Co., Williams v. (Va.).....	680
State v. <i>Ross (S. C.)</i>	977	Wachovia Loan & Trust Co., Board of Com'rs of Town of Salem v. (N. C.).....	442
State, <i>Rumsey v. (Ga.)</i>	167	Wachovia Loan & Trust Co., City of Ashe- ville v. (N. C.).....	800
State v. <i>Scott (N. C.)</i>	69	Wakefield Hardware Co., Pittsburg, J. E. & B. R. Co. v. (N. C.).....	422
State v. <i>Scott (N. C.)</i>	270	Walker v. State (Ga.).....	483
State, <i>Seale v. (Ga.)</i>	472	Wall, Davis v. (N. C.).....	350
State v. <i>Sheppard (N. C.)</i>	146	Wall v. Wall (N. C.).....	283
State, <i>Shubert v. (Ga.)</i>	1045	Wall v. State (Ga.).....	484
State, <i>Shuler v. (Ga.)</i>	496	Wallace v. State (Ga.).....	1042
State, <i>Simmons v. (Ga.)</i>	479	Walpert v. Bohan (Ga.).....	181
State, <i>Smith v. (Ga.)</i>	475	Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. (S. C.).....	973
State, <i>Smith v. (Ga.)</i>	1024	Wamsley v. Ward (W. Va.).....	998
State, <i>Starr v. (Ga.)</i>	478	Ward v. Moore (W. Va.).....	743
State, <i>Stocks v. (Ga.)</i>	478		
State v. <i>Stutler (W. Va.)</i>	906		
State, <i>Swift v. (Ga.)</i>	478		
State, <i>Taylor v. (Ga.)</i>	474		
State v. <i>Thomas (S. C.)</i>	893		
State, <i>Toliver v. (Ga.)</i>	478		
State v. <i>Trotman (N. C.)</i>	599		
State v. <i>Vanderford v. (Ga.)</i>	1025		
State, <i>Walker v. (Ga.)</i>	483		
State, <i>Wall v. (Ga.)</i>	484		
State, <i>Wallace v. (Ga.)</i>	1042		
State, <i>Welch v. (Ga.)</i>	183		
State, <i>Weldon v. (Ga.)</i>	1044		
State v. <i>Wells (N. C.)</i>	210		
State, <i>Whitehead v. (Ga.)</i>	404		
State, <i>Williams v. (Ga.)</i>	478		
State, <i>Williams v. (Ga.)</i>	480		
State, <i>Winn v. (Ga.)</i>	178		
State, <i>Woods v. (Ga.)</i>	1044		
State, <i>Wright v. (Ga.)</i>	167		
State, <i>Young v. (Ga.)</i>	477		
Steadman v. Steadman (N. C.).....	784		
Stephens, <i>Loudermilk v. (Ga.)</i>	956		
Stephenson, <i>Hamilton v. (Va.)</i>	577		

	Page		Page
Ward, Wamsley v. (W. Va.).....	998	Williams v. State (Ga.).....	490
Wayt v. Glasgow (Va.).....	536	Williams v. Virginia State Ins. Co. (Va.).....	680
Weaver v. R. L. Neal & Co. (W. Va.)....	909	Williamson v. Bryan (N. C.).....	77
Webb & Co. v. Trustees of Morganton Graded School (N. C.).....	719	Williams & Davison Co. v. Ferguson Con- tracting Co. (W. Va.).....	1011
Weeks v. Spooner (N. C.).....	432	Wilmington Sewerage Co., Solomon v. (N. C.).....	300
Welch v. State (Ga.).....	183	Wilson v. Atlantic Coast Line R. Co. (N. C.).....	257
Weldon v. State (Ga.).....	1044	Wilson Lumber Co. v. D. W. Alderman & Sons Co. (S. C.).....	447
Wells, Kendall v. (Ga.).....	41	Wilton, Herring v. (Va.).....	546
Wells v. Simmons (W. Va.).....	960	Winchester & S. R. Co. v. Commonwealth (Va.).....	692
Wells, State v. (N. C.).....	210	Winn v. State (Ga.).....	178
West, Graham v. (Ga.).....	931	Wiseberg, Novelty Hat Mfg. Co. v. (Ga.)..	923
Westall, York v. (N. C.).....	724	Wittkowsky's Land, In re (N. C.).....	617
Western Union Tel. Co., Cherokee Tan- ning Extract Co. v. (N. C.).....	777	Wolford, Sansom v. (W. Va.).....	1020
Western Union Tel. Co., Eaker v. (S. C.)..	129	Wood, McDowell County Bank v. (W. Va.).....	753
Western Union Tel. Co., Hancock v. (N. C.)	82	Wood Mowing & Reaping Co. v. Greenwood Hardware Co. (S. C.).....	973
Western Union Tel. Co., Harrison v. (N. C.)	435	Woodard & Woodard v. Tri-State Mill. Co. (N. C.).....	70
Western Union Tel. Co., Harrison v. (S. C.)	450	Woods v. State (Ga.).....	1044
Western Union Tel. Co., Helms v. (N. C.)	831	Woody v. Fountain (N. C.).....	425
Western Union Tel. Co., Jones v. (S. C.)..	318	W. P. Parker & Co. v. Continental Ins. Co. (N. C.).....	717
Western Union Tel. Co., Lathan v. (S. C.)..	184	Wright v. State (Ga.).....	167
Western Union Tel. Co., Mitchiner v. (S. C.).....	222	W. T. Harber & Bro. v. Nash (Ga.)....	928
Western Union Tel. Co., Mott v. (N. C.)	863	Wyche, Anderson v. (Ga.).....	19
Western Union Tel. Co., Planters' Cotton Oil Co. v. (Ga.).....	495	Yadkin R. Co., Carleton v. (N. C.).....	429
Western Union Tel. Co., Poteet v. (S. C.)..	113	Yarborough v. Banking, Loan & Trust Co. (N. C.).....	296
Western Union Tel. Co. v. Ryan (Ga.)....	21	York v. Westall (N. C.).....	724
Western Union Tel. Co., Shepard v. (N. C.)	704	Young v. Seaboard Air Line R. Co. (S. C.)	225
Wheeling Ice Storage Co. v. Conner (W. Va.).....	982	Young v. Southern Bell Telephone & Tele- graph Co. (S. C.).....	765
Whitehead v. State (Ga.).....	404	Young v. State (Ga.).....	477
Whitehouse v. Jones (W. Va.).....	780		
Wilcher v. Nunn (Ga.).....	924		
Wilkins, Anderson v. (N. C.).....	272		
Williams v. Cooley (Ga.).....	517		
Williams, Holland v. (Ga.).....	1023		
Williams v. Southern R. Co. (Ga.).....	948		
Williams v. State (Ga.).....	478		

See End of Index for Tables of Southeastern Cases in State Reports.

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BALTIMORE & O. R. CO. v. LEE.

(Supreme Court of Appeals of Virginia. Sept. 24, 1906.)

1. TRIAL — INSTRUCTIONS — SUBMISSION OF MATTERS NOT IN ISSUE.

In an action for a personal injury negligently inflicted, an instruction embodying the duty defendant owed to others than plaintiff was erroneous because not in issue.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 587-595.]

2. RAILROADS—INJURIES TO LICENSEES—CONTRIBUTORY NEGLIGENCE — LAST CLEAR CHANCE.

A brakeman in the employ of S. railway was in a coach on a delivery track in a yard of the company. A crew of B. railway was engaged in backing a freight train on the delivery track to couple the train to the coach. The brakeman stepped onto the coach platform for the purpose of alighting. The jar caused by the train striking the coach caused him to fall. There was no appreciable interval of time between his going onto the platform and the train striking the coach. *Held*, that as the crew had no opportunity to exercise any degree of care to avoid the consequences of the brakeman's negligent act in going onto the platform, the doctrine of the last clear chance was inapplicable.

3. TRIAL — EXCEPTIONS TO INSTRUCTIONS — SUFFICIENCY.

Where a party objected to an instruction, and made the objection the subject of a bill of exceptions, the failure to object to a subsequent instruction embodying the same principle did not impair his right to rely on the exception taken.

Appeal from Circuit Court, Rockingham County.

Action by Benjamin E. Lee against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

D. O. Dechert and C. R. Winfield, for appellant. Bumgardner & Bumgardner, for appellee.

HARRISON, J. This action of trespass on the case was brought by Benjamin E. Lee to recover damages for personal injuries alleged to have been occasioned the plaintiff by the negligence of the Baltimore & Ohio Railroad Company.

The plaintiff was a brakeman in the employ of the Southern Railway Company and was injured in the yards of that company at

Harrisonburg by having his foot run over by a train of the Baltimore & Ohio Railroad Company. At the time of the accident, a crew of the defendant company was engaged in the operation of backing an engine and heavy freight train on the "delivery track" or siding in the yards of the Southern Railway Company, in order to couple the train to a combination coach of the last-named company which was standing on the "delivery track." The plaintiff was in the combination coach, and at the moment of the impact between the backing train and the coach he stepped out of the coach upon its front platform for the purpose of alighting. The jar caused him to fall to the ground with his foot under the wheels of the train, resulting in the injury for which he seeks to recover damages.

The second instruction given by the court tells the jury that if they believe from the evidence that the backing or pushing of the defendant's train rendered the position of the plaintiff and other persons more dangerous, then it became the duty of the defendant to use such care, etc.

It was plainly error to instruct the jury as to the duty the defendant owed to persons other than the plaintiff. This suit was brought to recover damages for an injury to the plaintiff, and the question of the defendant's duty to other persons is not an issue. So far as the record shows, no other person was injured; but if others had been injured, the plaintiff could not recover for such injury.

We are further of opinion that the circuit court erred in modifying instructions 7, 8, 9, and 12, asked for by the defendant, by adding to each of said instructions the words, "unless after the defendant saw or knew of his danger, or by the exercise of ordinary care could have known of his danger, it could have avoided injuring him by the use of ordinary care to avoid such injury." These instructions, as asked by the defendant, properly submitted to the jury the question of the plaintiff's contributory negligence in going upon the platform at the instant of the impact between the train and the coach. One of the chief contentions of the defendant was that the plaintiff, by going upon the plat-

form at the instant of the impact, had not only contributed to the accident, but had thereby caused the injury of which he complains. The modification of the instructions made by the court is based upon the doctrine known as the "Last Clear Chance." This doctrine had no application to the case at bar. There is no evidence to sustain the theory that after the alleged negligence of the plaintiff in going upon the platform, there was an intervening space of time and an opportunity for the defendant to have avoided the injury. On the contrary, it appears without contradiction that there was no appreciable interval of time and no opportunity for the defendant, by the exercise of any degree of care, to have avoided the consequences of the plaintiff's act, between his going upon the platform and the accident. There was no clear chance, and it was misleading to instruct the jury upon that subject.

The language of this addendum appears also at the foot of instruction No. 13, which was given by the court, and does not appear to have been objected to in that connection. It is contended that inasmuch as the defendant failed to make objection to instruction No. 13, which was given by the court, it cannot now object to the addendum to instructions 7, 8, 9, and 12, which were asked for by the defendant. In support of this contention, the rule announced in the case of *Va., etc., Co. v. Bailey*, 103 Va. 205, 49 S. E. 33, and other cases, is invoked. This rule is that although exception to the testimony of a witness may be well taken, if the same fact is subsequently proved by other witnesses, without objection, the error will be deemed harmless.

This rule has no application to the question under consideration. The defendant had already objected to the addendum four times, and had made that objection the subject of a bill of exception each time. This was entirely sufficient to save the question and make it the subject of review by this court. The defendant was not called upon to repeat indefinitely the same objection, or to continue to protest against the use of language by the court in framing instructions which the court had already passed upon and held to be proper. It was the law that was complained of, not the number of times the court repeated the proposition to the jury. If the defendant was prejudiced by the first statement of the erroneous proposition of law, and the question was then properly saved, he has the right to have the error reviewed, although it may have been subsequently repeated without objection being taken. It would have been an idle ceremony to have enrolled and sealed a bill of exceptions to set out an error that was already embodied in the record four times.

The failure, therefore, to embody instruction No. 13 in a bill of exceptions cannot impair the right of the defendant to rely in this court upon its exception duly taken to

instructions 7, 8, 9, and 12, as modified by the circuit court.

As the case must be remanded for the errors already pointed out, it is unnecessary to comment upon the evidence or upon questions that may not arise on another trial.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

BREEDEN et ux. v. PEALE.

(Supreme Court of Appeals of Virginia. Sept. 24, 1906.)

1. ATTACHMENT—ACTIONS IN WHICH ATTACHMENT IS AUTHORIZED—MOTION FOR JUDGMENT BY NOTICE.

Code 1887, § 2959 [Va. Code 1904, p. 1568], providing for the issuing of an attachment at the time of bringing any action for the recovery of personal property, a debt or damages for breach of contract, applies to a motion for judgment by notice.

2. LIS PENDENS.

Code 1887, § 3566 [Va. Code 1904, p. 1903] provides that no lis pendens or attachment shall affect a bona fide purchaser without notice under a memorandum, etc., be left with the clerk of the court. *Held*, that where land was sold by verbal contract, and the vendee sold it and a deed was made from the original vendor to the purchaser from the vendee, but the same was not recorded until two days after there was left with the clerk a lis pendens in an attachment suit against the land as that of the original vendor, the one purchasing from his vendee had constructive notice.

3. ATTACHMENT — GROUNDS — FRAUDULENT CONVEYANCES.

Code 1887, § 2959 [Va. Code 1904, p. 1568], makes it ground for attachment that defendant is about to dispose of his property with intent to hinder, delay, or defraud creditors. A landowner who was indebted on a partnership account to his late partner, promised to give him a deed of trust on his property, but he failed to do so, and thereafter sold it, he having made no secret of the fact that he was endeavoring to sell. He devoted the proceeds of the sale to the payment of other creditors. *Held*, that the facts did not authorize the issuance of an attachment.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 96, 101.]

Error to Circuit Court, Rockingham County.

Action by John B. Peale against Luther N. Breeden and wife. Judgment in favor of plaintiff, and defendants bring error. Reversed and remanded.

Sipe & Harris and Harnsberger & Harnsberger, for plaintiffs in error. Conrad & Conrad and J. B. Stephenson, for defendant in error.

KEITH, J. John B. Peale gave notice to J. W. Churchill that he would, on the 21st day of March, 1904, move the circuit court of Rockingham county for judgment against him for the sum of \$631.92, with interest, and filed an account with the notice setting out the items of his demand. On the 15th of March, Peale made an affidavit in

which he states that the defendant, Churchill, "is converting, or is about to convert, a certain house and lot situate in Elkton, in Rockingham county, Va., belonging to and now occupied by him, into money, with intent to hinder, delay, and defraud his creditors, and particularly affiant." Upon this affidavit an attachment was issued, and was levied upon the house and lot named in the affidavit, and a *lis pendens* was filed in the clerk's office of Rockingham county upon the same day.

There is no question raised in this court as to the indebtedness on the part of Churchill to Peale, and it appears that the affidavit, the attachment, the levy, and the *lis pendens* are all in conformity with law.

On the 16th of March, 1904, Churchill and wife conveyed the property levied on to Luther N. and Annie E. Breeden, by deed duly acknowledged, which was on the following day, March 17th, also submitted to record.

Breedon, on behalf of himself and wife, filed their petition in the cause in the circuit court, in which they state that some time in December, 1903, one William H. Marshall, by verbal contract purchased of Churchill the house and lot described in the attachment proceedings; that in February, 1904, Marshall sold this property to the petitioners; and that, in order to avoid the expense of several conveyances, a deed was made from Churchill directly to the petitioners at the suggestion of Marshall; that after receiving the conveyance of the Churchill property petitioners were informed that an attachment had been sued out by John B. Peale and levied upon it, upon the ground that Churchill was converting, or about to convert, said house and lot into money, with intent to hinder, delay, and defraud his creditors and particularly the said John B. Peale; "that Churchill had lived in Elkton for many years and maintained a high character for honesty and integrity; and petitioners charge that the attachment was sued out upon false suggestion, and that the allegation of fraudulent intent on the part of Churchill is unfounded and untrue; that abundant proof will be offered to show that, of the consideration of \$2,000, more than \$1,900 was actually applied by Churchill to the discharge of his debts."

An issue was made up and tried before a jury to determine this controversy, and a verdict was returned for the plaintiff John B. Peale. A motion to set aside this verdict was overruled, judgment rendered in favor of Peale, and the case is before us upon a writ of error to that judgment.

We have no doubt that section 2959 of the Code of 1887 [Va. Code 1904, p. 1568], which provides for the issuing of an attachment at the time or after the institution of any action at law for the recovery of any specific personal property, or a debt, or dam-

ages for the breach of a contract, applies to a motion for judgment by notice. We are further of opinion that the proceeding upon the attachment in this case being in conformity with the law, the *lis pendens* operated to give constructive notice of the lien of the attachment to Breeden and wife, it having been left with the clerk of Rockingham county as provided by section 3566 of the Code of 1887 [Va. Code 1904, p. 1903], and the deed from Churchill to Breeden, conveying the same tract of land, not having been recorded until two days thereafter, on the 17th of March, 1904; the result being that as to the creditor, Peale, Breeden stands upon no better footing than his grantors.

We come now to consider whether or not, as between Peale and Churchill, the attachment was properly sued out.

It is provided by section 2959 of the Code of 1887 [Va. Code 1904, p. 1568], as one of the grounds for attachment, "that the defendant has assigned or disposed of, or is about to assign or dispose of, his estate or some part thereof with intent to hinder, delay, or defraud his creditors."

Before discussing the evidence, it may be well to see how the language used in the statute is to be construed.

In Bigelow on Frauds, vol. 2, p. 85, in discussing the statute of Elizabeth which deals with conveyances made "with intent to hinder, delay, and defraud creditors," it is said: "When we come to conveyances made for valuable consideration, a different question, applicable alike to existing and to future creditors, arises. Such conveyances, if made in good faith, are expressly excepted from the operation of the statute. When is a conveyance not made in good faith? Is it necessary that it should be made with actual intent to defraud, to take it out of the exception? So it appears to have been laid down. 'There is one class of cases, no doubt,' it has been said by way of concession, 'in which an actual and express intent is necessary to be proved, that is * * * where the instruments sought to be set aside were founded on valuable consideration.'" And on page 86 of the same volume it is said to be "a difficult matter to make a case against a purchaser for value, especially for full value; and it well should be, for the debtor has still the right to sell his property, and the creditor has still his resort to the substituted property. It is no delay in law that he cannot reach the property sold."

There is no doubt, however difficult the proof may be, that, even against a purchaser for value and for full value, and although the debtor has a right to sell his property and the creditor the right to resort to the substituted property, if it can be made to appear that the transaction was entered into by the grantor with an intent to hinder, delay, and defraud his creditors, and that intent was shared and participated in by the grantee, it comes with-

in the purview of the statute, and is void as to creditors. By what proof this may be shown this court will not undertake to determine until a case arises for decision. The same considerations which have withheld courts from giving a definition of fraud will deter them from any effort to prescribe the proof by which fraud shall be ascertained; but they will wait until a case comes up for judgment and will then determine whether it has or has not been established.

"An intent to defraud cannot be inferred from preference given to certain creditors over others in a general assignment where such preference is not inhibited." *Waples on Attachments*, § 72. But we need not cite authority to show that in this state it is lawful for a debtor, though insolvent, to prefer certain of his creditors in a deed of assignment, and that such preference is neither fraudulent per se nor a badge of fraud.

Every assignment by a debtor of his property must of necessity work some delay as to other creditors in the collection of their claims, but this is not such delay as is meant by the statute which gives the right of attachment when the debtor is about to convey, assign, conceal, or dispose of his property to delay and defraud his creditors. *Waples on Attachments*, § 66.

Examining the evidence in the light of these principles of law, it appears that Peale and Churchill had been partners and that Churchill had become indebted to him upon partnership account. He owed other debts, and being urged by Peale for a settlement, promised to secure him by a deed of trust upon his property. This he ultimately failed to do, but in the latter part of December, 1903, entered into a verbal contract with Marshall for the sale of his house and lot, and Marshall in turn sold this property to Breeden and wife and, for motives of convenience and economy, a deed was made directly from Churchill to Breeden and wife. Churchill made no secret of the fact that he was endeavoring to sell this property. He conversed with Peale upon the subject more than once; there was no concealment; and his explanation of his devoting the proceeds of the sale to the payment of other creditors and of his failure to comply with his promise to secure Peale was that, in his judgment, Peale had sufficient security for his debt in the partnership property which was under his control, while his other creditors could get nothing except from the sale of the property in dispute. However reprehensible it may have been from a moral standpoint for Churchill to make a promise and break it, it does not constitute fraud in the sense in which that term is used in the statute.

All that can be said is that Churchill owed a debt to Peale which he was unable to pay; that he promised to secure it and violated his promise; that he preferred other creditors, as he had a right to do; that he appropriated the proceeds of the property, sold

at a fair price, to the satisfaction of claims of other creditors; and his purpose to make that sale was not only not concealed, but was discussed between the debtor and his creditor. These facts do not, in our judgment, make out the case stated in the affidavit for an attachment—that the defendant had disposed of or was about to dispose of his estate or some part thereof, with intent to hinder, delay, or defraud his creditors.

We are of opinion that the judgment of the circuit court should be reversed, and the case remanded for further proceedings to be had therein.

DAVIS v. ROLLER.

BOWMAN'S EX'RS v. SAME.

(Supreme Court of Appeals of Virginia. Sept. 24, 1906.)

1. JUDGMENT—ACTION ON—LIMITATIONS.

Code 1904, § 3577, provides that where execution issues within a year from judgment, an action may be brought on the judgment within 10 years from return day of execution. *Held*, that an execution regular in all respects, duly attested by the clerk, and marked "to lie" though never delivered to an officer, was "issued" within the statute.

2. SAME—COMPUTATION OF TIME.

Where, after the issuance of an execution a decree was made in the cause, directing that no more than a certain amount should be collected on the execution until the further order of the court, to be made subsequently, the time between the two orders should be excluded in computing limitations under the statute.

3. LIENS—PRIORITIES—JUDICIAL SALES—PURCHASE PRICE.

The land of an insolvent was sold in a chancery suit, and purchased by his wife, but, she not being able to meet the first payment, the receiver was authorized to assign the bond covering such payment to D.; the decree providing that the lien so assigned should be postponed until the other bonds were paid off in full. Subsequently a judgment was obtained by the receiver on the remaining bonds, and by decree the receiver was authorized to sell the judgment to R. by the same decree, the receiver being directed to convey the lands to the wife, retaining a lien to secure the amounts assigned, and the deed recited that a lien was retained to secure the payment first to D. of a certain sum, and to secure to R. a certain sum. *Held*, that there was no preference as between D. and R., but their liens were of equal dignity.

4. ESTOPPEL—CLAIM TO PROPERTY.

D. having assigned his lien to A., who was one of the sureties in the debt due R., could not assert his lien as against R. in an action by R. on the judgment assigned to him.

Appeal from Circuit Court, Rockingham County.

Suit by John E. Roller against L. Virginia Davis and others. From a decree for complainant, defendants Davis and the executors of David Bowman prosecute separate appeals. Reversed and remanded.

Conrad & Conrad, for plaintiff. J. B. Stephenson and Chas. Curry, for defendant.

KEITH, P. The appellee, John E. Roller, suing on behalf of himself and all other

lien creditors of Mary E. Pence, filed his bill in the circuit court of Rockingham county, alleging that B. G. Patterson, receiver, recovered a judgment for \$1,200, with legal interest from the 1st day of May, 1880, until paid, subject to a credit of \$546 as of January 9, 1883, against Mary E. Pence and John P. Pence, her husband, Arehart, Bowman, Will, Thompson, Homan, and Andes; that in the chancery cause of Basore v. Pence, B. G. Patterson, special receiver, assigned to the complainant \$870.88, a part of this judgment, with interest on \$775.09 from November 29, 1884, and on \$95.79, from January 12, 1885; and that by deed dated February 7, 1885, Patterson, as special commissioner, acting under the decrees of the court, conveyed to Mary E. Pence the real estate involved therein, which need not be here specifically stated. This deed was admitted to record in the clerk's office of Rockingham county on the 12th day of February, 1885, and the judgment referred to was docketed in the clerk's office of that county on the 7th day of May, 1884.

The bill further alleges that Mary E. Pence subsequently became indebted to the complainant in various sums, for which she and her husband executed to him a negotiable note for \$300, due June 18, 1888; that by reason of certain transactions set forth in the bill, it was agreed between the plaintiffs John E. Roller, and Mary E. Pence, and John P. Pence, her husband, that a credit of \$350 should be given to them upon settlement of the matters outstanding between them, to be applied to the satisfaction of the \$300 negotiable note, and to the lien of the judgment which had been assigned to him.

It further appears from the bill that a part of the judgment in the name of Patterson, receiver above referred to, was assigned to one James Dove, and by him assigned to Andrew Andes, who was himself one of the defendants in the judgment; and a lien for both sums—that is to say, the \$300 assigned to Andes and \$870.88 assigned to Roller, together constituting the amount of the Patterson judgment—was reserved as a vendor's lien upon the property conveyed to Mary E. Pence by Patterson, special commissioner by the deed of February 7, 1885, before mentioned.

The prayer of the bill is, that all the parties against whom the judgment was obtained be made defendants to the bill; that the vendor's lien and judgment lien may be enforced against the property of the principal defendant; and that, if there be any deficiency after appropriating the proceeds of said property, the living sureties and the representatives of those deceased may be called upon to pay their respective proportions; and for general relief.

Several of the defendants answered the bill; and the cause coming on to be heard, an account was ordered to be taken as to the fee simple and annual value of the real estate owned by Mary E. Pence, and of the liens against the same and order of their priority.

The commissioner reported, and to his report sundry exceptions were filed, with the result that the matter was again referred to a commissioner; and upon the exceptions to this second report arise the issues which we are now called upon to consider.

The statute of limitations was pleaded to the judgment in the name of Patterson, receiver, against Pence and others, which was in part assigned to the appellee, John E. Roller. The commissioner was of opinion that this judgment was barred by the statute, and an exception to this ruling was sustained by the court. This is one of the alleged grounds of error insisted upon by appellants.

This judgment was obtained at the April term, 1884, of the circuit court of Rockingham county, and it was docketed on May 7th of that year. The first execution upon it bears date April 30, 1884, is regular in all respects, and is duly attested by the clerk. Upon the back of it is the following indorsement: "The within execution is subject to a credit of five hundred and forty-six dollars and sixty cents as of the 9th day of January, 1883;" and then follow the words "To lie."

The defendants in the judgment insist that this execution does not comply with our statute (section 3577 of the Code of 1904), which provides, that "On a judgment execution may be issued within a year, and a scire facias or an action may be brought within ten years after the date of the judgment; and where execution issues within the year, other executions may be issued, or a scire facias or an action may be brought within ten years from the return day of an execution on which there is no return by an officer, or within twenty years from the return day of an execution on which there is such return; * * *" the precise contention of defendants being that no execution can be said to have issued upon a judgment unless it be, not only made out by the clerk, but placed in the hands of an officer to be levied; and counsel cites authorities from other jurisdictions which seem to support this position. In this state, however, the law seems to be otherwise.

In 4 Minor's Institutes, pt. 1, p. 799, it is said: "Executions are expected properly to be sued out within a year from the date of the judgment; yet they may, notwithstanding, in many cases, be obtained afterwards, sometimes by means of a writ of scire facias, or an action on the judgment, and sometimes without any process thereon, as a matter of course. If within the year an execution issues (by which is understood its being made out and signed by the clerk, ready for the sheriff) other executions on the same judgment may be issued without scire facias; or a scire facias or action on the judgment may be brought within 10 years from the return day of an execution, on which there is no return by an officer,

or within 20 years from the return day of an execution on which there is such return."

We need not enlarge upon the authority of Minor's Institutes in this state.

But there is a yet more persuasive argument in support of the position, and that is that what was done in this case was in pursuance of, and in accordance with, a practice, which we believe to be coeval with the statute under construction, and which has been uniform and unquestioned throughout the limits of the state.

We are of opinion, therefore, that the execution dated April 30, 1884, was duly issued within a year from the date of the judgment.

This execution of April 30, 1884, was made returnable on the 1st Monday in the ensuing July, and the next execution which was issued, and the one which appellee relies upon, is dated the 11th day of October, 1884; so that after the return day of the first execution and before the issuance of the second execution, a period of 10 years, three months and some days had elapsed. The bar of the statute would, therefore, still attach, unless there was some interruption of its operation which will reduce the time to the statutory period of 10 years.

By decree entered in the cause of Basore and others against Pence and others, at the October term, 1884, it was directed, among other things, that Special Receiver B. G. Patterson, in whose name the judgment was rendered upon which the execution was issued, was "not to collect any more of said judgment than the sum above named, until the further order of the court, which will be made hereafter, if found to be necessary to pay any unpaid costs." The sum "above named" referred to in this decree was \$814.23, which it was thought would be sufficient to pay off all the liens remaining unpaid against John P. Pence and the unpaid costs, which sum was considerably less than that for which the execution of April 30, 1884, was issued, viz., \$1,200, with interest from the 1st day of May, 1880, subject to a credit of \$548.60 as of the 9th of January, 1883. That decree remained in force until the 3d day of February, 1885, so that the period from the 22d day of October, 1884, to the 3d day of February, 1885, is to be excluded from the computation of time in determining whether or not the bar of the statute of limitations applies to the judgment in question; the result being that the execution of October 11, 1884 was issued within less than 10 years from the return day of the execution which was returnable on the 1st Monday in July, 1884.

We are of opinion that there was no error in holding that the vendor's lien in favor of James Dove, which was assigned by him to Andrew Andes, is of equal dignity with that of John E. Roller. It is true, as was said by the commissioner, that the de-

cree in Basore, etc., against Pence, etc., of May 31, 1881, authorizing the assignment by B. G. Patterson, special receiver, of a portion of the debt due from Mary E. Pence on account of her purchase money, provided that "the said assignment was to be without recourse, and the lien of said bond to be postponed until the other bonds are paid off in full," thus subordinating the lien in favor of Dove to that securing to the receiver the payment of the residue of the purchase price; but by a subsequent decree of the January term, 1885, directing the conveyance of the land purchased by Mary E. Pence, it was directed that a lien should be retained "to secure the sum due James Dove and John E. Roller, respectively, under decrees in this cause," and the deed making this conveyance reserved liens in favor of "James Dove and John E. Roller, respectively, as liens of equal dignity." Andes, on the other hand, claims that the lien in his favor for \$300 should be preferred to that of John E. Roller, and bases his contention upon the language of the deed of February 7, 1885, by which "a lien is expressly retained on the properties herein conveyed to the secure the payment first, to James Dove the said sum of \$300, with interest on the same from the 1st day of June, 1881, and to secure to John E. Roller the payment of \$870.88, with interest, etc.

There was no reason why a preference should have been given to the one over the other. Both represented parts of the purchase money, and there was no supervening equity growing out of the order of assignment which should have disturbed the equality of the rights between the assignees.

A fourth exception filed to the report of the commissioner was that the commissioner erred in not holding that Andrew Andes, being the surety in the debt due to John E. Roller, is estopped from asserting the vendor's lien in his (Andes') favor until the debt due John E. Roller is paid in full.

This claim was denied by the commissioner because he was of opinion that Roller's judgment was barred by the statute of limitations. He states in his report that if the lien of that judgment had not been barred, Andes would have been estopped by his suretyship from enforcing his lien to Roller's prejudice.

We having reached the conclusion that the judgment was not barred, but is still in full force and vigor as a security for whatever sum may be due upon it, it seems to be clear that Andes, one of the sureties in that judgment, should not be permitted to withdraw money claimed by him under his vendor's lien to the prejudice of the judgment creditor, upon whose judgment an execution had issued which is a lien upon all the personal property of the judgment debtors whether capable of being levied on or not.

We are further of opinion that the record fails to show that appellee Roller so dealt

with the liens and securities existing for the protection of his debt as to impair his right to enforce said liens for whatever amount may appear to be due to him on account of them, and we shall, therefore, not further prolong this opinion than to declare the principles upon which the amount thus due to him may be ascertained.

There is in the supplemental record a statement setting forth the items constituting the consideration for the negotiable note dated June 11, 1888, for \$300. That note is carried into a statement showing the balance due from Mary E. Pence to John E. Roller, and which also embraces the judgment for \$870.88, which is the principal subject of this litigation. These two sums constitute the principal of the debt claimed by him, making a total of \$1,170.88, upon which interest is calculated, and after allowing certain credits, among them the amount agreed upon for the Pope bonds, which were assigned to him, of \$950, a balance is ascertained in his favor of \$550.56 as of May 1, 1894.

However this settlement may be as between Roller and Mrs. Pence, it is certainly incorrect as to the sureties in that judgment. In order that the exact balance for which the sureties are justly liable may be determined, there must be a reference to a commissioner. There may be items entering into the \$300 negotiable note which ought to be taken into the computation in ascertaining the balance due. Such items should be allowed, if any there be, but the residue of the \$300 negotiable note should be excluded as to the sureties from the amount due to John E. Roller, as shown by the commissioner's report of March, 1901.

Numerous questions were presented in argument which we think it unnecessary to discuss.

The decree of the circuit court is reversed, and the cause remanded for further proceedings to be had in accordance with the views herein expressed.

SHEARER v. TAYLOR, Sergeant.

(Supreme Court of Appeals of Virginia. Sept. 24, 1906.)

1. SHERIFFS AND CONSTABLES—LIABILITIES—ATTACHMENT—LEVY ON PROPERTY OF THIRD PERSON—DAMAGES—INSTRUCTION.

The instruction in an action by the owner of property, wrongfully levied on as the property of another, that the measure of damages in this case is the rental value of the property during the time it was held under the warrant, is erroneous, in excluding from the consideration of the jury evidence that at the time of the levy the property was in storage under a contract for its storage for a year, and that it remained in storage six months after its release from the levy, which tended to show that the owner contemplated no use of the property during the time of the levy, and therefore suffered no loss of use because of the levy.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 307; vol. 5, Cent. Dig. Attachment, § 1379.]

2. SAME—INJURY DURING LEVY.

Whether plaintiff, whose property was wrongfully levied on as the property of another, is entitled to recover, as an element of damages, for injury to the property occasioned by its storage during the time of the levy, it having remained such time where it had been stored by plaintiff prior to the levy, depends on the determination by the jury of the conflicting evidence as to whether or not the officer or his agents caused the injury.

3. SAME—DAMAGES TO OTHERS THAN OWNER.

Plaintiff's furniture having been in storage when levied on, and having remained there for six months after dissolution of the levy, and the only testimony as to loss of use being that of plaintiff's mother and sister, that "we" wanted it to go housekeeping with, and couldn't because "we" couldn't get the furniture, a requested instruction that there could be no recovery except for such loss as plaintiff herself, and no one else, suffered should have been given.

4. SAME—EVIDENCE OF VALUE OF USE.

The value of the use of furniture which its owner lost during the period of a wrongful levy thereon should be estimated by the market value of the use where the property was located, so that evidence of the increase of rental of a house in another city when furnished with such property is not admissible to show the damages from the levy.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sheriffs and Constables, § 307; vol. 5, Cent. Dig. Attachment, § 1379.]

Error to Circuit Court, Frederick County.

Action by J. W. Taylor, sergeant, for the benefit of Anne M. Johnson, against A. L. Shearer. Judgment for plaintiff. Defendant brings error. Reversed and remanded.

Barton & Boyd, for plaintiff in error. R. E. Byrd, for defendant in error

HARRISON, J. In October, 1903, a distress warrant was sued out by Etta B. Robins to recover of Edward C. Johnson a balance due of about \$900 for the rent of a hotel in Winchester. This warrant was levied on the day it was issued, upon certain furniture, described in the record, which was claimed by Miss Anne M. Johnson. Thereupon an indemnifying bond was demanded by the officer and given by the plaintiff in error, A. L. Shearer, in the penalty of \$1,500. Miss Johnson intervened in the distress warrant proceedings, claiming the property as her own; and an issue was made up, which was tried in October, 1904, and decided in her favor.

In March, 1905, this suit was brought by J. W. Taylor, sergeant, suing at the relation and for the benefit of Anne M. Johnson, against A. L. Shearer, upon the indemnifying bond executed by him, to recover damages alleged to have been sustained in consequence of the levy. The bill of particulars filed was as follows: Loss of use furniture, \$1,000. Damage to furniture, \$450. Storage on furniture, \$20.

The case was tried in June, 1905, resulting in a verdict in favor of the plaintiff for \$743. A motion for a new trial was overruled, and thereupon a writ of error was awarded by this court.

The action of the court in giving for the plaintiff the following instruction is made ground of exception:

"The jury are instructed that the measure of damage in this case is: (1) A fair rental value of the property levied on for the period the same was held under the distress warrant, not exceeding 12 months; (2) the damage to the same occasioned by the storage during the same period."

This instruction gives the plaintiff the right to recover, during the period of the detention, the fair rental value of the property levied on without regard to whether she was deprived of its use or suffered any damage from the loss of such use or not. This view of the court was emphasized by the following verbal instruction given while the case was under argument, which was also excepted to: "The jury in this case is directed to allow a fair rental value for the property during the time it was held under levy, considering the character of the property levied on, not exceeding amount claimed in the bill of particulars."

We are of opinion that it was error to give both the written and the verbal instructions here complained of. In a case like this, where no fraud, malice, oppression, or other special aggravation is shown, the object of the law is to give compensation for the injury suffered, and damages are restricted to that object. *Peshline v. Shepperson*, 17 Grat. 484, 94 Am. Dec. 468; *Fishburne v. Engledove*, 91 Va. 558, 22 S. E. 354.

Where the property has a usable value, it seems to be well settled that the measure of damages is the value of the use of the property during its detention, to be estimated by the ordinary market value of such property. *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Clark v. Martin*, 120 Mass. 543; *Hoyt v. Fuller*, 104 Fed. 193, 48 C. C. A. 466; *McGinnis v. Savage*, 29 W. Va. 362, 1 S. E. 746; *Nichols v. Campbell*, 10 Grat. 561.

At the time the levy under consideration was made, the property levied on had been in storage for about 80 days under a contract which provided for its storage during a period of 12 months, and the whole of it remained in storage for 6 months after it had been released from the levy by the decision in favor of the plaintiff in this case. This and other evidence tended to show that the plaintiff had not been deprived of the use of the property at all, but that during the existence of the levy the property remained undisturbed where the plaintiff had stored it and contemplated it should remain during the entire period of the levy. If no use of the property was contemplated by the plaintiff, she suffered no loss of use in consequence of the levy, and therefore was not damaged. The effect of the instruction given was to exclude from the jury all consideration of the evidence tending to show that the plaintiff

had suffered no loss of use of the property, and to require them to ascertain its rental value without regard to whether or not injury had been suffered as a result of the levy.

The evidence was conflicting as to whether the property was damaged while in storage during the period of the levy, and as to whether the plaintiff or the defendant was responsible for such damage. It was therefore for the jury to ascertain, upon the whole evidence, what damage to the property, if any, had been occasioned by the defendant or his agents while it was under levy.

The action of the circuit court in refusing to give the following instructions, asked for by the defendant, is also assigned as error:

"(1) The jury is instructed that the plaintiff can only recover in this case for such actual loss, as she herself, and nobody else, did in fact sustain by inability to use the property levied on, and for such expense of storage and damage to the furniture as she may have sustained in consequence of said levy.

"(2) The jury is instructed that the only recovery in this case can be of such actual loss, as the plaintiff herself, and nobody else, did in fact sustain, because of the levy, by her inability to use the property levied on, and such expense of storage and damage to it caused by the same; but if the jury believe that the property was put in storage by the plaintiff before the levy, and would have remained there even if it had not been levied on, they must find for the defendant whether it was levied on or not."

The plaintiff did not testify in the case. The only evidence on her behalf was that of her mother and sister. Their testimony as to loss of use of the property was very vague and meager, consisting of such expressions as, "We wanted it to go house-keeping with." "We looked at a small house, and could not rent it because we could not get the furniture." "We were considering going to housekeeping, but could not do so because we could not get the furniture." It is by no means clear who were included in the term "we." There is no proof that it had any application except to the sister and mother who were testifying and using the word. As no one but the plaintiff had any right to recover of the defendant damages for the loss of the use of the furniture, it was proper, in view of this evidence, as was done by these rejected instructions, to tell the jury that the only recovery there could be in the case was such actual loss as the plaintiff herself, and no one else, had in fact sustained by reason of the levy.

What has been said in dealing with the instruction that was given applies to the latter part of the second rejected instruction, and need not be repeated here. The evidence shows that the property was put

in storage by the plaintiff, and was never removed from such place of storage by the defendant, notwithstanding the levy. It was a question for the jury to determine, from the whole evidence, whether or not the plaintiff had any intention of using the property during the time it was under levy. If she had no intention of using it during that time, and it remained where she put it and desired it to be, she suffered no injury from loss of use, and could, therefore, recover no damages on that account. It was proper, therefore, that the jury should have been instructed to that effect.

In answer to a question as to the rental value of the property levied on, Miss Mary Johnson, a witness for the plaintiff, among other things, said, that a house of 14 rooms was rented in Baltimore for \$50 per month, and that furnished with the property and furniture levied on, it was subsequently let for \$150 per month. The court overruled an objection to this answer, and a bill of exception was taken.

We are of opinion that this evidence should have been stricken out. It is true that the rental value of the property may be shown as one means of proving the value of the loss of the use, but the value of the use should be estimated by the fair market value at the place where the property is located. What the value of the use of furniture, of the character described, might be, as giving the rental value to a furnished house in Baltimore, would be no criterion for determining the value of the use of the same furniture in Winchester.

For these reasons, the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with the views expressed in this opinion.

PLUNKETT v. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS.

(Supreme Court of Appeals of Virginia. June 14, 1906. Rehearing Denied Sept. 13, 1906.)

1. INSURANCE—MUTUAL BENEFIT SOCIETY— CONTRACT—SUBSEQUENT AMENDMENTS TO BY-LAWS—PLEADING—ADMISSIONS BY DEMUR- RER.

In an action on a benefit certificate conditioned on the insured complying with the laws then in force and those thereafter adopted, a plea alleged that after the issuance of the certificate a new law, providing that no benefit should be paid to the beneficiary of any member committing suicide, sane or insane, etc., was enacted. *Held*, that a demurrer admitted the regular enactment of the new law so that it became operative retrospectively except as to rights which had become vested.

2. SAME—DEFENSE OF SUICIDE.

A demurrer to a plea in an action on a benefit certificate, alleging that the insured committed suicide, and died from the effects of a pistol wound inflicted by himself with suicidal intent, admits that the insured committed suicide while sane.

3. SAME.

A mutual benefit certificate, silent on the subject of suicide of the member, was conditioned on his complying with the laws then in force and those that might be adopted. After the issuance of the certificate, the society adopted a new law, providing that no benefit should be paid the beneficiary of a member committing suicide, sane or insane. *Held*, that the beneficiary could not recover on the certificate on the member committing suicide while sane.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1855.]

Appeal from Circuit Court of City of Richmond.

Action by Estelle V. Plunkett against the Supreme Conclave, Improved Order of Heptasophs. From a judgment for defendant, plaintiff appeals. *Affirmed*.

A. H. Sands and C. R. Sands, for plaintiff. Wm. & Henry Flegenheimer, for defendant.

KEITH, P. "It appears from the record that Charles W. Plunkett applied for membership in the Improved Order of Heptasophs on June 28, 1897, and in his application he agreed 'to conform in all respects to the laws, rules and usages of the order now in force or which may hereafter be adopted by the same.' Upon said application he was admitted as a member, and on the 12th day of August, 1897, a benefit certificate for the sum of two thousand (\$2,000) dollars was issued him, his wife, Estelle V. Plunkett, beneficiary. This certificate was delivered and accepted, 'upon the condition that the said brother herein complies with the laws, rules and regulations now governing said conclave and benefit fund, or that may, in the future, be enacted by the Supreme Conclave to govern said conclave and fund.' At the time Plunkett applied for membership, and at the time the benefit certificate was delivered to him, there was no by-law of the company in regard to the suicide.

"At the session of the Supreme Conclave, held in June, 1903, section 257 of constitution and by-laws was enacted. This section provided as follows: 'No benefit shall be paid to the beneficiary or beneficiaries of any member committing suicide (sane or insane); provided, however, that where such suicide has completed one year of membership (although the Supreme Conclave shall by his act be released from all claims represented by the benefit certificate) his beneficiary or beneficiaries shall, nevertheless, receive from the Supreme Conclave a sum of money in full discharge of all demands which he, she, or they might otherwise have had upon said Supreme Conclave equal to the equitable proportion of the total benefit, such equity to be determined by the number of years the suicide was a member of the order as related to his expectancy of life when admitted.' This by-law was in force on the 9th day of August, 1903, upon which

day Charles W. Plunkett committed suicide, and died from the effects of a pistol shot wound inflicted by himself with suicidal intent.

"The beneficiary upon proper proofs of death, made a demand for the face value of the benefit certificate, to wit, the sum of \$2,000. The demand was refused, and thereupon she brought her action.

"The defendants tendered two special pleas. The first alleged that in the application and also in the benefit certificate that Charles W. Plunkett promised to conform in all respects to the laws, etc., in force at the time of said application and benefit certificate, and those thereafter to be adopted; that section 257 had been thereafter adopted, and that the said Plunkett committed suicide, and died from the effects of a pistol wound inflicted by himself with suicidal intent. The second plea set forth the above facts, and in addition thereto, that in accordance with section 257 the defendant was indebted to the plaintiff in the sum of \$333.34, and that on the day when the said sum became due the defendant tendered the plaintiff said sum; that the plaintiff wholly refused to accept; and that the defendant has ever been, and still is, ready to pay the said plaintiff the said sum, which the defendant brought and paid into court. To both of these pleas the plaintiff demurred.

"It was contended, in support of said demurrer, that the by-law interfered with rights which had become fixed and vested by the terms of the original contract. The demurrer admits that its enactment was regular and in accordance with the provisions of the defendant's constitution, and by the express terms of the contract between the plaintiff's husband and the defendant the former agreed to comply 'with all the laws, rules and regulations now governing said conclave and benefit fund, or that in the future may be enacted by the Supreme Conclave to govern the said conclave and fund.' Therefore, the by-laws regularly adopted by the defendant became retrospective as well as prospective in their operation, except as to the rights which had become fixed and vested by the terms of the original contract. In the original contract there was no mention of death by self-destruction or suicide of a member, whether sane or insane. The demurrers to the pleas also admit that the plaintiff's husband was a suicide; and the meaning of the word suicide is, as defined by the Century Dictionary, 'One who commits suicide; at common law, one who, being of years of discretion and sound mind, destroys himself, and the act itself is defined by designedly destroying one's life.' 'To constitute suicide at common law, the person must be of years of discretion and of sound mind'; but in addition to this definition there is a presumption of sanity which must be entertained in the absence of proof. Insanity

cannot be predicated simply upon the act of self-destruction, for human experience has shown that sane men have taken their own lives. To the extent that the by-law provided for the forfeiture of contract rights in the event of suicide by the insured while sane, it is valid, first, because it invades no vested rights of the insured, and second, because it is a fundamental though unexpressed part of the original contract, that the insured should not intentionally cause his own death. Inasmuch as the original contract and by-laws were silent upon the subject of suicide by the insured while sane, the new by-law is valid, because there can be no such thing as a vested right for a sane man to commit suicide, and for the further reason that it is nothing more than the written expression of the provision which the law had read into the contract at its inception.

"Therefore, inasmuch as the demurrer admits that the plaintiff's husband was sane at the time of the commission of the suicide, the court is of the opinion that there can be no recovery except in accordance with the terms of the by-laws of the association."

Thus far we have adopted the opinion of the judge of the circuit court, and shall content ourselves with adding a few authorities in support of his conclusion.

In *Pain v. Societe St. Jean Baptiste*, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287, the Supreme Judicial Court of Massachusetts held that where "a by-law of a beneficiary association, providing that every member should have a right to five dollars a week if he became disabled during a period not exceeding thirteen weeks in each year, was amended so as to provide that 'when a member has received thirty-nine weeks of sick benefits he shall not hereafter receive more than one dollar per week, instead of five dollars, thirteen weeks of each year,' during a period of five years, the amended by-law applied to a member who, at the time of its adoption, was under a disability, and had received payment of benefits for thirty-nine weeks."

In *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188, it is said, that a by-law, adopted by a fraternal benefit association, which provides that a benefit certificate issued to a member shall be void, and all benefits thereunder forfeited, in case the insured shall die by suicide, felonious or otherwise, sane or insane, although adopted after the benefit certificate was issued and before the death of the insured by suicide, violates no vested right of the beneficiary.

In *Daughtry v. Knights of Pythias*, 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310, it was decided that under a contract of life insurance issued by a mutual company, conditioned to be subject to any by-law thereafter to be enacted, the insured is bound by a subsequent by-law, forfeiting such policies when the insured should die by his own

hands; citing and approving Supreme Commandery Knights of Golden Rule v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332.

In *Shipman v. Protected Home Circle*, 174 N. Y. 398, 67 N. E. 83, the court says: "Where the contract is silent upon the subject of the suicide of a member while sane, a by-law subsequently enacted providing that the certificate issued to him shall become void in case he shall die by suicide, felonious or otherwise, sane or insane, or by his own hand, sane or insane, provided that in such case there shall be refunded to the beneficiary named in said certificate the amount of all payments made, together with interest thereon at the rate of three per cent. per annum, applies to a certificate in force at the time of the amendment issued to a member who thereafter commits suicide while he is sane, first, because it invades no vested right, and, second, it is fundamental though unexpressed part of the original contract that the insured shall not cause his own death. See, also, *United Moderns v. Colligan* (Tex. Civ. App.) 77 S. W. 1032.

The case presented to us upon the pleadings is that of a sane man who takes his own life. In other words, as was said in *Burt v. Union Cent. L. Ins. Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216, do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

In *Amicable Soc. v. Bolland*, 4 Bligh N. R. 194, decided by the House of Lords, the Lord Chancellor said: "It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim?"

In *Burt v. Union Cent. L. Ins. Co.* supra, it is held, upon grounds of public policy, that a policy of life insurance does not insure against the legal execution of the insured for crime, even though he may in fact have been innocent, and therefore unjustly convicted and executed.

And in *Ritter v. Mutual L. Ins. Co.*, 169

U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 698, Mr. Justice Harlan, delivering the opinion, said: "There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns—expressly provides for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. In the case any different in principle if such policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his willful, deliberate act when in sound mind?"

We have not found it necessary to express any opinion as to whether or not the by-law in question in this case would be binding upon members who afterwards became insane, and while insane committed suicide, and as to such persons no opinion is expressed.

We think the authorities cited fully vindicate the opinion and judgment of the circuit court, and it is affirmed.

HOME INS. CO. OF NEW YORK v. CHATTAHOOCHEE LUMBER CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. INSURANCE—CANCELLATION OF POLICY.

Where a fire insurance policy was issued for a term of one year, which contained provision for cancellation at the instance of the insured, and also at the instance of the insurer upon giving five days' notice, in the absence of any statutory provision, a cancellation could only occur within the year in one of three ways, so as to furnish a defense in case of loss by fire—by the exercise of the right on the part of the insured, by the action of the insurer canceling the policy upon five days' notice, or by an agreed cancellation.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 498-504, 516.]

2. SAME—ACTION ON POLICY—DEFENSES.

If negotiations were pending between an insurance company and a holder of a fire insurance policy issued by it, for the purpose of canceling such policy, but such negotiations had not been completed, so that the minds of the parties had not met and a cancellation had not become actually effective before the fire occurred, this would not furnish a defense to the company to a suit on the policy.

3. SAME—PROPOSITION FOR CANCELLATION—ACCEPTANCE.

If a proposition for a cancellation by agreement was made by letter, and a reply by letter was relied on as an acceptance completing the agreement, such reply would take effect from the time when it was sent.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 504, 519.]

4. SAME.

If it was not sent until after the fire occurred, an officer of the insured corporation would not then have implied authority to send it, and thereby destroy any right of indemnity which had accrued to the company.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 505.]

5. SAME.

An agreement for an immediate cancellation without giving five days' notice can be made, and this may be shown by acts and conduct as well as by direct words. The burden of showing a complete cancellation is on the party asserting it.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 507, 1649.]

6. TRIAL—DIRECTING VERDICT.

A verdict should not be directed except where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict.

7. INSURANCE—ACTION ON POLICY—QUESTION FOR JURY.

Under the evidence in this case it was not error for the presiding judge to direct a verdict. (Lumpkin, J., dissenting.)

8. SAME.

Taking into consideration the terms of the letter proposing a cancellation, the amount remitted as return premium, the indorsement of the check sent therefor, and the deposit of it in the bank to the general credit of the insured, the payment of it in due course, the retention of the money by the insured, and the entire conduct of the parties, and, in view of the principle announced in the sixth headnote above, I think there was enough to have authorized the submission of the case to the jury, under proper instructions as to whether there was an agreed cancellation, rather than to have directed a verdict. (Per Lumpkin, J.)

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. W. Spence, Judge.

Action by the Chattahoochee Lumber Company against the Home Insurance Company of New York. Judgment for plaintiff, and defendant brings error. Affirmed.

The Chattahoochee Lumber Company brought suit against the Home Insurance Company of New York to recover \$20,000 upon a policy of insurance. It was issued by the defendant on January 17, 1903, for a term of one year, and covered certain property belonging to the plaintiff. It contained the following provision in regard to cancellation: "This policy shall be cancelled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retain-

ing the customary short rates; except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." The vice president of the lumber company lived in Savannah, where it apparently had its office, and the president lives in the suburbs of the city. On February 19, 1903, Graves, the agent of the insurance company, wrote a letter dated at Bainbridge, addressed to the lumber company at Savannah, which contained the following: "I am to-day in receipt of your check for \$1,410, the amount of the premiums on insurance policies recently issued to you on the Donalsonville sawmill property. I deeply regret to inform you, however, that I have this day received a visit from a traveling inspector for the Home Insurance Company, and he advises me that in the present condition the Donalsonville property is not acceptable as insurable property, as the hydrants are in bad repair, and some of the hose is old and worn out; also that the slab-pit is not protected by a wall from the mill, and in times of high wind the property is in great danger from a general conflagration. This necessitates my asking you to return the policies for cancellation, which I sincerely regret. I trust, however, that in the near future the fire protection at this mill will be improved, and that you will again let me handle the line for you. I inclose you check for \$1,292.50, the amount of the return premium due you. You see you have been insured against loss for a little more than a month, so that the companies are due one-twelfth of the premium. Assuring you that I regret very much that the companies have found it expedient to take this step, I remain," etc. This was received by the vice president of the lumber company on the morning of February 21st. He dictated to a stenographer, and signed during the same morning, a reply, in the following terms: "Yours of the 19th, inclosing check for \$1,292.50, received, requesting us to return policies; and we herewith inclose same, which is perfectly satisfactory to us. We cannot blame you or the insurance companies for not continuing the risk on the mill property in the condition it is in." The president knew of this reply, and approved it.

Two policies were held by the plaintiff; the one sued on, and another which it is not material to describe here. The vice president delivered the check to the secretary and treasurer, who delivered the policies to the stenographer during the forenoon. The check was drawn on a bank in Bainbridge. It was payable to the order of the lumber company, and was indorsed by it and deposited in the bank, and the company was given credit for the amount. It was paid by the Bainbridge bank a few days later. About 2 o'clock of February 21st, the property caught fire and burned until it was destroyed. A telegram was received by the lumber company about 4 o'clock p. m.,

informing it of the fire. The vice president asked the secretary and treasurer for the policies. He testified that his purpose was to hold them if they had not been mailed. The secretary and treasurer replied that they had been mailed or sent off. The latter testified that he so stated because he had delivered the policies to the stenographer, who he had supposed had sent them; that late in the afternoon he learned that they had not been mailed; that in passing through the stenographer's office he saw a large envelope, asked him if those were the policies, and was surprised to hear him say they were; that he (witness) tore open the envelope, obtained the name of the company, and handed the policies back to the stenographer, though he did not tell the latter not to mail them; that the vice president did not know at that time that they had not been mailed, nor were they mailed after the fire with his knowledge; that it was a misunderstanding on the part of the witness that he allowed them to be mailed; and that he supposed that, having received the return premium, it did not make any difference. The stenographer testified that he mailed the letter and policies about 8 or 8:30 p. m. The defendant moved for a nonsuit, which was refused. Its counsel announced that it had no testimony to introduce. Thereupon the court directed a verdict for the plaintiff, and the defendant excepted.

King, Spaulding & Little, for plaintiff in error. Donalson & Donalson and Adams & Adams, for defendant in error.

LUMPKIN, J. (after stating the foregoing facts). The policy of insurance was issued for the term of one year, and the fire occurred within that time. The company relies on the defense of cancellation before the fire. This could only occur in one of three ways: By the exercise of the right of cancellation by the insured (which is not claimed); by the action of the company under the clause in the policy which permitted it to cancel on five days' notice (the only clause on the subject); or by an agreed cancellation taking effect before the loss. The letter asking that the policies be returned for cancellation was a proceeding under the provisions of the policy, or else a proceeding independent thereof. If this was an effort to exercise a right of cancellation under the policy, it carried with it the corresponding right on the part of the other side to five days' notice before the insurance terminated, unless this was waived. It is true that, independently of the right of cancellation reserved in the policy, there may be an immediate cancellation by agreement; but such an agreement must be shown. In 2 Clements on Fire Insurance, 415, it is said: "If fire occurs before the expiration of the five days' notice of cancellation required, policy remains in force, though it may have been sent by mail to the agent for the purpose of cancellation and procuring other in-

surance. There must be evidence of intention to consent to immediate cancellation." See, also, *Wicks v. Scottish Union Ins. Co.*, 107 Wis. 608, 83 N. W. 781; *Kirby v. Phoenix Ins. Co.*, 13 Lea (Tenn.) 340. In *Hollinsworth v. Germania Fire Ins. Co.*, 45 Ga. 294, 12 Am. Rep. 579, the attempted cancellation was under the policy. While the letter did not directly say that an immediate cancellation, outside of the right to cancel on five days' notice, was proposed, it is contended that it does so by implication, and that immediate cancellation may be shown by acts and conduct as well as by words. In this connection it is urged that no premium was retained by the company for the five days during which the notice would have run that the insurance was not intended to continue for that time. It will be observed, however, that the letter stated that the lumber company had been insured against loss for a little more than a month; but eleven months' premium was returned, indicating that, aside from the five days, which would have run under a notice given in accordance with the policy, a nice calculation of premium for exact days was not made by the insurance company or its agent.

It is further insisted that, when the check was indorsed and deposited to the credit of the lumber company, it became the property of the bank, and the money became that of the company; and that such a transaction would amount to the payment of a debt, if the check was given for that purpose. There is authority for this position, but this court appears not to have thought that such a deposit was the equivalent of payment in cash until the check itself was paid. *Charleston Railway Co. v. Pope*, 122 Ga. 580, 50 S. E. 374; *Civ. Code* 1895, § 3720. When it is paid, however, whether it relates back for certain purposes need not be discussed. See, on this subject, 22 Am. & Eng. Enc. L. (2d Ed.) 573. Suppose that, instead of a check which was turned into cash, the company had forwarded the money directly, and it was in the hands of the insured at the time of the fire, but the policy and letter of the insured had not been mailed, what would then have been the status? If this letter from the agent of the insurance company was a proposition for a cancellation, as the minds of the parties must have met to create a contract, so, too, they must meet as to its termination, unless the obligation is made to end in some other manner by the original agreement. *Ostrander on Fire Insurance* (2d Ed.) § 217. If there was a proposition by letter to cancel or surrender for cancellation, and an acceptance by letter relied on, it would take effect from the time when it was sent (*Civ. Code* 1895, § 3646), and, this being after the fire, no officer of the company would then have implied authority to waive or relinquish any right of the company to indemnity, which had already accrued. 10 Cyc. 908. It is thus clear from the evidence, without controversy,

that there was no cancellation completed by giving five days' notice, as provided in the policy. It is equally clear that, if the letter from the agent of the insurance company is to be considered as a proposition for a cancellation by agreement, independently of the right of cancellation given in the policy, in order to have become effective there must have been, not only a proposition, but an acceptance. If an acceptance by letter is relied on, it would take effect from the time when the letter was sent, and not before. If the answer were not sent until after the fire, it would not operate to make a complete cancellation before the fire.

The only remaining question is whether there was sufficient evidence, in view of all the facts disclosed, to have made it proper to submit to the jury the question whether, aside from any acceptance by the letter which was not mailed till after the fire, the minds of the parties had met, and there had been both a proposition and an acceptance, so that a cancellation had not been effectuated before the fire, or whether the presiding judge properly directed a verdict. As to the principles above discussed, we are all agreed; but, in the concrete application of them to the facts of this case, we differ. The majority of the court are of the opinion that the letter from the agent of the insurance companies was on its face a proceeding, under the terms of the policy, to cancel on five days' notice; that, five days not having elapsed, there was no complete cancellation before the fire; and that a verdict was properly directed. I am of the opinion that the letter from the agent was ambiguous, and might have been intended as a proceeding under the policy or a proposition for an agreed cancellation, independently of the right to cancel on five days' notice; that the letter from the insured, not having been sent till after the fire, was not alone sufficient to make an acceptance before the loss, but its terms may be considered as having an evidential value in determining how the parties considered the proposition; and that, in the light of all the facts, as disclosed by the evidence, the case (while close) was rather one for submission to a jury than for the direction of a verdict.

Thus the company, in remitting the return premium, did not retain any amount to cover the five days' pending notice. While, as has been seen, this did not necessarily show a proposition for immediate cancellation, and may not have resulted from any intention to have such immediate cancellation, yet this is more properly a deduction of fact than a matter of law. The letter from the insurance agent did not in express terms give notice of cancellation after five days, but set out certain reasons why the company desired to cancel, and asked that the policy be returned for cancellation. As in the matter of the amount of premium returned, the inference to be drawn was rather

for the jury than the court, as to whether a cancellation under the right given by the policy was sought, or whether it was a proposal, outside of the terms of the policy, for an immediate cancellation. The officer of the lumber company took the check, indorsed it, and deposited it in bank to the general credit of the company before the fire took place, and directed the stenographer to return the policies. The check of the company, or its agent, in the usual course, would be returned to it or the agent as paid. The lumber company never returned, or offered to return to the insurance company, the check or the money representing it. It may not have been bound to do so, and after the fire the crediting of the amount so received on the recovery may be a sufficient explanation; but what inference, if any, the jury would draw from this, I cannot say. The policies in fact were sent, though after the fire. Thus, under all the evidence, I am of the opinion that the case was not one in which a verdict could be directed. The exact questions for the jury are very narrow—whether the proposition for cancellation was under the terms of the policy, or independent of and outside of them, and, if the latter, whether the minds of the parties met and there was a cancellation consummated before the fire, or only a cancellation considered or intended, but not perfected.

However strong may be the testimony on one side, a verdict should not be directed except where there is no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demands a particular verdict. Questions of intention must necessarily be to a considerable extent dependent upon inferences from the facts proved. It has been said by a great jurist that juries are the chemists of the law; and the solution of these issues of fact, and the drawing of inferences of fact, where there is evidence to authorize it, may well be dealt with by these chemists in the laboratory called the "jury room." It is sometimes urged that, if the evidence be so weak on one side that the court would not permit a verdict in favor of such party to stand, he should direct a verdict at once, and save both the time and expense of a new trial. Such is the view entertained in some jurisdictions. But in this state, on a jury trial, questions of fact are for the decision of a jury, and not that of the judge. If they decide against the weight of the evidence, it is the duty of the judge to exercise a sound discretion in reference to the granting of a new trial. But there is a difference between granting a new trial, and thus permitting the jury to again pass upon the question, and laying hold upon the case in limine, and telling them how to find.

Judgment affirmed. All the Justices concur, except FISH, O. J., absent, and LUMPKIN, J., dissenting.

SEABOARD AIR-LINE RY. v. MEMORY.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. COURTS—OFFICIAL STENOGRAPHERS—COMPENSATION.

When the stenographer of a superior court is directed by the presiding judge to take down the evidence and other proceedings in a civil case, and does so, the judge has authority to allow him compensation, at the rate of 10 cents per 100 words, for his services in merely taking down such proceedings in shorthand, and to prescribe by whom and in what manner such compensation shall be paid.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 200.]

2. SAME—ENTRY OF JUDGMENT.

The judge has power to enter up judgment in favor of the stenographer against the party or parties by whom the court prescribes such compensation shall be paid; and all that is necessary in order for the stenographer to obtain such judgment is for him to render his bill to the judge and for the judge to be satisfied that the same is correct and just, at the rate of compensation fixed by him.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 200.]

3. SAME.

The stenographer is entitled to compensation not only for taking down the evidence, but also for taking down the charge of the court and the other proceedings in the case which the law requires to be taken down.

4. SAME.

The judge has no power, upon the ex parte application of the stenographer, to render a judgment in his favor against a party to a civil case in which he has taken down the proceedings, for the amount of the stenographer's bill for a transcript, from his shorthand notes of the evidence and charge of the court in such case, prepared and delivered to such party at his request.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Proceedings by S. F. Memory against the Seaboard Air-Line Railway. Judgment for plaintiff, and defendant brings error. Reversed.

Memory, the official stenographer of the Brunswick circuit, took down in shorthand notes the testimony and charge of the court in the case of Olsen v. Seaboard Air-Line Railway, tried at the May term, 1904, of Glynn superior court, these services being rendered by direction of the presiding judge and at the request of counsel for both parties. He wrote out, or transcribed, the evidence and charge of the court, in longhand, at the request of the counsel for the defendant, and delivered the transcript to them. At the December term, 1904, of the court, he presented to the court his bill or account, against the railway company for services rendered in the case as stenographer of the court, including therein the charge for the transcript delivered to the defendant's counsel, and a judgment was rendered in his favor against the railway company, by the court, for the amount thereof. The bill and the judgment thereon was as follows: "Seaboard Air-Line Railway. To S. F. Memory,

Official Stenographer, Brunswick Circuit, Dr. To one-half of my fee for taking down and stenographically reporting testimony and charge of the court in the case of Mrs. Rosa B. Olsen v. your company, suit for damages tried at May term, 1904, of Glynn superior court, 48,800 words at 10 cents per 100, your half being \$24.40. To fee for writing out and transcribing said evidence and charge of court at your request, the same being delivered to your attorneys, 48,800 words at 10 c. 100 48.80. Total \$78.20. In Glynn Superior Court, December term, 1904. It appearing to the court that the above stated bill is correct, and that the services charged therein were rendered by S. F. Memory as such official stenographer, under the direction of the court and at the request of counsel for both parties, and that said charges so made is proper to be awarded as costs to be paid by defendant in said case; it is thereupon considered, ordered, and adjudged by the court that said stenographer's fees and costs so set out and charged for in said bill be and the same are hereby awarded against said defendant, Seaboard Air-Line Railway, and that said S. F. Memory, as such official stenographer, do have and recover of and from the said defendant, Seaboard Air-Line Railway the sum of \$78.20, the amount of his said bill, and that execution do issue accordingly. Granted in open court this Dec. 12th, 1904. T. A. Parker, Judge S. C. B. C."

The defendant railway filed a petition to set aside this judgment, for the following reasons alleged therein: It appeared that the judgment was rendered without any petition or motion in writing therefor. It was obtained ex parte by Memory, without any process or rule nisi having been issued, directed to the defendant, and without notice to it, or waiver of notice, or appearance, upon its part. The court had no authority "to make the award as costs as it has done, and as is recited in said judgment." The charges made in the stenographer's bill "are illegal, excessive, greater than and not the charge allowed by law to be made in such cases by official stenographer's," in that 10 cents per 100 words is charged for taking down the testimony and charge and a like amount for writing out or transcribing the same, when "the charge prescribed by law" is "fixed at a rate not to exceed 10 cents per 100 words for taking down testimony and reproducing the same in ordinary and intelligible writing, and no compensation whatever [is] provided by law for taking down the charge of the court."

The motion was dismissed on general demurrer, and the movant excepted.

Crovatt & Whitfield, for plaintiff in error.
A. D. Gale, for defendant in error.

COBB, P. J. 1. The court erred in sustaining the demurrer to the motion, though

all of the grounds of the motion were not well taken. The judgment was not void because the stenographer was allowed 10 cents per 100 words for the work performed by him in taking down the testimony and charge of the court. The statute provides that "the compensation of the reporter or stenographer for recording, or taking stenographic notes, and recording the evidence in such civil cases as may be agreed by counsel to be recorded, or, in cases of disagreement, as aforesaid in such cases as the presiding judge may direct to be recorded, shall be at a rate not to exceed 10 cents per 100 words, to be fixed by said judge." Civ. Code 1895, § 4447. The meaning of this language is not as clear as is desirable, the expression, "for recording, or taking stenographic notes, and recording the evidence," being somewhat ambiguous. This phrase is awkward, the word "recording," as first employed, and the words "taking stenographic notes" being apparently used in the same sense, and yet followed by the words "and recording the evidence," as if something else was to be done after "recording, or taking stenographic notes" of, the evidence. "Record" means "to preserve the memory of, by committing to writing, to printing, to inscription, or the like; to make note of." Webster's Dict. A stenographer is "recording" the evidence when he is taking it down in shorthand, although he is not making a record thereof which is intelligible to those who are not versed in the system of shorthand which he uses, and even though no one but himself may be able to read his shorthand notes.

The word "record" is clearly used in this sense in the section of the Civ. Code of 1895 which immediately precedes the one which we are now considering. That section provides that it shall be the duty of the official stenographer "to attend all courts in the circuit for which he is appointed, and, when directed by the judge as hereinafter set forth, to exactly and truly record, or take stenographic notes of the testimony and proceedings in the cases tried, except the argument of counsel." Section 4446. It is clearly apparent that the word "record" and the expression "or take stenographic notes of" mean identically the same thing, the latter expression being merely explanatory of the former. It is also to be borne in mind that this section deals with the duties of the stenographer and prescribes what he shall do, while the section which we are construing deals with the subject of his compensation for performing those duties in civil cases. It would be strange, indeed, if the Legislature, after prescribing the duties of the stenographer, had, when providing for his compensation for performing those duties in civil cases, by mere implication materially changed and increased the duties which he was required to perform in order to earn such compensation. The section which prescribes the duties and the section which provides for the

compensation for the performance of these duties are to be construed together. So we cannot agree with counsel in the contention that section 4447 means that the official stenographer of the court shall, in every civil case in which he is required to take down the testimony, etc., transcribe his shorthand record into longhand before he is entitled to the compensation provided for therein.

We think that the next section of the Civ. Code of 1895 clearly contemplates that no public record is to be made of the evidence, etc., taken down by the stenographer in a civil case, available to anybody and everybody who may desire to use it. It provides that the stenographer "shall, for reports of evidence and other proceedings by him furnished, be paid by the party requesting the same, at a rate not to exceed 10 cents for each 100 words." Section 4448. This makes the fee for furnishing transcripts, in longhand, of the stenographic reports in civil cases part of the perquisites of the stenographer's office, of which it is apparent that he might, largely at least, be deprived, if he were required to make a public longhand record of the matter taken down by him in each civil case. We think the intention of the statute is that the stenographer shall be allowed compensation, at a rate not to exceed 10 cents per 100 words, for merely taking down, in shorthand, the evidence, etc., in civil cases. This is the way in which we understand the statute has been uniformly construed by the judges of the superior courts ever since it went into operation. This is certainly true so far as our information or knowledge of the practice of the superior court judges extends. Unless this construction is placed upon the statute, a stenographer who, under the direction of the court, takes down the testimony, etc., in a civil case in which, after verdict, no effort is made to review the trial, can get no compensation, unless he goes to the senseless and useless labor of transcribing his shorthand notes of the trial. As we understand the law upon the subject, the stenographer is not expected or required to transcribe his stenographic report of the proceedings at the trial, unless he is requested to do so for the benefit of one of the parties, or the trial judge desires such transcript for the purpose of aiding him in examining, revising, or approving a brief of evidence, or judging of the accuracy of statements contained in a motion for a new trial or bill of exceptions. And yet it seems obvious that the stenographer is entitled to be compensated for stenographically reporting the proceedings at the trial, whether he is ever called upon to transcribe his shorthand report or not, and such we think is the purpose of the statute. This construction of the statute was recognized in *Central Railroad Company v. Robertson*, 92 Ga. 741, 18 S. E. 986, where it was held that "the presiding judge may require the official stenographer not only to take stenographic notes of the

evidence in civil cases, but to write the same out in longhand for the use of the judge, in case he should need the stenographer's report for the purpose of aiding him in examining, revising, and approving any brief of evidence which may be presented to him, if there should be further proceedings by motion for new trial, or otherwise."

There would have been no reason for holding that the judge may require the stenographer to write out in longhand his stenographic notes of the evidence, if, under the statute, the stenographer was obliged to do this whether the judge required him to do it or not. The fact that the judge may require this to be done, whenever he deems it necessary, shows the absence of a pre-existing statutory requirement that it should be done. In the opinion in the case, delivered by Mr. Justice Samuel Lumpkin, it is said: "The parties can, by agreement, have the report made, and arrange between themselves and the stenographer for his compensation. If no agreement is made, the presiding judge may, of his own motion, direct the stenographer to take down in shorthand the testimony and other proceedings; and he may also, as already stated, prescribe by whom, and what amount, the stenographer shall be paid. If there should be no necessity for writing out the notes in longhand, the judge, in fixing the amount of the stenographer's compensation, would, of course, allow him less than would be allowed in case he should be required to write out his report." In the present case, the judge did not exceed his authority when he allowed the stenographer 10 cents per 100 words for taking down the evidence in shorthand; and having fixed the amount of the stenographer's compensation, he had authority to prescribe by whom it should be paid, and, therefore, could require that one-half of the amount should be paid by the defendant in the case.

2. Power to fix the amount of compensation and to prescribe by whom and in what manner it shall be paid, which the judge has under the provisions of section 4447, necessarily carries with it the power to render judgment in favor of the stenographer against the party by whom the court orders that the compensation shall be paid. The stenographer receives no salary, but is simply paid for the work which he does. In felony cases, wherein the law requires the evidence to be taken down, he is paid by the day from the treasury of the county wherein the cases are tried, upon orders drawn thereon by the presiding judge. In civil cases whatever compensation he receives comes from the parties to the litigation. If the judge directs him to take down the proceedings in a civil case, he is compelled to do so, and looks to the judge to fix the rate of his compensation and to prescribe by whom and in what manner it shall be paid. He is the court's officer, and in taking down the proceedings in such a case performs his work under the direction,

and in the presence of the judge, and the fees which he thus earns are in the nature of court costs, accruing during the trial of the case. It would be strange, indeed, if, in order to enforce the collection of his fees for work so performed, he should be compelled to bring suit against the party or parties by whom the court directed the fees should be paid. He is a sworn officer of the court, and performs his work and presents his bill therefor under his oath of office, and is no more compelled to serve notice upon the party liable for the payment of the bill, to show cause why it should not be paid, than is any other officer of the court who performs services in the case for which he is entitled to collect the fees prescribed by the law. All that is necessary in order for the stenographer to obtain judgment for such fees is for him to satisfy the judge that the bill rendered is correct and just, under the rate of compensation prescribed by the judge. Were it otherwise, the judge might, in every civil case in which he requires stenographic notes of the proceedings to be taken down by the official stenographer, be laying the foundation for additional and collateral litigation growing out of the case, between the stenographer and the parties thereto. We do not believe that the Legislature ever contemplated that this additional burden should be placed upon the court in every civil case in which the court requires the evidence, etc., to be taken down, or that the stenographer, in order to collect his fees for services performed by him under the direction and in the presence of the judge, should be compelled to go to the trouble and expense of a lawsuit with the party liable to him for his compensation. If a mistake is made in the amount awarded the stenographer in the judgment, the party against whom the judgment is rendered will not be thereby prevented from making a motion to retax the costs, if such party was not served with notice of the stenographer's intention to apply for the judgment before its rendition.

3. The judgment was not void because it embraced compensation for taking down the charge of the court. As we have seen, the Civ. Code, § 4446, provides that it shall be the duty of the official stenographer of the court, "to attend all courts in the circuit for which he is appointed, and, when directed by the judge as hereinafter set forth, to exactly and truly record, or take stenographic notes of the testimony and proceedings in the case tried, except the argument of counsel." It is clear, from this language, that whenever the stenographer is required by the court to "record, or take stenographic notes of the testimony and proceedings," he must take down the charge of the court, the charge being a very important part of the proceedings, and the only portion of the proceedings excepted from the requirement of the statute as to the duty of the stenographer being the argument of counsel. Consequently the next

section, which provides for "the compensation of the reporter or stenographer for recording, or taking stenographic notes, and recording the evidence in" in civil cases, must be construed in the light of the above provisions of section 4446. The stenographer is required to stenographically report all the proceedings in the case tried, except the argument of counsel; and the contention of the plaintiff in error is that no matter how much work he may perform in taking down the various motions, objections, etc., orally made during the progress of the trial, and the rulings of the court thereon, and the charge of the court, he is entitled to no compensation whatever therefor, but his compensation must be strictly limited to the work performed by him in taking down the evidence. As already indicated, we cannot agree with counsel in this construction of the statute. In some cases, much the greater portion of the work performed by the stenographer, in open court, is in taking down the proceedings other than the testimony, and in other cases, the whole of such work is thus performed, the case being terminated without the introduction of evidence. Obviously, it was never intended by the Legislature that the stenographer, although required to report all the proceedings, except the argument of counsel, should be paid only for taking down the evidence. Construing together the section which prescribes the duty of the stenographer as to taking down the proceedings in the case tried, and the section which provides for his compensation, we have no hesitancy in deciding that he is to be paid for taking down the proceedings other than the testimony, as well as for taking down the evidence, at the rate of compensation fixed by the court.

4. While the judgment ought not to have been set aside upon any of the grounds with which we have been dealing, we think it should have been set aside because the court had no authority to embrace therein the compensation of the stenographer "for writing out and transcribing [the] evidence and charge of the court," at the request of counsel for the railway company, and furnishing the transcript thereof to them. This portion of the stenographer's bill was clearly based upon matter of contract between him and the railway company, and not upon services performed in the case, in or out of the court, by direction of the judge. It is true that the judgment recites that the services of the stenographer, charged for in the bill, which by reference is made a part of the judgment, were rendered as "official stenographer,

under the direction of the court," but this recital evidently must refer only to the services which were performed in court, in taking down the testimony and the charge of the court; for the judgment also recites that the services referred to were rendered "at the request of counsel for both parties." Evidently, this latter recital must refer only to services rendered by the stenographer in court, which were for the benefit of both parties, and not to services rendered by him to the losing party, after the trial was over, which were for the benefit of that party alone. Besides, the bill of the stenographer, which is embraced in the judgment, shows that the services now under consideration were performed merely at the request of counsel for the railway company, and that the transcript charged for was not furnished to the court, but to such counsel. The judge might, as held in *Central Railroad Co. v. Robertson*, supra, have directed the stenographer to furnish him, for his own use and information, a transcript of the stenographic report of the proceedings upon the trial of the case, and have provided for the payment of the stenographer for his services in this respect, but it seems clear that this was not done. The services charged for in the second item of the stenographer's bill fall within section 4448 of the Civil Code of 1895, which provides: "Said reporter or stenographer shall, for reports of evidence and other proceedings by him furnished, be paid by the party requesting the same, at a rate not to exceed 10 cents for each 100 words." The services referred to in this section are matter of private contract between the stenographer and the party requesting them; and in order to recover for the same, in case of the refusal of the party for whom they are rendered to pay for them, the stenographer's remedy is to sue upon the contract. He is not obliged to deliver his report of the testimony and other proceedings to the party who has made a request for the same, until such party pays him therefor; but if he does, his right to recover is upon the contract, in a proceeding based thereon. He cannot recover upon an *ex parte* application for services performed out of court, under an agreement, express or implied, between himself and the party for whom such services were rendered. For the reasons indicated in this division of the opinion, the judgment of the court below is reversed.

All the Justices concur, except FISH, C. J., absent.

ANDERSON v. WYCHE.

(Supreme Court of Georgia. Aug. 17, 1906.)

ERROR, WRIT OF—DISMISSAL—PRESUMPTIONS.

This case having been brought up by direct bill of exceptions (no motion for a new trial having been made, and no brief of evidence filed), assigning error upon specified rulings of the court in the admission of evidence, and it not appearing that the verdict was necessarily controlled by any one or more of such rulings, or even that injury resulted therefrom (the evidence being admissible for one purpose), they cannot be reviewed, and the writ of error must therefore be dismissed.

Per Lumpkin, J. As indicated in *Henderson v. State*, 51 S. E. 764, 123 Ga. 749, I incline to the opinion that a judgment of affirmance would be the better judgment; but as no reversal can be had on this bill of exceptions, and as the result is the same, the form of judgment is not of great materiality.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by J. L. Anderson, administrator, against J. W. Wyche. Judgment for defendant, and plaintiff brings error. Dismissed.

J. L. Anderson, as administrator with the will annexed of C. H. Freeman, deceased, sued W. J. Wyche for the recovery of two described parcels of land situated in South Macon, Bibb county. Three separate defenses were filed to the action, viz.: (1) Title in defendant under a sale of the land in question for state and county taxes due by the estate of Freeman. (2) Title by seven years' adverse possession under written evidence of title. (3) Estoppel by reason of the following facts: Plaintiff, as administrator of the estate of Freeman, refused to redeem the property in question within the time prescribed by statute, after its sale by the sheriff to the commissioners of Bibb county for taxes against the estate of Freeman, and authorized the commissioners to sell the property to defendant for the amount of such taxes; and defendant, having been informed by the commissioners that plaintiff had given them such authority, paid such taxes, the benefit of which payment was received by the estate of Freeman, and took a deed from the commissioners to the property. On the trial there was a general verdict for the defendant. Plaintiff, without moving for a new trial, filed a direct bill of exceptions. The only evidence contained in the bill of exceptions is certain documentary evidence offered by defendant and admitted over specified objections of the plaintiff. No other evidence introduced is referred to in any way. Such documentary evidence, and the objections urged thereto, are as follows: (a) Return of the property of the estate of C. H. Freeman for 1895, for taxation, made under oath by "Legare Walker, Agent," wherein the realty owned by the estate was valued at \$5,000. This return was objected to on the ground that "it should have been made by the administrator of the estate; he being res-

dent." (b) "The sheriff's tax deed to the county of Bibb, and the tax execution attached thereto, dated August 4, 1896, conveying the land in dispute; the tax execution being issued by the tax collector of Bibb county against 'Legare Walker, Agent Estate of C. H. Freeman,' and levied upon the land in dispute, dated December 20, 1895, for taxes 1895, amount \$65.00." "The objections to the execution being that the same could not be levied on the property of the 'estate of C. H. Freeman' as is here defined, and that the execution could not be issued against 'Legare Walker, Agent Estate of C. H. Freeman,' but only against the administrator of the estate of C. H. Freeman, who should have notice; and to the deed, that the sheriff had no authority of law to make a deed at a tax sale to the county of Bibb." (c) "The following orders of the Bibb county commissioners, * * * entered on minutes of board, August 4, 1896: 'Ordered, that J. F. Means, as agent of this board, buy in, and for the county, all property this day sold by sheriff for state and county taxes, subject to the terms and conditions contained in the order of this board on this subject, of date May 1, 1894, and recorded on page 325 of these minutes.' 'Ordered, that J. F. Means, in the name and behalf of this board, be authorized and empowered to buy all property this day sold by Sheriff Wescott of Bibb county, for state and county taxes, under and by virtue of tax s. fas., bidding in each case only the amounts due and accrued costs; provided no one else bids such amount and costs; provided further, that the property thus bought is not to be paid for until said Means as agent of this board has been put in possession of the same.' Entered on minutes of board May 1, 1894." "The objections to said order being that the board had no authority of law to authorize any one to buy land at tax sale for the county of Bibb." (d) "The following order of the board of Bibb county commissioners: 'The clerk was given the power to sign deeds.' Certified copy of the minutes of said board, of date January 9, 1897." "The objection being that the board of commissioners has no authority of law to authorize the clerk to sign deeds for the county generally, this not being a specific authority to sign any particular deed to certain lands; also that the board cannot authorize the clerk to sign any deed to any land, legally, belonging to the county." (e) "A deed from the county of Bibb to W. J. Wyche, conveying the land in dispute, signed, 'The County of Bibb [Seal];' printed in the deed by 'S. C. Davis, Commissioner.' The consideration of said deed being \$84.92. Said deed dated 16th August, 1897, reciting bought at the tax sale of August 4, 1896, also reciting the power given to the clerk to sign the deed." "The objections to said deed being that the county of Bibb could not hold or sell the land described, being bought at the tax sale, there

being no authority of law for the same; also that the execution is defective in being signed by S. C. Davis as commissioner, no authority being shown to authorize such execution of the deed; also because the deed is not signed by the county commissioners." The bill of exception recites: "The above papers were allowed in evidence by the court to show title and color of title in the defendant, W. J. Wyche, for both purposes, over the objections as set out." Error is specifically assigned upon the ruling of the court in admitting, over plaintiff's objections, each particular piece of documentary evidence hereinbefore set out.

M. G. Bayne, for plaintiff in error. Lane & Park, for defendant in error.

LUMPKIN, J. (after stating the case). As will appear from the foregoing statement, there was no motion for a new trial, nor was any brief of the evidence brought up. The only evidence set out in the bill of exceptions, or in any way referred to therein, is the documentary evidence incorporated in the report of the case preceding this opinion, and which was offered by the defendant and admitted by the court, over plaintiff's objections, as the bill of exceptions recites, "to show title and color of title in the defendant." It is apparent that the defendant on the trial was insisting on his plea of prescription under color as well as on his plea of title, and introduced at least some evidence (the documents set out in the bill of exceptions) in support of both of these pleas. Such documentary evidence was clearly admissible as color of title. *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691, and cases cited; *Benedict v. Gammon Seminary*, 122 Ga. 412, 50 S. E. 162. What other evidence, if any, defendant submitted to the jury to support the plea of prescription does not appear. So far as this court is informed to the contrary, the defendant may have introduced, in support of his plea of prescription, such other evidence as, taken in connection with the documentary evidence set forth in the bill of exceptions, legally demanded a verdict in his favor on that plea. The sheriff's deed to the county of Bibb was executed August 4, 1896, and the suit was brought August 11, 1904. If no adverse possession could begin until the expiration of 12 months from the date of the sheriff's deed, in which period the plaintiff had the right to redeem the property sold at the tax sale, still suit was not entered until seven years had elapsed after the expiration of such period, and there may have been ample evidence of adverse possession of the land in question, for seven years, under written evidence of title, by defendant and the county under which he held. It seems, too, that the evidence incorporated in the bill of exceptions was admissible

as to the plea of estoppel. What other evidence, if any, in support of this plea was introduced does not appear. The verdict was general—not indicating upon which plea it was rendered, and was received without objection. As already indicated, the evidence may have demanded the verdict under the plea of seven years' adverse possession under written evidence of title, or under the plea of estoppel, or under both of these pleas. In order for this court to reverse a judgment two things—error and injury—must appear. *Collier v. Murphy*, 108 Ga. 777, 33 S. E. 641. It may be granted that the court erred in admitting all of the documentary evidence set out in the bill of exceptions for the purpose of showing a valid paper title under a tax sale. Still, in view of what we have said, it does not affirmatively appear that plaintiff was injured by such error. It certainly does not appear that the verdict was necessarily controlled by this ruling of the court. In order that a reversal may be had where a case is brought to this court, not as a whole, or after a motion for a new trial has been made and overruled, but by a direct bill of exceptions, merely bringing up and assigning error on particular rulings, it must appear that "the judgment, decree, or verdict has necessarily been controlled"—not possibly affected, but necessarily controlled—by such rulings. "It is not every error, but only necessarily controlling rulings, which may be segregated from the case, stripped from their surroundings, and brought to this court alone as successful grounds for reversal." *Henderson v. State*, 123 Ga. 739, 749, 51 S. E. 764.

It follows that the rulings complained of in the bill of exceptions do not authorize a reversal, and in accordance with the previous rulings of this court the writ of error must be dismissed. *Henderson v. State*, *supra*. As stated in the opinion in that case, I incline to think an affirmance the better judgment. But the result is the same.

Writ of error dismissed. All the Justices concur, except FISH, C. J., absent, and ATKINSON, J., not presiding.

COBB, P. J. (concurring). In *Harrell v. Tift*, 70 Ga. 730, it was held that there must be a valid exception to some final ruling of the court below on which to predicate other assignments of error, and that a bill of exceptions which did not assign error upon the final judgment would be dismissed, even though there were valid assignments of error upon rulings made *pendente lite*. The decision was followed in *Kibben v. Coastwise Dredging Co.*, 120 Ga. 899, 48 S. E. 330, and in *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621. In the case just cited it was also held that a statement in a bill of exceptions that plaintiff excepted to "said verdict and judgment as being contrary to law" was not a valid assignment of error

upon the final judgment in the case. It is to be noted that this ruling is based upon *Rogers v. Black*, 99 Ga. 142, 25 S. E. 20. In that case the writ of error was not dismissed, but the judgment was affirmed. In the present case the only assignment of error upon the final judgment is in the following language: "Plaintiff alleges that the verdict is contrary to law." Under the rulings above referred to this is not a valid assignment of error upon a final judgment. As I am bound by these rulings, I concur in the judgment dismissing the writ of error. If the questions were open, I would follow the view indicated by Mr. Presiding Justice Lumpkin in the case of *Haskins v. Bank of the State of Ga.*, 100 Ga. 216, 27 S. E. 985. That seems to me to be the sound, logical, and proper view of the matter. I can see no answer to his argument. While I concur in the judgment dismissing the writ of error, I cannot concur in the reasons given by the majority of the court for that judgment. The reasons which constrain me to dissent from the reasoning of the majority will be found in the majority opinion in *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897, and in the dissenting opinion in *Henderson v. State*, 123 Ga. 789, 51 S. E. 764.

ATLANTIC & B. RY. CO. v. HATTAWAY.
(Supreme Court of Georgia. Aug. 17, 1906.)
TRIAL—INSTRUCTIONS—ASSUMPTION OF FACT IN ISSUE.

The negligence claimed was based upon the existence of a "low place" in the track. Whether there was such a place was in issue both in the pleadings and the evidence. It was therefore error for the judge in his charge to assume that there was such a "low place."

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 420.]

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Action by J. B. Hattaway against the Atlantic & Birmingham Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff brought action on account of personal injuries received in a railroad wreck. He alleged that when making a run as a conductor of a freight train of the defendant, the caboose, in which he was riding, struck a low joint in the rails, was thrown from the track, and wrecked, causing him to be permanently injured by being thrown against the iron ladder in the car and ruptured. By answer the defendant admitted that the caboose had been wrecked, but denied negligence in any way respecting the injury; and contended, further, that the rupture of which the plaintiff complained was not caused by the wreck, but was received some time previously thereto. On the trial the evidence was conflicting as to whether

there was "a low place in the track." A verdict was returned in favor of the plaintiff. The defendant moved for a new trial upon the following, among other grounds: "That the court erred in charging the jury as follows: 'They [the defendant railway company] contend further that the low place in the rails was further on toward Montezuma, and that the caboose had not gotten so far as that when the accident occurred.'" This charge was alleged to be erroneous "in that it was an expression by the court that it had been proved that there was a low place in the rails, and usurped the province of the jury as to what had been proved in the case, there being no admission by the defendant in its pleadings or arguments that there was a low place in the rails or other defects in the track." The motion was overruled, and the defendant excepted.

Rosser & Brandon, W. T. Colquitt, J. L. Sweat, and Crum & Jones, for plaintiff in error. Hill & Royal and Morrow & Soti, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

WESTERN UNION TELEGRAPH CO. v. RYAN.

(Supreme Court of Georgia. Aug. 9, 1906.)
1. ASSIGNMENT—ACTION BY ASSIGNEE—REMEDY AT LAW.

Where one makes an assignment of his entire salary, earned and to be earned, for a named period, in a given employment in which he is engaged, it is not necessary for the assignee thereof to go into a court of equity in order to recover the amount of such salary, for such period, from the assignor's employer. Resort to a court of equity is only necessary when the assignment is of a part, instead of the whole, of the salary. *First National Bank v. Hartman Steel Co.*, 13 S. E. 586, 87 Ga. 435; *Walton v. Horkan*, 38 S. E. 105, 112 Ga. 814, 81 Am. St. Rep. 77; *Rivers v. Wright*, 43 S. E. 499, 117 Ga. 81. The assignment involved in this case was executed prior to the act of August 15, 1904 (Acts 1904, p. 79).

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 193, 194, 199.]

2. CERTIORARI—ASSIGNMENT OF ERROR—VERIFICATION.

Where an allegation of fact upon which an assignment of error in a petition for certiorari is based is not verified by the answer to the writ, such assignment of error cannot be considered by the reviewing court.

3. USURY—WHO MAY ASSERT.

Even if an assignment of the character indicated in the first headnote was made as part of a contract for a usurious loan of money and as security for such loan, and was therefore void, the right to set up the usury and have the assignment declared void would rest only with the assignor, his personal representatives and privies; and the person owing the salary assigned, when sued therefor by the assignee, could not do so. *Zelner v. Mobley*, 11 S. E. 402, 84 Ga. 746, 20 Am. St. Rep. 390; *Scott v. Williams*, 28 S. E. 243, 100 Ga. 540, 62 Am. St. Rep. 340. Especially is this true

when the assignor was made a party defendant to such suit and duly served as such, and took no steps to have the assignment declared void. See *Gilmore v. Bangs*, 55 Ga. 403, 405.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, § 364.]

4. ASSIGNMENT—ACTION BY ASSIGNEE—EVIDENCE.

Even if it were shown, in such a suit, that the assignment was made for the purpose above indicated, evidence offered by the employer of the assignor merely for the purpose of showing that he had been notified by the assignor that he had been discharged in bankruptcy from the debt which the assignment was made to secure would be inadmissible.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. Lumpkin, Judge.

Action by S. A. Ryan against the Western Union Telegraph Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Dorsey, Brewster & Howell and Jackson & Orme, for plaintiff in error. R. B. Blackburn, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent, and LUMPKIN, J., disqualified.

CALLAWAY & TRUITT v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. CARRIERS—FREIGHT—UNAUTHORIZED DELIVERY—LIABILITY OF CARRIER.

Where consignors delivered goods to a common carrier for carriage to a distant point, and there to notify a third person and deliver to him upon his presentation of the bill of lading and payment of the draft for the purchase money attached thereto, and the carrier delivered the goods to the designated person before the payment of the draft and without presentation of the bill of lading, but afterwards the consignors treated directly with the party taking the goods, accepted a part of the purchase money in cash, and took a check for the balance, which check was not paid upon presentation, and where the consignors afterwards demanded from the common carrier payment of the amount represented by the check, and, upon refusal to pay, instituted suit therefor, held that, under the ruling in the case of *Southern Ry. Co. v. Kinchen*, 29 S. E. 816, 103 Ga. 187, the consignors, by treating directly with the party receiving the goods, waived their right against the common carrier, and could not recover.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 361.]

2. JUSTICES OF THE PEACE—APPEAL—DIRECTING VERDICT.

Where a plaintiff obtains judgment in a justice's court, which is appealed by the defendant to the superior court, the appeal case must be tried by a jury. But, if the evidence demands a verdict for the defendant, the judge may direct that such verdict be found. In such case, if the plaintiff does not wish to be concluded by the verdict of the jury, it is his duty, before the verdict is directed, to move to dismiss the case.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Action by Callaway & Truitt against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

The plaintiffs brought suit in a justice's court to recover \$63.50 as damages which resulted to them by reason of the following facts: "Your petitioners shipped over defendant company's road certain goods to Peri, Fla., consigned as per bill of lading to Callaway & Truitt. Defendant company delivered said goods to the Owens Company, without any instructions from your petitioners, thereby violating their contract of shipment and damaging petitioners to the amount of \$63.50, as aforesaid." Upon the trial the jury found for the plaintiffs, and the defendant entered an appeal to a jury in the superior court. Upon the trial of the appeal case the evidence disclosed that on October 7, 1901, the plaintiffs shipped over the defendant's railroad goods from Atlanta, Ga., to Peri, Fla., taking the bill of lading to their own order, with direction to "notify the Owens Company." The goods were not to be delivered to the Owens Company except upon the payment of the draft of plaintiffs, which had been drawn with the bill of lading attached. By mistake, and without instructions from plaintiffs, the defendant allowed the Owens Company to get possession of the goods without paying the draft. About the 12th of the following February a salesman of plaintiffs who knew nothing about the transaction, called upon the Owens Company, who, without any solicitation whatever from the salesman, paid to him \$25 in cash, and gave a check for the balance of the purchase price of the goods. The salesman remitted the cash and forwarded to the plaintiffs the check, which by them was put in the bank for collection and returned unpaid. Soon after this the plaintiffs wrote to the defendant, asking reimbursement. There was correspondence between them and defendant, showing an effort upon the part of the defendant to collect for the plaintiffs the amount stated. They have never been paid, and it does not appear that any collection from the Owens Company has ever been made. The court directed a verdict for the defendant, and the plaintiffs excepted.

Etheridge, Boykin & Etheridge, for plaintiffs in error. Lamar Bucker, for defendant in error.

ATKINSON, J. 1. It is insisted by the plaintiffs that the ruling of the court was erroneous for two reasons: First, because the evidence did not require a verdict in favor of the defendant; and, second, because, though the plaintiffs failed to make out a case, the court should not have made

a final disposition of the case by directing a verdict for the defendant. Upon the first proposition we think the case is controlled by the ruling in *Southern Ry. Co. v. Kinchen*, 103 Ga. 187, 29 S. E. 816. There is no substantial difference between the cases. In that case, a 30-day draft was made by the consignor upon the consignee; but the ruling of the court turns not so much upon the fact that credit was given as upon the theory that, by electing to treat with and recognizing title in the consignee, there was an abandonment of any claim for a wrongful delivery. The principle there ruled is manifestly controlling in the case at bar. The plaintiffs certainly treated the title to the goods as having passed to the Owens Company. Under no other theory could they have accepted the cash or the check. They have never offered to return either. Had they not intended to adopt the action of the railroad company in making delivery to the Owens Company, the time for them to have spoken was when they received the remittance and check from their salesman. It may be that the salesman was not advised of the conditions, but there was no contention that the plaintiffs acted unadvisedly when they accepted the cash and the check. Under these facts, in view of the ruling in the case above cited, the plaintiffs would not be entitled to recover anything whatever, not even nominal damages, for, if there was a right to recover anything, the right would have extended to the full amount.

2. In an appeal case, there is a judgment of the lower court to be disposed of. By Civ. Code 1895, § 4472, it is mandatory that such cases shall be tried by a jury. The verdict is essential. In this connection, see *Montgomery v. Fouché*, 125 Ga. 43, 53 S. E. 767, and cases there cited. The court so interpreted the law, and, deeming it a proper case for such disposition, directed a verdict for the defendant. If there had been any conflict of evidence or anything whatever in the case which would have authorized the jury to determine either of two or more possible ways, it would have been proper for the court to submit the case upon appropriate instructions; but there was nothing of the kind in this case. There was only one verdict which the jury could possibly have rendered, and there was no reason why the court should not have directed the finding of that which the evidence demanded. If the plaintiffs did not wish to be concluded by the verdict of the jury, and if they had wished to save to themselves the right of instituting another suit upon the same cause of action, it was their privilege, after the conclusion of the evidence, to have dismissed the case upon their own motion. See *Fagan v. McTier*, 81 Ga. 74, 6 S. E. 177. They did not elect to do this, but stood by and suffered the verdict to be directed and entered against

them without moving to dismiss. Having voluntarily submitted their case, they could not afterwards complain, unless there had been some error of law or want of evidence.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

CALLAWAY & TRUITT v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. CARRIERS—DELIVERY OF FREIGHT.

Neither the evidence admitted nor that offered by the plaintiffs but rejected by the court was such as to fix the identity of the goods for the value of which they sought to hold the defendant company accountable, or to show what was the market price of the same.

2. JUSTICES OF THE PEACE—APPEAL—DIRECTING VERDICT.

On appeal from a justice's court to a jury in the superior court, where the plaintiff fails to make out a prima facie case, it is not error for the court to direct a verdict in favor of the defendant. *Callaway & Truitt v. Southern Railway Company* (this day decided) 55 S. E. 22.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Action by Callaway & Truitt against the Southern Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

Etheridge, Boykin & Etheridge, for plaintiffs in error. Lamar Rucker, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur, except Fish, C. J., absent.

KIRKLAND et al. v. ATLANTIC & B. RY. CO.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. APPEAL — DISMISSAL — ASSIGNMENTS OF ERROR.

Where a equitable petition seeking to obtain an injunction was filed, and on the hearing upon issues of both law and facts a general order was passed denying the injunction, a bill of exceptions which recited such facts, and then continued, "To which said judgment refusing and denying the temporary injunction prayed the said plaintiffs then and there excepted and now except and assign the same as error, and say that the court erred in not granting the temporary injunction as prayed by plaintiffs in their petition"—the bill of exceptions will not be dismissed for want of a sufficient assignment of error.

2. INJUNCTION — DENIAL OF INTERLOCUTORY INJUNCTION.

Regardless of whether the power conferred in section 2171 of the Civil Code of 1895, upon a railroad company chartered by the Secretary of State to change its right of way outside of a town or city is limited to making such change before final construction of the road, or whether it may make the change after the road has been once located and constructed, the decision in regard to the granting or refusing of an interlocutory injunction not appearing to have de-

pending upon or been controlled by questions of law alone, but also upon the decision of material issues of fact, and there having been conflicting evidence as to such issues, especially as to the intention of the defendant in making such change, and how it will affect the operation of the road relatively to the town where the plaintiffs reside and do business, and as to the necessity for such change, and whether or not it will be injurious to the plaintiffs and to such town, and whether or not the plaintiffs, by reason of laches is not applying for such injunction while the work of making the change was openly progressing for about a year, and large expenditures were being made in connection therewith, have lost any right which they may have had to obtain the writ, there was no abuse of discretion in refusing the interlocutory injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 307-309.]

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by David Kirkland and others against the Atlantic & Birmingham Railway Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

F. Willis Dart and C. T. Roan, for plaintiffs in error. Rosser & Brandon and J. L. Sweat, for defendant in error.

LUMPKIN, J. The practice has long prevailed of excepting to an order granting or refusing an injunction, and assigning error upon it, in a manner similar to that stated in the first headnote. It would, of course, more clearly present the case for adjudication to have errors assigned separately upon any ruling or rulings of law, and upon any question or questions of fact; but, where the presiding judge renders a general judgment denying an interlocutory injunction, it might sometimes be difficult, if not almost impossible, to make a more specific assignment than that now under consideration. If there is no conflicting evidence on material issues of fact, or if, treating the issues of fact as found adversely to the excepting party, the law demands a certain result, the question may be considered as one of law alone. If there is a conflict in regard to material questions of fact necessary for the adjudication, and the judgment denying the injunction is general, an exception of the character indicated will at least raise the question whether or not there was an abuse of discretion in such refusal; and this question has been determined many times on assignments of error no more specific than the one before us. It is true that a judge in such a case passes both upon questions of law and fact, and it is contended that the decisions holding that, where by agreement a case is submitted to the judge without a jury on final trial to determine both issues of law and fact, a general exception to his judgment is not sufficient, apply also to a case like this. There is, however, a difference. Where the case is on final trial, the province of the judge is to determine the questions of law, and the

province of the jury is to determine the issues of fact, under the law as given them in charge. If, by agreement, the presiding judge exercises the functions of both the judge and the jury, and it is desired to except to his judgment, it is proper that it should appear in the exercise of which function it is claimed that he had erred and what the error was. On the hearing of an application for an interlocutory injunction under the law, the presiding judge passes both upon questions of law and fact, regardless of any consent of parties, and the rule does not apply to the same extent. A party cannot compel a judge, on such a hearing, to pass separately on questions of law and fact. The judge may prefer to pass upon the whole application as matter of sound discretion. The losing party cannot well complain of specific rulings, if the judge made none. The Legislature knew the manner of hearing applications for injunction when they provided for excepting to the grant or refusal of them. Of course, where distinct rulings are made as to questions of law, or where the bill of exceptions brings before this court separately questions of law, they can be more readily passed upon. But we are not prepared to hold that an assignment of error like the one now before us is so imperfect as to require a dismissal of the bill of exceptions on motion. See *Anderson v. Newton*, 123 Ga. 518, 51 S. E. 508, and cases cited in the opinion.

After a careful consideration of the record and bill of exceptions, the ruling of the presiding judge appears to have been that, in the light of the questions of law raised and the conflicting evidence on the substantial issues of fact, he exercised his discretion in refusing the injunction prayed. And in view of the entire case, and of the situation disclosed by the evidence, we cannot say that he abused his discretion.

Judge affirmed. All the Justices concur, except FISH, C. J., absent.

BROWN et al. v. ATLANTIC & B. RY. CO.
(Supreme Court of Georgia. Aug. 13, 1906.)

1. RAILROADS—CHANGE OF LOCATION.

Where a railroad company to which has been given the power to choose its particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 123.]

2. SAME—RELOCATION OF LINE.

The Civil Code of 1895, § 2171, does not authorize a railroad company which obtained its charter from the Secretary of State under the general law for the incorporation of railroads after having located, constructed, and put in operation its road, at its mere volition to tear up such road, or a section thereof 19 miles in length, and relocate the same at a different place; nor is such authority conferred, although the portion of the road sought to be taken up

and relocated lies outside of the limits of a town or city.

(a) The defendant appears to be the successor to the road and franchise of the original company locating and constructing such road; and is so dealt with in this decision.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 108, 123, 124.]

8. INJUNCTION — RELOCATION OF RAILROAD — TEARING UP TRACK.

Where a railroad company owned two lines which crossed or separated from each other at an acute angle, a general allegation in an answer to an application for injunction to prevent the tearing up of part of one of them, to the effect that the defendant had leased another road which connected its two lines at a point on one of them some 19 miles from the point of union, and that it could thus operate its trains by this route and furnish as good service to the public, and did not need and could not profitably operate one of its lines between such point of union and the point where the leased line touched it (not showing the terms or length of the lease, nor even its existence, except by the general statement in the answer), did not furnish sufficient reason for allowing the intervening section to be torn up, and to prevent an injunction to stay such action until a final trial could be had at the instance of persons living and doing business along the line so to be torn up, and having stations thereon where they made shipments, and who would be specially injured by such action.

4. SAME.

The fact that the company had begun to tear up its track before the injunction was applied for to restrain the completion of such action, if wrongful and working special damage to the plaintiffs, will not furnish a reason for refusing to enjoin it from proceeding with the work.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 307, 308.]

5. SAME—RELAYING TRACK.

A mandatory injunction to require the relaying of a substantial portion of the track which had been torn up, and the operation of the road, was not sought at the interlocutory hearing in this case. If it were, to that extent it would be denied.

6. SAME—SPECIAL DAMAGES.

If wrongful action was about to be taken which would work special and irreparable damage to the plaintiffs, not merely such as would be shared in by the general public, they could apply for an injunction to restrain it.

7. SAME—DISCRETION OF COURT.

The facts of this case, as disclosed by the pleadings and evidence in the record now before us, do not make such a case as to be controlled by the discretionary action of the presiding judge in granting or refusing the injunction.

8. SAME—REMEDY AT LAW.

In a case of the character indicated by the preceding notes, an injunction will not be denied on the ground that the plaintiffs have an ample remedy at law, or on the ground that the damages complained of are not irreparable.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 14, 16.]

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by J. L. Brown and others against the Atlantic & Birmingham Railway Company. Judgment for defendant, and plaintiffs bring error. Reversed.

Brown and others filed their petition against the Atlantic & Birmingham Rail-

way Company, seeking to enjoin the defendant from tearing up, removing, or abandoning a section of one of its lines of road about 19 miles in length. They alleged that along the section which the defendant intended to tear up they lived, owned property, and did business; that the road ran through or near their lands; that there were several stations on this section of road, at one of which one of the plaintiffs had located at large expense a "general cross-tie business" and shipped the output of the business over this line of road, and had made investments for the purpose of also doing "a turpentine business"; that this was the only line running and operating through these places, that the other plaintiffs were the owners of large tracts of real estate along and contiguous to the line of road, and some of them owned and operated farms near it, and had upon the faith of the location and operation of the road made valuable improvements on their property; that the defendant was proceeding to tear up and abandon its road between Bushnell and Ocilla, which includes the section above referred to, and that to permit this to be done would work irreparable injury to the plaintiffs, and cause damage which, on account of the nature of the investment and the depreciation in value of business, would be incapable of being measured by the rules of law. The defendant admitted that it intended to take up its line between the towns of Bushnell and Ocilla, but it claimed that it had the right to do so. It denied that plaintiffs would be injured as claimed, or were entitled to any injunction. It alleged that it had two lines of road which separated from each other at the town of Bushnell at an acute angle; that from Bushnell to Ocilla was 19 miles; that it had leased another road which connected a point on the more northern line of its railroad, called Osierfield, with Ocilla, and that thus it had a line from Bushnell to Ocilla by way of Osierfield, and the distance from Bushnell to Osierfield is 11 miles, but it was alleged that the two lines were only about 8 miles apart, and the distance by that way not much longer than by the other; that the public could be as well or better accommodated by this line, and that on account of the maintenance, and the small amount of business done on the section of the direct road between Bushnell and Ocilla, it was not remunerative to operate trains by that route. It was further alleged that somewhat more than 4 miles of the track had been removed before the restraining order was obtained, and that the change in plan by the abandonment of the old road would not "make any greater distance than four miles for transportation of any freight to be delivered at other points in lieu of any point on the old road." It appeared that what was originally known as the

"Waycross Air Line Railroad Company," having a line of road extending from Waycross to Fitzgerald, in Irwin county, and a further line under construction extending beyond that point to Cordele, changed its name to the "Atlantic & Birmingham Railroad Company," increased its capital stock, and obtained an amendment to its charter authorizing it to extend the road to the Alabama line in the direction of Birmingham, to build a branch in the direction of Atlanta, and obtain the benefits of the general laws on the subject of railroads incorporated by the Secretary of State. This is now held by the defendant. The Brunswick & Birmingham Railroad Company was chartered for the purpose of building and operating a railroad from Brunswick through various counties, including that of Irwin, to a point on the Alabama line; the purpose being to continue the road to the cities of Montgomery and Birmingham, in that state. The defendant became the purchaser of that road, which according to the evidence extended from Brunswick to Nichols, where it joined the defendant's railroad, and then from a point westward of this junction, namely, Bushnell, extended westward through Ocilla a distance of some miles to Irwinville. The details of the manner of the purchase do not appear. On the hearing the presiding judge refused the injunction and plaintiffs excepted. The other facts, so far as necessary to be stated, are set out in the opinion.

C. T. Roan and F. Willis Dart, for plaintiffs in error. King, Spalding & Little and Haygood & Cutts, for defendant in error.

LUMPKIN, J. 1. Has a railroad company authority, after it has located and constructed its line, to abandon it, or a portion of it some 19 miles in length, tear up its track, and relocate such part of its line over a different route? "It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus a change cannot be made for reasons of convenience, or expediency, or economy merely." 23 Am. & Eng. Enc. L. (2d Ed.) 690 (5); *Leverett v. Middle Ga. & A. R. R. Co.*, 96 Ga. 392, 24 S. E. 154 (in that case the terminus was fixed by the charter; but the reasoning of it is applicable to several of the questions in the case now before us); *State ex rel. Little v. Dodge City, etc., R. Co.*, 53 Kan. 329, 36 Pac. 755, 24 L. R. A. 564, and notes; *Lusby v. Kan. City, M. & B. R. R. Co.*, 73 Miss. 360, 19 South. 239, 36 L. R. A. 510; *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272, 37 N. E. 91; *Ill. C. R. Co. v. People*, 143 Ill. 434, 33 N. E. 173, 19 L. R. A. 119; *People v. L. & N. R. Co.*, 120 Ill. 48, 65,

10 N. E. 657; *Chicago, B. & Q. R. Co. v. Chicago*, 149 Ill. 457, 37 N. E. 78; *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316; *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. Law, 205; *Mason v. Brooklyn, etc., R. Co.*, 35 Barb. (N. Y.) 373; *People v. New York & H. R. R. Co.*, 45 Barb. (N. Y.) 73; *Morehead v. Little Miami R. Co.*, 17 Ohio, 340; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235, 59 Am. Dec. 667; *Negus v. Brooklyn*, 10 Abb. N. C. (N. Y.) 180; *In re Providence*, 17 R. I. 324, 21 Atl. 965; *Boston & P. R. R. Corp. v. Midland R. Co.*, 1 Gray (Mass.) 340. The authorities differ somewhat as to what will constitute a location within the rule; but after the selection of the route and actual construction they generally concur that the location is fixed. *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437; 4 Am. & Eng. Ry. Cas. 199, 200, note to *Western Penn. R. Co.'s Appeal*; and cases cited above. Most of the cases cited by defendant in error, when carefully considered, do not militate against this position. Several of them are applications for mandamus to compel the company to perform certain alleged duties of a public character. Thus in *Crane v. Chicago, etc., R. Co. (Iowa)* 37 N. W. 397, 7 Am. St. Rep. 484 (an application for mandamus), the plaintiffs and others were shown not to have been deprived of railroad facilities, and there had been public meetings and an agreement with citizens as to the matter. In *Snook v. Ga. Imp. Co.*, 83 Ga. 61, 9 S. E. 1104, it was held that a change in the terminus of a railroad was such a material change as operated to release a subscriber for stock who did not consent thereto. In *Northern Pac. R. Co. v. Dustin*, 142 U. S. 499, 12 Sup. Ct. 283, 35 L. Ed. 1092, an effort was made to compel a railroad company by mandamus to locate and erect a station at a certain place, although one had been located about four miles distant. There was evidence to show that the depot actually located best served the interests of the public in that vicinity. A dissenting opinion was filed by Mr. Justice Brewer, with whom Mr. Justice Field and Mr. Justice Harlan concurred. In the course of it is used the following vigorous language: "A railroad company has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other." In *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556, 560, an effort was made to compel a railroad company to maintain a station, although it had erected another about half a mile away, and it appeared that the public would be better served by the change. In the present case it is not a question of merely shifting the location of a station a short distance, but of abandoning altogether a part of a line, with the stations thereon, leaving no facilities there at all, and

using another line located at a distance from the former location, at the widest point amounting to some three miles.

2. If, after location and construction of the road, statutory authority was required, was it conferred? Section 2171 of the Civil Code of 1895 is relied on as doing so. It reads as follows: "Said railroad company shall have the power to change the general direction and route of said railroad from that stated in the original petition, by a two-thirds vote of the capital stock of said corporation represented in person or by written proxy at any annual or special meeting of the stockholders of said corporation, and when the same is so changed, shall have the right and power to enter upon, condemn rights of way, and construct said road on the new or changed line as they had on the original line; but no change shall be made in any town or city after the road has been constructed, without the consent of such town or city expressed through its proper authorities, and in case the route is changed after grading is commenced, compensation shall be made to all persons owning lands on the original route which have been injured by such grading or other work on such original route. If no agreement can be made, such amounts are to be ascertained in the method provided for condemning right of way." Plaintiff in error contends that this does not confer power, after location and construction, to abandon, tear up, and change the location of the road; but that such power of change exists only before final construction. Defendant in error contends that such power exists equally after construction and operation as before. This section is taken from the act of 1892 (Laws 1892, p. 37), which was the general act touching the incorporation of railroads. "Statutes authorizing changes in the location of railroads are to be strictly construed." 23 Am. & Eng. Enc. L. (2d Ed.) 682 (b). See, also, on the general subject, *Mayor, etc., of Macon v. Macon, etc., R. Co.*, 7 Ga. 221; *Central R. Co. v. Collins*, 40 Ga. 582, 625, 637, 638; *Frederick v. City Council of Augusta*, 5 Ga. 561; *Mayor, etc., Savannah v. Hartridge*, 8 Ga. 23; *McLeod v. Burroughs*, 9 Ga. 213; *Winter v. Muscogee R. Co.*, 11 Ga. 438. This section of the original act (Laws 1892, p. 48, § 12) authorizes the company "to change the general direction and route of said railroad from that stated in the original petition * * * and when the same is so changed, shall have the right and power to enter upon, condemn rights of way and construct said road on the new or changed line as they had on the original line as set out in sections 9 and 10 of this act." The italics are ours. It had been provided that a petition should be filed with the Secretary of State setting forth certain facts, among which were "the length of the road as nearly as can be estimated, the general direction of said road, the coun-

ties through which it will probably run, the names of the principal places from which and to which it is to be constructed." Section 9 declared the powers of the company so incorporated and provided for such examinations and surveys to be made as should be necessary for the selection of the most advantageous route; for the acquisition of property by voluntary grants or purchase; for the laying out of its right of way, not exceeding in width 200 feet, and to construct the road; for the construction across or along streams, streets, or highways; for the crossing or joining other railroads; for the operation of the road as a common carrier; for the erection of buildings, fixtures, etc.; for the regulation and fixing of transportation rates, subject to the state law and the rules and regulations of the railroad commissioners; for the power to borrow money; for the acquisition of other railroads under foreclosure or judicial sale, and the power to reorganize. Section 10 authorized the extending of the railroad or the building of branches, but required that it be done by resolution of the board of directors designating the route of the proposed extension or branch, and after advertising and filing a copy of the resolution with the Secretary of State in a manner similar to that required in regard to the original petition. An examination of sections 9 and 10 indicates that the Legislature had in mind the making of provisions for the construction and operation of a railroad, not for its reconstruction or removal. Section 12 (Civ. Code 1895, § 2171) authorizes the company to change "the general direction and route of said railroad from that stated in the original petition." The language here used is applicable to the changing of the general direction and route, not the railroad after it has been constructed and operated. The original petition was required to contain a statement of the general direction and route of the railroad which it was intended to construct. Reasons might exist which would render such route impracticable, and it was the purpose of the Legislature not to restrict the company in constructing its road to an exact compliance with the petition in this regard, provided it should be altered by a two-thirds vote of the capital stock at an annual or special meeting of the stockholders. The change authorized was not from the road as constructed and operated, but from the general direction and route of the contemplated road stated in the original petition. It was also provided that when "the same [the general direction and route] is so changed the company shall have the right to enter upon, condemn rights of way and construct said road." These words more properly apply to an original construction than to a tearing up and reconstruction at a different place. The power to construct the road on the changed line is the same as that set out in sections 9 and 10. Section 9, as has been

seen above, has reference to locating and building originally. Section 10, which authorizes an extension of the road or the building of branches, requires certain proceedings to be had as a condition precedent to the exercise of the right, including advertising and filing a copy of the resolution with the Secretary of State. Is it within the range of probability that the Legislature intended that, if a railroad company should desire to make a short extension beyond the terminus originally contemplated, or to build a small branch road, it should be required to give notice by advertisement and filing resolutions with the Secretary of State, but that, without any formality whatever, after it had constructed and been actually operating its line, it could tear up the whole or part of such line at its pleasure, and relocate it at some entirely different place? Another expression in the section of the Code above quoted which strengthens this construction is the statement that "in case the route is changed after grading has commenced, compensation shall be made to all persons owning lands on the original route which have been injured by such grading or other work on such original route." The expression "after grading has commenced" evidently contemplates a change before the construction is completed. Certainly the Legislature did not intend to declare that after the building and construction the road might be torn up and removed without any provision being made for compensation, but that if this were done after grading was commenced, but before the completion, compensation should be made. It is contended by counsel for the defendant in error that the power to remove and change the railroad after construction anywhere except within the limits of a town or city was conferred by implication from the following language of the section: "But no change shall be made in any town or city after the road has been constructed without the consent of such town or city expressed through its proper authorities." After a railroad has been constructed in whole or in part, the change or alteration of the location of that part lying within the corporate limits of a town or city might cause municipal inconvenience; or, on the other hand, it might be more convenient both to the railroad and to the city that the location of its tracks should be changed so as to give better service in entering the town or in running through the corporate limits. It was doubtless to protect municipalities from possible inconvenience which might arise to them, and to guard against the broad construction which might be put upon the language of the act so as to affect such towns or cities, that the words last quoted were used. But from the mere use of the words "after the road has been constructed," in connection with such municipal control, the company was not by mere implication given power to tear up all of its

lines outside of the corporate limits, or so much as it might desire, and change them at its will. Such a construction would practically give to railroad companies chartered under the general law a general commission to construct, tear up, and reconstruct their lines on entirely different routes at their pleasure, provided only that they did not take up the small portions of the tracks which might be within the limits of a town or city. The act confers no such authority. In 1903 an act was passed having the following caption: "An act to amend section 2171 of volume 2 of the Code of 1896, providing for the change of general direction and route of railroads, by adding at the end of said section authority to the directors and officers of railroad companies to relocate and reconstruct their line between the termini for the purpose of reducing grades and curvatures, and for other purposes." Acts 1903, p. 36. The exercise of this power itself is limited in the body of the act, and it has more special reference to the acquisition or building of a narrow-gauge line. The present case presents no effort to straighten curves or change grades or make small alterations for those purposes; and therefore we decide nothing on that subject. We think it clear that no such power was conferred by section 2171 of the Civil Code of 1896, as is contended by the defendant. It is further contended in the brief of counsel for plaintiffs in error that the defendant company was subject to the rules and regulations of the railroad commissioners, and that one of these rules prohibited the changing of stations without the consent of the commission. But, if we can take judicial cognizance of all the rules of the railroad commissioners, this point does not appear to have been made or passed upon by the court below. It appears that the defendant acquired the tracks and franchise of the Brunswick & Birmingham Railway Company, but under what character of sale or on what terms does not distinctly appear. Apparently it became the successor of that company, and is here treated as such both as to rights and duties incident to the position of a railroad company owning and operating a located and constructed road.

3. In discussing this branch of the subject, counsel for the defendant in error have treated the proposed change as being a relocation and reconstruction; and have also urged that that where a railroad company owns two lines between the same points it is not compelled to operate both at a loss, if the operation of one would accommodate the public. Whether this rule would apply in Georgia need not be determined, because the facts set up make no such case. The defendant in error has acquired two lines of railroad which cross each other or separate at an acute angle. It alleges that at a point some 19 miles beyond the point of separation it has leased from another railroad company a

track some miles in length, extending from one of its lines to the other. It thereupon proposes to tear up and abandon altogether one of these lines from the point of intersection, and to the point where the leased line connects the two. The existence of a lease is alleged in the answer; but beyond this no proof in regard to it was introduced. At most, it does not make a case of the ownership of two lines between the same points. What are the terms of the lease, for how long is it to continue, whether the defendant in error has the right to terminate it or abandon the use at its option, or whether its lessor has a right to terminate the lease or to resume possession on any contingencies, nowhere appears. Certainly it cannot be successfully contended that the mere general assertion of the existence of a lease constitutes a relocation and reconstruction which would be a lawful substitute for the line which it is proposed to tear up. See *Coker v. A. K. & N. Ry. Co.*, 123 Ga. 483, 51 S. E. 481 (5). A number of the authorities cited on the part of the defendant in error are to the effect that if the charter of a railroad company simply authorizes it, without requiring it, to construct and maintain a railroad to a certain point, it cannot be compelled by mandamus to complete the road to that point or to operate a line or branch, or run trains of a certain character, or with certain schedules, at a loss. Without entering into a discussion of these various citations, it may be remarked that the facts in each are quite different from those now presented before us. The present case does not involve the application for a mandamus to compel a railroad to do some act of the character just indicated, or even to rebuild or restore a portion of a line that has been taken up. It is an application for injunction by persons who allege that they will be specially injured to prevent a railroad company from tearing up its tracks, and abandoning a portion of its line of road already constructed, in order to run its trains over a different route. Probably the strongest case presented for the defendant in error is that of *Jack v. Williams et al.* (C. C.) 113 Fed. 823. It is there stated broadly that "in the absence of special circumstances, or an express contract embodied in a charter, the owner of a railroad, whether a corporation or individual, cannot be compelled to maintain and operate the same at a loss. The duty arising from the ownership of the franchise is merely to meet the public requirements, and, where the traffic on a road is not sufficient to pay its operating expenses, such duty does not require its operation, and it may be abandoned." It appeared, however, that a short road 12 miles long had been dismantled by a receiver in charge of it under order of the court. After a sale of it, by intervention it was sought to require the purchasers to rebuild and operate the road. Under a statute of South Carolina, passed

after the purchase by private individuals, natural persons were not permitted to operate a railroad without organization into a corporation. It was said: "The receiver having taken up and sold the rails under an order of court entered without opposition, the court could not require the owners to purchase new materials and rebuild the road, on an offer by intervenors to lease and operate the same if restored, especially in view of the fact that the franchise to operate it as a railroad had been forfeited." There is a wide difference between an effort by mandamus to compel action of this character, and a proceeding by injunction to stop the tearing up of a railroad track. *State v. Dodge City, etc.*, R. Co., 53 Kan. 377, 36 Pac. 747, 42 Am. St. Rep. 295; *Gates v. Boston, etc.*, R. Co., 53 Conn. 333, 343, 5 Atl. 695. If the test of profitability is to be applied, we are by no means certain that the mere selection of two or three small stations, and proof of the amount of business done at them disconnected from a general consideration of the line on which they are located, could be taken as conclusively showing the right to omit that part of the line altogether and relocate or run trains by another line partly owned by the same company and partly used by it under some character of lease. But it is unnecessary to consider this question.

4. It is contended that because some of the track has already been taken up, injunction to prevent the taking up of the balance should be refused. Where the thing sought to be done is completed, it is too late to apply for an interlocutory injunction to prevent it; but there is no rule of law, that because a thing has been begun, injunction will not be granted to stop its completion.

5. It is further urged that in this state a mandatory injunction will not be granted on an interlocutory hearing. And this may be true, if the substantial relief sought is affirmative. 115 Ga. 340, 41 S. E. 695. But we do not understand that a mandatory injunction to compel action of such a character is sought. If so, to that extent it should be denied.

6. It is also said that, if the dismantling of the section of the road involved in this controversy is unlawful, nevertheless the plaintiffs are not entitled to bring this action, but that it should be brought by the state. But if the plaintiffs will suffer special damages, not merely as members of the public, but by reason of their residences and the location of their businesses and investments, and shipments made by them, and the surrounding circumstances disclosed by the evidence, we do not see any reason why they may not bring an action to enjoin the removal of the road, if wrongful. This is especially true as to one of them, who testifies that he has made investments and entered upon a business of cutting and shipping cross-ties and beginning "a turpentine business" on the faith of the location of the road

and its stations, and that a removal would destroy his shipping facilities and irreparably damage him. *Macon & B. R. Co. v. Gibson*, 85 Ga. 2, 11 S. E. 442, 21 Am. St. Rep. 185 (6); *Sav., etc., Canal Co. v. Shuman*, 91 Ga. 400, 17 S. E. 437, 44 Am. St. Rep. 43; *Leverett v. M. G. & A. R. Co.*, 96 Ga. 385, 24 S. E. 154 (2); *Coker v. A. K. & N. R. Co.*, 123 Ga. 483, 51 S. E. 481; 1 *Pomeroy's Eq. Jur.* (8d Ed.) § 257.

7. Finally, it is said that the judgment of the presiding judge should be affirmed as being an exercise of discretion. We do not think that this result would follow from the evidence in the present case. It is entirely different from the case of *Kirkland et al. v. Atlantic & Bir. R. Co.* (decided to-day), 55 S. E. 23. In that case there was conflicting evidence on nearly every material or substantial issue of fact. And there was also evidence tending to show that the plaintiffs had lost by laches any right they might have had to claim an injunction, if they had any such right originally. Here there is no denial that the defendant is preparing to abandon, tear up, and remove a part of its line of railroad on which are located two or three stations and along which are situated the plaintiffs' residences and places of business, to which their means of access is by defendant's tracks. True, some other persons living in that section do not think that they will be damaged, and desire the change to be made. But there is little or no conflict as to the fact that the plaintiffs will sustain injury. The real response of the defendant is that it has the right to make the change and to use its other track from a point where the two cross to another point where it asserts in an indefinite way that it has leased a road connecting the two lines, and that it has the right to abandon and tear up the track some 19 miles in length, which has heretofore been located and operated by the company under which it holds by purchase. We do not know what the evidence may show on the final hearing, or whether it will be such as to entitle the plaintiffs to a permanent injunction, nor do we decide whether or not plaintiffs can apply for a mandamus, or whether upon any application for it the writ will be granted. These questions will be determined when they arise. What we now hold is that, under the pleadings and the evidence, the presiding judge erred in refusing to grant an interlocutory injunction to prevent the defendant from further taking up and dismantling its track, and roadbed between the points described in the pleadings and evidence, until the final hearing.

8. The damages complained of by the plaintiffs would be of such an irreparable nature as authorized an application by equitable petition for injunction. In 16 Am. & Eng. Enc. L. (2d Ed.) 361, it is said: "An injury is irreparable either from its own nature, as when the party injured cannot be adequately

compensated in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard, or when it is shown that the party who must respond is insolvent, and for that reason incapable of responding in damages." See *Kerlin v. West*, 4 N. J. Eq. 453. As to injury to business, see *Brown & Allen v. Jacobs' Pharmacy Co.*, 115 Ga. 451, 41 S. E. 553, 57 L. R. A. 547, 90 Am. St. Rep. 123. If the plaintiffs' contentions were true, their remedy at law would be inadequate.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

CORBIN et al. v. DURDEN.

(Supreme Court of Georgia. Aug. 9, 1906.)
FRAUDS, STATUTE OF—PURCHASE OF GROWING
TIMBER—CONTRACT IN WRITING.

A contract of sale of growing trees concerns an interest in realty, and under Civ. Code 1895, § 2693 (4), must be in writing. A receipt in these words, "Received of A. Corbin \$50.00, as part payment on Dekle and Boyd tracts of timber," signed by the vendor, does not comply with the statute, because of the omission of the purchase price. Nor will partial payment of the purchase price, unaccompanied by possession, except the case from the statute.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 117, 238.]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlins, Judge.

Action by J. B. R. Durden against Ark Corbin and S. R. Williamson. Judgment for plaintiff, and defendants bring error. Affirmed.

Williams & Bradley, for plaintiff in error.
Saffold & Larsen, for defendants in error.

EVANS, J. B. R. Durden, alleging himself to be the owner of a described tract of land, sought to enjoin Ark Corbin and S. R. Williamson from cutting and removing the timber thereon. The damage to the freehold resulting from cutting the timber was declared in the petition to be irreparable, for the reasons given; and the defendants were alleged to be insolvent. In response to the rule nisi, the defendants offered their sworn answer, wherein they admitted that plaintiff was the owner of the land, but averred that he sold to Corbin all the pine timber on the land described in the petition which was suitable for sawmill purposes, at and for the sum of \$500, and gave to Corbin the following receipt: "Rec'd of A. Corbin \$50.00 dollars as part payment on Dekle and Boyd tracts of timber. This 11th day of Sept., 1905. [Signed] B. R. Durden." The defendants further averred that Corbin had tendered to plaintiff, before entering on the land for the purpose of cutting the timber, the balance of the agreed purchase price. That portion of the pleadings alleging the insolvency of the defendants, and

that the damages which would result to the land from cutting the timber would be irreparable, was denied. The plaintiff demurred to the defendants' answer, because the sale was by parol and the receipt was insufficient to take the case out of the statute of frauds. The court granted an injunction, and the defendants excepted.

The interlocutory judgment granting an injunction was based on the pleadings, no other evidence having been submitted. Inasmuch as the plaintiff affirmed, and the defendants denied, the insolvency of the defendants and that the damages would be irreparable, the court, without abusing its discretion, might well decide these issues with the prevailing party. With these issues eliminated, the correctness of the judgment complained of turns on the validity and effect of the parol sale of the timber, the vendor receiving part of the purchase money and giving his receipt therefor. It is no longer an open question in this state that trees growing upon land constitute part of the realty, and a sale of them must, under the statute of frauds (Civ. Code 1895, § 2693, par. 4), be in writing. *Coody v. Gress Lumber Co.*, 82 Ga. 793, 10 S. E. 218; *Balkcom v. Empire Lumber Co.*, 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; *Pritchett v. Davis*, 101 Ga. 242, 28 S. E. 666, 65 Am. St. Rep. 298. "The writing, in order to be sufficient to satisfy the statute, must be coextensive with the stipulations; it must cover the entire contract." *Lester v. Heldt*, 86 Ga. 228, 12 S. E. 214, 10 L. R. A. 108. Conceding the contention of the plaintiff in error that the descriptive words, "Boyd and Dekle tracts of land," appearing in the receipt, are sufficiently definite to refer to a particular body of land, so as to allow *alunde* parol evidence to locate it (see *Anslay v. Green*, 82 Ga. 181, 7 S. E. 921; *Mohr v. Dillon*, 80 Ga. 575, 5 S. E. 770), yet the receipt does not contain the whole contract, because the price is not stipulated. It has been often remarked that the same reasons that forbid parol proof of the entire contract which the statute requires to be in writing just as cogently apply to supplying any omission of its terms by verbal evidence. There is not the slightest suggestion in the receipt of a purchase price, and this omission is fatal to the writing as an effective compliance with the statute of frauds. *Turner v. Lorillard*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345. The receipt of a part of the purchase money is not such part performance as will take the case out of the statute. It is only in cases where partial payment of the purchase money is accompanied with possession that will amount to part performance so as to take the contract out of the statute. Civ. Code 1895, § 4037. The vendor never yielded possession, and as soon as the vendee entered upon the land and began to cut the trees he instituted this action to enjoin the cutting and removal of the timber. The contract of sale being unenforceable because it was not in writing, the unaccepted tender

of the balance of the purchase money did not give it legal effect.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

KNIGHT v. SUDDETH & CRENSHAW.

(Supreme Court of Georgia. Aug. 18, 1906.)

1. EVIDENCE — DOCUMENTARY—AUTHENTICATION.

The remedy afforded by the provisions in Civ. Code 1895, § 8628, for attacking a deed upon the ground of forgery, is merely cumulative. *Sibley v. Haslam*, 75 Ga. 493.

2. SAME—FORGED DEEDS.

Upon an interlocutory hearing of an equitable petition for injunction the provisions of the above section of the Code are not applicable. Nevertheless any deed, ancient or modern, which is offered as a muniment of title, may be attacked as a forgery by any competent evidence submitted to the judge of the superior court hearing the application.

3. APPEAL—REVIEW—CONFLICTING EVIDENCE.

One of the deeds in the case at bar, which was a necessary link in the plaintiff's chain of title, having been attacked for forgery, and the evidence upon that issue being conflicting, this court will not disturb the judgment of the lower court in denying the injunction prayed for.

(Syllabus by the Court.)

Error from Superior Court, Berrien County; R. G. Mitchell, Judge.

Action by W. J. Knight against Suddeth & Crenshaw. Judgment for defendants, and plaintiff brings error. Affirmed.

W. G. Harrison and Z. D. Harrison, for plaintiff in error. Quincey & McDonald, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SWILLEY v. HOOKER et al.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. PARTIES—AMENDMENT—TIME TO AMEND.

On a note payable to Smith, or order, and indorsed by the payee to Swilley, suit was brought in a county court in the name of Smith, for the use of Swilley. From the judgment Swilley appealed in his own name to the superior court, and gave a bond, treating himself as the party plaintiff. A motion was made to dismiss the case on the ground that it appeared on the face of the proceeding that Smith had no title to the note and no right to bring suit upon it. The court announced orally that he would sustain the motion. Swilley moved to amend by striking from the declaration the name of Smith and the words "for the use of," so as to leave the case to stand in his own name as plaintiff. The court refused to allow the amendment, on the ground that it was offered too late, and dismissed the case. *Held*, that this was error. *Woodbridge v. Drought*, 45 S. E. 266, 118 Ga. 671.

2. SAME—TIME OF MAKING.

The fact that the presiding judge had announced orally that he would sustain the motion and dismiss the case, but had not signed any judgment to that effect, did not render a proper amendment then tendered too late, nor authorize him to reject it on that ground.

Lytle v. De Vaughn, 7 S. E. 281, 81 Ga. 226; *Freeman v. Brown*, 41 S. E. 385, 115 Ga. 23.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, § 186.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by J. W. Swilley against Fanny Hooker and others. Judgment for defendants, and plaintiff brings error. Reversed.

Stanley & Bennet, for plaintiff in error. J. W. Edmondson and L. W. Branch, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

MAUCK v. ROSSER et al.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. JUSTICES OF THE PEACE—JURISDICTION—JUDGMENT.

One who had furnished materials to a contractor, to be used in improving the real estate of another, brought an action against the contractor and the owner of the property improved, in a justice's court of the district in Fulton county wherein the land was located and such owner resided, for the double purpose of obtaining a personal judgment against such contractor for the price of such materials, and foreclosing a materialman's lien upon the realty improved. The contractor resided in De Kalb county, and did not file any plea or otherwise enter an appearance in the case. *Held*, that a judgment rendered in such proceeding against the contractor was void, as the court had no jurisdiction over him.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 147.]

2. SAME—WAIVER OF OBJECTIONS.

A defendant to a proceeding in a justice's court which has no jurisdiction over him, who files no plea, enters no appearance, and makes no defense therein, does not waive such want of jurisdiction by merely testifying as a witness in the case in behalf of the plaintiff, by whom he is introduced, although when placed upon the stand as a witness he does not raise the question of the court's jurisdiction over him as a party defendant.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 218.]

3. MECHANICS' LIENS—FORECLOSURE—JUDGMENT.

There can be no valid judgment of foreclosure of a materialman's lien for materials furnished to a contractor, upon the real estate improved with such materials, in the absence of a valid judgment in his favor against the contractor for the price of such materials.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mechanics' Liens, § 437.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by M. M. Mauck against L. Z. Rosser and others. Judgment for plaintiff before a justice was reversed on certiorari, and he brings error. Affirmed.

Mauck, for the purpose of foreclosing a materialman's lien upon realty belonging to

to Rosser and Blalock, brought a suit against them and Kellam, a contractor to whom he furnished material for improving the property. The suit was brought in the justice's court of the district in Fulton county wherein Rosser resided and the realty in question was located. Blalock resided in Fayette county and Kellam, the contractor, in De Kalb county. All of the parties defendant were served. Kellam filed no plea, and made no defense. Rosser and Blalock filed two special pleas, in one of which they alleged that the court had no jurisdiction to entertain a suit for the foreclosure of a lien upon real estate, but that the superior court of Fulton county had jurisdiction of the subject-matter of the suit. In the other, they alleged that the contractor, Kellam, was not a party to the suit, no service having been made on him, and that the suit could not be maintained against them, without Kellam was a codefendant. Subject to these pleas, they pleaded that the plaintiff could not maintain his action to foreclose the alleged lien, because there had been no judgment against the contractor, nor any valid suit filed against him, prior to or concurrently with this proceeding. The magistrate overruled these pleas. After the plaintiff had closed his evidence, and Rosser and Blalock had moved to dismiss the case on the ground that it was not made out, and the magistrate had indicated his intention to sustain this motion, Kellam came into the courtroom, and the court, over the objection of Rosser and Blalock, allowed the plaintiff to reopen the case, and introduce him as a witness. The magistrate rendered a general judgment for the amount sued for, in favor of the plaintiff against Kellam, and a judgment setting up and establishing a special lien upon the real estate in question of Rosser and Blalock, for a like amount. Rosser and Blalock obtained a writ of certiorari, and upon the hearing the same was sustained, and final judgment was rendered dismissing the plaintiff's case; whereupon he excepted.

Jas. E. Warren and Walter McElreath, for plaintiff in error. B. J. Conyers, for defendants in error.

COBB, P. J. 1. In our opinion, there could be no lawful judgment foreclosing a materialman's lien in this case, for the reason that no judgment for the amount of the claim had been previously obtained against the contractor, and no valid judgment could be rendered against him in this proceeding, because the court had no jurisdiction over him, and he did nothing which amounted to a waiver of jurisdiction. *Hartsfield v. Morris*, 89 Ga. 254, 15 S. E. 363, and cit.; *Sanford v. Bates*, 99 Ga. 145, 25 S. E. 35. Section 16 of article 6 of the Constitution of this state deals with the subject of venue. Paragraph 1 of this section provides for the venue of divorce cases. Paragraph 2 declares that

cases respecting the titles to land shall be tried in the county where the land lies, except where a single tract is divided by a county line, when the superior court of either county shall have jurisdiction. Paragraph 3 provides that equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed. It is provided in paragraph 4 that "suits against joint obligors, joint promisors, co-partners, or joint trespassers, residing in different counties, may be tried in either county." Paragraph 5 provides that, "suits against the maker and indorser of promissory notes, or drawer, acceptor, and indorser of foreign or inland bills of exchange, or like instruments, residing in different counties, shall be brought in the county where the maker or acceptor resides." Then, paragraph 6 lays down the general rule as to the venue in civil cases in the following words: "All other civil cases shall be tried in the county where the defendant resides." Civ. Code 1895, §§ 5869, 5870, 5871, 5872, 5873, 5874. It is apparent, therefore, that in so far as the present case was a proceeding against Kellam, the contractor, for the purpose of recovering a general judgment against him for the amount of the plaintiff's claim, it had to be brought in the county of his residence, which was De Kalb, unless the case falls within some one of the above-indicated exceptions to this general rule as to the venue of civil cases, which are enumerated and specified in the Constitution. Of course, the case is not covered by the provisions of paragraph 1, 3, or 5. Naturally, it is not contended by the plaintiff in error that the case falls under the provisions of paragraph 2, as this would amount to an abandonment of his case, for the reason that justices' courts have no jurisdiction of cases respecting the titles to land. What the plaintiff in error does contend, however, is that the case falls within the exceptions to the general rule which are found in paragraph 4, which, as we have seen, provides that "suits against joint obligors, joint promisors," etc., "residing in different counties, may be tried in either county." It seems to us perfectly clear that the owner of real estate, and one who contracts with him to improve it, are not, relatively to a contract between the contractor and a materialman who furnishes him with materials to be used in improving the property, joint obligors, or joint promisors. A very simple test will demonstrate this. If they are joint obligors, or promisors, to the materialman, then he would have the right to sue them both upon the contract, in the same action, in the county of the residence of either, and to obtain a general judgment against both. We apprehend that no one would seriously contend that where one who has contracted with the owner of real estate, for a stipulated compensation, to place improvements thereon at his own expense, purchases, for the pur-

pose of carrying out his contract, building material from a third party upon a credit, and fails to pay for the same, the person furnishing such building material can sue the owner of such real estate for a breach of such contract of purchase, and recover a general judgment against him for the contract price of such material. He cannot do this, for the very obvious reason that the owner of the property improved was no party to such contract of purchase. Joint obligors are not only liable upon the same contract, but their liability thereunder is the same in extent. Upon a breach of the contract, they may be all sued and all held individually liable to the full extent of the damages sustained by the plaintiff. In a case of the character of the one with which we are dealing, the owner of the property improved by the contractor cannot be held individually liable at all upon the contract between the contractor and the materialman. No general judgment can be obtained against him, but only a judgment establishing a lien upon certain property belonging to him. And the plaintiff below in the present case seemed to recognize this, for he made no effort to obtain a personal judgment against the owners of the land improved. He did not even attempt to sue the contractor to whom he furnished material for improving the property and the owners of the property as joint obligors. If the contention of counsel for plaintiff in error were sound, the passage of the act of October 19, 1891 (Acts 1890-91, p. 233), now embodied in Civ. Code 1895, § 2802, was an idle and useless thing. That act provides that any person who gives out to contract the building or construction of any house, etc., shall retain 25 per cent. of the contract price thereof, until the contractor submits to him an affidavit that all debts incurred for material and labor in building or constructing such house, etc., have been paid, or that the persons to whom such debts are due have consented to the payment of such balance of the contract price; and that if he pays to the contractor such 25 per cent. of the contract price, without requiring such affidavit, he shall be liable, to the extent of 25 per cent. of the contract price to any materialman or laborer for material furnished or work done for the contractor in the building or construction of such house, etc. It took a statute to render the owner of the real estate improved personally liable to any extent to a materialman for material furnished by him to the contractor who improved the property. If the owner and the contractor had been, under the existing law, jointly liable to the materialman, under the contract between him and the contractor, this statute would have been unnecessary. As said by Chief Justice Simmons, in *Wilder v. Walker*, 98 Ga. 508, 510, 25 S. E. 571, this act "gave new and distinct rights to materialmen and laborers." He further said that this act "gives a right

of action for a breach of a statutory duty." The reference to this act is merely for the purpose of illustration, the provision referred to having been repealed by a later act. We fail to see wherein the decision rendered in *White v. Hart*, 35 Ga. 269, which is cited and relied on by counsel for plaintiff in error, even tends to support their contention in the present case. There it was decided that the principal and the surety upon a promissory note could be sued together, in the county of the surety's residence, because they were "joint and several promisors, and the note [was] to be treated as the joint and several note of them all."

2. As the present case does not fall within any of the exceptions to the general rule laid down by the Constitution, that all civil cases shall be tried in the county where the defendant resides; and as it appeared upon the face of the proceeding that Kellam, the contractor, and the party against whom a general judgment was sought, did not reside in Fulton county, it follows that the justice's court of that county, wherein the action was brought, had no jurisdiction to render a judgment therein against him, unless, in response to the summons, he appeared and voluntarily submitted himself to its jurisdiction in this particular case. He filed no plea, entered no appearance, and took no part whatever in the trial of the case, except to testify as a witness in behalf of the plaintiff, by whom he was introduced, after the plaintiff had closed his evidence, and the court had indicated an intention to sustain the motion to dismiss the case, upon the ground that it was not made out. We think it is obvious that, under these circumstances, there was no waiver of jurisdiction on the part of Kellam. Counsel for plaintiff in error, in their brief, say: "No formal written pleading is necessary in a justice's court as a defense to an action on account not sworn to. The manner of making defense in such a case is to appear and, by evidence, contest the justness and fairness of the account." But Kellam did not do this. He did not appear to make any defense at all. He walked into the courtroom, when the magistrate was about to render judgment against the plaintiff, and the plaintiff, in order to save his case, introduced him as a witness. Counsel say: "He appeared, and without objecting in any way to the jurisdiction, gave testimony which 'made out the case' against himself, and showed the existence of the materialman's right of lien. Jurisdiction was therefore waived, and the waiver was good as to all the parties to the cause." The answer to this is that he made no appearance in the case as a party, but appeared only as a witness produced by the plaintiff. The court had jurisdiction over him as a witness when he was in its presence and was offered as such, although he resided in a different county, whether it had jurisdiction over him as a party to the case or not; and when

placed upon the stand as a witness it was not incumbent upon him to raise the question of the court's jurisdiction over him as a party. An implied waiver of jurisdiction arises when a defendant appears and pleads to the merits, without pleading to the jurisdiction, and without excepting thereto. Civ. Code 1885, § 5080. It is evident that there was no plea to the merits by Kellam in this case, either written or oral. He did not plead at all; he simply testified, and did this not at his own instance, but at the instance of the plaintiff. The case of *Berrie v. Smith*, 97 Ga. 782, 25 S. E. 757, will not be extended beyond its peculiar facts.

3. It is well settled that before a materialman's lien for materials furnished to a contractor to improve the real estate of another can be foreclosed, there must be a judgment for the price of such materials in his favor against the contractor, or the contractor must be sued concurrently with the owner of the property improved. *Lombard v. Trustees*, 73 Ga. 322; *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772; *Clayton v. Farrar Lumber Co.*, 119 Ga. 37, 45 S. E. 723. In the present case there was an effort by the materialman to sue the contractor to whom he had furnished the material, and the owner of the property upon which it was used, concurrently; but this effort failed, because the court in which the suit was brought had no jurisdiction over the contractor. And as the materialman could not foreclose any lien upon the property in question, without a valid judgment establishing the liability of the contractor for the amount of his claim, the judgment of foreclosure was void.

It follows that the judge of the superior court not only did right in sustaining the certiorari, but also did right in rendering a final judgment, dismissing the plaintiff's cause. Whether or not the intimation thrown out in *Castleberry v. Johnston*, 92 Ga. 499, 17 S. E. 772, as to going into equity when the contractor had left the state, would have any application to residence in different counties is a question not now before us.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

J. A. MIDDLEBROOKS & CO. v. FER-GUSON.

(Supreme Court of Georgia. Aug. 13, 1906.)
1. WILLS—CONSTRUCTION—ESTATE DEVISED.

A testator bequeathed and devised his property to his wife, in trust for the joint use and enjoyment of herself and his five named children, for and during her life, with full power in her, as such trustee, "to sell, dispose of, and convey any portion of said estate at such time and in such manner, and to apply the proceeds thereof, as she [might] deem best calculated to promote the interests of [his] children, or grandchildren during" her lifetime; and provided that at the death of his wife such portion of the estate as might remain on hand should be sold and the proceeds thereof equally divided among his children then living, "and

the child or children of such as [might] be dead, they taking the portion thereof which their ancestor would be entitled to, were he or she then living;" and constituted and appointed one of his sons trustee, at the death of the wife, "to take charge of, and sell, dispose of, and convey such portion of the estate as [might] then remain on hand, * * * and to divide the proceeds thereof among the children and grandchildren of the testator in accordance with the above provisions as to the distribution of the estate remaining undisposed of at the death of the wife." *Held*, that the trust was executory during the life of the wife, and consequently, and notwithstanding the married woman's act, she took no vested legal interest in any of the property of the testator's estate, and therefore could not, in her individual capacity, convey any by her deed.

2. POWERS—EXECUTION—DEED.

Where the donee of a power of sale, who individually has no legal interest in its subject, executes, without reference to the power or the instrument creating it, a fee-simple deed to land covered by it, the deed is to be construed as an execution of the power.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Powers, §§ 137-146.]

(Syllabus by the Court.)

Error from Superior Court, Clinch County; T. A. Parker, Judge.

Action by Walton Ferguson against J. A. Middlebrooks & Co. Judgment for plaintiff, and defendants bring error. Affirmed.

Walton Ferguson, Jr., brought a petition for injunction against J. A. Middlebrooks, H. J. Finney, and J. T. Finney, composing the firm of J. A. Middlebrooks & Co., to restrain them from cutting any of the timber on lots of land 110, 183, 184, and 185, in the Thirteenth district of Clinch county. The defendants filed a sworn plea to the jurisdiction, in which it was alleged that neither of them, at the beginning of the suit or at the time of filing the plea, resided in Clinch county, but that all of them resided in Jones county. At the interlocutory hearing, the plaintiff traced the title to the lots of land in question from the state into William O. Lumsden. He then introduced the will of William O. Lumsden, dated February 25, 1858, together with the probate thereof and the judgment admitting it to probate and record in the orphans' court of the District of Columbia, on June 28, 1868, the same being admitted without objection. The portion of this will relied on by the plaintiff and material in the present case was as follows: "All my other estate both real and personal, of which I may die seised and possessed, I give and bequeath to my beloved wife, Rachel Pottenger Lumsden, to be held in trust for the joint use and enjoyment of my said wife, and my children, Mary Ann Lumsden, Martha McGruder Lumsden, John William Lumsden, Elizabeth Rebecca Lumsden, and Charles Clark Lumsden, for and during the natural life of my wife, and my said wife and trustee is however fully authorized and empowered to sell, dispose of, and convey any portion of said estate at such time and in such manner, and to apply the proceeds thereof, as

she may deem best calculated to promote the interests of my children, or grandchildren during the lifetime of my wife; and at the death of my wife, I desire that such portion of my estate as may remain on hand be sold, and the proceeds thereof equally divided among my children, or such of them as may then be living, and the child or children of such as may be dead, they taking the portion which their ancestor would be entitled to, were he or she then living. And I hereby constitute and appoint my son, John William Lumsden, trustee, at the death of my wife, to take charge of, and to sell, dispose of, and convey such portion of the estate as may then remain on hand, at such time as he may think best, to promote his own and their interests, and to divide the proceeds thereof equally among my surviving children, or the child or children of such of them as may then be dead, such grandchild or grandchildren taking the portion thereof which the ancestor would be entitled to were he or she then living." Plaintiff then offered a deed from Rachel P. Lumsden to George W. Garmany, purporting to convey to the grantee, for the consideration of \$1,250, the lots of land in controversy and certain other lots, executed in Montgomery county, Md., April 2, 1884. There was in this deed no reference to the will of William O. Lumsden, to the power of sale contained therein, or to the trust thereby created. It purported to convey the lots of land described therein, "together with all and singular the houses, outhouses," etc., "liberties, privileges, easements," etc., "thereunto belonging, or in any wise appertaining; and the reversion or reversions, remainder and remainders, rents, issues, and profits; and all the estate, right, title, interest, property and possession, claim and demand whatsoever, in law or in equity, of the said Rachael P. Lumsden, of, in, or to the same, or any part or parcel thereof, with the appurtenances," "unto the said George W. Garmany, * * * his heirs and assigns, to the only use and behoof of the said George W. Garmany, his heirs and assigns forever." When this deed was tendered in evidence the defendants objected to its admission "upon the ground that no title had been shown in Rachael Pottenger Lumsden in her individual capacity; that the will of William O. Lumsden, her husband, having conveyed the property to her in trust for the joint use and benefit of her and her children, her individual deed did not divest the title of cestui que trusts." The court overruled this objection and admitted the deed, which ruling is assigned for error. The plaintiff then introduced certain other documentary evidence tracing whatever title George W. Garmany acquired by this deed into the plaintiff; and also introduced certain affidavits showing facts necessary to entitle him to an injunction against the defendants, in the event he had shown the requisite title to the premises in dispute. The defendants an-

nounced that they would rely upon their plea to the jurisdiction of the court, their objections to the deed from Mrs. Lumsden to Garmany, "and upon the failure of the plaintiff to show that he was entitled to an injunction against defendants, and not introduce any evidence beyond their sworn plea. The court then passed an order restraining and enjoining defendants from cutting, felling, or removing the timber from the lots of land in controversy or in any manner trespassing upon the same." To this judgment the defendants excepted. There was positive testimony that J. A. and J. D. Middlebrooks, two of the defendants, were residents of Clinch county.

C. J. Haden and Leon A. Wilson, for plaintiff in error. Toomer & Reynolds, for defendant in error.

CORB, P. J. 1. The case turns upon a single question and that is whether the deed from Mrs. Lumsden to Garmany was made in execution of the power of sale conferred upon her, as trustee, by the will of her husband, William O. Lumsden, and therefore conveyed to the grantee a fee-simple title to the entire interest in the lands described therein, or was merely her individual deed, conveying to the grantee only her individual interest in a life estate in such lands. This is the only question argued here upon either side though counsel for plaintiffs in error, in discussing it, as presented by the assignment of error upon the admission of the deed in evidence, say that they do so "without waiving their other assignments of error." The contention of the plaintiffs in error is that the will created "a life estate in the testator's property, to be held and enjoyed by" Mrs. Lumsden "and the said children or grandchildren, as joint users, for and during" her life, "with power in her to sell for the purpose of promoting the interests of the testator's children or grandchildren, and only for this purpose, any portion of said estate," and that it "also created in the children or grandchildren a legal estate in remainder." They further contend that the trust which the testator attempted to create became, relatively to Mrs. Lumsden, executed by the married woman's act of 1866 and the legal title to an undivided one-sixth interest in the life estate vested in her; and that she could convey her individual interest in the life estate by her individual deed. They then contend that as in the deed in question there is no reference to the will, to the power of sale therein conferred upon Mrs. Lumsden, or to the trust thereby created, this deed must be construed as simply her individual deed, and as conveying only her interest in the life estate. In support of this contention, they cite the decisions of this court in *Holder v. American Investment Co.*, 94 Ga. 641, 21 S. E. 897, and *New England Mortgage Security Co. v. Buice*, 98 Ga. 796, 28 S. E. 84. Those

cases followed the general rule expressed in Kent's Commentaries in the following language: "The general rule of construction, both as to deeds and wills, is that if there be an interest and power existing together in the same person over the same subject, and an act be done without a particular reference to the power, it will be applied to the interest and not to the power. If there be any legal interest on which the deed can attach, it will not execute the power. If an act will work two ways, the one by an interest, and the other by a power, and the act be indifferent, the law will attribute it to the interest and not to the authority." 4 Kent's Com. Side pp. 234, 235. Whether, in view of these and other decisions of this court upon the subject, this rule must be rigidly applied in every case in which there is a power coupled with an interest, and in which the donee of the power executes a deed purporting to convey the entire interest in the subject-matter of the power, without in any way referring to the power, we need not stop to consider. As shown by the brief of counsel for defendant in error, there are decisions rendered by courts in other jurisdictions to the effect that in such a case the court, when construing the deed, may take into consideration the price paid by the grantee for the property, whether it was the full value of the whole fee therein or not, the meagerness of the interest which the grantee would acquire if the deed should be construed to pass only the individual interest of the grantor, language in the deed clearly indicating the purpose of the grantor to convey the entire estate in the property, etc. There is great force in the argument of counsel for defendant in error that, as the evidence shows that the consideration named in the deed was a fair and full price for the whole interest in the lands described therein, and as they were all wild lands at the time of the conveyance and shown by the evidence to be valuable only for the timber upon them, it would be "unreasonable to conclude that it was Mrs. Lumsden's intention to convey, and Garmany's intention to receive, only an undivided one-sixth interest in this wild land for her life, when, in the condition in which the land was at that time, Garmany * * * could not have used the property for the purpose for which it was alone valuable; that is, for its timber." But, in our opinion, we need not consider this argument, nor the outside authorities cited to support it, nor need we consider the argument drawn from the use of the words, "reversion and reversions, remainder and remainders," in the granting clause of the deed.

The general rule invoked by counsel for plaintiffs in error has no application to the present case, even when rigidly construed; for Mrs. Lumsden had no legal interest in the property, to convey by her individual

deed. The trust created by the will was executory. It never became executed as to Mrs. Lumsden, nor during her life could it become executed as to the other cestui que trust as they respectively became of age. All the cestui que trust might become of age during the life of Mrs. Lumsden and still the trust would not become executed, but would remain executory. The trust estate was projected beyond the life of Mrs. Lumsden, provision being made that, at her death, such portion of the property as she had not disposed of, under the power conferred upon her, should be sold, and the proceeds thereof equally divided among the testator's children then in life and the child or children of such as might then be dead, such child or children taking the portion which their ancestor, if living, would be entitled to receive. And for the purpose of carrying out this provision as to the disposition of the property after the death of Mrs. Lumsden the testator's son, John William Lumsden, was appointed as her successor in the trust, "to take charge of, and to sell, dispose of, and convey such portion of the estate as [might] then remain on hand, at such time as he [might] think best, to promote" the interests of the cestui que trusts, "and to divide the proceeds thereof * * * among" them as directed by the will. Here was something for the succeeding trustee to do in execution of the trust. Upon the death of Mrs. Lumsden the duty would devolve upon him to ascertain among whom the proceeds of the property remaining on hand should be distributed and the proportion thereof to which each should be entitled, and to sell the property at such time as he might deem best for the interests of all concerned, and distribute the proceeds as directed by the testator. Clearly the trust created by the will falls within the definition of executory trusts given in our Civil Code. "In executory trusts, something remains to be done by the trustee, either to secure the property, to ascertain the object of the trust, or to distribute according to a specified mode, or some other act, to do which requires him to retain the legal estate." Civ. Code 1895, § 3156. Mrs. Lumsden had no separate legal interest in any of the property covered by the trust; she had only a usufructuary interest in the trust estate during her life. *Thomas v. Crawford*, 57 Ga. 211; *Jennings v. Coleman*, 50 Ga. 718; *Balle v. Carolina Interstate Building & Loan Ass'n*, 100 Ga. 20, 28 S. E. 274; *Smith v. McWhorter*, 123 Ga. 287, 51 S. E. 474, 107 Am. St. Rep. 85. As she had no legal interest in the property embraced in the deed under consideration, this deed would be a mere nullity, unless construed as an execution of the power conferred upon her by the will.

2. The rule is clear that the deed of the donee of a power of sale, purporting to convey land over which the power extends, but not referring to the power or to the instrument creating it, will generally operate as

an execution of the power, if the grantor had no interest in the property which he could convey by his individual deed. *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420. This rule is especially applicable in a case like the present, where, although the power is not even indirectly referred to in the deed, there are expressions therein which clearly indicate an intention to convey the entire interest in the property in fee simple. The deed conveyed to Germany, the grantee, a fee-simple title to the lands in question; and, as the plaintiff showed that he had acquired whatever title Germany had, and the evidence in other respects was sufficient to authorize the grant of the injunction prayed for, the court did not err in rendering the judgment complained of.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SOUTHERN RY. CO. v. CHAMBERS.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. TORTS—MALICIOUS INJURY TO BUSINESS.

Malicious injury to the business of another will give a right of action to the injured party.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Torts, § 10.]

2. PRINCIPAL AND AGENT—TORTS OF AGENT—LIABILITY OF PRINCIPAL.

A licensed drayman had contracts with merchants to haul their freight from the depot of a railway company to their places of business. The depot agent of the railway company at the place in which the drayman was licensed to do business, knowing of the existence of such contracts, willfully and maliciously refused to deliver to the drayman goods of such merchants, notwithstanding orders, oral and written, to that effect were communicated to the agent. As a consequence of this wrongful conduct of the agent the drayman was damaged in his business, and his business practically destroyed. *Held*, that the railway company was liable for such damages to the business of the drayman as flowed from the wrongful conduct of its agent.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 599-602.]

3. CORPORATIONS — LIABILITIES — TORTS OF AGENT.

A corporation is not liable for the malicious acts of an agent, unless such acts were expressly authorized by the corporation, or were within the scope of the duties of the agency, or were in themselves a violation of the duty owed by the corporation to the party injured, or such acts were ratified by the corporation.

4. PRINCIPAL AND AGENT—TORTS OF AGENT—LIABILITY OF PRINCIPAL.

A railway company is liable to one who goes to a depot of the company to deal with the depot agent as to matters connected with the business of the company, who, while in the course of the transaction, is insulted and humiliated by the language and conduct of the agent. *Aliter*, if the insult results from the conduct of the agent at a place other than that to which the public is invited by the establishment of the agency, and such conduct is neither authorized nor ratified by the company.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 600-602.]

5. ELECTION—COUNTS OF PETITION.

When a petition contains two or more counts, and each sets forth a separate and distinct cause of action, the plaintiff will not be required to elect upon which count he will proceed.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 1199, 1200.]

6. TRIAL—INSTRUCTIONS.

When there is no evidence as to the worldly circumstances of the parties, it is erroneous in any case to charge upon the subject. Where there are two counts in a petition, and an instruction on worldly circumstances of the parties is appropriate as to one, and not appropriate as to the other, the instructions of the judge should be such as to inform the jury that the worldly circumstances are to be considered as to one, and not as to the other.

(Syllabus by the Court.)

Error from City Court of Carrollton; W. C. Hodnett, Judge.

Action by E. N. Chambers against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Chambers sued the Southern Railway Company for damages. Objection was made to the petition as originally filed upon the ground that it set forth two separate and distinct causes of action and that each was not set forth in a separate count. This defect was remedied by an amendment, and the petition as amended contained two counts. The first count alleged that plaintiff was a licensed drayman of the town of Villa Rica, and had purchased the necessary outfit for that business; that the most profitable part of his business consisted of hauling the freight of merchants shipped over the line of defendant; that he had contracts with a majority of the merchants to haul their freight from the depot to their places of business; that the defendant, through its depot agent at Villa Rica, refused to deliver him freight to be hauled to the merchants, although such agent knew he was authorized to receive and haul such goods, petitioner presenting written and verbal orders for the same; that "defendant's agent, G. A. Scarborough, would go around to petitioner's customers and beg and persuade them to allow other parties than petitioner to receive and haul said goods, to the injury and damage of your petitioner; * * * that the conduct on the part of the defendant was willful, malicious, and done for the sole purpose of injuring and damaging your petitioner, and did injure him and damage him" in a sum stated; and that the conduct on the part of the defendant had destroyed the business of the plaintiff. The second count alleged that on a named day the agent of the defendant, while acting in the discharge of his duty as such agent, and being at the time in the depot of the defendant, in the presence and hearing of certain named citizens, used to and of the plaintiff certain "abusive and malicious words," which are set forth in the petition, for the sole purpose of injur-

ing and harassing him, and did cause him great mental pain and suffering, and that on another occasion at the store of a merchant, such agent, while in the discharge of his duty as agent, used of and concerning petitioner certain other language, which in effect charged petitioner with a crime punishable by law. The defendant filed a demurrer, in which it was alleged that no cause of action was set out, and that the petition was defective for the reason that the acts of the agent were entirely outside of the scope and province of his duties, and without sanction or authority of the defendant. The demurrer was overruled, and the defendant excepted *pendente lite*. The trial resulted in a verdict for the plaintiff. The defendant's motion for a new trial was overruled. The bill of exceptions assigns error upon the exceptions *pendente lite*, and the judgment overruling the motion for a new trial.

Coles & McPherson, Hugh M. Dorsey, and Arthur Heyman, for plaintiff in error. J. O. Newell and Beals & Adamson, for defendant in error.

COBB, P. J. (after stating the foregoing facts). 1-3. When the first count in the petition is taken in its entirety, it is manifest that it was the intention of the pleader to lay a cause of action for damages flowing from the destruction of the business of the plaintiff by the wrongful conduct of the defendant as alleged in the petition. The refusal to deliver freight to the plaintiff, notwithstanding he was clothed with authority from the consignees to receive it, is not alleged for the purpose of recovering damages that might result from the refusal to deliver in any particular case; but this constant and continuous refusal is alleged for the purpose of showing the effect upon the plaintiff's business as a drayman. The count alleged that the plaintiff's business was entirely destroyed. This resulted from two causes: First, the refusal of the agent to deliver freight which the plaintiff was authorized by the consignees to receive; and, second, the conduct of the agent in going to the merchants of Villa Rica and persuading them to discontinue their contracts with the plaintiff. It is alleged that this was done maliciously. In other words, the count, when taken in its full effect, charges that the business of the plaintiff was maliciously destroyed by the wrongful conduct of the defendant. Malicious injury to the business of another has long been held to give a right of action to the injured party. *Barr v. Essex Trade Council*, 53 N. J. Eq. 115, 30 Atl. 881. See, also, in this connection, *Lumley v. Gye*, 2 El. & Bl. Q. B. 217; *Ryan v. Burger & Hower Brewing Co.* (Sup.) 13 N. Y. Supp. 660; *Bernard Delz v. Winfree, etc.*, 80 Tex. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Lucke v. Cloth-*

ing Cutters' & Trimmers' Ass'n (Md.) 26 Atl. 505, 19 L. R. A. 408, 59 Am. St. Rep. 421. Our Code declares: "When the law requires one to do an act for the benefit of another, or forbear the doing of that which may injure another, though no action be given in express terms, upon the accrual of damages the party may recover." Civ. Code 1895, § 3809. The petition alleged that the plaintiff had contracts with the merchants of Villa Rica to deliver their freight for them, and that the defendant through its agent maliciously procured the merchants not only to abandon their contracts, but to violate them while they continued. It has been held that the malicious procurement of a breach of a contract of employment resulting in damages, where the procurement is during the subsistence of the contract, is an actionable wrong. *Employing Printer's Club v. Blosser Co.*, 122 Ga. 509, 50 S. E. 353, 69 L. R. A. 90, 106 Am. St. Rep. 137.

If this suit had been against Scarborough in his individual capacity, there would be little question about the fact that a cause of action was set forth, not only as regards the refusal to deliver freight, but also as regards his conduct in persuading the merchants of Villa Rica to abandon their contracts with the plaintiff. But is the railway company responsible for the conduct of Scarborough? Is the malice of Scarborough the malice of the company? It is not alleged that the railway company expressly authorized that to be done which is charged against Scarborough. It appointed Scarborough its agent. It placed him in a position where it was his duty to deliver freight to consignees or their authorized agents. Those things which were done in connection with this duty were within the scope of his agency. The railway company would be responsible for the wrongful conduct of Scarborough in dealing with the consignees or their authorized agents in delivering freight to them. If he refused to deliver freight when he ought to have delivered it, his act was the act of the railway company. If he maliciously refused to deliver, and the consequence of this malice was damage to him who had a right to receive, the malice of Scarborough became the malice of the railway company. So far as the cause of action rests upon the malicious act of Scarborough in refusing to deliver freight to the plaintiff upon orders, verbal and written, from the consignees, the action is well laid. But was the action well laid so far as it relates to the conduct of Scarborough in going to the merchants of Villa Rica and procuring them to abandon their contracts with the plaintiff? It is alleged that he is the agent of the railway company. It is alleged that as such he went to the merchants of the town of Villa Rica, and interfered with the plaintiff's business by begging and persuading his customers to allow other parties to haul their goods which came over the line of road represented by

him. What he did in this respect was his individual act. It was beyond the scope and authority of his agency, and the company would not be responsible, unless it appeared that it was done by its direction and authority, or that it ratified his acts in reference thereto. If the plaintiff seeks to hold the company responsible for the acts of the agent under such circumstances, it must distinctly appear from his petition that the company authorized the acts, or that they were within the scope of his employment, or, if beyond the scope of his employment, they were approved and ratified by the company after a full knowledge of his conduct. So far as that portion of the first count relates to the conduct of the agent in persuading the merchants to discontinue business with the plaintiff, nothing appears in the petition bringing the case within this rule. The count was to this extent defective.

4. A corporation is not liable for damages resulting from speaking false, malicious, and defamatory words by one of its agents, even where, in uttering such words, the speaker was acting for the benefit of the corporation and within the scope of his agency, unless it affirmatively appears that the agent was directed or authorized by the corporation to speak the words in question. *Behre v. National Cash Register Co.*, 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 820. See, also, *Ozborn v. Woolworth*, 108 Ga. 460, 32 S. E. 581. If the second count of the declaration be construed as an action for slander, it set forth no cause of action. While certain portions of the count might be so construed, when the count is taken as a whole it is apparent that damages were also claimed as resulting from an insult to the plaintiff, growing out of the abusive and defamatory language used to him while he was engaged in conversation with the agent of the defendant, in a matter relating to the business of the company. The Code declares that a railway company is liable for any damage done by any person in its employment or service, unless the agents of the company have exercised all reasonable care and diligence. Civ. Code 1895, § 2321. This section has been construed to create a cause of action in favor of a widow whose husband was slain by a depot agent while as a customer he was lawfully at the depot on business pertaining to the agency. *Christian v. Railway Co.*, 79 Ga. 460, 7 S. E. 216; *Columbus Railway Co. v. Christian*, 97 Ga. 56, 25 S. E. 411. It has also been held that a railway company was liable for an assault and battery committed by an agent upon a person who was at the depot of the company transacting business with the agent in connection with the agency. *Ga. R. Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565. It has also been held that a railway company was liable to a passenger for damages resulting from the conduct of the conductor in using to the passenger opprobrious words and abusive

language tending to cause a breach of the peace and humiliate the passenger and subject him to mortification. *Cole v. Railway Co.*, 102 Ga. 474, 31 S. E. 107. That portion of the second count which alleges that the agent of the railway company at the depot used to the plaintiff abusive and insulting language, when the plaintiff was upon the premises of the defendant, in conversation with the agent upon business connected with his agency, set forth a cause of action against the company. In the case where the railroad was held liable for the homicide committed by the agent, the agent was at his place of business. In the case where the railroad company was held liable for an assault, the assault was committed upon the premises of the company at the place where it had placed its agent upon duty. In the case where the railroad company was held liable for the insult by the conductor, the insult was upon the train where the company had placed the conductor upon duty. None of the cases, so far as our attention has been called to them, has gone to the extent of holding that the company would be liable for the tort of the agent at other places than where the agent was placed by the company for the discharge of the duties of his agency. If the agent insulted the plaintiff upon the streets of Villa Rica, or at any place of business of the merchants or others of the town of Villa Rica, the act would be the individual act of the agent, and the company would not be liable for such insult, even though at the time of the insult the agent was transacting the business of the company. When one goes to the agency of a corporation, the corporation owes him a duty to protect him from the wrongful acts of the agent in charge of the agency. But, when one who is an agent of the corporation commits a tort at places other than the place of agency, the company is not liable for the tort, unless it appears that it authorized the act or ratified it after its commission.

The first ground of the demurrer simply alleged that the petition set forth no cause of action. The second ground related to the matter of paragraphing and the division of the petition into counts, which, as has been said, was cured by amendment. The only remaining ground of the demurrer was in the following language: "Defendant prays that the petition of plaintiff be dismissed, because it affirmatively appears that if the acts attributed to the agent were by him committed, they were entirely outside the scope and province of the duties for which he was employed, and entirely without the sanction or authority of the defendant. Wherefore defendant prays that said case be dismissed." If this ground of the demurrer can be properly construed to be a special demurrer objecting to certain specific paragraphs in the petition, it should have

been sustained; for, as has been shown, there was in the first count a paragraph which should have been stricken, and also in the second count, which really embraced two causes of action, a cause of action which should have been stricken. But this ground of the demurrer cannot be properly construed as a special demurrer. It attacked the whole petition. It pointed to no particular part of it. It covered the whole pleading. It was simply an amplification of the general demurrer. As against a general demurrer the petition in both counts sets forth a cause of action, and the judgment overruling the demurrer will not be reversed.

5. There was no error in refusing to require the plaintiff to elect upon which count he would proceed. The law allows a plaintiff to embrace in one petition as many causes of action as he sees proper, provided that they are all of the same character; that is, all sound in tort or all sound in contract. He may proceed upon the petition with all the counts, and recover upon one or all, as the law and facts may authorize.

6. The judge charged the jury: "The worldly circumstances of the parties, the amount of bad faith in the transaction, and all the attendant facts should be weighed." This charge was assigned as error for the reason that there was no evidence to authorize it. We find no evidence to authorize an instruction upon the subject of the worldly circumstances of the parties. The charge was erroneous, and prejudicial to the defendant, and requires the granting of a new trial. *Ga. Ry. & Elec. Co. v. Baker*, 125 Ga. 562, 54 S. E. 639. If upon another trial there should be evidence as to the worldly circumstances of the parties, the charge would be appropriate so far as the cause of action in the second count is concerned; for that count seeks to recover damages for wounded feelings and humiliation only. The judge should, however, distinctly instruct the jury that the worldly circumstances of the parties are to be considered only in reference to the cause of action set forth in the second count, and should not be considered in reference to the cause of action set forth in the first count.

The evidence as to the conduct of the agent of the defendant, when acting as agent for the express company in reference to packages which the plaintiff had authority to receive, was irrelevant, and should not have been admitted. The case involved the acts of the defendant as agent of the railway company, and therefore evidence as to his conduct in reference to a package of freight, when it did not distinctly appear from the testimony whether it was in his custody as agent of the railway company or as agent of the express company, should have been excluded. Except as above indicated, no material error seems to have been committed

in any of the instructions complained of in the motion for a new trial.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

KENDALL et al. v. WELLS.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. DEED — CONSTRUCTION — CONVEYANCE BY ACRE.

A deed based upon the express consideration of \$371 described the land conveyed as follows: "A certain tract of land in the eighth land district of Colquitt county, Ga., known and described in the plan of said eighth district as part of west half of land lot No. 85, containing (50) fifty acres in the southwest corner of said lot 85, and bounded as follows, to wit: 'Commencing on the south line of said lot 85, on the west side of Georgia Northern Railway Co. railroad, and 100 feet from the center of the railroad track, and running west, 34 chains, along said land line, to the southwest corner of said lot 85; thence north, along west land line said lot 85, 13 chains, to stake; thence east, 25 chains, to within 100 feet Ga. Northern Ry. track, to a stake; thence south along said right of way to place of commencing. Held, that this was a conveyance of land by the tract, and not by the acre.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 322; vol. 48, Cent. Dig. Vendor and Purchaser, § 836.]

2. VENDOR AND PURCHASER—DEFICIENCY IN QUANTITY CONVEYED.

Where land has been sold and conveyed by the tract, the number of acres being mentioned in the deed only as part of the description, and not by way of covenant, in the absence of actual fraud, no recovery can be had by the purchaser against the vendor on account of a deficiency in quantity.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 835, 836.]

3. SAME—PLEADING—FRAUD.

The allegations of the declaration were not sufficient on the subject of fraud, or want of knowledge by the vendee, or what opportunity he had for knowledge.

(Syllabus by the Court.)

Error from Superior Court, Colquitt County; R. G. Mitchell, Judge.

Action by E. S. Wells against C. J. Kendall and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. A. Wilkes and Shipp & Kline, for plaintiffs in error. Edwin L. Bryan, Y. L. Watson, and W. C. McCall, for defendant in error.

LUMPKIN, J. Two controlling questions are raised in this case: (1) Were the allegations of deficiency in the number of acres contained in the tract of land conveyed alone sufficient to show that the plaintiff was entitled to recover? (2) If not, were the allegations as to misrepresentation or fraud in regard to quantity sufficient? In 2 Devlin on Deeds (2d Ed.) § 1044, it is said: "In the description of land it is usual, after the description by metes and bounds or subdivisions, to add a clause stating that the land described contained so many acres. But, unless there is an express covenant that

there is the quantity of land mentioned, the clause as to quantity is considered simply as a part of the description, and will be rejected if it is inconsistent with the actual area, when the same is capable of being ascertained by monuments and boundaries. The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description. Neither party has a remedy against the other for the excess or deficiency, unless the difference is so great as to afford a presumption of fraud." The language may be such, however, as to make quantity the controlling element in the description. Id. § 1045; 1 Jones on Real Property, §§ 398, 401; Strickland v. Hutchinson, 128 Ga. 396, 51 S. E. 848. In 4 Kent's Com. (14th Ed.) *467, it is said: "Whenever it appears by definite boundaries, or by words of qualification, as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed is a mere matter of description, and not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case." See, also, 1 Jones on Real Property, §§ 398, 399, 400; Rawle on Covenants (5th Ed.) § 297; 3 Washburn on Real Property (6th Ed.) § 2322; 1 Warvelle on Vendors, § 881; Collinsville Granite Co. v. Phillips, 123 Ga. 842, 51 S. E. 666; Jackson v. McConnell, 19 Wend. (N. Y.) 175, 82 Am. Dec. 439; Powell v. Clark, 5 Mass. 355, 4 Am. Dec. 67; Wright v. Wright, 34 Ala. 194. In Warvelle on Vendors, § 834, after discussing the status of executory and executed contracts in reference to the matter of deficiency of quantity of land, the author adopts the classification made from the decision in Harrison v. Talbot, 2 Dana (Ky.) 258, which is worthy of consideration. Though of some length it is here copied: "Where a sale is of a specific tract by name or description, each party taking the risk of quantity, the sale is said to be in gross. These sales may be classified as follows: (1) Sales strictly and essentially by the tract without reference in the negotiation or in the consideration to any designated or estimated quantity of acres. (2) Sales of the like kind, in which, though a supposed quantity by estimation is mentioned or referred to in the contract, the reference is made only for the purpose of description, and under such circumstances or in such manner as to show that the parties intended to risk the contingency of quantity whatever it might be, or how much soever it might exceed or fall short of that which was mentioned in the contract. (3) Sales in which it is evident from extraneous circumstances of locality, value, price, time, and the conduct and conversation of the parties, they did not contemplate or intend to risk more than the usual rates of excess or deficiency in similar cases or than such as might reasonably be calculated on as within

the range of ordinary contingency. (4) Sales which, though technically deemed and denominated sales in gross, are in fact sales by the acre, and so understood by the parties. Contracts belonging to either of the two first-mentioned classes, whether executed or executory, are not susceptible of modification or rescission, in the absence of fraud; but in sales of either of the latter kinds an unreasonable surplus or deficit may entitle the injured party to relief unless he has by his conduct waived or forfeited his equity."

This decision has been much cited, but it, as well as that of *Blessing's Adm'r's v. Beatty*, 1 Rob. (Va.) 287 is severely criticised in the elaborate decision in *Crislip v. Cain*, 19 W. Va. 438, where it was held that for an honest mistake as to quantity, unmixed with fraud, and where neither party is more to blame than the other, the only remedy would be by rescission, and that any allowance for deficiency in such case by a court of equity would be in effect to make a new contract for the parties. The court also discussed what evidence was admissible to explain the statement of the number of acres in a description, and when admissible, and what evidence was admissible to show fraud. It also declared that all contracts of sale by the tract were contracts of hazard on the part of the vendor, and that the allowance of an apportionment for a deficiency was in the nature of allowing damages for a fraud perpetrated by the vendor on the vendee. This decision covers 126 printed pages of the report in which it was published, but it encountered the danger incident to so much elaboration (a danger which the writer of this opinion may possibly not escape), and in *Newman v. Kay*, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908, it was itself disapproved in so far as it held that a contract of sale of land in gross might be rescinded on the ground of a mutual mistake as to the quantity of land in the tract sold, resulting in a large excess or deficiency, no other ground for relief being shown. In the case last referred to there is a discussion of both excess and deficiency. Another much cited case on the subject is that of *O'Connell v. Duke*, 29 Tex. 299, 94 Am. Dec. 282, where a vendor brought suit to rescind the sale of a tract of land on the ground of a mistake as to the quantity it contained. If the conveyance is clearly by the tract, it has been held in this state that parol evidence is not admissible to prove that it was in fact by the acre. Whether, as in West Virginia, parol evidence is ever admissible on the theory of ambiguity, or as in Kentucky, for the purpose stated in the case of *Harrison v. Talbot*, *supra*, is not here involved.

Did the recital of the number of acres mentioned in the deed now under consideration constitute a covenant, or only form a part of the description? This question is answered in the case of *Longino v. Latham*, 93 Ga. 274, 20 S. E. 308. The headnote (there being no

opinion) is as follows: "A public sale of land by an administrator, under the description of 'a certain tract or parcel of land situated in the Ninth district of originally Fayette, now Campbell county, Ga., being one hundred and sixty-five acres of land lot No. 129, being all of said land lot except thirty-seven acres in the northeast corner of said lot,' is a sale by the tract, and not by the acre; and a deficiency in the number of acres specified, there being no fraud alleged, is no ground for making any deduction from the amount of the purchaser's bid, that amount being a gross sum for the whole tract or parcel sold." The deficiency there alleged was 37 acres out of the 160 granted in the deed. See, also, *Turner v. Rives*, 75 Ga. 606; *Walker v. Bryant*, 112 Ga. 417, 37 S. E. 749; *Benton v. Horsley*, 71 Ga. 619. Section 3542 of the Civil Code of 1895 reads as follows: "In a sale of lands, if the purchase is per acre, a deficiency in the number of acres may be apportioned in the price. If the sale is by the tract or entire body, a deficiency in the quantity sold cannot be apportioned. If the quantity is specified as 'more or less,' this qualification will cover any deficiency not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud; in this event the deficiency is apportionable; the purchaser may demand a rescission of the sale or an apportionment of the price according to the relative value." An examination of this section will show that it deals with the matter of deficiency of quantity of land under three sets of circumstances: (1) Where the sale is made by the acre; (2) where it is by the entire tract or body; (3) where the quantity is specified as "more or less." Where these words are used, it is declared that they will cover any deficiency not so gross as to justify the suspicion of willful deception or mistake amounting to fraud. In that event there may be an apportionment or a rescission.

In *Seegar v. Smith*, 78 Ga. 616, it was said (page 618, 3 S. E. 618, 614) that this was true whether the sale was by the tract or by the acre, and that the purchaser was not obliged to claim a rescission, but might have an apportionment. In that case it was claimed by one side that there was a sale by the acre, and by the other that the sale was by the tract, specifying the quantity as so many acres, more or less. What was said in the second headnote must be read in the light of the opinion, which stated that the case was sent back for a jury to pass on the issues. The size of the deficiency was treated as a matter of fact, rather than a determination as matter of law that any particular deficiency would furnish an invariable rule. In that case, also, certain evidence was illegally rejected. In that part of the Code section quoted which relates to the subject of a deed stating the quantity as "more or less," nothing is expressly said as to a deed where the description of the tract of land

mentions a certain number of acres, but does not add the words "more or less." Clearly it was not intended that the addition of those words would give a superior right of apportionment for a deficiency, where it would not exist without them. To so hold would reduce this provision of the section to an absurdity. Thus, to say that, if a tract of land is described as containing 100 acres, and it really contains 50, the purchaser will be without remedy; but, if to the description be added the words "more or less," the purchaser will have a remedy (it being for the jury to say whether such a deficiency was sufficient to raise a suspicion of willful deception or mistake amounting to fraud), would be in effect to say that, the more vague and indefinite the description, the greater the right of the purchaser to recover for a deficiency. This section never meant to declare that the right of a purchaser to apportion for a deficiency is in adverse ratio to the definiteness of the description in his deed. One of two things must be the case—either that the sale of land by the tract, containing as part of the description a statement of the number of acres, stands on the same basis, whether or not the words "more or less" be added, or that it has a better standing without these words. It certainly could have no worse. This section was not a legislative enactment, but a codification.

In *Beall v. Berkhalter*, 28 Ga. 567 (decided in 1853, before the first codification of the laws in this state), it was said: "When the words 'more or less' are annexed to the quantity of land, it is against principle that the vendor should be responsible to assure any given number of acres, unless he practiced fraud upon the purchaser. These words should have been held to be used, as they no doubt were originally, to protect him against any such disability. It would have saved an incalculable amount of litigation, as every rule which is fixed and certain does. But it is too late, perhaps, to establish such a doctrine in the face of such an amount of judicial interpretation to the contrary. The decisions are that these words are intended only to protect the seller against a small deficiency, where there is an approximation to the quantity of acres mentioned." With this decision doubtless before them, the codifiers intended to express the risk which was covered by the words "more or less," not to confer any additional right by their use. The principle is stated somewhat more strongly than in some of the states. In *Estes v. Odom*, 91 Ga. 600, 13 S. E. 355, it was held that, by accepting a deed to land sold by the tract in which the words "more or less" were used, "the vendee waives not only any mistake, but any deception as to quantity, unless (keeping in view the object of the purchase and all the attendant circumstances) some willful deception or gross mistake would, after ascertaining the true

quantity, be suggested to the mind by a mere comparison of that quantity with the quantity named." But it was held that this was ordinarily a question for the jury rather than for the court. The deed there involved described the land as containing 40 acres more or less. There were really 7 acres less, and the fraud alleged was that the seller knowingly represented that the tract contained $41\frac{1}{4}$ acres. See, also, *Perkins Mfg. Co. v. Williams*, 98 Ga. 388, 25 S. E. 556; *Seymore v. Rice*, 94 Ga. 184, 21 S. E. 293.

In an elaborate opinion in the case of *Harrison v. Talbot*, 2 Dana (Ky.) 258, Chief Justice Robertson reviewed numerous authorities and said: "The equity of each case must depend on its own peculiar circumstances. The relative extent of the surplus or deficit cannot, per se, furnish an infallible criterion. The conduct of the parties, the date of the contract, the value and extent and locality of the land, the price, and other nameless circumstances, are always important and generally decisive." Under the decisions in *Estes v. Odom* and *Perkins Mfg. Co. v. Williams*, *supra*, each case presents its own particular facts, and the nature and character of the property, the purpose for which it was purchased, and all the attending circumstances may be proved, not for the purpose of contradicting the contract, but of throwing light on the question of whether there was fraud, and whether or not a deficiency in quantity sold by the tract, even where described as so many acres more or less, is so gross as to justify the suspicion of willful deception or mistake amounting to fraud. In *Noble v. Googins*, 99 Mass. 231, it was said (page 234): "The American courts have shown more unwillingness than the English to encourage litigation about the amount of the price by reason of a variation in the quantity of land agreed to be conveyed, without clear evidence that the quantity was made an essential element of the bargain." In that case the land was described by boundaries, and one line was recited as "measuring about two hundred and twenty feet on C. street, more or less." In fact it measured only 170 feet, and the lot was proportionately less valuable. It was held that, in the absence of fraud, the purchaser was not entitled to an abatement of the stipulated price.

In *Gauldin v. Shehee*, 20 Ga. 531 (4), it was said: "The fraudulent misrepresentation of the vendor, as to the quantity of his river bottom land, which constituted a material inducement to the trade, and which the vendee was prevented by high water from examining, will entitle the purchaser to relief." It is true that the quality as well as the quantity of the unseen land was here involved, but the ruling evidently contemplated, not merely misrepresentation, but fraudulent misrepresentation or actual fraud. The present case is not one of an executory contract; but the sale has been executed, the

deed has been made, the purchaser placed in possession, and the suit has been brought some 2½ years after the date of the deed. It does not purport to be based upon any mutual mistake, nor does it seek to obtain rescission or reformation of a deed. The effort is to retain possession of the property and to recover for the alleged deficiency, on the ground that the representation of the vendor was false. It may be analogized to an action for deceit, in which there must be a willful misrepresentation of a material fact, or knowledge of a falsehood stated, or a fraudulent or reckless representation of a fact as true, though not known to be false, yet intended to deceive. *Smith v. Dudley*, 69 Ga. 78 (3).

As to the particular point now under consideration, the description by metes and bounds, with the addition of the recital of the number of acres, is often discussed by text writers and judges, together with the employment of such words as "more or less," or similar expressions. Thus in 2 *Warvelle on Vendors*, § 832, it is said: "The difficulty arises in determining whether the sale was intended to be in gross or by the acre. If the former, the authorities are unanimous in declaring that the mention of quantity of acres after another and certain description, whether by metes and bounds or other known specifications, is not a covenant or agreement as to the quantity to be conveyed, particularly if qualified by the terms 'more or less,' or 'containing by estimation,' or similar expressions. In such case the statement of acreage is regarded as mere matter of description, and not of the contract; the purchaser, as a general rule, taking the risk of the quantity, provided there be no intermixture of fraud." See, also, 4 *Kent's Com.* *467, *supra*, and other authorities above cited. This seems to treat the difference rather as one of degree than of kind. Where the words "more or less" are used, as stated in *Estes v. Odom*, *supra*, the deficiency must be so great as that a mere comparison of the quantity stated in the description and the actual quantity will suffice to suggest fraud. Where these words are not used, this is not so. But the existence of actual fraud or gross mistake amounting to fraud, in order to obtain an apportionment, appears to have been treated as necessary in either case. In *Finney v. Morris*, 116 Ga. 758, 42 S. E. 1020, it was held that "where land is sold by the tract and described in the conveyance as so many acres, 'more or less,' a deficiency in the number of acres actually conveyed to the purchaser will not authorize an apportionment in the price agreed to be paid, if the purchaser admits that there was no intentional fraud upon the part of the vendor." In *Wylly v. Gazan*, 69 Ga. 506, 516, the principle of section 3542 of the Civil Code of 1895 was applied to a sale of a city lot, and it was said: "If the sale is by the entire tract or lot, and the quantity is specified as

'more or less,' this qualification will cover any deficiency not so gross as to justify the suspicion of willful deception, or mistake amounting to fraud." Code, § 2642. This court, in the case of *Walton v. Ramsey*, 50 Ga. 618, considered this section of the Code in connection with former decisions, and came to the conclusion that if there is actual fraud and deception on the part of the vendor of the land, or the deficiency is so gross as to be evidence of it, then the deficiency may be apportioned, but not otherwise. They considered in that case how far this rule had been modified by the element of legal fraud introduced into the Code, and concluded that it was not affected by it. The case settles another important principle, that where the parties have equal opportunities of judging they must avail themselves of those opportunities, or they are precluded from setting up a claim to relief." If the same general rule in regard to the necessity for fraud applies to a conveyance by the tract, although in addition to giving metes and bounds there is a statement of quantity, as matter of description, not of covenant, it must follow that the fraud in such case must also be of the same character, and that the representations must have been of a material fact and made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party. In *Adams' Eq.* (8th Ed.) *177, *178, it is said: "The requirement that the representation shall be not only false, but false within the knowledge of the party making it, distinguishes a fraudulent representation inducing to a contract from an erroneous affirmation embodied in it by way of warranty or covenant. Affirmations of this latter kind bind the party making them, although he were himself honestly mistaken, because he explicitly agreed that they should do so; but, if a warranty or covenant is not given, a mere representation, honestly made and believed at the time to be true by the party making it, though not true in fact, does not amount to fraud." *Spence v. Duren*, 3 Ala. 251; *Ormrod v. Huth*, 14 Mee. & W. 651.

If this was the law before the Code, and if the Code made no change as to the character of fraud required under this section (as has been held), it follows that actual fraud must be shown to authorize an apportionment, however it may be as to rescission. But for previous rulings it might be argued with force that the Code did make a change. In the case of *Leyden v. Hickman*, 75 Ga. 684, the representations were charged to be false and fraudulent, and the employment of artifice to prevent examination was alleged. In *Seymore v. Rice*, 94 Ga. 183, 21 S. E. 293, there were allegations of actual fraud, and the question was as to what evidence was sufficient to make out a *prima facie* case. In the opinion Mr. Justice Lumpkin said: "The deficiency of 51 acres in a tract of this size was quite considerable, and it

was the province of the jury, and not of the court, to say whether or not Rice was guilty of actual and willful deceit in making the sale." In *Seegar v. Smith*, 78 Ga. 616, 3 S. E. 613, the ruling was on the subject of evidence, not the pleadings; and it was merely held that the verdict was contrary to the evidence. In *Estes v. Odom*, 91 Ga. 607, 18 S. E. 337 (a case where the words "more or less" were used), Chief Justice Bleckley said: "The same facts which justify the suspicion may prove the fraud, *prima facie*." The difference between a necessary allegation in a declaration and the evidence which may be sufficient to sustain such allegation is clear. In this declaration it is not alleged whether the defendants made misrepresentations willfully to deceive, or recklessly without knowledge; nor (except by implication) whether the plaintiff was ignorant of the facts; nor what opportunity she had for knowing them. These allegations are attacked by special demurrer. If land is sold by the acre, generally an apportionment for a deficiency is to be made proportionally to the number of acres in the deficiency. *Yost v. Mallicote's Adm'r*, 77 Va. 610. But there are exceptional cases where it is otherwise.

It is further contended that there are no allegations to show that the defendants prevented the plaintiff from examining the land lines and having a survey made. In *Estes v. Odom*, 91 Ga. 604, 18 S. E. 356 (4), it is held: "Previous knowledge of the land or its boundaries would not preclude the vendee from recovering for fraudulent misrepresentations of quantity, if without fault on his part he was actually deceived and defrauded by the misrepresentation, provided the deficiency was more than could be fairly covered in the given instance by the phrase 'more or less.'"

As the declaration was amended, the other grounds of the special demurrer were without merit. A reversal must result because of the overruling of the grounds of demurrer dealt with above.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

GREEN v. FREEMAN.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. FRAUDS, STATUTE OF — ADMINISTRATOR'S SALE.

No note or memorandum in writing is necessary to charge either the administrator or purchaser at any administrator's sale.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 134.]

2. INJUNCTION — INTERLOCUTORY HEARING — PROCEDURE.

Where, upon an interlocutory hearing of an equitable petition for injunction, the judge, after hearing argument of counsel, announces that he will grant the interlocutory restraining order, but that for the purpose of making certain rulings on evidence offered he will pass the case two days later, it is not error for him

to refuse to receive and consider other affidavits tendered by the defendant on the day set for announcing such rulings, no reason being shown for not submitting the rejected affidavits at the hearing.

3. SAME—EXCLUDING EVIDENCE.

The court below did not err in repelling the affidavit upon the exclusion of which error is assigned.

4. APPEAL — APPLICATION FOR INJUNCTION — DISCRETION OF COURT.

The granting or refusing of interlocutory injunctions where the evidence is conflicting is a matter of sound discretion intrusted to the judges of the superior courts, to be exercised by them according to the circumstances of each case; and such discretion will not be controlled by this court, unless manifestly abused.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 304.]

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by R. J. Freeman against J. H. Green. Judgment for plaintiff. Defendant brings error. Affirmed.

Green, Tilson & McKinney, for plaintiff in error. Etheridge, Boykin & Etheridge, for defendant in error.

BECK, J. Freeman sought to enjoin Green, an administrator, from selling certain described land belonging to the estate of the latter's intestate. It was alleged in the petition for injunction that the administrator had sold the property to plaintiff at a regular administrator's sale for the sum of \$3,625, plaintiff being the highest and best bidder; that the sale was acquiesced in by the administrator at the time and for several weeks subsequent thereto, but upon Green's discovering that petitioner could sell the land at a profit, he refused to make plaintiff a deed (although the money had been tendered him by plaintiff), and advertised the land for another sale. The defendant admitted in his answer that Freeman had bid the amount named for the land, but averred that he did so only as a "by-bidder" or "puffer" for the estate, and with no intention of purchasing the property; or if he had such intention, it was in furtherance of a fraudulent scheme, for he had promised the administrator to bid the property up to the sum of \$3,500, and there stop, in order to help the sale of the land; and it was known to other bidders present that Freeman was to act as a by-bidder, and that he was instructed not to go over the sum of \$3,500, but when he did exceed that amount the bona fide bidders became disgusted and refused to participate in the sale. When the bid of \$3,625 was made, defendant asked petitioner to whom must the property be "knocked down," whereupon petitioner replied, "To me, for the present." Defendant did not discover until some time after the sale that several bona fide bidders were prevented from further participating in the sale by the misconduct of the plaintiff, and "defendant charges that all the facts of this transaction,

at the time of said sale and subsequent thereto, show that said Freeman had no intention of making any bona fide bid at said sale, but that his intention was to find a purchaser for said property at a profit, and then seek to have the administrator convey him the property, and pay for the same out of the proceeds of said sale, and, if no purchaser could be found, to let the matter drop, and never call for a deed; that having found a purchaser, he then sought to carry out his scheme, and thus perpetrate a fraud upon said estate." Upon the trial of the case a great number of affidavits were introduced in support of the contentions of each party. The judge granted a temporary restraining order, and the defendant excepted. He also complained of the refusal of the judge to allow in evidence certain affidavits tendered to the court on January 1st under the following circumstances: "At the conclusion of the evidence at the hearing on the 30th of December, 1905, and after argument, the court announced that he would grant a temporary restraining order, but, for the purpose of making rulings on the evidence offered and the objections thereto, would pass the case until the 1st day of January, 1906, and (on January 1, 1906) * * * the defendant tendered in evidence the following affidavit, which was ruled out by the court on the ground that it came too late, as he had closed the case on the previous Saturday, except for the purpose of hearing objection to the evidence and of receiving one more affidavit from the defendant, which has already been set out in the foregoing evidence." Defendant also excepted to the court's excluding an affidavit of the widow of his intestate, to the effect that plaintiff had repeatedly threatened her with ruining the sale of the property contended for if she would not urge the administrator to make plaintiff a deed; "that said Freeman had stated that unless he did make the deed, he, Freeman, would get up at the next sale, if the administrator advertised the place for sale again, and state to the public that he, Freeman, had bought the place, and that if anybody else bought it they would buy a lawsuit." Defendant further excepted to the court's not sustaining his demurrer to the petition.

1. One of the points urged by the administrator in his argument before us was that, as the evidence adduced upon the hearing disclosed that there had been no memorandum in writing made of the purchaser and price at the time of the alleged sale to the plaintiff, the sale was within the statute of frauds, and therefore void. But we cannot give our assent to this proposition. An administrator's sale of lands belonging to the estate of his intestate cannot be properly termed a contract for the sale of lands, or any interest in or concerning them. The exposure of the property for sale is a mere ministerial act in compliance with an order

or judgment of a court of competent jurisdiction, and when, in obedience to such judgment, the land is "put up" for sale and "knocked off" to one bidding therefor, the purchaser is liable for the amount of the purchase money as soon as the hammer falls. "Any person who may become the purchaser of any real or personal estate at any sale which may be made at public outcry by any executor, administrator, or guardian, or by any sheriff or other officer under and by virtue of any execution or other legal process, and shall fail or refuse to comply with the terms of such sale when requested so to do, shall be liable for the amount of such purchase money, and it shall be at the option of such sheriff or other officer, either to proceed against such purchaser for the full amount of the purchase money, or to resell such real or personal estate and then proceed against the first purchaser for the deficiency arising from such sale." Civ. Code 1895, § 5486. No memorandum in writing is necessary to charge the purchaser under the provisions of this section. The offer, the bid, its acceptance, indicated by "knocking off" the property to the person bidding, makes a contract binding upon the purchaser. Can we ascribe to the lawmaking power the purpose of making a given state of facts binding upon one party to a sale and not upon the other when the former stands ready to perform all that is necessary to complete the purchase, to wit, the payment of the purchase money? This should not be done, especially in view of the fact that up to the moment the property is knocked off to the highest and best bidder, should the bids all be too low or the best interests of the estate be jeopardized, the administrator may withdraw the property, and those who have been bidding will not be heard to complain or to insist that inasmuch as the property had been put up at public outcry the sale should be completed. In the case of *Bean v. Kirkpatrick*, 105 Ga. 476, 80 S. E. 426, it was decided that "it is the right and duty of an administrator who is conducting a public sale of property belonging to the estate of his intestate to withdraw the same from sale when it is manifest that the property is about to be sacrificed at a grossly inadequate price." And again, "when land appraised at \$2,000 was exposed to sale by an administrator and the highest bid therefor was only \$151, this court will not interfere with the discretion of the trial judge in refusing to enjoin the administrator from again advertising and offering the property for sale, it appearing from the record that at the interlocutory hearing the evidence was decidedly conflicting upon the question whether the property had been actually knocked off to the person making such bid, or had been withdrawn from sale." While the question was not decided in that case, still it is very strongly intimated that if the evidence had shown conclusively that the

property had been knocked off, the trial judge should have enjoined the administrator from again advertising and offering the property for sale. See, also, the case of Tillman v. Duman, 114 Ga. 406, 40 S. E. 244, where a similar intimation is found in these words: "It is the right of an executor offering land for sale at public outcry to withdraw the same at any time before the hammer falls." In the case of Mallard v. Curran, 123 Ga. 872, 51 S. E. 712, while the precise question raised in the case at bar was not made, we can infer from the record that no memorandum was made, and it was there held that the administrator was bound at the moment in which the property was knocked off; it was also broadly held that the contract of purchase and sale was completed upon the fall of the hammer, and that either party might then enforce performance by the other.

We have not thought it necessary to discuss the question as to whether an administrator's sale might be held to be a judicial sale, and a memorandum in writing dispensed with under the Civil Code 1895, § 5448; but we may remark that in this state the term "judicial sale" is used to denote more than what is known in the text-books as such. Seymour v. National B. & L. Ass'n, 116 Ga. 285, 42 S. E. 518. And it has been held that a sale by an administrator or executor under an order by the court of ordinary is in the nature of a judicial sale. Harwell v. Foster, 102 Ga. 38, 29 S. E. 174. See, also, 18 Cyc. 820. But whether an administrator's sale can be classed with judicial sales or not, we hold, for the reasons stated, that no note or memorandum in writing is necessary to charge either the administrator or the purchaser at any administrator's sale.

2-4 The second, third, and fourth head-notes rule the other questions raised in the case.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SEABOARD AIR LINE RY. v. RANDOLPH.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. PARTIES—STRIKING OUT—AMENDMENT OF PETITION.

Where a petition in an action of tort is brought against two defendants, and no service is perfected upon one of them, it may be amended by striking therefrom the one not served; and if this is done, without otherwise altering the language of the petition, all the substantial allegations of the petition will thereafter be read and understood as if there had been only one defendant originally.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Parties, §§ 100-107.]

2. COSTS—PREVIOUS ACTIONS—FAILURE TO PAY—AFFIDAVIT.

The affidavit filed by the plaintiff with her petition in the present case was sufficient to relieve her of the necessity of paying the costs which had accrued against her in the two pre-

vious suits, which she had brought upon the same cause of action and against the same defendants, and which had been dismissed.

So far as her right to bring the present action is concerned, the question whether she, at the time she brought the second suit had paid the costs which had accrued in the first, or made the prescribed affidavit in lieu thereof, is immaterial.

3. RAILROADS—INJURY TO PERSON ON TRACK—PETITION.

The petition set forth a cause of action against the defendant railway company upon which service was perfected in the case.

4. LIMITATION OF ACTIONS—DISMISSAL OF ACTION—APPEAL.

Where a suit is dismissed by the trial court, and a valid writ of error is sued out for the purpose of procuring a reversal of the judgment of dismissal, the statutory period of six months within which a suit which has been dismissed may be renewed, so as to prevent the cause of action from being barred by the statute of limitations, does not run while such writ of error is pending.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Limitation of Actions, §§ 554, 557, 565.]

5. PARTIES—MISJOINDER.

After the petition was amended by striking therefrom one of the defendants named therein, the ground of the demurrer which alleged a misjoinder of parties defendant presented no question for consideration.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Parties, §§ 100-107, 178.]

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by H. B. Randolph against the Seaboard Air Line Railway. Judgment for plaintiff, defendant brings error. Affirmed.

On January 27, 1905, Mrs. H. B. Randolph filed a petition against the Seaboard Air Line Railway and the Brunswick & Birmingham Railroad Company, in which she sought to recover from the defendants damages for the homicide of her husband, which was alleged to have occurred on February 3, 1902, and to have been caused by the negligence of the defendants. The petition alleged that the plaintiff had previously brought suit against the defendants, which suit was nonsuited by the court, and that the judgment of nonsuit was affirmed by the Supreme Court on August 12, 1904; that the plaintiff subsequently filed a second suit against the defendants, which was dismissed by her; and that with the petition in the present case she filed the affidavit required by law. Attached to the petition was an affidavit by the plaintiff, setting forth her inability to pay the costs which had accrued in the two previous cases. The Seaboard Air Line Railway was duly served, but there was no service upon the Brunswick & Birmingham Railroad Company, nor any return as to that defendant by any officer authorized to make service. The allegations of the petition with reference to the cause of action are sufficiently indicated in the opinion. At the appearance term the Seaboard Air Line Railway filed a demurrer, which was, by order of the court, set down to be heard

and determined by the judge at chambers, on a named date. When the case came on to be heard upon the demurrer, the Seaboard Air Line Railway made a motion to dismiss the case for want of jurisdiction in the court to hear and determine the same, which motion was overruled. Pending the hearing upon the demurrer, the plaintiff, by leave of the court, amended her petition by striking therefrom the Brunswick & Birmingham Railroad Company as a party defendant. The court overruled the demurrer, and the Seaboard Air Line Railway excepted.

Crovatt & Whitfield, for plaintiff in error.
Burton Smith and Krauss & Shepard, for defendant in error.

COBB, P. J. 1. One ground of the motion to dismiss was because the return term of the court for the case had adjourned without any service having been perfected upon the Brunswick & Birmingham Railroad Company, or any return by any officer authorized to make service to account for the want of such service. After the court had overruled the motion, the plaintiff amended her petition by striking therefrom the Brunswick & Birmingham Railroad Company, as a party defendant. She had a perfect right to do this after the court had overruled the motion to dismiss the case upon the ground above indicated. She could amend her petition at any stage of the cause. This court has held that, even after the Supreme Court has decided that the trial court erred in overruling a demurrer to a petition, the force of the demurrer may be avoided by a proper amendment to the petition, before the remittitur from the Supreme Court is entered upon the minutes of the trial court. *Thurmond v. Clark*, 47 Ga. 501; *Augusta Railway Co. v. Andrews*, 92 Ga. 706, 19 S. E. 713; *Savannah Railway Co. v. Chaney*, 102 Ga. 814, 30 S. E. 437; *Charleston Railway Co. v. Miller*, 115 Ga. 92, 41 S. E. 252. It was held in *Stanford v. Bradford*, 45 Ga. 97, that: "In a joint suit against several, if one be not served, the plaintiff may dismiss as to the one not served; and, if he go to the jury and get a verdict, the verdict is good against those served, though there be a failure to dismiss against the defendant not served. The defect is a mere irregularity, and does not make the judgment void." So, where a petition in an action of tort is brought against two defendants, and no service is perfected upon one of them, it may be amended by striking therefrom the one not served; and, if this is done, without otherwise altering the language of the petition, all the substantial allegations of the petition will thereafter be read and understood as if there had been only one defendant originally. *Chattanooga Railroad Co. v. Whitehead*, 89 Ga. 190, 15 S. E. 44; *Chattanooga Railroad Co. v. Davis*, 89 Ga. 708, 15 S. E. 626.

2. Another ground of the motion to dis-

miss was because it did not appear from the petition that the costs which had accrued in the previous cases of which this case was the renewal had been paid, or that the affidavit required by law, in lieu of the payment of costs, had been filed. At the time of filing the suit now under consideration, the plaintiff filed the following affidavit: "That she had been advised and believes that she has good cause for recommencing her suit against the Seaboard Air Line Railway and the Brunswick & Birmingham Railroad Company, and that owing to her poverty she is unable to pay the costs which have accrued in said case. Petitioner has heretofore filed two suits in this case, and this affidavit applies to each of them." The contention of the plaintiff in error is "that, upon the bringing of the second suit, the plaintiff must either have paid the costs of the first case or filed the affidavit in lieu thereof at that time; and that the filing of an affidavit at the time of bringing the third suit, in lieu of the payment of costs, does not and cannot dispense with the necessity of paying the costs or filing the affidavit at the time of bringing the second suit; and that the affidavit filed with the third suit can apply only to that particular case, and not to the previous first and second dismissed cases." It matters not whether the plaintiff, before or at the time of bringing the second suit, paid the costs which had accrued in the first one, or in lieu thereof made the necessary pauper affidavit. If she did not, then, for that reason, the second suit was subject to dismissal, and it was dismissed by the plaintiff herself. Her failure to comply with the statute in question before bringing the second suit cannot affect the validity of the third suit, if when it was brought she had complied with the statute upon the subject of the payment of costs. The question with which we are concerned here is whether the statute invoked by the movant, in support of the motion to dismiss the petition, was complied with when the present action was brought. If it was, it makes no difference how many suits, upon this same cause of action, the plaintiff may have instituted after the dismissal of the first, without paying the costs in that case, or making the requisite pauper affidavit in lieu thereof. If she failed to comply with the statute in question before filing her second suit, she voluntarily paid the penalty for her failure so to do by dismissing that action. The affidavit which was filed by the plaintiff with the petition in the present case was sufficient to relieve her of the necessity of paying the costs incurred in the two previous cases before instituting this one. She swore that she had previously filed two other suits in this case; that, from her poverty, she was unable to pay the costs which had accrued in the case; and that this affidavit applied to each of the two previous cases brought by her.

3. There was no merit in the general de-

murrer. Counsel for plaintiff in error, in their brief, contend that the petition set forth no cause of action, because it alleged that the engine which killed the plaintiff's husband was operated by the Seaboard Air Line Railway, and was at the time upon the track of the Brunswick & Birmingham Railroad Company. In support of this contention, the cases of Railroad Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678, Chattanooga Railroad Co. v. Liddell, 85 Ga. 482, 11 S. E. 853, 21 Am. St. Rep. 169, and Central Railroad Co. v. Phinizee, 93 Ga. 488, 21 S. E. 66, are cited. The first-mentioned decision holds: "Where a railroad company permits other companies or persons to exercise the franchise of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars." The other cases cited are to the same effect. But this by no means relieves the active perpetrator of the injury of responsibility therefor to the person injured. If the plaintiff's husband was killed by the negligence of the Seaboard Air Line Railway, it would be responsible in damages for his homicide, whether it killed him upon its own track or upon the track of some other railroad company; and the fact that she might, under the circumstances of the case, hold the other railroad company responsible for the damages inflicted, if she chose to do so, can make no difference.

Counsel for plaintiff in error further contend that the petition set forth no cause of action, because it shows that the deceased went upon the track, in front of an approaching engine, "and nowhere shows that he made any effort to ascertain if the track was clear, nor any effort whatever to avoid the danger and its result, and by all the allegations of said petition it appeared that the deceased, as a rational man, could have, by the exercise of the slightest care, avoided the killing." They further contend that "the company had the right to assume that he would not voluntarily place himself in danger, and to rely upon that presumption until the contrary appeared, and was then, and not until then, bound to make any effort to avoid the killing." The petition made the following allegations: Plaintiff's husband "was killed by the running of the locomotive, cars, and other machinery of the defendants," by being struck by their engine as he was crossing one of their tracks. At the time he was killed, he was crossing the tracks of the defendants on a private way, and "at a place where he had a right to be, and where the public had a right to be." "Defendants were charged with knowledge of the fact that some one might, and probably would, be upon said track at any time." The deceased "was killed by the negligence of defendants and could not have avoided the result of defendants' negligence by the use of ordinary

care." The "defendants were running the engine negligently and without proper care." "After defendants became aware of the presence of the deceased upon the track, they negligently failed to stop their engine and negligently ran over and killed him." He "was seen from the engine of defendants by representatives of defendants as he approached the track. He was approaching the track in a slanting direction with his side and back towards the engine, a great distance in front of the engine. He was approaching the track so that he could not see the engine, and did not know of its approach. Defendants saw him about to step upon the track, and saw that he did not see the approaching engine, and knew of his danger, and yet made no effort to stop until they were right on him. Deceased was killed near a public crossing, and the defendants failed to check, and to continue to check, and failed to blow and continue to blow on approaching said crossing, all of which were acts of negligence on the part of defendants bearing upon and conducing to the death of deceased. Upon the engine of defendants there were two other persons besides the engineer and fireman, distracting the attention of the fireman and engineer from the proper exercise of their duties," and "that this condition existed and constituted negligence on the part of the defendants." There were allegations as to the age of the deceased at the time of his death, his earning capacity, etc. These allegations sufficiently set forth a cause of action, as against a general demurrer. Crawford v. Southern Railway Co., 106 Ga. 870, 33 S. E. 826; Ashworth v. Southern Railway Co., 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592; Bullard v. Southern Railway Co., 116 Ga. 644, 43 S. E. 39.

4. Another ground of the demurrer was that the petition showed that the cause of action was barred by the statute of limitations. From the allegation of the petition as to the date when the plaintiff's husband was killed, the cause of action accrued on February 8, 1902. The petition does not disclose the date of the filing of the first suit by the plaintiff, and it could not be assumed, upon demurrer, that it was not filed in due time under the statute of limitations. We will say, however, that the petition clearly indicates that the first suit was brought before the cause of action could have been barred by the statute of limitations. The petition alleged that a nonsuit was granted by the superior court of Glynn county in that case, and that the judgment of nonsuit was affirmed by the Supreme Court on the 12th of August, 1904. In other words, the suit had been brought in the superior court, had reached the trial term in that court, been nonsuited, and then brought to the Supreme Court, to a term thereof not later than the March term, 1904, where the judgment of the trial court was affirmed on August 12, 1904. It is obvious that that suit could not

have been brought on or after February 3, 1904, and therefore, must have been brought within two years after the cause of action declared on accrued. Counsel for plaintiff in error do not contend that the petition in the present case shows that the original suit was not brought in time, but they contend that the period of six months after the judgment of nonsuit in that case, within which the suit could be renewed, so as to avoid the bar of the statute of limitations, began to run against the plaintiff from the date of the judgment of the superior court, and not from the date of the affirmance of that judgment by the Supreme Court. In support of this contention, counsel cite *Allen v. Savannah*, 9 Ga. 286, and *Gilmore v. Georgia Railroad Co.*, 93 Ga. 482, 21 S. E. 50. It is true, as shown in those cases, that, when the judgment of a trial court is affirmed by the Supreme Court, it takes effect, for most purposes, from the date when it was rendered in the lower court. But this is not true when the question involved is whether the suit in which the judgment was rendered was, relatively to the statute of limitations, finally disposed of when the judgment of trial court excepted to was rendered, or when that judgment was affirmed by the Supreme Court. The running of the statute is suspended during the pendency of a valid writ of error. The question now under consideration is controlled by the principle which was applied in *Roach v. Sulter*, 54 Ga. 458, wherein a bill of exceptions filed to a judgment of the city court of Savannah, on the ground that the verdict was contrary to the evidence, had been dismissed by the Supreme Court, and the party complaining had, within three months of such dismissal, sued out a certiorari to the superior court. It was held that such certiorari was sued out within the time allowed by the statute for such purpose. Judge McCay, who delivered the opinion, said that, until the dismissal in the Supreme Court "was had, the case was not finally disposed of by the city court. Its judgment was suspended, superseded by the writ of error," and "the party had his three months from the dismissal to apply for his new proceeding." Under that decision, it is clear that the contention here that the six months within which the plaintiff could renew her suit after the judgment of nonsuit, dismissing it, must be calculated from the date when such judgment was rendered in the trial court, and not from the date when it was affirmed by this court, is not sound. The principle ruled in *Roach v. Sulter* was fully recognized by this court when it affirmed the judgment of nonsuit rendered in the first suit brought by Mrs. Randolph against the plaintiff in error and the Brunswick & Birmingham Railroad Company. Upon the call of that case in this court a motion was made to dismiss the writ of error, upon the ground that after it had been sued out the plaintiff had filed another suit for identically the

same cause of action, as shown by the certificate of the clerk of the trial court. It was held that, as the plaintiff had "continued and preserved the original action by filing a bill of exceptions," the pendency of the first suit "may have been a good ground for abating the second, but the pendency of the second [could] not be used to abate the first," and therefore the motion to dismiss the writ of error was overruled. *Randolph v. Brunswick & Birmingham Railroad Co.*, 120 Ga. 969, 971, 48 S. E. 898.

5. Another ground of the demurrer was that there was a misjoinder of parties defendant. Whether this was true or not as to the original petition, it was not true after it was amended by striking therefrom the Brunswick & Birmingham Railroad Company, leaving the case to proceed only against the Seaboard Air Line Railway, the plaintiff in error here. So the merits of this ground of the demurrer are not before us for consideration.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent, and ATKINSON, J., disqualified.

HENDERSON ELEVATOR CO. v. NORTH GEORGIA MILLING CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. SALE—WARRANTY.

In a contract for the sale of goods, words descriptive of the subject-matter of sale and the time of shipment are ordinarily to be regarded as a warranty.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 740-748.]

2. SAME—ENTIRE CONTRACT.

Whether a contract be entire or severable depends on the intention of the contracting parties. A contract for the sale of 20,000 bushels No. 2 white corn, bulk, at 59¼ cents per bushel, 10,000 bushels to be shipped in February, and 10,000 bushels in March, is to be construed as an entire contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 171-179.]

3. SAME—RESCISSION OF CONTRACT.

Where there was a contract of sale of corn and a portion was delivered, paid for, and used by the purchaser, he cannot rescind the contract upon the ground that the quantity received and accepted by him was inferior in quality to that stipulated in the contract.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 293, 299.]

4. SAME—ACTION FOR BREACH—RECOUPMENT BY VENDEE.

But, if the vendor delivered corn inferior in quality and in less quantities than stipulated in the contract of sale, the vendee, though unable to rescind the contract because of his inability to make restitution of the portion used by him, may, in defense to an action by the vendor to recover damages for a breach of the contract, recoup damages approximately flowing from the vendor's failure to deliver corn in the quantity and of the quality contracted for, provided there has been no waiver by the vendee touching the time of delivery or with respect to the quality of the corn tendered and accepted.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 977-981.]

5. SAME—ACCEPTANCE.

If the vendee accepted delivery of inferior corn, and, with knowledge of its inferiority, caused it to be ground into meal, the vendor will not be answerable in damages for the losses accruing from milling the corn. Nor can the vendee complain, after acceptance of the corn with knowledge of its defective condition, that it was inferior to the contractual quality.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 818-822.]

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by the Henderson Elevator Company against the North Georgia Milling Company. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff corporation sued the defendants for a breach of contract. It alleged in its petition, that on January 28, 1903, it entered into a contract with defendants for the sale of 20,000 bushels of No. 2 white corn, bulk, at 59½ cents per bushel, 10,000 bushels to be delivered in February, 1903, and 10,000 bushels to be delivered in March, 1903; that plaintiffs and defendants, on February 20, 1903, entered into a contract of sale for 20,000 additional bushels of No. 2 white corn, bulk, at 60 cents per bushel, 10,000 bushels of which was to be delivered in March, 1903, and 10,000 bushels in April, 1903; that in compliance with its contract, plaintiff delivered to defendants 12,096 bushels of corn of the grade contracted for, which defendants accepted and paid for at the contract price; that after delivery and acceptance of the 12,096 bushels, defendants, without sufficient cause, refused to accept further shipments of corn under the contract; and that plaintiff sold the corn which defendants refused to accept, after notice to them, at a sum less than the contract price. The suit was to recover the loss thus sustained. The defendants in their answer denied liability, and put the plaintiff on proof of its case, also setting up the following special pleas: (1) When they made the contract sued on, they depended thereon to supply their mill with corn, and of this fact apprised the plaintiff; that, relying on the contract, they bought little or no corn elsewhere with which to run their mill, and although the plaintiff company had full notice that this was true, it, nevertheless, failed to comply with its contract and ship the corn as agreed on; that defendants were in consequence compelled to shut down their corn mill a great part of the time, one-fourth of the month of February and two-thirds of the month of March, and that they thereby sustained damages to the amount of \$600. (2) The corn delivered was of an inferior quality, and this was defendant's reason for refusing to take the balance. According to the classification of grain adopted by the dealers of Henderson, Ky., the home of plaintiff, No. 2 white corn must comply with these specifications: "Sound,

dry, and reasonably clean; may contain a limited quantity of colored grains, not to exceed 10 per cent." The contracts made with the plaintiff were based upon this classification. Nevertheless nine cars of corn shipped to defendants did not come up to contract, the corn not being sound and dry, but being wet, soggy, greasy, and unfit for milling; the "defendants repeatedly called the attention of plaintiff to these facts while the corn was being received, but the plaintiff failed and refused to send better corn. Defendants endeavored to save plaintiff from loss of this corn by milling and shipping same as carefully and quickly as possible, but notwithstanding this fact a large part thereof, to wit, one-half, totally spoiled as milling corn and was greatly damaged and inferior." (3) Of the corn shipped under the contract, two cars were good; "two cars were ground by defendants, and the meal spoiled and soured before it could be shipped from the warehouse," the meal being then mixed with bran and sold by defendants for cattle feed; two of the "cars soured before they could be ground, and were sold by defendants for cattle feed, being entirely unfit for milling," and the "remaining five cars defendants ground and shipped as meal to the agents and customers of defendants. This meal all spoiled in shipment, and defendants were compelled to make large rebates to the buyers thereof. And owing to the defective quality of the corn so used and not used, defendants suffered large damage," to wit, \$2,600. The plaintiff demurred to paragraphs 8 and 9 of the answer (in which the defective condition of the corn was set up as a defense), on the grounds that no latent defects in the corn at the time of the acceptance were alleged, that the damages claimed were too remote, and that the alleged losses resulted from defendants' own acts, with which the plaintiff was not chargeable. The court overruled the demurrer, and the plaintiff excepted pendente lite. The trial resulted in a verdict for the defendants on their plea of recoupment. A motion for a new trial was made, which being overruled, the plaintiff excepted, and assigned error on the overruling of its demurrer and the refusal to grant a new trial.

F. K. McCutchen and C. D. McCutchen, for plaintiff in error. R. J. & J. A. McCarty, for defendant in error.

EVANS, J. (after stating the facts). The motion for a new trial complained that many excerpts from the charge were erroneous, and that the court erred in refusing several written requests to charge, and in certain rulings on the admissibility of testimony. We shall not undertake to specifically deal with each of the numerous assignments of error, but will endeavor to discuss the legal principles which must control the case on the next trial under the pleadings as they

shall stand after striking paragraphs 8 and 9 of the answer.

1. In a contract for the sale of goods, words descriptive of the subject-matter of sale and the time of shipment are ordinarily to be regarded as a warranty. The plaintiff agreed to sell and the defendants agreed to buy "20,000 bushels of number 2 white corn, bulk." "These words comprehend quality, as well as variety, and import a warranty on the part of the seller as to both." *Miller v. Moore*, 83 Ga. 692, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329; *Americus Grocery Co. v. Brackett*, 119 Ga. 489, 46 S. E. 657. The contract of sale bound the seller to deliver the corn in stipulated quantities during certain months. It is to be presumed, as this is a mercantile contract, that the stipulations respecting delivery were not idle words, but were intended as a covenant binding the seller to make delivery to the purchaser in the quantity and within the time stipulated. Time was an important element, if not of the essence of the contract. Such a material incident of the sale should be construed as a warranty in that respect. *Norrington v. Wright*, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

2. The contract of sale was for a stated quantity of bulk corn, with provision for delivery of specific quantities within specific periods. The thing sold was one aggregate bulk, not several bulks of the quantity specified for each delivery. This is an important fact in determining the intention of the parties as expressed in their contract, when we come to construe the contract as being entire or severable. The criterion is whether the sale of the whole quantity, as a whole, is of the essence of the contract. If it appears that the contract was to take the whole or none, then it is entire. *Broxton v. Nelson*, 103 Ga. 330, 30 S. E. 38, 68 Am. St. Rep. 97. It would seem to be beyond cavil that the parties intended that the contract of sale should operate on the full amount of the corn therein stipulated. The seller could not have intended to sell nor the buyer to purchase a less quantity. We therefore hold that the contract was an entire one.

3. It was alleged in the pleadings and proved on the trial that the purchaser had accepted, paid for, and used a portion of the corn. The purchaser was thus not able to make restitution, so as to repudiate the contract. *Lyon v. Bertram*, 20 How. (U. S.) 149, 15 L. Ed. 847. A party may rescind without the consent of the opposite party only when both parties can be restored to the condition in which they were before the contract was made. *Civ. Code 1895, § 3712*. See, in this connection, *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379. The defendants admitted that they had refused to accept further shipments of corn under their contract with the plaintiff, but did not plead a rescission. It was

their contention on the trial that the corn which was accepted by them was of inferior grade, and because of this fact, and the failure of plaintiff to deliver within the stipulated period, they refused to accept the balance of the corn. If a vendee has accepted a portion of a quantity of goods contracted for, and they prove inferior to those stipulated for, he cannot for this reason refuse to accept the residue, but if the residue prove inferior, he may refuse to accept them. *Cahen v. Platt*, 69 N. Y. 848, 25 Am. Rep. 203. The defendants had contracted for corn to be delivered during the months of February, March, and April. On March 23d they undertook to countermand their orders for corn, but made no offer to restore such corn as had previously been received. If corn not coming up to warranty was shipped, it could be summarily rejected; if not shipped within the time contracted for, the defendants could, if able to make restitution, elect to rescind the contract, or, without returning any of the corn received, hold the plaintiff liable for all proximate damages flowing from the delay. Corn under both of the contracts had been accepted, and until the time limited within which delivery could be made had expired, the plaintiff could call upon the defendants to accept additional shipments of corn coming up to warranty. By wrongfully refusing to further carry out the contracts, the defendants subjected themselves to a suit for damages for the breach. "If a purchaser refuses to take and pay for goods bought, the seller may retain them and recover the difference between the contract price and the market price at the time and place for delivery; or, he may sell the property, acting for this purpose as agent for the vendee, and recover the difference between the contract price and the price on resale; or, he may store or retain the property for the vendee and sue him for the entire price." *Civ. Code 1895, § 3551*. The plaintiff elected to resell at the risk of the defendants, after giving notice to them of such intention, and if the corn was in good faith resold for the highest price that could be received for it, the plaintiff was entitled to recover the difference between the amount realized and the contract price.

4. By special plea the defendants asked that they be allowed to recoup damages sustained by them by reason of the delay of the plaintiff in making shipments of corn, which delay required them to shut down their mill for a large portion of the time during the months of February and March. If, as averred by the defendants, it was within the contemplation of the contracting parties that the corn was to be used for milling purposes at their mill in Dalton, and the delay in shipment forced them to shut down their mill, the damages sustained would be proximately caused by the plaintiff's breach of covenant to supply the corn necessary to

keep the mill in operation. On the other hand, if the plaintiff's contention be in accord with the truth, the defendants were not entitled to recover for any losses thus sustained, because they expressly waived a strict compliance with the covenant as to time of shipment and induced and brought about the delay, first by directing the corn to be routed over a certain line of railway which could not furnish a sufficient number of cars, and subsequently requesting plaintiff not to ship over a limited quantity of corn per week. A warranty of quality does not usually extend to patent defects, unless intended by the parties. Civ. Code 1895, § 3560; 30 Am. & Eng. Enc. Law (2d Ed.) 160. A vendee who has exacted of the seller a warranty as to quality and knowingly accepts goods deficient in the quality warranted, will be denied to subsequently assert their defective quality. His duty is to reject the article, and his acceptance with knowledge of the defect amounts to a waiver of the warranty as to such defect. *Miller v. Moore*, supra. There is no duty resting upon the purchaser who has bought goods under an express warranty to inspect the article purchased or exercise care in discovering any defects. He may rely on the contractual obligation of the seller that he will deliver goods of the quality warranted. *Haltiwanger v. Tanner*, 103 Ga. 314, 29 S. E. 965; *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143. If subsequently to acceptance the buyer discovers that the goods do not come up to the warranty, he may rely on the warranty and plead partial failure of consideration. Civ. Code 1895, § 3557, provides: "After acceptance of goods purchased, the presumption is that they are of the quality ordered, and the burden is on the buyer to prove the contrary. Partial payment, with knowledge of the defective condition, will not estop the buyer from pleading partial failure of consideration." This section of the Code is but a codification of a principle announced in *Atkins v. Cobb*, 56 Ga. 86, which was a case of express warranty. In *Cook v. Finch*, 117 Ga. 541, 44 S. E. 95, it was held that this section of the Code was applicable only in cases of express warranty. Applying these principles to the case at bar, if the purchaser knew that the corn was not of the quality contracted for and accepted the same, such acceptance will be a waiver of the warranty. But if he accepted the goods without inspection, and they were of defective quality, he was entitled to an abatement in the purchase price for the breach of warranty, and the measure of damages would be the difference between the contract price and the actual value of the goods. *Grier v. Railroad Co.*, 120 Ga. 355, 47 S. E. 808. It was not insisted at the trial that there were any latent defects in the corn.

5 The case was tried upon a misconception of the law as regarded the right of the

defendants to claim damages on account of the defective condition of the corn shipped to them, as their answer discloses the fact that they knew its condition before accepting it, waived strict compliance with the warranty as to quality, and merely protested to the plaintiff that the corn was unfit for milling. If the defendants wished to insist upon the express warranty that the corn should be sound and dry, under these circumstances they should have refused to accept the nine cars which were loaded with corn which "was wet, soggy, greasy, and unfit for milling." Certainly they were not at liberty to grind such corn into meal, under a misdirected endeavor "to save plaintiff from loss," and then hold the plaintiff liable for the disastrous results of this misadventure. Indeed having accepted the shipments with knowledge that the corn was not sound and dry, the defendants are not in a position to set up a breach of the warranty as to quality. Both the eighth and ninth paragraphs of the defendants' answer should have been stricken; for the plaintiff's demurrer clearly pointed out that they sought to recover damages; not because of any latent defects in the corn, but because of a patent defect of which they had actual knowledge before accepting the shipments and making payment therefor.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

SPRINGER v. INDIANAPOLIS BREWING CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. SALE—WARRANTY OF QUALITY.

Where goods of a certain brand and quality were sold, and the buyer afterwards ordered another shipment of the same brand and quality, which order was accepted and the goods shipped thereon, the seller warranted the last shipment to be of equal quality with the first. *Haltiwanger v. Tanner*, 29 S. E. 965, 103 Ga. 314.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 769-771.]

2. SAME — ACTION FOR PRICE — DEFENSES — ABATEMENT OF PRICE.

If, after acceptance of the goods, the purchaser discovered that the quality was inferior to that warranted, he could plead partial failure of consideration to an action for the purchase price, and would be entitled to an abatement of the purchase price to the extent of the difference between the purchase price and the actual value of the goods.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 1234, 1235, 973-977.]

3. SAME—EXPRESS WARRANTY—EFFECT.

An express warranty excludes an implied warranty; and in a suit to recover the purchase price of goods sold under an express warranty, with a plea of partial failure of consideration, the issues presented are whether the goods delivered were of the quality warranted, and, if not, to what extent the purchase price is to be abated.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 760, 761, 1249-1252.]

4. SAME—WAIVER OF WARRANTY.

If there are defects in the goods delivered, and there is an express warranty, acceptance by the buyer with knowledge of such defects will amount to a waiver of the warranty. But, if the defects are not discovered until after acceptance, the buyer may plead such in abatement of the price.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 764, 817-822, 1214-1219.]

5. SAME—EVIDENCE.

The letters referred to in the motion for new trial were properly admitted in evidence.

(Syllabus by the Court.)

Error from City Court of Columbus; J. L. Willis, Judge.

Action by the Indianapolis Brewing Company against F. H. Springer. Judgment for plaintiff. Defendant brings error. Reversed.

The plaintiff instituted a suit declaring upon an open account, and exhibiting a bill of particulars. The defendant by plea denied the indebtedness, for reasons stated, and set up a contract under which the goods were bought, claiming that the purchase was made by sample exhibited by the agent of the vendor, and therefore that there was an express warranty that the quality of the goods should be equal to that of the sample; that as a matter of fact they were not, and, because of the deficiency in that respect, the goods were not worth the contract price, for which reason the amount of the plaintiff's recovery should be correspondingly reduced. On the trial, the plaintiff introduced evidence proving the sale and delivery at the price stated, and that the defendant had ordered from the plaintiff three car loads of beer of a given grade and quality, known as the "Progress brand;" that one car load was shipped May 10, 1902, and the second was shipped July 19, 1902, but the third, which was ordered in May, 1903, was not shipped because of a failure to pay for the second. There was no evidence relative to the exhibition of any sample by the agent of the vendor. The beer in controversy was shipped in response to an order as follows: "Columbus, Ga., July 17, 1902. Indianapolis Brewing Co., Indianapolis, Ind. Ship immediately car progress beer. Check en route to cover last car. Route car same as last. F. H. Springer." There was a letter acknowledging and accepting this order with the promise that the "car will go forward to-morrow." This is the whole contract relative to the subject-matter of this suit. The record discloses no other agreement with reference thereto. The car was shipped on July 19, 1902. The first shipment was saleable. The evidence is conflicting as to the second. On September 23d defendant wrote making complaint as to quality. Plaintiffs replied and asked for samples, which do not appear to have been furnished. After this complaint, promises of payment were made by letter, and also verbally to the agent of plaintiff, who called on defendant. After purchase of the second car, defendant entered a copartnership styled

"Reed-Moschell Company," who conducted the business, and some of the correspondence was in the name of that copartnership. The jury found for the plaintiff. The defendant moved for a new trial, which was denied, and he excepted. In addition to the general grounds, the following other grounds were taken in the motion.

(1, 2) The court admitted in evidence certain letters signed Reed-Moschell Company, which were objected to on the ground that said company was altogether a different party from defendant.

(3) The court admitted in evidence a letter signed by plaintiff addressed to F. H. Springer & Co., which was objected to on the ground that it was not written to defendant or any firm of which he was a member. The letter was in substance as follows: "We received your kind order through our Mr. Holtzclaw for 105 casks, to be shipped June 1st in our branded bottles. We will be ready to ship the same immediately upon your advice. Mr. Holtzclaw also states to us that he agreed to allow you ten casks as samples, and to cover the few casks you have on hand which formed a sediment. This is perfectly satisfactory to us as we desire to have you handle our goods again. We want to build up a large trade on the same. Mr. Holtzclaw also states to us that you will remit the balance of your account on the 20th, which is satisfactory."

(4) The court erred in charging the jury as follows: "Mr. Springer claims that he bought this beer upon the representation of the brewing company, and that it was not suitable for the uses for which he bought it; that is, for sale by him in his business as a wholesale and retail dealer in this town"—because "there was no such claim made by the defendant's plea in said case, the defendant's plea being partial failure of consideration, and the defendant claiming to have bought the beer upon a sample and upon the strength of purchases of the same goods theretofore made by him."

(5) The court erred in charging as follows: "I charge you that if the goods were bought generally and not upon an express warranty, the purchaser must exercise caution in detecting defects. There is a duty on the purchaser to discover any defect that may be ascertained by ordinary diligence; and if you find that the defendant by the exercise of ordinary diligence could have discovered defects in the beer, if there were any defects, before the beer was accepted, then I charge you that the defendant would be estopped from setting up such defects as a defense"—because the charge was "not applicable to the case under consideration, and because said charge was misleading and was not a correct rule of law controlling the issues made in said case, and because said charge was otherwise illegal."

(6) The court erred in charging as follows: "It is claimed that the defendant discovered

the defects when the first car of beer was opened, and notwithstanding these defects, accepted it, used it in his business, and after so discovering the defects promised in writing to pay for it"—because "no such claim was made by the pleadings and evidence in said case; and because said charge was not adjusted to the facts and issue in said case; and because it is otherwise illegal."

(7) The court erred in charging as follows: "I charge you that if you believe from the testimony that the defendant did discover the defects when the beer was first opened, yet he went ahead selling it, never offered to return it, and afterwards agreed in writing to pay for it, you should find a verdict for the plaintiff"—because "it is not the correct rule of law that should govern in the case then under consideration, and because said charge had the effect of entirely withdrawing from the consideration of the jury the defendant's plea of partial failure of consideration."

(8) The court erred in charging as follows: "Look and see if Mr. Springer, by the exercise of ordinary care, if there was any implied warranty, could have discovered any defects in the beer, if there were any defects in it. The law puts that duty upon him. If he could have found them out and didn't do it, if there were such defects that could be found out, he would be estopped from setting it up as a defense"—because "it is not a correct rule of law, because it had the effect of eliminating from the consideration of the jury the defendant's plea of failure of consideration, and because said charge is otherwise illegal."

(9) The court erred in charging as follows: "If he actually discovered defects, yet still accepted it and used it in his business and afterwards agreed to pay for it, then, as I stated to you before, you should find a verdict for the plaintiff"—because "it is not a correct rule of law that should govern and control the jury in arriving at a verdict in the case, and eliminated from the consideration of the jury all evidence respecting defendant's plea of partial failure of consideration, and because said charge is otherwise illegal."

(10) The court erred in charging as follows: "If he knew at the time he accepted these goods that they were defective, they were not suited for the purpose for which they were bought, yet he went ahead and used them, made no offer to return them, and agreed in writing to pay for them, then he could not set that up as a defense"—because "it did not state a correct principle of law, and had the effect of withdrawing from the consideration of the jury the defendant's plea of partial failure, and was equivalent to a direction of a verdict in favor of the plaintiff in the amount sued for, and because said charge was otherwise illegal."

T. T. Miller, for plaintiff in error. O. B. Battle, for defendant in error.

ATKINSON, J. From the evidence in this case it appears that both buyer and seller understood that the shipment of beer, for the purchase price of which this suit was brought, was to be of the same quality as that of the previous car load of beer. This amounted to an express warranty of the quality, and the standard was the grade and quality of the first shipment. The relative rights of the parties are stated in the second, third, and fourth headnotes. The court charged the jury on the subject of implied warranty; and in this he erred, because an express warranty excludes all idea of an implied warranty. The rules laid down in the headnotes will serve as a guide in the next trial. In connection with the rulings here made, see *Henderson Elevator Company v. North Georgia Milling Company*, 55 S. E. 50. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

M. H. LAUCHHEIMER & SONS v. JACOBS.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. REPLEVIN — BAIL — QUESTIONS OF LAW — TROVER — EVIDENCE — CUSTOM — SALESMEN — SALE OF SAMPLES.

This was a suit for the recovery of the possession of personal property by bail in trover, and the direct and circumstantial evidence introduced was sufficient, upon the point that the allegata and probata must agree, to carry the case to the jury.

(a) But it was made to appear further, from evidence introduced by the plaintiffs, that there was in existence a universal custom by which travelling salesmen, at the end of the season, were authorized to sell samples. The evidence upon the existence of such custom was unequivocal and uncontradicted. This being so, it was in the province of the court to hold, as a matter of law, that there was such a custom.

(b) And it being made to appear by unequivocal and uncontradicted evidence that the defendant in good faith bought the property sued for, at the end of the season, from the agents of the plaintiffs, in pursuance of the universal custom, it was in the province of the court to hold, as a matter of law, that the agent had authority to sell, and did sell to the defendant; and, it being thus made to appear from the plaintiffs' evidence that the defendant was the owner of the property, the court did not err by granting a nonsuit.

2. WITNESSES — EXAMINATION — LEADING QUESTIONS.

Where a party to a suit calls the opposing party to the stand and examines him as his witness, it is in the discretion of the court to refuse, on objection, to prohibit counsel for the party so called from asking leading questions on cross-examination.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 989.]

3. SAME — REDIRECT EXAMINATION.

Where, on the direct examination of a witness, the party calling him propounds a certain question, which is answered, and counsel then proceeds to examine the witness on other matters and finally yields the witness to cross-examination by the opposite party, it is in the discretion of the court to refuse to allow the same question to be again propounded to the witness on the redirect examination, and, unless there be an abuse of discretion, such refusal

will not authorize a reversal of the judgment of the court.

There was no abuse of discretion in this instance.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 1005.]

4. SAME—INCRIMINATING EVIDENCE.

The manner of examination of witnesses is largely in the discretion of the court, and it is not an abuse of discretion for the court, in a case where applicable, and in response to repeated requests from counsel, to instruct a witness that he need not answer a question tending to incriminate himself, unless he desires to do so.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1047, 1048.]

5. REPLEVIN — BAIL TROVER — LIABILITY ON BOND.

Where, in a suit by bail in trover, the defendant refuses to give a replevy bond to the officer seizing the property, but allows the same to remain in the hands of the officer, and the plaintiffs execute a bond in which the property is described and its value is stated, and the condition is for the forthcoming of the property and the payment of the eventual condemnation money, and the court, after the grant of a nonsuit in the trover case, enters a judgment against the plaintiffs and bondsmen for the value of the property as indicated in the bond, such judgment is not erroneous upon the grounds "that it could not be taken until the matter had been submitted to the jury and the worth of the goods proved, and on the further ground that the bondsmen had not been sued, and judgment could not be entered against them on a replevin bond without first suing them."

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. H. Lauchheimer & Sons against M. Jacobs. Judgment for defendant, and plaintiffs bring error. Affirmed.

The plaintiffs asserted title to certain property, consisting of pants, sack coats, overcoats, and jackets, each being tagged by certain numbers, and alleged that the defendant was in possession thereof. The defendant denied that he was in possession of any property belonging to plaintiffs, but asserted in his plea that the plaintiffs sued out bail in trover against him for the property sued for, and that, upon the defendant's declining to give bond, the plaintiffs gave bond and took from the custody of the defendant and the sheriff, on October 3, 1903, certain overcoats of the alleged value of \$215.50, and certain jackets of the alleged value of \$58.50; the plea showing that the numbers on the overcoats and jackets corresponded with the numbers on the overcoats and jackets described in the petition. It was alleged in the plea that the goods so taken were claimed by the plaintiffs, but that in fact they belonged to the defendant. Thereupon a judgment was prayed against the plaintiffs on their bond for the value of the property so taken. The replevy bond given by the plaintiffs was payable to John W. Nelms, sheriff, and recited the value of the property so taken from the defendant at the figures already stated, and obligated the plaintiffs to produce the property or cause the same to be produced to

answer the judgment or decree that might be made in the case, and likewise to pay the eventual condemnation money, whatever it might be. On the trial it was insisted by the plaintiffs that they had established ownership of the goods, by reason of the following facts: They had employed one Lane as a traveling salesman and had delivered to him certain goods to be used as samples. It was provided in the contract of employment that the samples of goods in the possession of Lane were, and should remain at all times, the property of the plaintiffs and subject to their order. It was shown that the list of goods set out in the petition corresponded to that which was delivered to Lane. Lane testified that they were the same. It was shown that the defendant knew that Lane was the salesman of the plaintiffs, and that he did buy an indefinite amount of goods from Lane, and that the sheriff afterwards took some of them from him. The defendant knew that the goods purchased from Lane were samples, but did not know that they were samples of the plaintiffs'. It was shown by the plea of the defendant that the numbers on the overcoats and the numbers on the jackets which the sheriff took corresponded with the numbers on the overcoats and the numbers on the jackets specified in the petition. It was shown by the evidence that there was a universal custom of trade to the effect that, at the end of each season, such agents as Lane had authority to sell their samples; that in this case the sale was at the end of the season; and that the goods were bought in good faith as samples. The court granted a nonsuit, and then, upon motion of counsel for the defendant, entered up judgment in favor of the defendant against the plaintiffs on their bond for \$274, covering the value of the goods taken by the plaintiffs from the custody of the sheriff. The plaintiffs excepted.

They also assigned error on the following rulings: During the progress of the trial, the plaintiffs introduced the defendant as a witness, and upon cross-examination the court permitted the counsel for the defendant to propound certain questions which were objected to by the plaintiffs upon the ground that they were leading. While interrogating the defendant, counsel for the plaintiffs exhibited to him the list of goods attached to the petition, and asked: "I will ask you again, Mr. Jacobs, if you will swear that you did not receive those goods?" Upon objection by counsel for the defendant, the court refused to allow the question to be answered, upon the ground that the witness had gone into the matter upon direct examination, and had answered that he could not. It appeared from the evidence already delivered by the witness that he had been handed a list of goods set out in the plaintiffs' petition, and asked "whether or not they were the goods bought by him from Lane." He stated that he

did not know whether they were the same ones or not, but that he bought several coats and boys' jackets from Mr. Lane. He did not remember how many he bought; whether there were 50, 25, 10, or 5. He did not recollect, except there were several. He could not testify as to the number of coats or jackets, nor what the sheriff did take. He testified that the sheriff took from him a number of overcoats which he purchased from Mr. Lane, and exhibited a memorandum of the goods taken from him by the sheriff, which memorandum was given him by the sheriff. The plaintiffs contend that the court erred in its ruling, upon the ground that the question "had never been asked, and the witness had not answered it specifically, but that the witness had avoided giving a specific answer thereto." J. H. Lane was called as a witness by the plaintiffs, and, when he was introduced, counsel for the defendant stated to the court that the defendant was sued for goods purchased from the witness, and that the only theory upon which the plaintiffs could recover would be that the witness was guilty of a crime in selling the goods, and requested the court to instruct the witness that he need not answer any questions which would tend to incriminate himself. The court instructed the witness as requested. During the progress of the examination, the counsel for the defendant several times interrupted and requested the court to instruct the witness that he need not answer any question that would incriminate himself, unless he desired to do so. The plaintiffs contend that the court erred in permitting the interruptions referred to, and in repeating the instructions to the witness as requested.

Mayson, Hill & McGill, for plaintiffs in error. Slaton & Phillips, for defendant in error.

ATKINSON, J. This is a suit in trover. The question is one involving title to certain personal property. The plaintiffs assert title to certain pants, sack coats, overcoats, and jackets, set forth in their petition, bearing certain numbers as marks of identification. The burden of proof is upon the plaintiffs to establish their title. It appears that Lane was a traveling salesman of the plaintiffs, and that the plaintiffs, reserving title in themselves, had delivered into the possession of Lane, to be used as samples, the identical goods which are described in the petition. There was no direct evidence as to what disposition Lane made of these goods, except that a part of them were returned to the plaintiffs by him. But it was shown that Lane sold some indefinite quantity of goods to the defendant, that he was known by the defendant to be the plaintiffs' agent, and that the goods purchased were samples. It was shown by the defendant's answer that, when the bail-trover proceeding was commenced, the sheriff took from the

possession of the defendant a large number of overcoats and a large number of jackets, and that the numbers thereon corresponded with the numbers on the overcoats and jackets described in the plaintiffs' petition. Lane testified that the goods described in the petition were the same as those which had been delivered to him by the plaintiffs. On the question of the probata corresponding with the allegata, the facts and circumstances above enumerated were sufficient to carry the case to the jury.

But it was contended that, though the goods may have been originally the property of the plaintiffs, yet the plaintiffs had placed them in the hands of their agent, who, under a prevailing and universal custom of the trade, at the end of the season had sold them to the defendant, an innocent purchaser, and, for that reason, the plaintiffs should not be allowed to recover them. It is stated in *Clark & Skyles* on the law of Agency (section 69): "Proof of the custom and usage in a particular business cannot be sufficient, without anything more, to show that the relation of principal and agent exists; but such proof may be material, when the fact of agency is otherwise proved, or admitted, to show what the contract of agency was, and to show the extent of the agent's authority. When the rights, duties, and liabilities as between an acknowledged agent and his principal are in question, or when the authority of an acknowledged agent to do a particular act or make a particular contract is in question, an established custom or usage in the particular business or place may be proved and taken into consideration, either for the purpose of construing the contract of agency as between the parties, or for the purpose of determining the extent of the agent's authority; for, unless expressly excluded, such a custom or usage enters into a contract of agency, as it does into other contracts, and also enters into the authority of the agent as respects persons dealing with him. Of course, as between the parties themselves, and as against persons with notice, the principal may, by his instructions to the agent, exclude customs and usages, however well established. But such secret instructions cannot be set up against persons dealing with the agent without notice of them; for they have a right to assume, in the absence of notice to the contrary, that the agent's authority is in accordance with established customs and usages. * * * " See, also, *Thompson v. Douglass*, 64 Ga. 57. Applying this rule to the case at bar, it appearing from the evidence that Lane was the agent of the plaintiffs, it is competent to inquire into the universal custom of trade for the purpose of determining what authority Lane had for making a disposition of the personal property in controversy. Only one witness testified on the subject of the custom of trade. His testimony was clear and unequivocal that it was a universal custom

that salesmen such as Lane, at the end of the season, had the right and authority to sell and dispose of samples, as was done by Lane in this case. The evidence itself was unequivocal, and there was no contradictory evidence or circumstances sufficient to raise a question of fact for submission to a jury. The testimony upon this point clearly made *prima facie* proof of such a custom of trade as would give Lane, the agent, the authority to dispose of the goods. Under these circumstances, it was for the court to determine as a matter of law whether or not there was proof of the custom of trade. Had the matter been submitted to a jury, the jury could not have found otherwise, because their verdict would have been contrary to the evidence, and the judge would have been obliged to have set it aside because no other conclusion could be drawn from the evidence submitted. It is stated, in 22 Enc. Pl. & Pr. 410, that: "Where the facts and circumstances by which it is sought to establish a usage or custom are undisputed, and are such that but one legitimate reasonable conclusion or inference can be drawn, the question whether such usage or custom has been proven is one of law for the court. Under such circumstances, it cannot be left to the jury to determine whether the usage existed or what operation or force must be given to it." Under this view of the case, the court was authorized to reach the conclusion that Lane, the agent, had authority to make the sale. So, if the property had been ascertained to be the same which the plaintiffs had delivered to Lane, the agent, they cannot recover, because it further appears from their own proof that, under the universal custom, a sale of the goods were made by their agent by due authority. It follows, therefore, that the court did not err in granting a nonsuit.

2. Where a party to a suit calls the opposing party to the stand as a witness, it is within the discretion of the judge to refuse, on objection, to prohibit the counsel for the opposing party from asking leading questions on cross-examination, and the fact that the court allowed the cross-questions complained of in this case does not show such an abuse of discretion as to authorize the grant of a new trial. Civ. Code 1895, §§ 5283, 5290; *Cade v. Hatcher*, 72 Ga. 359.

3. On the direct examination, a list of goods, which was attached to the plaintiffs' petition, was exhibited to the witness, and he was asked the question whether or not they were the goods bought by him from Lane. After he was asked this question, further questions were propounded to him on different lines, and finally he was turned over to the opposite side for cross-examina-

tion. After the cross-examination, the party introducing the witness again exhibited the same list of goods to the witness, and said: "I will ask you again, Mr. Jacobs, if you will swear that you did not receive those goods?" As will be seen by comparison, the two questions are substantially the same. The witness had answered that he did not know whether or not he had bought any of the goods which were described in the petition, and it was not any abuse of discretion for the court to refuse to allow the same question answered again. If additional questions had been asked tending more thoroughly to sift the information of the witness, the court, with some profit, might have allowed them answered; but no additional question was propounded, and we cannot assume what other, if any, question was desired to be propounded, and cannot reverse the judgment of the court below upon a ruling which was not made. Again, if the defendant had answered that he had bought from Lane the identical goods which were described in the petition, that would not have aided the plaintiffs, because the case really turned against the plaintiffs, not for the want of proper identification of the goods, but on account of the prevailing universal custom already discussed.

4. The manner of examination of witnesses is largely in the discretion of the court, and it is not reversible error for the court to allow counsel, during the examination of a witness, to repeatedly request the court to instruct the witness, nor for the court to so instruct the witness that he need not answer incriminating questions unless he desired to do so.

5. In the bill of exceptions, the judgment of the court rendered against the plaintiffs and their bondsmen for the value of the property replevied by the plaintiffs was excepted to, "on the ground that it could not be taken until the matter had been submitted to a jury and the worth of the goods proved, and on the further ground that the bondsmen had not been sued, and judgment could not be entered against them on a replevin bond without first suing them." There were no other exceptions to that judgment. These exceptions were not well taken. There was no issue to be presented to a jury. The bond which the plaintiffs made specified the article which was taken, and the value thereof. The judgment of the court was merely upon the uncontradicted state of facts as presented by the plaintiffs themselves. It was not necessary to institute a separate suit against the bondsmen. See, in this connection, *Thomas v. Price*, 88 Ga. 533, 15 S. E. 11; *Waldrop v. Wolff*, 114 Ga. 620, 40 S. E. 880.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

HARRISS et al. v. HOWARD.

(Supreme Court of Georgia. Aug. 17, 1903.)

1. ADVERSE POSSESSION — CONSTRUCTIVE POSSESSION.

Constructive possession of lands is where a person having paper title to a tract of land is in actual possession of only a part thereof. In such case the law construes the possession to extend to the boundary of the tract. Hence adjacent owners may be in constructive possession of the same land, being included in the boundaries of each tract. In such cases no prescription can arise in favor of either, but the rights of the parties will be determined according to the superiority of the one title or the other aside from such prescription.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 547-574.]

2. SAME — COLOR OF TITLE — DEVISE UNDER WILL.

A devise of land under a will duly recorded may give color of title.

3. SAME.

A devise in a will duly probated and recorded, whereby a testator left to his two sons "all of my lands," contained a sufficient description to operate as color of title to land in the county of his residence to which he had recorded deeds, and which formed a part of a plantation known by his name, and of which he died in possession.

4. TENANCY IN COMMON — ADVERSE POSSESSION.

There can be no adverse possession against a co-tenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Tenancy in Common, §§ 42-52.]

5. SAME—OUSTER OF CO-TENANT.

Where one of two co-tenants, each of whom owned a half interest in certain land, gave a mortgage to a third person, describing the entire interest in the land, and such mortgage was foreclosed, and the land sold at sheriff's sale, after which the sheriff took the purchaser to the land, which was vacant, and, merely looking at it or pointing to it, informed the purchaser that he delivered it to him, this alone would not constitute such an ouster as would put the co-tenant on notice and furnish a starting point from which prescription would begin to run against him.

6. TRIAL—DIRECTING VERDICT.

There being some conflict in the evidence as to whether actual possession was taken by the purchaser, or to what extent, or for how long held, and as to the nature and character of possession claimed by the respective parties, it was error for the court to direct a verdict in favor of the defendant.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 381-389.]

(Syllabus by the Court.)

Error from Superior Court, Early County; H. O. Sheffield, Judge.

Action by T. B. Harriss and A. D. Harriss against S. T. Howard. Judgment for defendant, and plaintiffs bring error. Reversed.

On March 12, 1903, T. B. Harriss and A. D. Harriss brought ejectment against S. T. Howard for lot of land No. 143 in Early county. The evidence showed that Joshua Harriss died in possession of the land, and that what was known as the Joshua Harriss

plantation comprised lots Nos. 101, 103, 137, 139, 140, 142, 143, 178, 182, 183, 218, 219 in Early county. Recorded deeds to some of the lots (Nos. 142, 143, 139, and 140) were introduced in evidence. The lots immediately connected with this controversy are lot No. 143 (the lot involved in the suit), the south half of lot No. 178, which adjoins it on the west, No. 142, which adjoins it on the south, No. 139, which is east of No. 142, and No. 140, which is south of No. 139. Joshua Harriss made a will which was duly recorded on September 2, 1873. The seventh item of it was as follows: "I give and bequeath to my sons, H. J. Harriss and James Harriss, * * * all of my lands and appurtenances thereto belonging." On November 8, 1902, H. J. Harriss made a deed to T. B. Harriss and A. D. Harriss, which was recorded. They claimed that they were entitled to an undivided half interest in land lot No. 143, under the will of Joshua Harriss and this conveyance. There was also some evidence as to the purchase of the interest of the estate of James Harriss after his death by one of the plaintiffs; but this need not be set out, as the substantial controversy is as to an undivided interest. The defendant claimed under a foreclosure and sale under a mortgage given by James Harriss, which included not merely a half interest in lot 143, but all of it, and the south half of 178. He also set up prescription under the sheriff's deed.

On December 31, 1877, James Harriss, who presumably was the same person as J. M. Harriss, executed to J. J. Bird a mortgage duly recorded and covering land lot No. 143 and the south half of lot No. 178. It was regularly foreclosed, and the land was sold by the sheriff; his deed being dated June 5, 1883, and duly recorded. The defendant testified that the sheriff put him in possession, and that he had since been so; that there were then no houses on the land, and there was no cultivation of it; that the sheriff rode out to the land with him and put him in possession by showing it to him and turning it over to him. On the subject of occupancy, he further testified: There were no houses or cultivation or other occupation of the land until about 1892, when he built a house on the south half of lot No. 178, and his tenant moved into it and cultivated some patches on that lot; but there was no actual possession of lot No. 143. In 1895 and 1896 another person became tenant and had a patch of about 20 acres on the eastern portion of that lot No. 143 and a small patch on the western portion of it, but lived and farmed chiefly on lot No. 178. In 1897 the land was sold to one Munger; but, after keeping it for two years, he failed to pay for it, and surrendered his possession and bond for title. He lived on the south half of lot No. 178, built a plank fence on lot No. 143, and cultivated a portion of it. Each year after Munger left, the place was

rented out. In 1899 the tenant cultivated some of the land on lot No. 143. In 1900 defendant could not say positively that the tenants cultivated any part of lot No. 143. In 1901 the tenant did so. In 1902 the witness could not say part of lot No. 143 was cultivated. All of these tenants lived on the south half of lot No. 178, and had the option of cultivating lands upon lot No. 143, if they desired to do so. The occupancy of the house and field in the south half of lot No. 178 has been continuous.

One of the plaintiffs testified in regard to the possession, in brief, as follows: The lot in dispute was a part of his grandfather's plantation. After the death of the latter the place was turned out into old fields, and there were no houses, fences, cultivation, or other acts of actual possession exercised over it by any one until Munger built a fence and cultivated a small field on it in 1897. This fence remained about a year, and was torn down; and, while tenants of the defendant had cultivated patches on the lot in dispute occasionally since 1898, there had never been any continuous occupancy of it, nor had there been any cultivation of it by any one during several of the last seven years prior to the bringing of this suit. When Munger built the fence, he was notified that H. J. Harriss owned a half interest in the lot, and so also was the defendant. Neither H. J. Harriss nor these plaintiffs claimed any interest in lot No. 178. There had never been any division of the plantation, except as to lots Nos. 178 and 183, in which H. J. Harriss sold his interest. After H. J. Harriss conveyed the land to the plaintiffs in 1902, one of them went into possession of a portion of it and cultivated it during the years 1903 and 1904. H. J. Harriss had a tenant who cultivated land on lot No. 140 for 10 years or more, and prior to that time he had other tenants. As to lot No. 142, which adjoined the land in dispute, the co-tenant of H. J. Harriss, namely J. M. Harriss, in his lifetime, and his children after his death, cultivated a field continuously, with the exception of a few years, not more than four or five, ever since the death of Joshua Harriss up to about four years before the trial, when the plaintiffs bought the interest of the estate of J. M. Harriss, he having died, and they have been in possession of land and cultivating the field on No. 142 ever since. On the close of the plaintiffs' evidence, the judge directed a verdict for the defendant, and the plaintiffs excepted.

A. G. Powell, for plaintiffs in error. W. D. Kidder, for defendant in error.

LUMPKIN, J. (after stating the foregoing facts). As to the actual possession of the lot of land involved in the controversy, or any part of it, there was clearly a conflict in the evidence. In addition to this, the plaintiffs claimed that Joshua Harriss de-

vised his lands to his two sons; that they had acquired the interest of one of these sons; and that they and those under whom they claimed had been in continuous possession of lot No. 143, by being in actual possession of some of the adjoining land which formed a part of the Joshua Harriss plantation. The defendant claimed a prescriptive title under a sheriff's deed, which included lot No. 143 and the south half of lot No. 178, which adjoins it. Aside from the contention as to possession of a part of lot No. 143, he contended that he had been in actual possession of the south half of lot No. 178, and that thus his prescriptive title had ripened. If the conflict in the evidence in regard to actual possession at times of a part of the land lot in dispute is material, the presiding judge, of course, erred in directing a verdict. If this be disregarded, under the undisputed evidence the will under which the plaintiffs claimed, and the deed under which defendant claimed, each covered the interest in controversy; and each party asserted constructive possession of the particular lot or interest in it by reason of possession of land claimed to be included in his paper color adjacent to that in controversy, or forming with it part of a general tract. It is true that lot No. 140 does not immediately adjoin lot No. 143, but there is enough evidence in regard to it and lot No. 142 to indicate the case just stated.

Section 3586 of the Civil Code of 1895 is as follows: "Constructive possession of lands is where a person having paper title to a tract of land is in actual possession of only a part thereof. In such a case, the law construes the possession to extend to the boundary of the tract. Hence, adjacent owners may be in constructive possession of the same land, being included in the boundaries of each tract. In such cases, no prescription can arise in favor of either." *Grimes v. Ragland*, 28 Ga. 123, 127. Outside of this state, it has been declared by several courts that: "Where two patents, grants, surveys, deeds, or other conveyances are conflicting, each including land which the other purports to convey, and the senior claimant is in actual possession of some part of the land lying within his grant, but not within the interlock, possession by the junior claimant of a part of the tract included in his conveyance outside of the interlock or lap gives him no constructive possession of lands lying therein." 1 Cyc. 1131, and citations; *White v. Burnley*, 61 U. S. (20 How.) 235, 15 L. Ed. 886; *White v. Ward*, 35 W. Va. 418, 18 S. E. 22; *Elliott v. Cumberland Coal & Coke Co.*, 109 Tenn. 745, 71 S. W. 749. A devise of land under a will duly recorded may give color of title. 1 Cyc. 1099, and note. On the subject of color of title, see *Street v. Collier*, 118 Ga. 470, 45 S. E. 294. As to the sufficiency of the description of the land in the will, it is said, in *Crawford v. Verner*, 122 Ga. 816, 50 S. E. 958, referring to a deed: "And where it can be gathered from the words em-

played in a deed that the intention of the grantor was to convey the whole of the tract owned by him, even a vague description of the same will suffice, if by competent parol evidence its precise location is capable of ascertainment, and its identity can thus be established." It was held that descriptive words very similar to those now considered were sufficient. *Flannery v. Hightower*, 97 Ga. 592, 608, 25 S. E. 371 (5); *Priester v. Melton*, 123 Ga. 375, 51 S. E. 830. Descriptions quite as general as that here involved have been sustained where the property could be identified and the description applied to it by parol evidence. See *Jones on Real Property*, § 348; *Henley v. Willson*, 81 N. C. 405; *Carson v. Ray*, 52 N. C. 609, 78 Am. Dec. 267; *Pettigrew v. Dobbelaar*, 63 Cal. 896; *Harmon v. James*, 7 Smedes & M. (Miss.) 111, 45 Am. Dec. 296; *Prettyman v. Walston*, 34 Ill. 175; *Jackson v. DeLancey*, 11 Johns. (N. Y.) 364.

It can hardly be contended that a devise by a testator of "all of my lands" is not sufficient to carry title to his devisees to lands shown to answer that description. But it is suggested that, though the devise was sufficient to convey title, it was insufficient to operate as color of title. We recognize, of course, the difference between a will and a deed, and the great liberality allowed in making wills and passing title by them. But, if we look at this case as if the description were in a deed, it would seem somewhat peculiar if a description were sufficient for the conveyance of good title, but insufficient to constitute even a semblance or color of title, sufficient to convey, but not sufficient to purport to convey. Some decisions have held that the description to constitute color must be as complete as that which is necessary for a conveyance of title. *Hanna v. Palmer* (Ill.) 61 N. E. 1051, 56 L. R. A. 93. It has been said that "the same degree of certainty was required." *Allmendinger v. McHie* (Ill.) 59 N. E. 517; *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691. But no case has come to the writer's notice where it has been held that a description in a deed must be better to constitute color or semblance of title than to convey actual title. To what extent would the description, "all of my lands," in the devise be color of title? To the extent that certain lands were shown to fall within the description, "all of my lands." How is this any less valid than if the description were "my home place," or the "place where I reside," or the like? Any such description must be adjusted to its subject-matter by extraneous evidence.

In *Busch v. Huston*, 75 Ill. 343, it was held that: "Where a party in possession of land, of which his wife is seised, as heir, of an undivided part, takes a quitclaim deed from one of the other heirs, who is seised of an undivided fourth thereof, and who simply released and quitclaimed all his right, title, and interest, such deed will constitute good color and claim of title to the extent of the grantor's interest, but no further." In *Hol-*

brook v. Forsythe, 112 Ill. 306, it was held that a devise by a testator of all the lands belonging to him in a particular state did not give the devisee color of title to those lands in the particular state to which his deviser had not a good, but only a colorable, title. This seems to be somewhat restricted, as persons often describe lands as "mine," though their title, on careful legal examination, may not be entirely perfect. The headnotes in that case might appear at first view to hold that a description of all the land the testator owned in the state of Illinois was not sufficient to constitute color of title at all. But a careful reading of the whole opinion will show that the ruling is as already stated. The rule in this state does not appear to be as strict as in Illinois. In *Johnson v. Girtman*, 115 Ga. 794, 42 S. E. 96, it was held that a quitclaim deed, taken in good faith, is sufficient color upon which to base prescriptive title, and that a conveyance of "all the right, title, interest, claim, or demand [the grantor] has or may have had in and to his interest in and to" a certain tract of land was sufficient to convey whatever interest the grantor had in the entire tract. In *Tumlin v. Perry*, 108 Ga. 520, 522, 34 S. E. 171, it was held, that, treating an obscurely written word as "owned," or supplying "owned" as an omitted word, a description in a bond for title of "all the lands which James Knox owned and now lying on the road from the town of Canton, in said county, to Orange about six miles and a quarter east of Canton, it being in the third district and second section of said county, all in one body, containing several lots and parts of lots," construed in connection with the evidence identifying the land, was sufficient color of title to support a prescriptive title to the premises in dispute. In *Cantagrel v. Von Lupine*, 58 Tex. 570, it was held that "possession under a recorded deed, which described the land as 'all the land' which the vendor owned 'in Harris county,' is a sufficient description of the land, under the plea of five years' limitation, when it is shown that the vendor had a recorded deed describing the particular land." In the present case the testator had recorded deeds covering the disputed and adjacent lands. They formed part of what was known as the Joshua Harriß plantation, of which he died in possession. In *Davis v. Stroud*, 104 N. C. 484, 10 S. E. 666, where W. sold a tract of land to D., who, after conveying several parts thereof to other parties, abandoned his purchase, surrendered his evidence of title, and gave up possession, and W. contracted to sell to H. the "residue" of the tract sold to D., and executed title in pursuance thereof, it was held that, in an action by persons claiming under H. for possession against one alleged to be a trespasser, they must distinctly locate the residue by producing the deeds conveying away parts

of the tract. From the foregoing it will be seen that we hold the devise was sufficient color of title. Had it not referred to or given any designation of lands at all so that they could be identified, but had said, "all my property," or the like, thus giving no indication that any land was to pass under it, a different question would have been presented.

There can be no adverse possession against a co-tenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession; in either of which events the co-tenant may sue at law for his possession. Civ. Code 1895, § 3145. It is contended that the evidence in this case showed an ouster, and that prescription ran in favor of the defendant. We are not prepared to hold that when the sheriff went with the defendant to the land, which was vacant, and, merely looking at it or pointing to it, informed the purchaser that it was delivered to him, this alone would constitute such ouster as would put the co-tenant on notice and furnish a starting point from which prescription would run as to the half interest of the co-tenant. In regard to whether actual possession was taken by the defendant (who claims an ouster), or to what extent, the question is rather one of fact than of law, and the evidence is not so clear and free from conflict as to authorize the court to direct a verdict.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

HAWES v. GLOVER.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. LIMITATION OF ACTIONS—SUSPENSION—ADMINISTRATION—ALLOWANCE OF CLAIMS.

Since the passage of the act of September 26, 1883 (Acts 1882-83, p. 104; Civ. Code 1895, § 3782), the statute of limitations, relatively to the debts of a decedent, is suspended during the period of time between his death and representation upon his estate, if such period does not exceed five years. Whether the decision in *Johnson v. Johnson*, 5 S. E. 629, 80 Ga. 260, was rendered in view of this act cannot be definitely determined, as the act was not referred to by the court. If it was so rendered, the ruling there made would go no further than holding that this act was not applicable to a case in which the period of time between the death of a debtor and representation taken upon his estate had completely expired before it was passed. In the present case even the debt itself, sought to be enforced against the estate of the decedent, was created long after the act of 1883 was passed, and the time between the death of the debtor and representation upon her estate was clearly covered by it. Consequently, in holding that the statute of limitations, relatively to this debt, was suspended while the estate of the deceased debtor was unrepresented, we have not found it necessary to overrule the decision in *Johnson v. Johnson*, supra.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 431-438.]

2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Where one of the joint obligors upon a promissory note gives a mortgage to secure its

payment, and, after his death, the holder of the note and mortgage institutes a proceeding in the nature of a foreclosure of the mortgage, a surviving co-obligor upon the note is a competent witness, in such proceeding, to prove the execution of such mortgage, if, at the time he testifies, the note as to him has become barred by the statute of limitations.

3. SIGNATURE—VALIDITY.

Where a husband signs his wife's name to a mortgage purporting to be executed by her, in her immediate presence, and by her express request and direction, the effect of such signature is the same as if she had signed the mortgage herself.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Signatures, § 6.]

4. MORTGAGES—VALIDITY—SEAL—WITNESSES.

A seal is not necessary to the validity of a mortgage, even upon real estate; and a mortgage is valid, as between the parties thereto, without any attesting witness, and without being recorded.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 146, 153, 154, 199, 200.]

5. HUSBAND AND WIFE—MORTGAGE BY WIFE—PLEA OF COVERTURE—PERSONAL PRIVILEGE.

As the plea of coverture is a personal privilege available only to the feme covert or her privies in blood or estate, a mere creditor of a married woman, even in case of her insolvency, cannot attack a mortgage executed by her, upon the ground that it was given to secure the debt of her husband and son.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, §§ 671-683.]

6. MORTGAGES—PRIORITY—UNRECORDED MORTGAGE.

Section 2727 of the Civil Code of 1895, which provides that an unrecorded mortgage is "postponed to all other liens created or obtained prior to the actual record of the mortgage," refers only to liens created or obtained during the lifetime of the mortgagor.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 410-425.]

(Syllabus by the Court.)

Error from Superior Court, Jones County; H. G. Lewis, Judge.

Action by Joanna Hawes against W. J. McMichael. Judgment for defendant and on levy of execution S. M. Glover gave notice of lien. On trial of issue, judgment was rendered finding the fund in dispute should be applied to the claim of S. M. Glover, and plaintiff brings error. Affirmed.

Mrs. Joanna Hawes, as trustee for herself and her children, obtained a judgment against W. J. McMichael, as administrator of the estate of Mrs. Emily J. McMichael. The judgment was special as to certain described lands and general as to the other property of the decedent. The execution issuing from this judgment was partially satisfied by the sale thereunder of the lands covered by the special lien; and was then levied upon a lot of land in Jones county, which was the property of the estate of the defendant in execution. This lot of land was advertised for sale, under the levy, by the sheriff of the county; whereupon Mrs. S. M. Glover gave notice that she claimed a mortgage lien upon it. An agreement was

then entered into between the judgment creditor, the mortgagee, and the administrator, providing for the sale of the entire interest in the land by the sheriff under the execution, and that the plaintiff in *fi. fa.* and Mrs. Glover, who claimed the mortgage lien, should file their respective petitions, in the nature of a money rule, against the sheriff, setting up their respective claims against the fund realized by the sale, and have the question as to who held the superior lien upon the proceeds of the sale determined by a verdict and judgment in the superior court, reserving to each the right to attack the validity of the lien claimed by the other. The land was accordingly sold by the sheriff. The parties filed their respective petitions, claiming the fund. The sheriff answered, and it appeared that the fund in his hands was not sufficient to satisfy the claim of either of the contesting creditors. Upon the trial of the issue thus formed, Mrs. Hawes, trustee, introduced her execution, and it was admitted that the land levied upon and sold thereunder was a part of the estate of Emily J. McMichael, in the hands of her administrator, W. J. McMichael, and that the funds in controversy were derived from the sheriff's sale of the same. It was further admitted that the judgment in favor of Mrs. Hawes, trustee, was based upon notes of Mrs. E. J. McMichael. Mrs. Glover introduced W. J. McMichael as a witness, for the purpose of proving the execution of the mortgage claimed by her by Mrs. E. J. McMichael. The witness who testified that Mrs. E. J. McMichael was his wife, was handed a written instrument, in the form of a promissory note and a mortgage upon the land in question to secure the payment of the same, as follows: "December 18, 1894. On or before the first day of December, 1895, and 1896, I promise to pay to Mrs. S. M. Glover, or order, seven hundred dollars," etc. Then followed waiver of homestead and the mortgage in question. It concluded as follows: "In testimony whereof I have hereunto set my hand and seal the day and year above written. [Signed] E. J. McMichael. W. J. McMichael. J. S. McMichael. Signed, sealed and delivered in the presence of: Witness as to the signature of J. S. McMichael; J. S. Stewart, H. T. Powell, Notary Public, Bibb Co., Ga."

Indorsed upon it was an entry by the clerk of the superior court of Jones county, that it had been recorded on a named date, which was long prior to the date of the judgment in favor of Mrs. Hawes, trustee. But the attempt to record it had been made without any probate of the mortgage whatever. When the witness was asked to state whether he signed Mrs. E. J. McMichael's name to this instrument at her request, the question and the answer sought to be thereby elicited were objected to upon the following grounds: (a) Because, under the evidence act (Civ. Code 1895, § 5269), the witness was not com-

petent to testify as to any transaction with his deceased wife. (b) Because it appeared that the witness and Mrs. E. J. McMichael were joint obligors on the paper, and, under the provisions of the act approved December 21, 1897 (Acts 1897, p. 58), the witness, being the administrator of the estate of Mrs. E. J. McMichael, and a co-obligor on the note, should not be permitted to testify to any matter that would relieve or modify his own liability on the note and tend to make the estate of Mrs. McMichael primarily liable thereon. (c) Because the authority to execute a mortgage on real estate must itself be executed with all the formality required in the case of a mortgage, and the witness should not be allowed to testify to a verbal authority given to him by Mrs. McMichael. The court overruled the objection, and the witness testified: "E. J. McMichael was my wife. I signed her name to that paper by her verbal request, under her direction, and in her presence. The estate of Mrs. Emily J. McMichael is insolvent." When the mortgage was offered in evidence, it was objected to upon the grounds, that there were no subscribing witnesses to the signature of Mrs. McMichael; that it was not a sealed instrument, and that it had never been recorded. These objections were overruled and the mortgage admitted in evidence. While W. J. McMichael was on the stand as a witness, counsel for Mrs. Hawes, trustee, upon cross-examination, asked him "if the paper offered by Mrs. Glover as a mortgage was not a security obligation on the part of Mrs. E. J. McMichael, and if (she) was not as to said obligation a surety for her husband, W. J. McMichael, and her son, J. S. McMichael." This question was objected to, upon the ground that the plea of coverture was a personal one and could not be urged by the plaintiff in *fi. fa.* Counsel propounding the question stated to the court that he expected to prove by the witness that Mrs. McMichael, being a married woman, signed the mortgage as surety for her husband and her son, and that this fact was known to Mrs. Glover. The court sustained the objection and refused to permit the witness to answer the question. After the conclusion of the evidence, the court, on motion of counsel for Mrs. Glover, directed the jury to return a verdict finding that the fund in dispute should be applied toward the satisfaction of the mortgage held by Mrs. Glover; and upon such verdict being rendered, judgment was entered in accordance therewith. Mrs. Hawes, trustee, thereupon sued out a bill of exceptions, assigning error upon each of the foregoing rulings.

Hall & Wimberly and J. E. Hall, for plaintiff in error. Jno. R. L. Smith, for defendant in error.

COBB, P. J. 1. Counsel for plaintiff in error do not contend in their brief that the

debt claimed by Mrs. Glover against the estate of Mrs. McMichael was barred by the statute of limitations, nor does it appear that this contention was made in the trial court. But counsel for defendant in error has discussed the question whether this debt was thus barred, contending that it was not, and has asked and obtained leave to review the decision of this court rendered in *Johnson v. Johnson*, 80 Ga. 280, 5 S. E. 629, evidently being apprehensive that if that decision should be followed in the present case, the judgment of this court might be adverse to his client. Even admitting that the note held by Mrs. Glover, which the mortgage was given to secure, fell due on December 1, 1895, it was not, relatively to the estate of Mrs. McMichael, barred by the statute of limitations. As shown by the evidence, Mrs. McMichael died on April 29, 1897, and there was no administration upon her estate until August 7, 1899. During the period of time between these two dates the statute of limitations, relatively to claims against her estate, was suspended. Civ. Code 1895, § 3782; Acts 1882-83, p. 104. It was, of course, still further suspended for 12 months after the appointment of the administrator. Civ. Code 1895, §§ 3421, 3423; *Smith v. Hudspeth*, 68 Ga. 212; *Pendleton v. Andrews*, 70 Ga. 306; *Johnson v. Johnson*, supra; *Adams v. Adams*, 113 Ga. 824, 39 S. E. 291; *Williams v. Lancaster*, 113 Ga. 1020, 39 S. E. 471; *Tarver v. Cowart*, 5 Ga. 66. Mrs. Glover took the initial steps toward the enforcement of her mortgage on August 24, 1903, when she, after giving notice of her mortgage upon the land, became a party to the agreement under which the entire interest in the land was sold under the execution in favor of Mrs. Hawes, trustee; and on September 16, 1903, she filed her petition setting up her mortgage, and claiming thereunder the funds in the hands of the sheriff arising from this sale. Taking either of these dates as the time when the statute of limitations finally ceased to run in favor of the estate of Mrs. McMichael against the claim of Mrs. Glover, it is very clear that such claim was not barred, as the statute had not run against it for the period of six years, which is applicable to promissory notes not under seal. In *Johnson v. Johnson*, supra, which counsel for defendant in error obtained leave to review, it was held that the statute of limitations was not suspended during the time that the estate of a deceased debtor was unrepresented. That decision simply followed the one rendered in *Pendleton v. Andrews*, 70 Ga. 306, in which it was held that section 2829 of the Code of 1882 (now section 3781 of the Civil Code of 1892) could not "be invoked by a creditor whose debtor dies, in order to prevent the statute of limitations from running," as "that section provides for the suspension of the statute for five years when the creditor dies, and his estate is unrepresented, but does not suspend the statute in favor of one who

holds a claim against" the unrepresented estate of a decedent. The decision in *Pendleton v. Andrews* was rendered on April 24, 1883, and at the first session of the Legislature thereafter the act of September 26, 1883, was passed, which provided that, from and after its passage, "the time between the death of a person and representation taken upon his estate, or between the termination of one administration and the commencement of another, shall not be counted against creditors of his estate, provided such time does not exceed five years." This made the rule which theretofore had been applicable only to creditor estates likewise applicable to debtor estates. That act, counsel for defendant in error seems to think, was overlooked when the decision in *Johnson v. Johnson*, supra, was rendered. When that decision was rendered the act of 1883 had not been codified, and, in the opinion in the case, delivered by Chief Justice Bleckley, it is not referred to. Whether the court had it in view when that case was decided cannot be definitely determined. The cause of action with which the court was then dealing lacked but 16 days of being barred by the statute of limitations when the act of 1883 was passed; and, assuming, as the court did, that the persons sued were rightful executors, the time between the death of the debtor and representation upon her estate had expired when that statute was enacted. So, if the decision was made in view of the act of 1883, the ruling there made would go no further than holding that that act was not applicable to a case where the time between the death of a debtor and representation taken upon his estate had completely expired before that act was passed. This is not at all in conflict with the ruling which we make in the present case; for here even the debt itself was created long after the act of 1883 was passed, and, of course, the statute of limitations, relatively to such debt, had not even begun to run until many years after that statute was enacted, so that the period between the death of the debtor and representation upon her estate was clearly covered by the statute in question. There is therefore no necessity in the present case for overruling the decision in the one which we have been asked to review, in order to reach the ruling which we now make.

2. Section 5269 of the Civil Code of 1895, which is relied upon by plaintiff in error to exclude the testimony of W. J. McMichael as to the execution of the note and mortgage by Mrs. E. J. McMichael, is as follows: "Where a person not a party, but a person interested in the result of the suit, is offered as a witness, he shall not be competent to testify, if as a party to the cause he would for any cause be incompetent." Relatively to the question of the liability of the witness upon the note, he was competent to testify to its execution by his deceased co-obligor thereon, because, at the time he testified, he

was no longer legally liable upon the note. Although the body of the note concluded with the expression, "Witness my hand and seal," it was not, as to any of its makers, a sealed instrument, as no seal, or anything intended to take the place of one, appeared thereon after the signature of any one of them. *Ridley v. Hightower*, 112 Ga. 476, 37 S. E. 733, and cases cited; *Jackson v. Railroad Company*, 125 Ga. 801, 54 S. E. 697. It was certainly matured on December 1, 1896. The trial under review occurred in 1905, at the April term of the court. As the note was not under seal, it was clearly barred as to this witness when he testified in the case; for it is not claimed that any suit had ever been brought against him upon it, but the question as to his competency was based solely upon the facts which appeared upon the face of the paper. The mere fact that it was not barred as to the estate of Mrs. McMichael, his co-obligor thereon, did not prevent its being barred as to him. In *Shepherd v. Crawford*, 71 Ga. 458, it was held: "Where a client brought suit against the representative of his deceased attorney, for money collected by such attorney and not accounted for, if the claim against the original debtor was barred by the statute of limitations, so that no recovery could be had against him in case of failure to recover against the attorney's estate, he would be a competent witness to prove that he had paid the amount of the claim to the deceased attorney." In the opinion Mr. Justice Hall, in discussing the question whether the trial court was right in permitting the original debtor to testify that he had paid the amount of the claim against him to the plaintiffs' attorney, who was then dead and against whose estate the suit was proceeding, said: "Was the court right in admitting Gilliam's testimony, over the defendant's objection? This depends upon the further fact of Gilliam's liability to the plaintiffs, in the event of their failure to recover against Crawford's executor. If he would have been liable over to them in that event, when he testified, as Crawford was dead, then, under the decision of this court at the present term, in the case of *Daniel v. Burts* [72 Ga. 143], he was incompetent to testify. But it is apparent from the record in this case that the plaintiffs' right to the claim that had been given Crawford for collection was then barred by the statute of limitations. Even at common law this would render a witness competent, who would, without it, be excluded. *Leverett v. Stegall*, 23 Ga. 257. In *Flournoy & Epping v. Wooten, Administrator*, and *Wooten, Adm'r. v. Flournoy & Epping*, this court, at its present term [71 Ga. 168], held that a witness competent to testify at common law was not rendered incompetent by reason of the exception contained in the evidence act of 1866 (Code 1873, § 3854, par. 1) relative to parties to the suit or contract, etc., where the opposite party was dead." In the *Flour-*

noy & Epping cases, 71 Ga. 168, which are here cited by Mr. Justice Hall, it was held: "The act of 1866 (Code 1873, § 3854) was not intended to exclude any one from testifying who was competent as a witness by the law as it stood at the time of its passage, but did intend to make all persons competent as witnesses except those who fell within the exceptions to the act." And in the case in 23 Ga. 257 (*Leverett v. Stegall*), cited by him, it was held: "A witness, whose interest is uncertain, and who is protected against recovery by the statute of limitations, is a competent witness." But while, as we have seen, the witness in the present case cannot be held to have been incompetent, by reason of any liability upon his part upon the contract evidenced by the note, he was nevertheless interested in the result of this suit. He was thus interested, because if the amount of the note should be collected from the estate of his deceased joint obligor, he, judging from the face of the note, would be liable, upon an implied contract, to her estate, to contribute his proportionate share of the amount which was required to pay the debt. *Sherling v. Long*, 122 Ga. 797, 50 S. E. 935. The fact that his liability upon the note was barred by the statute of limitations would not prevent his being liable upon such implied contract to the estate of his deceased co-obligor, for his proportionate share of the debt; for the cause of action in behalf of such estate against him for contribution would not arise until the payment by it of the debt evidenced by the note, and then only would the statute begin to run as against such cause of action. Id.

It will be seen, however, that, while the witness was thus interested in the result of the suit, his testimony was directly opposed to his interest; for, in establishing, by his testimony, the claim of Mrs. Glover against the estate of Mrs. McMichael, he was laying the foundation for a possible future liability upon his part to such estate. When he took the stand as a witness, he stood protected by the statute of limitations against a suit upon the note by Mrs. Glover, but his testifying to the execution of the note by his joint obligor, Mrs. McMichael, tended to render her estate liable for its payment, and to render himself liable over to such estate for contribution, in the event it was forced to pay the debt. As we have seen, the section of the Civil Code invoked for the purpose of excluding the testimony of the witness provides that a person who is not a party to the case on trial, but who is interested in the result of the suit, "shall not be competent to testify, if as a party to the cause he would for any cause be incompetent." As a party to the cause, the witness would not have been incompetent to testify as he did; for he was testifying against his own interest. Even before the passage of the evidence act of 1866, removing, with certain exceptions, the incapacity, which existed at common law, of

parties and persons interested in the result of the litigation to testify in the case, it was held that a witness, although interested in the result of the suit, was competent when testifying against his own interest. *Molyneaux v. Collier*, 18 Ga. 406; *Brown v. Burke*, 22 Ga. 574. We have already seen that this court has held that the evidence act of 1866 "was not intended to exclude any one from testifying who was competent as a witness by the law as it stood at the time of its passage." Since the passage of that act, it was held in *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243, that "the surviving party to a contract, who is not a party to the record, is generally competent to testify against his interest, or where his interest is equally balanced." In *Reed v. Baldwin*, 102 Ga. 80, 29 S. E. 140, the court held a surviving party to a contract competent to testify against his own interest, even when he was a party to the record. The headnote in that case is as follows: "Where the executors of the deceased payee of a promissory note bring suit thereon against a husband and wife who signed is as joint makers, and the wife files a plea that the debt was her husband's and that she is not bound therefor, the husband is a competent witness, under the evidence act (Civ. Code 1895, § 5269), in support of the plea of the wife. The testimony thus offered is not in favor of the party testifying." In the opinion Chief Justice Simmons emphasizes the language of the evidence act which shows that when a suit is instituted or defended by the personal representative of a deceased person, the opposite party is only incompetent "to testify in his own favor against the deceased person as to transactions or communications with such deceased person," and "that where a suit is instituted or defended by partners, persons jointly liable or interested, the opposite party" is simply rendered incompetent "to testify in his own favor as to transactions or communications solely with the deceased partner, or person jointly liable or interested." It is clear, therefore, that, if the witness W. J. McMichael had been individually a party to the case, he would not have been incompetent to testify against his own interest. As he would not, as a party to the cause, have been incompetent to thus testify, it necessarily follows that he, as a person not a party, but interested in the result of the suit, was not incompetent to testify against his own interest.

It is further contended, however, that the witness was incompetent under the act of December 21, 1897 (Acts 1897, p. 53). That act provides: "That when suit is instituted against joint defendants, one of whom is the representative of an insane or deceased person, the sane or living party defendant shall not be permitted to testify as to any transaction or communication with the insane or deceased party, when his evidence would tend to relieve or modify the liability of the par-

ty offered as a witness and tend to make the estate of the insane or deceased party primarily liable for the debt or default." We are unable to see how the witness was incompetent under the provisions of this act. The case in which he testified was not a suit against joint defendants, nor was he a party defendant thereto. The act of 1897 simply extended the exceptions contained in the act of 1889 and subsequent acts to the general rule of competency of witnesses provided by the evidence act of 1866; and, as was said by Mr. Justice Candler in *Hendrick v. Daniel*, 119 Ga. 300, 46 S. E. 438: "This court is thoroughly committed to the proposition that the act of 1889 and the subsequent acts amendatory thereof, the provisions of which are embodied in Civ. Code 1895, § 5269, are to be literally construed, and nothing will be added to or taken from them by judicial construction." Besides, even if, under the act of 1897, the witness would otherwise be incompetent, we have seen that the bar of the statute of limitations as to him would remove his disqualification and render him competent.

The objection to the testimony of the witness that he signed the name of his wife, Mrs. E. J. McMichael, to the note and mortgage, by her request, under her direction, and in her presence, upon the ground that authority to execute the mortgage could not be conferred by parol, but would have to be executed with all the formalities required in the execution of the mortgage itself, was properly overruled by the court. In *Reinhart v. Miller*, 22 Ga. 402, it was held: "When a party present, and an instrument is presented for his signature, directs another to sign it, no written authority is necessary, and if the instrument is signed and the parties immediately recognize it by acting upon it, no proof of the presence of the party when the instrument is signed need be made." In *Brown v. Colquitt*, 78 Ga. 59, 62, 54 Am. Rep. 867, it was said: "A deed may be signed, sealed, and delivered by a person under instructions by parol, if the grantor be present at the time, and it will be good to pass title, because the law considers, under such circumstances, the act of the agent to be the act of the principal. It is done at his instance and under his directions. It is his act." In *Wyatt v. Walton Guano Co.*, 114 Ga. 375, 40 S. E. 747, it was held: "Where a husband, in the presence of his wife and with her express consent, signs her name to a promissory note which she knows is to be delivered to the payee in settlement of an existing indebtedness for which she is individually liable, and such note is delivered in the cancellation of the indebtedness, the mere fact that she remarked to her husband, at the time of authorizing him to sign the paper: 'You may sign my name to it, but I will have nothing to do with it,' the same not being heard or communicated to the payee, does relieve her from liability on the note."

Counsel for the plaintiff in error invoke and rely upon the statute of frauds, and contend that the execution of a mortgage on realty in this state must comply with its provisions "as contained in section 2693, par. 4," of the Civil Code of 1895, which requires that "any contract for the sale of lands, or any interest in or concerning them," shall "be in writing signed by the party to be charged therewith, or some person by him lawfully authorized." It is utterly immaterial here whether this provision of the statute embraces a mortgage upon real estate or not; for it is obvious that when it is held that a contract is, in contemplation of law, signed by a party when his name is signed thereto by another, in his presence and by his direction, there is no room for the contention that such a mortgage, so signed, is invalid under the statute of frauds. Counsel admit that this court "has decided the point as regards a deed or marriage agreement, in the case of *Reinhart v. Miller*, 22 Ga. 402," 68 Am. Dec. 506, but they insist that "the deed there, however, was nothing more than a bill of sale to personality; the subject-matter being slaves," and that "all said in the decision further than was necessary to pass upon the question as one respecting a bill of sale to personality was obiter." We do not agree with counsel in the construction which they place upon the instrument dealt with in that case, nor in the criticism which they make upon the opinion of the court therein. The instrument which was there under consideration was undoubtedly "an agreement made in consideration of marriage," now the law required then, and requires now, to be in writing. *Cobb's Dig.* 1127; *Bradley v. Saddler*, 54 Ga. 691; Civ. Code 1895, § 2693 (4).

3. A mortgage is good as between the parties without any attesting witness. *Marable v. Mayer*, 78 Ga. 60. So is a deed. *Johnson v. Jones*, 87 Ga. 85, 13 S. E. 261; *Howard v. Russell*, 104 Ga. 230, 30 S. E. 802. And a mortgage, not attested as the law requires, is good as against third persons who take with actual notice of its existence. *Gardner v. Moore*, 51 Ga. 269. The requirements of the Code as to the attestation of mortgages have reference to the registry laws, and must be complied with in order to entitle the instrument to record. A seal is not necessary in order to render a mortgage valid. Civ. Code 1895, § 2724. As said by McCay, J., in *Nichols v. Hampton*, 46 Ga. 256: "Our Code requires no specified form to constitute a mortgage. It conveys no title, and is not required to be under seal. It is sufficient if it specifies the property, states the debt, and shows that the parties intend to create a lien." A mortgage is perfectly valid as between the parties thereto, though never recorded. *Hardaway v. Semmes*, 24 Ga. 305; *Gardner v. Moore*, 51 Ga. 268; *Myers v. Picquet*, 61 Ga. 280; Civ. Code 1895, § 2727. If it is not recorded, or, as in this case, is illegally recorded, the only effect is to postpone it

to purchases made, or liens procured by contract, without notice of its existence, or to liens obtained by operation of law. It follows that the mortgage, upon proof of its execution, was admissible in evidence.

4. Civ. Code 1895, § 2488, provides that "while the wife may contract, she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate made to a creditor of her husband in extinguishment of his debts shall be absolutely void." In construing this section, it has been repeatedly held that any contract of suretyship entered into by a married woman, whether in behalf of her husband or any other person, is void, and at her instance will be so declared. But the question whether a creditor of hers can raise the question of the validity of such a contract entered into by her, when, because of her insolvency and the existence of some lien or conveyance which she has executed in connection with the contract, it tends to prevent the collection of his debt against her, has never, so far as we have been able to discover, been before this court. In *Palmer v. Smith*, 88 Ga. 84, 13 S. E. 956, it was held: "A conveyance of land executed by a married woman in payment of her husband's debt, though declared by the statute absolutely void, is only so as against her and upon her election to treat it as void; coverture being a personal privilege which is not available in behalf of a stranger to her title." In the opinion, Mr. Justice Simmons said: "Where a married woman having a separate estate conveys her property to a third person in payment of her husband's debts, and afterwards seeks to recover the property or cancel the deed, the deed will be declared void, on her motion, as against all persons who had notice that it was made for such purpose. But where she has conveyed her separate estate, in payment of her husband's debts, to one party, and another party is in possession of the property who is not in privity with her in blood or estate, and is sued therefor by the vendee of the wife, the defendant cannot set up in his defense that the deed is void because made in payment of the husband's debts. This plea of the wife is a personal privilege, confined to her or her privies; and if she or they do not set it up, no stranger has the right to do so." This decision, or principle, would seem to be directly in point here, notwithstanding the fact that there it was not shown that the defendant, who sought to invalidate the married woman's deed, was a creditor of hers. The decision, in principle, seems to be directly in point, because it is based upon the principle that the plea of coverture is not available except to the wife herself and her privies in blood or estate, and we fall to see how a mere creditor can be a privy in estate to his debtor. We say this, in full

view of the decisions of this court, rendered in cases involving the right of a creditor of an insolvent debtor to raise the question of usury relatively to transactions between such debtor and another creditor; and we frankly admit the force of the argument of counsel for plaintiff in error, based on the strong analogy in principle between some of those cases and the present one.

The theory, or principle, that there exists a legal privity between a creditor and his debtor, of which one creditor of an insolvent debtor can avail himself for the purpose of raising the question of usury as to the claim of another creditor such debtor, was first announced by this court in *Pope v. Solomons*, 36 Ga. 541, the decision in which, though sometimes criticised, has been followed in a number of subsequent cases wherein the question of usury was involved. It is to be noted, however, that it was not held in that case that a creditor is a privy in estate to his debtor. The holding there was simply that there was a sufficient "legal privity" between a creditor and his debtor to authorize one creditor of an insolvent debtor, for his own protection, to raise the question of usury as to transactions between such debtor and another creditor holding a claim against him, which claim, under the circumstances of the particular case, had priority relatively to the funds in controversy of the common debtor, in order to reduce such prior claim by the amount of usury which the debtor had paid thereon. The term "privy in estate" was not once used by the court in dealing with the case. Of that case *McCay, J.*, in delivering the opinion of the court in *Gatewood v. City Bank*, 49 Ga. 45, 50, said that "the circumstances were peculiar. There was a privity between all the parties. The debtor had sold his goods, and the purchaser had agreed to pay the purchase money to the creditors of the seller. Solomons was mentioned by name, the other generally. As the case was before the court, Pope, one of the creditors, had garnished the purchaser, and he, Pope, knowing the terms on which the purchaser had bought, filed a bill to attack Solomons' debt on account of usury. Here was a fund belonging to an absconded debtor, in hand, none of the debts were in judgment, and the fund had been, as the record was before the court, appropriated by the debtor to the creditors. And this court, on the idea, we suppose, that under the circumstances of the case the principles of a trust or the usages of a bankrupt court were applicable, sustained the bill. The privity then existing, by reason of the written orders of the debtors, makes that case stand on peculiar circumstances. Otherwise it would be contrary to the uniform current of decisions, and a dangerous innovation on established principles." Notwithstanding this sharp criticism, the ruling in *Pope v. Solomons* has not been confined to the peculiar facts of that case, but has been followed

in subsequent cases, wherein the facts were dissimilar, but which involved the right of one creditor of an insolvent debtor to raise the question of usury relatively to transactions between such debtor and another creditor. So that, as shown by Presiding Justice Lumpkin, in the opinion in *Stone v. Georgia Loan & Trust Co.*, 107 Ga. 524, 83 S. E. 861, the principle announced in that case, as applied to usury cases, may be now considered as firmly established in this state. Indeed, as he points out in that opinion, our Civil Code now applies that principle to the subject of usury in the following language: "The plea of usury is personal; but a creditor has no right to collect usurious interest from an insolvent debtor to the prejudice of other creditors." But the application of this principle has not been extended beyond the usury cases, and we deem it unwise that it should be. Those cases must stand in a class apart to themselves. The plea of coverture being a personal privilege, we are clearly of opinion that no one should have the right to question the validity of a mortgage executed by a married woman as security for the debt of another, whether such debt be the debt of her husband or of some one else, except the woman herself or her privies in blood or estate. We are equally clear that a mere creditor of hers is not her privy in estate.

5. Section 2727 of the Civil Code of 1895, which provides that an unrecorded mortgage is "postponed to all other liens created or obtained * * * prior to the actual record of the mortgage," refers to liens created or obtained during the lifetime of the mortgagor. Standing alone, this section would seem to give a general judgment obtained against the estate of a decedent priority over a mortgage executed before the judgment but not recorded. But the statute of distribution provides that "judgments, mortgages, and other liens created during the lifetime of the deceased (are) to be paid according to the priority of their lien," and gives them the sixth place in the order of distribution of insolvent estates. CIV. CODE 1895, § 3424 (6). This clearly excludes the idea that a judgment obtained after the death of the judgment debtor is to have any priority of lien, as a judgment, upon the assets of his estate. It also clearly includes the idea that a mortgage, whether recorded or not, is entitled after the death of the mortgagor to whatever priority of lien it had when he died. So the provisions of these two sections of the Civil Code of 1895 are to be construed together and in harmony with each other. Subsequent paragraphs of section 3424 give the order of priority of debts ranking below liens created in the lifetime of the deceased, placing "All liquidated demands," including promissory notes, etc., in the eighth class. In construing this distribution statute, it has been repeatedly held that, in the distribution of an insolvent estate of a decedent, a judgment obtained

against the administrator thereof ranks no higher than the claim upon which it is based. Consequently a mere general judgment against the estate of a decedent can neither take precedence over, nor stand upon an equal footing with, an unrecorded mortgage executed by him. Counsel for plaintiff in error contend "that the word 'mortgages' in the sixth paragraph of section 3424 means a mortgage executed and recorded in accordance with law, such a mortgage only as would be good against a subsequent judgment if the intestate had remained in life, because a mortgage unattested and unrecorded according to the provisions of section 2727 is not such a lien as could claim the fund in a contest with third persons who are judgment creditors." The sixth paragraph of section 3424 includes all mortgages "created during the lifetime of the deceased," and provides that they shall be paid according to the priority of their liens. It makes no exception as to unrecorded mortgages, but applies to all mortgages alike, whether recorded or not. They all take effect according to the priorities of their liens; and an unrecorded mortgage takes effect according to the priority of its lien, which is the priority of the lien appertaining to an unrecorded mortgage; and this, in the distribution of the insolvent estate of a decedent, is superior to that of a general judgment obtained after his death, because such judgment, in such distribution, ranks no higher than the claim upon which it is founded.

It follows that the court did not err in directing the verdict in favor of the mortgagee.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

STATE v. SCOTT.

(Supreme Court of North Carolina. Sept. 25, 1906.)

1. ASSAULT AND BATTERY — DEFENSES — DEFENSE OF PROPERTY.

One may lawfully use as much force as is reasonably necessary to protect his property or to retake it when wrongfully taken by another, but if he uses more force than is required for the purpose, he is guilty of an assault.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 4, 13-15.]

2. SAME.

The right to protect person or property by the use of such force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except in urgent cases, and the person whose right is assailed must first use moderate means before resorting to extreme measures.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, § 4.]

3. SAME.

The prosecutor and a third person were driving a team which had been taken from accused under attachment and delivered by the officer to the plaintiff in the attachment as bailee. Accused pointed a pistol at the driver

and ordered him to drop the reins. He then turned to prosecutor, asked him what he was doing, and pointed the pistol at him and ordered him to leave. *Held*, that accused was guilty of assault at common law, if not under Revisal 1906, § 3622, making it an assault for one to point any pistol at another either in fun or otherwise, etc.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assault and Battery, §§ 1, 3.]

Appeal from Superior Court, Franklin County; Long, Judge.

J. F. Scott was convicted of assault, and he appeals. Affirmed.

Criminal action tried before Long, J., and a jury at August term, 1906, of Franklin superior court. The defendant was indicted for an assault on Johnson Smith. It appears that two mules had been attached by the sheriff in the suit of I. H. Kearney v. J. F. Scott and by him delivered to Kearney as his agent or bailee. The jury returned a special verdict from which we make the following extract: "In July, 1906, Richard Perry by order of Kearney harnessed the mules to a wagon, and together with Johnson Smith started to haul lumber. The wife and sister of the defendant went out and told them to carry the mules back to the stable and let them stay there. In a few minutes John Conyers came back driving the same team, and with the said Johnson Smith was preparing to load the wagon with lumber, the lumber being near the house of the prisoner. The prisoner went to the place with a pistol in his hand, pointed at the driver, the said John Conyers, and ordered him to turn loose the reins, which he did, leaving the team standing. The prisoner turned to Johnson Smith, and asked him what he was doing there. Upon being informed that he was there helping to haul the lumber, the prisoner pointed the pistol at him and ordered him to leave which he also did; the prisoner still having the pistol in his hand. The mules and wagon were then sent back to the stables of Kearney. No shot was fired from the pistol. The parties in charge of the mules were acting under orders of Kearney." Upon this verdict, the defendant was adjudged guilty, and from the sentence of the court he appealed.

N. Y. Gulley, for appellant. Atty. Gen., for the State.

WALKER, J. (after stating the case). Whether Kearney, as bailee of the sheriff, had the right to use the property, and if he did use it or permit it to be used in the manner described in the special verdict, whether the officer thereby lost his special property in the mules, so that the defendant could thereafter retake them, are questions we prefer not to discuss as the case can well be decided upon another ground which clearly sustains the judgment of the court. The rights and duties of a sheriff with respect to property in his custody by virtue of a

levy under attachment are considered in 1 Shinn on Attachment, 392. See, also, *State v. Black*, 109 N. C. 856, 13 S. E. 877, 14 L. R. A. 205. A person may lawfully use so much force as is reasonably necessary to protect his property or to retake it, when it has wrongfully been taken by another, or is withheld without authority, but if he use more force than is required for the purpose, he will be guilty of an assault. So if one deliberately and at the outset kills another with a deadly weapon in order to prevent a mere trespass, it is murder, and if he offers to strike with a deadly weapon or to shoot with a pistol, under the same circumstances, before resorting to a milder mode of prevention, he shows ruthlessness and a wanton disregard of human life and social duty. *State v. Myerfield*, 61 N. C. 108. The right to protect person or property by the use of such force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except in urgent cases. The person whose right is assailed must first use moderate means before resorting to extreme measures. *Clark's Cr. Law* (2d Ed.) 241, 242; *State v. Crook*, 133 N. C. 672, 45 S. E. 564. Ordinarily, whether excessive force has been used is a question for the jury. *State v. Goode*, 130 N. C. 651, 41 S. E. 3; *State v. Taylor*, 82 N. C. 554. In *State v. Morgan*, 25 N. C. 186, 38 Am. Dec. 714, speaking of an assault with a deadly weapon to prevent a trespass, the court, by Gaston, J., says: "It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking or endeavoring to take the life of a fellow being, in order to save one's self from a comparatively slight wrong, which is essentially wicked and which the law abhors. You may not kill, because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty." It is said in *State v. McDonald*, 49 N. C. 19: "Whether the deceased was in fact committing a trespass upon the property of the prisoner at the time when he was killed, and if he were, whether the prisoner could avail himself of it, as he assigned a different cause for the killing, it is unnecessary for us to decide. Admitting both of these inquiries to be decided in favor of the prisoner, the homicide is still, according to the highest authorities, murder, and murder only. To extenuate the offense in such a case, however, it must be shown that the intention was not to take life, but merely to chastise for the trespass, and to deter the offender from repeating the like, and it must so appear." To the same effect is *State v. Brandon*, 53

N. C. 463. Those are the leading cases, and are considered as having settled the law in this state upon the subject. When they are tested by the principle there announced, and it is commended both by common sense and a just regard for the public peace and private security, we find no difficulty in adjudging the facts found in the special verdict sufficient to establish the defendant's guilt. John Conyers and his companion, Johnson Smith, who is the prosecutor, were putting lumber on the wagon when the defendant suddenly appears on the scene and points a pistol, presumably loaded (*State v. Cherry*, 33 N. C. 475), at the prosecutor, without demanding the possession of his property or that he desist from using it, but merely asking him what he was doing there. The return by him of the mules to Kearney shows that he at least did not think he was entitled to the possession of them. If he pointed the pistol at Conyers and Johnson in resentment for using the mules, his act was none the less criminal, but was an aggravated assault, first on Conyers, and then on Johnson. In any view of the case, he was guilty of an assault at common law (*State v. Daniel*, 136 N. C. 571, 48 S. E. 544, 108 Am. St. Rep. 970), if not under section 3622 of the Revisal of 1905. No error.

WOODARD & WOODARD v. TRI-STATE MILLING CO.

(Supreme Court of North Carolina. Sept. 25, 1906.)

1. APPEARANCE — JURISDICTION — WAIVER — AGREEMENT.

An agreement by the counsel for defendant that a case brought before a justice of the peace should be heard before the justice on a day subsequent to the return day, entered into prior to the return day, is not a general appearance, and defendant may object to the insufficiency of the service of process.

2. SAME—SPECIAL APPEARANCE.

The appearance of an attorney for the sole purpose of moving to dismiss the action for irregularities in the proceedings is a special appearance and the right to dismiss may be insisted on.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, § 47.]

3. APPEAL—WAIVER OF OBJECTIONS—MOTION TO DISMISS.

Where, on a special appearance, a motion to dismiss an action for irregularities in the proceedings is denied, defendant may proceed with the trial without thereby losing his right to have the ruling reviewed by an appellate court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3612.]

Appeal from Superior Court, Edgecombe County; E. B. Jones, Judge.

Action by Woodard & Woodard against the Tri-State Milling Company. From an order of the superior court dismissing an appeal from a judgment of a justice of the peace, plaintiff appeals. Affirmed.

This action was commenced in the court of a justice of the peace, and, on appeal, was dismissed. The following are the findings of the superior court, his honor, Judge Jones, presiding:

"(1) That summons was duly issued by the justice of the peace on the 22d day of March, 1904, returnable on the 25th day of March, 1904, and the same was returned on the return day thereof by the constable with the indorsement 'Defendant not to be found in the county.' (2) There was no affidavit sufficient to order the publication of the service of the summons, nor was there any order directing the publication of the summons, nor is there any record showing there was a publication of the summons, and warrant of attachment in the papers. (3) I find that the defendant's attorney by correspondence, agreed with the plaintiff's attorney that the matter should be continued from April 23, 1904, and come up for hearing on the 13th day of May, 1904, at Whitakers, N. C. (5) That at the beginning of the trial on the 13th day of May, 1904, W. O. Howard, attorney for the defendants, moved to dismiss the action for irregularities in the proceedings, which motion was overruled and the cause proceeded with. (5) There was no personal service nor was there service by publication, but it was admitted that there was attempted service by publication returnable April 23, 1904."

From the order of the superior court, plaintiff appealed.

G. M. T. Fountain, for appellant. W. O. Howard, for appellee.

BROWN, J. The counsel for plaintiffs admits the correctness of his honor's ruling unless, as he contends, the defendant's counsel entered a general appearance before the justice of the peace. Prior to the return day of April 23d, it appears that counsel for plaintiffs and defendant, both of whom reside in Tarboro, some little distance from the office of the justice of the peace, agreed that the case should be heard before the justice on May 13th, instead of April 23d. This agreement was made doubtless for mutual agreement, and we see nothing in it to indicate that counsel for defendant intended to enter a general appearance or to waive any right he had which could have been exercised had he appeared on April 23d. In the language of Mr. Justice Walker, in *Bullard v. Edwards*, 140 N. C. 647, 53 S. E. 445, "We would not give so strained and technical a construction to his application for a continuance, as to exclude therefrom the idea that the plaintiff intended that the whole matter and not merely the trial upon the merits, should be continued for hearing to a more convenient time." Again, "we hold that he could do on the 2d of February, precisely what he could have done on the 26th of January, and further that he did not intend to waive any of his rights." 140 N. C. 648,

53 S. E. 448. That case seems to be very much in point. Agreements similar to the one made in this case are frequently made outside of court between counsel for their mutual convenience and it cannot be supposed that either intended thereby to waive any legal right his client possessed.

When the counsel for defendant appeared before the justice, on May 13th, he did not enter a general appearance. "The test for determining the character of an appearance is the relief asked, the law looking to its substance rather than form." *Scott v. Life Association*, 137 N. C. 518, 50 S. E. 221. Where the record shows that the appearance was made for the purpose of dismissing the action it is a special appearance. *Scott v. Life Association*, supra. The character of the appearance is to be determined by what the attorney actually did when he appeared in court, at the call of the case. 3 Cyc. pp. 502, 509. The first act of the attorney before he entered any appearance was to move to dismiss the action for irregularities in the proceedings. This conduct showed no purpose to enter a general appearance, but was in fact a special appearance itself for a special purpose. The motion being overruled, the attorney was warranted then in proceeding with the trial, and did not thereby abandon the right to have the justice's ruling reviewed by the superior court.

Affirmed.

BURTON v. BELVIN.

(Supreme Court of North Carolina. Sept. 25, 1906.)

1. BASTARDS—SUPPORT—CONTRACTS—ACTIONS FOR BREACH—COMPLAINT.

A complaint, alleging that defendant seduced plaintiff and begot children with her; that during the cohabitation he promised that, if she would not institute bastardy proceedings against him, he would provide necessities for herself and children; that his promise was renewed from time to time, and by means of the promises based on their illegal relations, but without stipulation as to future cohabitation, she was induced to refrain from instituting bastardy proceedings; that defendant broke his promises, and removed to another state, and demanding recovery for breach of the promise—states an action for damages for breach of a promise supported by a good consideration, and not a proceeding in bastardy.

2. SAME—CONSIDERATION.

An agreement by the mother of a bastard not to resort to bastardy proceedings is a good consideration for a pecuniary settlement by the putative father.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, § 25.]

3. CONTRACTS—VALIDITY—LEGALITY OF OBJECT—PAST COHABITATION.

A contract, in consideration of past cohabitation to support the woman and children begotten during the cohabitation, is not void, though the illegal cohabitation continues, if there is no stipulation for future cohabitation.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bastards, § 25; vol. 11, Cent. Dig. Contracts, § 514.]

Appeal from Superior Court, Vance County; Ward, Judge.

Action by Lucy Burton against N. J. Belvin. From a judgment for plaintiff, defendant appeals. Affirmed.

A. C. Zollicoffer and Henry T. Powell, for appellant. T. T. Hicks and T. M. Pittman, for appellee.

CLARK, C. J. The complaint alleges that the defendant, who is a married man, seduced the plaintiff when she was 14 years of age and has begotten three children by her; that during such cohabitation, in response to her repeated requests for assistance for herself and children, she then being again with child by him and disclosing her purpose to appeal to the bastardy law if refused, the defendant promised that, if she would not institute such proceeding, he would provide her "with money and necessities for the support of herself and children, begotten by him, and for the expenses of her sickness and lying in, and for her maintenance when she was unable to work. These promises he continued to make and renew from time to time to the plaintiff and to her father for her, and by means of his said promises, all of which were based upon their relations and the results thereof, and without stipulation or reference to any future cohabitation, she was induced to refrain from making application to the court under the provisions of the bastardy law or to bring any action against him." The complaint further alleges that the defendant has broken his oft repeated and solemn promises and removed to Virginia, leaving her, and his children by her, destitute and unprovided for, and asks for the recovery of damages sustained from the breach of the defendant's promises.

The defendant demurred on the grounds:

1. "That this is a proceeding in bastardy, and a justice of the peace has exclusive original jurisdiction." This is not a bastardy proceeding, but it is an action for damages from a breach of a promise made upon good and valid consideration. Bastardy proceeding would not be a feasible remedy, for the defendant has removed from the state. Besides, the plaintiff sues for breach of a promise and asks damages beyond the jurisdiction of a justice of the peace.

2. "That the action, being based upon a promise not to institute bastardy proceedings, is illegal and void and against public policy." Bastardy proceedings are civil, not criminal, in their nature (*State v. Liles*, 134 N. C. 735, 47 S. E. 750), and an agreement not to resort to or to discontinue such proceeding is "a good consideration for a pecuniary settlement or compromise" (9 Cyc. 510).

3. "That the alleged cause of action is based upon an immoral and illegal contract and is therefore void as against public policy." It is true that a contract for future cohabitation is immoral and void, as against pub-

lic policy. But a contract in consideration of past cohabitation to support the mother and children is in the nature of reparation, as far as it goes, and to be commended. It is neither void nor immoral, even though the illegal cohabitation continues, if there is no stipulation for future cohabitation. *Brown v. Kinsey*, 81 N. C. 243, and cases there cited. It would be infinitely more to the credit of the defendant that he should provide for the victim of his lust and the innocent children of whom he has become the father, and should keep them from suffering and from becoming a charge upon the taxpayers, than that he should remove to another state, leaving her and his children in destitution, and, when sued for breach of his promise, should plead his own immorality and violation of law as a defense. The defendant was under a natural obligation to support his illegitimate offspring (*Kimborough v. Davis*, 16 N. C. 74), and maintain the plaintiff in her sickness, which he had caused. This obligation the law not only recognizes, but enforces it in bastardy proceedings. It cannot be immoral for the defendant to promise to do his natural and legal duty by the plaintiff and his illegitimate offspring. He presents a very sorry spectacle in pleading to be released from liability on the ground that such promise is immoral and against public policy. He has been immoral, but not in promising to provide for the support of his victim and his children. It is in furtherance of, not against, public policy that provision for them should be made by him and the burden not be cast upon the taxpayers. *Brown v. Kinsey*, supra, is exactly in point. *Corbett v. Clute*, 137 N. C. 546, 50 S. E. 216, which holds that a bond given as consideration for the suppression of a criminal prosecution is null and void, has no application. The execution of public justice cannot be stayed by the payment of money or by any private arrangement. But bastardy proceedings are not in the enforcement of punishment. It is a quasi civil remedy for the sole purpose of providing support for the woman and child, and to save the taxpayers from that expense. The judgment overruling the demurrer is affirmed.

STATE v. BURNETT.

(Supreme Court of North Carolina. Sept. 25, 1906.)

1. INDICTMENT AND INFORMATION—MOTION TO QUASH.

A motion to quash an indictment after plea of not guilty is allowable only in the discretion of the court.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 473.]

2. SAME—MISJOINDER OF OFFENSES.

An indictment charging one in one count with a violation of Revisal 1905, § 3358, making it a felony to abduct a child under the age of 14 years, residing with his father, and in another count a violation of section 3630, making

it a misdemeanor to entice any minor to go beyond the limits of the state without the consent of the parent, cannot be quashed for misjoinder of offenses; the counts being mere statements of the same transaction, varied to meet the different phases of proof.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, §§ 403-413.]

3. CRIMINAL LAW — INSTRUCTIONS — DUTY OF COURT TO GIVE.

It is not necessary for the court to give requested instructions verbatim, and a charge substantially embracing the requests so far as they are correct is sufficient.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2013, 2014.]

4. ABDUCTION—NATURE OF OFFENSE — STATUTES.

The offense of abduction, denounced by Revisal 1905, § 3358, making it a felony to abduct any child under the age of 14 years who shall reside with his father, is not established, where there is force or inducement, and the departure of the child from the custody of the father is voluntary.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abduction, §§ 1-10.]

5. SAME—INSTRUCTIONS.

An instruction on the trial of an indictment for violating Revisal 1905, § 3358, making it an offense to abduct any child under the age of 14 years who shall reside with his father, that the jury must be satisfied that the child was under 14 years, that she was residing with her father, and that accused carried her away against her will and by means of force, fraud, or other inducement, and that if there was no inducement or force and the child departed from her father voluntarily, accused was not guilty, and that, should it be found that the child was taken away by accused against her father's will, accused could not be convicted unless it should be found that the child was carried away by force or fraud, or by the persuasion of the accused, was sufficiently favorable to accused.

6. SAME—ELEMENTS OF OFFENSE.

To constitute the abduction of a child in violation of Revisal 1905, § 3358, making it a felony to abduct a child under the age of 14 years, it is not necessary to prove that the taking of the child was against the father's will and without his consent.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abduction, § 10.]

7. SAME—DEFENSE—BURDEN OF PROOF.

One charged with the abduction of a child in violation of Revisal 1905, § 3358, has the burden of establishing the defense that the carrying away of the child was with the father's consent.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abduction, § 17.]

Appeal from Superior Court, Vance County; Ward, Judge.

W. E. Burnett was convicted of abduction, and he appeals. Affirmed.

F. S. Spruill, T. M. Pittman, and J. C. Kittrell, for appellant. The Attorney General, for the State.

CLARK, C. J. The defendant was convicted of abduction. There are two counts in the bill, one based upon Revisal 1905, § 3358, which makes it a felony to "abduct, or by any means induce any child under the age

of 14 years, who shall reside with the father, * * * to leave such person. * * *

The second count is under Revisal 1905, § 3630, which makes it a misdemeanor to entice any minor to go beyond the limits of the state for the purpose of employment without the consent in writing "of the parent, guardian or other person having authority over such minor." The jury found the defendant guilty on the first count, and not guilty on the second. After the indictment was read to the jury, the defendant asked leave to withdraw his plea of not guilty and moved to quash the indictment for misjoinder of two different offenses. This was denied, and defendant excepted.

A motion to quash, after plea of not guilty, is allowable only in the discretion of the court. *State v. DeGraff*, 113 N. C. 688, 18 S. E. 507; *State v. Flowers*, 109 N. C. 845, 13 S. E. 718; *State v. Miller*, 100 N. C. 543, 5 S. E. 925; *State v. Jones*, 88 N. C. 671. We may note, however, that if the motion had been made in apt time, when the several counts are, as in this case, merely statements of the same transaction varied to meet the different phases of proof, the bill cannot be quashed. *State v. Harris*, 106 N. C. 682, 11 S. E. 377; *State v. Parish*, 104 N. C. 679, 10 S. E. 457; *State v. Morrison*, 85 N. C. 561; *State v. Eason*, 70 N. C. 88. An indictment containing several counts describing the same transaction in different ways is unobjectionable. *State v. Haney*, 19 N. C. 390; *State v. Eason*, supra; *State v. Reel*, 80 N. C. 442; *State v. Morrison*, supra; *State v. Parish*, supra; *State v. Howard*, 129 N. C. 656, 40 S. E. 71; *State v. Morgan*, 133 N. C. 743, 45 S. E. 1033.

To charge two separate and distinct offenses in the same count is bad for duplicity (*State v. Cooper*, 101 N. C. 684, 8 S. E. 134), and the bill may be quashed on motion in apt time; but the objection is waived by failing to move in apt time and is cured by a nol. pros. as to all but one charge, or by verdict. *State v. Cooper*, supra. When an indictment charges several distinct offenses in different counts, whether felonies or misdemeanors, the bill is not defective; but the court may in its discretion compel the solicitor to elect, if the offenses are actually distinct and separate, lest the prisoner be confused in his defense or embarrassed in his challenges; but there is no ground to require the solicitor to elect when the indictment charges the same act "under different modifications, so as to correspond with the precise proofs that might be adduced." *State v. Haney*, 19 N. C. 394; *State v. Barber*, 113 N. C. 714, 18 S. E. 515; *Goldbrick Case*, 129 N. C. 656, 40 S. E. 71, and cases there cited. Besides, duplicity is ground only for a motion to quash, made in apt time, and is cured by verdict. *State v. Wilson*, 121 N. C. 655, 23 S. E. 418; *State v. Hart*, 116 N. C. 973, 20 S. E. 1014; *State v. Cooper*, supra; *State v.*

Haney, *supra*; State v. Simons, 70 N. C. 336; State v. Locklear, 44 N. C. 205.

The court charged the jury on the first count that they must be satisfied beyond a reasonable doubt that the girl was under 14 years, that she was residing with her father, and that the defendant took and carried her away, not only against his will and without his consent, but that the taking and carrying of the child was by the defendant's force, fraud, persuasion, or other inducement, exercising a controlling influence upon her conduct; that, if he merely permitted her to go with him and his family and gave her his active assistance, that of itself would not make him guilty; that abduction is the taking and carrying of a child, ward, etc., either by fraud, persuasion, or open violence; that the consent of the child is no defense, but, if there was no inducement nor force, and the child departed from her father entirely voluntarily on her part, the defendant was not guilty of abduction; that, should the jury find that the girl was taken away by the defendant against her father's will and without his consent, the defendant cannot be convicted, unless the jury should go further and find beyond a reasonable doubt that the girl was carried away by the force or fraud, or induced to go by the persuasion, of the defendant." This charge substantially embraced the prayers of the defendant so far as they were correct. It was not necessary to give them verbatim. See numerous cases cited in Clark's Code (3d Ed.) § 415.

In State v. Chisenhall, 106 N. C. 879, 11 S. E. 518, the court adopts Webster's definition of abduction, "The taking and carrying away of a child, a ward, a wife, etc., either by fraud, persuasion, or open violence," and adds: "It is clear that the consent of the child, obtained by means of persuasion, is no defense, since the result of such persuasion is just as great an evil as if it had been accomplished by other means. Even under the English statutes, where a 'taking' is required, it was said by Wightman, J. (in Rex v. Handley, 1 F. & F. 648), that: 'A taking by force is not necessary. It is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home.'" The court then further added that "the true spirit of the statute is for the protection of the parent." Of course, if there is no force or inducement, and the departure of the child is entirely voluntary, there is no abduction. The defendant has no cause to object to his honor's charge. Indeed, it may be here noted that an allegation or proof that the taking was "against the father's will and without his consent" is not required by the statute as to the first count. State v. George, 93 N. C. 567. That the carrying away was with the father's consent is a defense the burden of which is upon the defendant. State v. Chisenhall, *supra*.

No error.

IVES v. ATLANTIC & N. C. R. CO.

(Supreme Court of North Carolina. Sept. 25, 1906.)

1. FRAUDS, STATUTE OF—INTERESTS IN REAL ESTATE—SALE OF STANDING TIMBER.

A contract for the sale of standing timber is within the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 117.]

2. SAME—CONTRACT TO CUT TIMBER.

An oral contract, whereby one of the parties agreed to cut timber on the land of the other and deliver it for a certain price per cord, was not within the statute of frauds.

3. APPEAL—HARMLESS ERROR—SELECTION OF JURORS.

A party cannot complain of the sustaining of an objection to a juror, where at the time he had not exhausted his peremptory challenges, and the jury chosen constituted a panel acceptable to both parties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4125.]

4. CONTRACTS—ACTION—EVIDENCE—ADMISSIBILITY—ABILITY TO PERFORM.

In an action for damages for breach of a contract whereby plaintiff was to cut and deliver wood for defendant, the testimony of a witness that he loaned plaintiff money to enable him to fulfill his contract was admissible on an issue as to plaintiff's ability and readiness to perform.

5. SAME.

In an action for breach of contract, the testimony of a witness that he loaned plaintiff money to fulfill the contract, offered on an issue as to plaintiff's ability and readiness to perform, was not objectionable on the ground that its effect was to make the witness the real plaintiff.

6. EVIDENCE—DECLARATIONS—STATEMENTS OF CORPORATE OFFICER.

In an action for breach of contract, whereby plaintiff was to cut wood for defendant railroad and deliver it on the right of way, evidence that defendant's president, the agent of the road deputed to make the contract, stated in the presence of plaintiff that plaintiff need not deliver the wood on the right of way, and that he ordered that it should be paid for where it then stood, was admissible against defendant.

7. TRIAL—INSTRUCTIONS—REQUESTS—NECESSITY.

If a party desires more definite instructions on any issue, he must make a special request for them, or he cannot be heard to complain of the indefiniteness of the instructions on appeal.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 628.]

Appeal from Superior Court, Craven County; Long, Judge.

Action by B. W. Ives against the Atlantic & North Carolina Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Civil action tried before Long, J., and a jury at May term, 1906, of Craven superior court. The action was brought to recover damages for breach of an oral contract between the parties by which the plaintiff agreed to cut for the defendant and deliver along its right of way 15,000 cords of wood, 3,000 cords of which were to be cut from the plaintiff's land and the balance from the land of the defendant. For the 3,000 cords

the defendant agreed to pay \$2 per cord and for the remainder \$1.75 per cord, the defendant, as to the latter, being allowed a deduction on the price of 25 cents per cord for what is called "stumpage"; that is, for the trees furnished by it or cut on its land. Plaintiff cut 5,000 cords, for which he was paid, and he cut and was ready to deliver 5,184 cords, and has cut and delivered 748 cords, for which he was not paid, making 10,986 cords, and leaving uncut 4,014 cords. There were 1,140 of the 5,090 cords which were not delivered on the right of way, because it was already full of other wood and there was no room for it. This was hauled by plaintiff to his tramway and was ready for delivery, when defendants directed that it should be inspected and paid for. Six hundred cords of it was afterwards delivered on the right of way. The plaintiff alleged that he had been prevented from complying fully with his part of the contract by the wrongful acts of the defendant, although he was at all times ready, able, and willing to do so, and there was evidence tending to support the allegation. There was evidence tending to show that the plaintiff had not complied in all respects with the contract on his part. It was also in evidence that there had been no breach of the contract by the defendant, until after the road was leased; the former president of the defendant company stating that he would have carried out the contract fully had he been continued in office. The defendant pleaded a counterclaim consisting of \$1,193 paid to the plaintiff for the 1,140 cords of wood cut from its land, which it alleged had not been delivered on the right of way and which had become worthless, and \$285 for stumpage, and \$413.40 for quarters erected for the plaintiff's hands, at his request, making in all \$2,691.40, and there was some evidence to sustain the demand.

The plaintiff objected to a juror, N. H. Russell, upon the ground that he was now in the employ of the lessee of the defendant, and had formerly been in its employ, the said lessee being responsible under its contract with the defendant for any recovery against the defendant. The objection was sustained, and the defendant excepted. The plaintiff was permitted to prove by one J. A. Meadows, over the defendant's objection, that he had advanced \$13,000 to the plaintiff to enable him to carry out this contract, and that the defendant still owed him \$7,300 on the debt. This evidence was introduced solely for the purpose of showing that the plaintiff was ready and able to perform his part of the contract. Many other exceptions were taken by the defendant to the rulings and to the charge of the court but it is not necessary to make any special reference to them here as they are noticed in the opinion. The issues, with the answers thereto, were as

follows: "(1) Did the defendant contract with the plaintiff as alleged in the complaint? A. Yes. (2) Did defendant fail to perform said contract on its part as alleged in the complaint? A. Yes. (3) What sum, if any, is the plaintiff entitled to recover of defendant on account of said alleged breach? A. \$8,106.90. (4) Did the plaintiff carry out and perform said contract on his part? A. Yes. (5) What sum, if any, is the defendant entitled to recover of the plaintiff on account of his failure to perform his contract as alleged by defendant? A. Nothing."

Judgment was entered upon the verdict, and the defendant appealed.

W. C. Munroe, P. M. Pearsall, A. D. Ward, and O. H. Guion, for appellant. D. L. Ward and W. W. Clark, for appellee.

WALKER, J. (after stating the case). It may not be taken as settled that growing trees are a part of the realty, and a contract to sell or convey them or any interest in or concerning them must be reduced to writing. They are *fructus naturales*, and, being rooted in the soil, are by nature as much annexed to the freehold as any permanent fixture can be. *Scorell v. Boxall*, 1 Younge & Jervis, 396; *Carrington v. Roots*, 2 M. & W. 254; *Rodwell v. Phillips*, 9 M. & W. 501; *Evans v. Roberts*, 5 B. & C. 829. The course of judicial decision in England upon this subject, from the time of the dictum of Treby, C. J., in *Anon.*, 1 Lord Raymond, 182, to the latest period, will be found well stated in *Reed on Statute of Frauds*, §§ 707, 711. We have adopted the rule as given in the cases above cited, and a contract for the sale of standing timber has always been considered by us as within the meaning and intent of the statute. *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 738; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Moring v. Ward*, 50 N. C. 272; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Green v. Railroad*, 73 N. C. 524; *Mizell v. Ruffin*, 113 N. C. 21, 18 S. E. 72. The question was directly presented and decided in *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539, and *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 852. But the contract of the parties to this action was not one for the sale of standing trees, but, in the one case, for the sale and delivery of cord wood, and, in the other, for the conversion of trees growing on the defendant's land into cord wood and the delivery of the same on the defendant's right of way. It was not contemplated by the parties that there should be a transfer of any title to or interest in the trees as they stood upon the land, and this is essential to bring the agreement within the purview of the statute. 29 Am. & Eng. Enc. (2d Ed.) 890. In *Washburn v. Burrows*, 1 W. H. & G. (Exch.) 115, Rolfe, B., for the court, said that where the vendor, who is the owner of the soil, sells what is

growing on the land, whether natural produce (*prima vestura*), such as timber, grass, herbage or apples, or the annual fruits of industry (*fructus industriales*), as corn, pulse, or the like, on the terms that he (the vendor) is to cut, or sever them from the land and then deliver them to the purchaser, the latter acquires thereby no interest in the soil "which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel." It was ruled in the leading case of *Smith v. Surman*, 9 B. & C. 561, that where the owner of land agreed with another to cut timber from his own land and deliver the trees, when cut down or severed from the freehold, to the latter for a stipulated price, the statute did not apply, and the particular agreement, in that case, being construed to have the said effect in law, was therefore held not to be within the statute. And the converse of the proposition is equally true, that where one contracts with another to cut timber from his land and deliver it to him when cut or severed, the statute has no application. It has been so expressly decided. *Killmore v. Howlett*, 48 N. Y. 569; *Forbes v. Hamilton*, 2 Tyler (Vt.) 356; *Scales v. Wiley*, 68 Vt. 39, 33 Atl. 771; *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Boyce v. Washburn*, 4 Hun (N. Y.) 792; 2 Reed on Statute of Frauds, § 711. The courts properly said in the cases cited that to give the statute the construction contended for, would be to destroy the right of recovery of almost every laborer at harvesting or mowing which generally and almost universally rests on a parol contract, and, further, that it would make a writing indispensable to the validity of a contract by the owner of a peat bed or a sand bank to deliver even a load from it, and, we may add, it would jeopardize the rights of every woodman who for hire fells trees in the forest. The construction is utterly inadmissible. It has been said in some cases, following a dictum of *Littledale, J.*, in *Smith v. Surman*, *supra*, that if the trees are sold by the vendor, who is the owner of the land upon which they are standing, to the vendee, with a stipulation that they must be cut and removed at once or within a reasonable time, the trees will be regarded as chattels and the contract will therefore not be within the statute, and this because of the shortness of the time given for cutting and removing them. *Marshall v. Green*, L. R. 1 C. P. Div. 35. This distinction is scholastic, if not arbitrary. It partakes more of formalism than it does of sound logic and cogent argument. We would not cite this class of decisions in support of our ruling in this case, as we cannot assent to the reasoning and conclusion of the courts in them. While they may seem to be in point, they really are not, as there the trees themselves, as standing timber, were sold to the vendee. Here

they were not. The question as to whether the statute applies should not be determined by the mere accident that time is given to sever the trees or other growth, but by the nature of the thing, as being or not being a part of the freehold. This is the better reason and ground for decision and it was so considered by Lord Ellenborough in *Crosby v. Wadsworth*, 6 East, 602, wherein the court held an agreement that the plaintiff should enter the defendants' land and cut and carry away a crop of grass, to be for an interest in land, because "conferring an exclusive right to the vesture of the soil during a limited time"; and to the same effect is *Scorell v. Boxall* and *Killmore v. Howlett*, already cited by us, and numerous other cases decided by courts of high authority. 28 A. & E. Enc. (2d Ed.) 540, and note 6; 29 A. & E. Enc. (2d Ed.) 889 and note 5, where the authorities are collected. At any rate, the cases which hold that as the time fixed for cutting and removal shows whether or not it was intended that the trees or other growth should receive further nutrition from the soil, it should control in the decision of the question, are at variance with the reason assigned by this court for its ruling that contracts for the sale of standing trees are within the statute. What is the law, in this respect, with regard to the fruits of industry (*fructus industriales*), is not now before us. *Flynt v. Conrad*, *supra*. Our opinion is therefore against what appears to be the main contention of the defendant, that the contract is void because it was not in writing, for this is a contract not for the sale of trees but merely for the cutting of them into cord wood. It is simply a contract for employment and not for any interest in the article upon which the labor is to be bestowed. This is the practical view and accords with the intention of the parties.

The defendant is not in a position to except to the ruling of the court sustaining the objection to the juror. It had not exhausted its peremptory challenges, and, so far as appears, the jury chosen to try the case constituted a panel entirely acceptable to both parties. The purposes of justice and the end of the law are equally attained when a fair and impartial trial has been secured to the complaining party. The right of challenge confers not a right to select but a right only to reject. This is so in theory and it should be so in practice. *State v. Gooch*, 94 N. C. 987; *State v. Hensley*, 94 N. C. 1021; *State v. Jones*, 97 N. C. 469, 1 S. E. 680; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357; *State v. Brogden*, 111 N. C. 656, 16 S. E. 170; *State v. McDowell*, 123 N. C. 764, 31 S. E. 839. If an unobjectionable jury was secured, how does it concern the defendant that a juror was improperly rejected, if such was the case, which we need not decide. The question, the form here presented, was de-

added against the defendant's contention in *State v. Arthur*, 18 N. C. 217.

The testimony of the witness J. A. Meadows was competent and also relevant to the issues being tried. The fact that he loaned the plaintiff money to enable him to fulfill his contract was surely some evidence bearing upon the issue as to the plaintiff's ability and readiness to perform his part of the agreement. Some of this money he had already used and a balance of \$7,300 still remained with which he excepted to complete the work. We are at a loss to know why this testimony was not relevant. The fact, if it be one, that its effect would be to make Meadows the real plaintiff, is not any legal objection to it. The defendant objected to evidence of the conversation between plaintiff, Bryan, and Carlyle as to the delivery of the 1,140 cords, in which Bryan agreed that he need not deliver it on the right of way and ordered that it should be paid for as it then stood. This is not the declaration, after the fact, of an agent, but merely the relation of what Bryan, as chief executive officer of the defendant—that is, its president, and, too, its agent specially deputed to make the contract and to see to its proper execution—had said and done in the course of his employment. It was a part of the very transaction involved in this dispute, and a statement made by Bryan while acting for the defendant, and *dum ferveat opus*. *Smith v. Railroad*, 68 N. C. 107, and the other like cases, do not therefore apply. The defendant's counsel further contended that as the plaintiff had delivered only 600 of the 1,140 cords on the right of way, leaving 540 undelivered, and as he had delivered only one other lot of 748 cords (exclusive of the 5,090 cords), making 1,348 cords so delivered, and as the defendants paid for 1,140 cords, the plaintiff is entitled to recover only the difference, or the value of 248 cords. The court charged the jury fully with reference to this matter and told them that the value of the 248 cords was the measure of the plaintiff's recovery "if they should find the facts to be according to the defendant's contention." The court, we think, went to the extreme limit in favor of the defendant. The defendant's prayer excluded entirely from the consideration of the jury the evidence introduced by the plaintiff to show that the defendant had waived a delivery on the right of way, and that it had in several respects deliberately broken the contract. The jury have found as a fact from the evidence that there was no valid reason for refusing to receive the entire lot of wood and providing a proper place for its storage. We were told on the argument, and it is so stated in one of the briefs, though it does not appear in the record, that after the lease was made, the defendant no longer needed the wood, as the engines were changed from wood to coal burners. This, if it be true, was, of course, no excuse for the breach, nor does it clearly appear that there

was any other good reason for refusing to receive this wood or for breaking the contract in any other respect, the former president of the defendant company having testified that the wood would have been accepted and paid for and the contract carried out if he had continued in office, and the jury having adopted the plaintiff's version of the facts. We refer to these matters to show that in submitting the case to the jury the court has given the defendant the benefit of every possible contention in respect to them, and this is true with reference to all the questions involved. The other exceptions of the defendant are numerous, but they are not of such a nature as to require any extended discussion of them. They relate in one form or another to the refusal of the court to give more explicit instructions and to explain the relative rights and obligations of the parties under the contract. It has been so repeatedly held by this court that if a party desires more definite instructions, he must make a special request for them; that the citation of authority to support the rule is hardly required. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. But it must not be inferred that we think the criticism of the charge is warranted, for we are not of that opinion. The instructions were clear and comprehensive, embracing every possible phase of the case which was material, and should have been submitted to the jury. We do not doubt that the jury, which the parties appear to have regarded as fair and intelligent, got a perfect understanding of the facts and the law as explained by his honor.

We have discussed the exceptions chiefly relied on in the argument before us. The others are, we think, without merit. The case has been fairly and correctly tried, and the defendant must abide by the result.

No error.

WILLIAMSON v. BRYAN.

(Supreme Court of North Carolina. Sept. 18, 1906.)

1. BOUNDARIES—DISPUTED BOUNDARY ISSUES.

Where, in an action to recover land, the only issue was with reference to a disputed boundary line, which defendant alleged was established, owned, and recognized by the owners of the lands belonging to plaintiff and defendant, which was well marked and defined, and which formed the boundary line between the lands described in plaintiff's complaint and the adjoining lands owned by defendant, it was not error for the court to refuse to submit an issue as to whether plaintiff was the owner and entitled to possession of "a narrow strip of land described in the complaint," and to submit an issue as to which of two lines indicated on a map was the true line dividing plaintiff's and defendant's lands.

2. EJECTMENT—TITLE OUT OF STATE.

Where, in an action to recover land, the answer admitted that plaintiff owned all the lands on one side of a well-established boundary line and that defendant owned all on the other side, it was unnecessary for plaintiff to prove title out of the state to any of the lands.

plaint, if it shall be found that the boundaries set out in the first allegation cover the said strip of land so described in the third allegation. The defendant further says that more than 30 years ago there was a well-established line owned and recognized by the owners of the lands belonging to the plaintiff and the defendant, which was well marked and defined and which formed the boundary line between the lands described in the plaintiff's complaint and the adjoining land now owned by the defendant. The answer further alleges that the defendant and those under whom he claims held and worked up to this boundary line, and that the defendant and those under whom he claims have had possession up to such well-recognized boundary line, and that they have held up to and recognized the said boundary line, and had possession of the said strip of land, which the defendant claims is on his side of the line, for more than 20 years, etc. It will be observed that the defendant claims nothing, either by way of title or possession, beyond the boundary line which he claims was established and recognized by the owners of the lands on both sides more than 30 years ago.

We think that, under the pleadings in this case, the sole controversy relates to the allegation of a boundary line between the lands of the plaintiff and the defendant, the plaintiff claiming on the west side of that line and the defendant on the east side of it. The form of the first issue is directly responsive to the allegations of the complaint and the answer, and, taken in connection with the admissions set out in the pleadings, was amply sufficient to justify the judgment of the court.

It is contended that the plaintiff has failed to show title out of the state. This was unnecessary because the answer admits that the plaintiff owns all the lands on one side of the well-established boundary line and the defendant all on the other side. This admission rendered it unnecessary to prove title out of the state to any of the lands, and made it only necessary to determine the exact location of this boundary line which the jury has located according to the contention of the plaintiff. Nevertheless, under the second issue, his honor did submit to the jury with appropriate instructions the various phases of the case as presented by the evidence relating to adverse possession of the strip of land in controversy, which issue was also found for the plaintiff. But in the view we take of it this was unnecessary because, under the admissions contained in the answer, the controversy between the parties was determined when the jury located the true line between the lands of these adjoining owners, and this finding coupled with the admissions in the pleadings is sufficient to sustain the judgment. However, we have examined the evidence, the charge of the court and the exceptions relating to the second issue, and we find that, under that issue,

the question of adverse possession, etc., was fully submitted to the jury with proper instructions, and we think the exceptions are without merit.

No error.

DUFFY v. FIDELITY MUT. LIFE INS. CO (Supreme Court of North Carolina. Sept. 25, 1903.)

1. INSURANCE—NOTICE OF ASSESSMENTS—SUFFICIENCY OF NOTICE.

A by-law of an assessment insurance company, providing that notice of an assessment may be given members by mail, is valid.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1884, 1900.]

2. SAME—ACTION—BURDEN OF PROOF.

Where it is the duty of an insurance company to mail a notice of an assessment, in order to sustain a forfeiture for nonpayment it must show affirmatively that the notice was mailed, properly addressed within the time fixed.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1897-1902.]

3. SAME—NOTICE OF ASSESSMENTS.

A by-law of an assessment insurance company, making a certificate by the treasurer or bookkeeper conclusive evidence of the mailing of a notice of an assessment, is unreasonable and invalid.

4. SAME—ACTION—EVIDENCE—ADMISSIBILITY.

Where a by-law of an assessment insurance company made a certificate of the treasurer or bookkeeper of the mailing of notice of an assessment conclusive as to the mailing, a certificate made by the treasurer to the effect that there was attached thereto a correct transcript of the company's records showing the mailing of the notice, being the affidavit of the mailing clerk, and a paper referred to therein, was inadmissible as hearsay.

Appeal from Superior Court, Craven County; E. B. Jones, Judge.

Action by Charles Duffy, Jr., against the Fidelity Mutual Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This action is prosecuted by plaintiff for the alleged wrongful cancellation of a policy of insurance by defendant; plaintiff claiming as damages the premiums paid and interest thereon. Defendant admitted the cancellation, and justified by alleging that, plaintiff having failed to make premium when due, the policy, by its terms, became void. The controversy arises upon the question whether the notice of the assessment was given to plaintiff according to the terms of the policy and by-laws of the association. The two issues material to be considered in disposing of this appeal are: "(1) Was a notice of assessment of July 1, 1903, which was payable July 31, 1903, duly directed to the plaintiff at New Bern, N. C., which address appeared at the time on the books of the company deposited on July 1, 1903, postage prepaid, in the post office in Philadelphia? Answer: No. (2) Was the notice of July 1, 1903, assessment received by plaintiff at his address in New Bern, N. C.? Au-

swer: "No." It was in evidence that, at the date of the policy, April 12, 1883, and by its terms, the assessments were due and payable to Joel Kinsey, Trustee, at New Bern, N. C.; that payments were made to said trustee until some time prior to July 1, 1903, when the by-law was so amended that the assessment became payable to the company in Philadelphia; that, after the change in the by-law, plaintiff made several payments of assessments by sending same to Philadelphia. Defendant introduced article 5, § 2, of the by-laws, as amended, as follows: "A printed or written notice directed to the address of a member, as it appears at the time on the books of the association, and deposited in the office at Philadelphia, shall be deemed a legal and sufficient notice of mortuary calls and dues. A certificate made by the treasurer or bookkeeper showing such facts shall be taken and accepted as conclusive evidence of the mailing of such notice." Defendant thereupon introduced a certificate made by O. C. Bosbyshell, treasurer, stating that on July 1, 1903, a notice of assessment, directed to the plaintiff, was deposited in the post office of the city of Philadelphia, inclosed in an envelope, postage prepaid, etc., concluding: "And this certificate is made by me, the treasurer of said company, in conformity with the by-laws of the said association, which are a part of said policy; and attached hereto is a true and correct transcript of the records of the company made at that time, showing the mailing of such notice, being the affidavit of the mailing clerk," etc. Following this certificate is the affidavit of S. E. Haines, clerk, who states that he has charge of the preparation and mailing of notices for premiums upon policies issued by defendant. That on the 7th day of July, 1903, he deposited the notices referred to in certain sheets attached, addressed to the persons named, etc. This affidavit bears date July 1, 1903, and attached thereto is a sheet showing notice of assessment mailed to plaintiff at New Bern, N. C. There is no controversy regarding the amount of the assessment. Plaintiff was asked the following question: "Did you ever receive any notice or demand for payment of assessment for July 1, 1903?" Defendant objected. Objection overruled. Defendant excepted. Answer: "I have never received a notice for July, 1903." The defendant requested certain special instructions, which are set out in the opinion. The jury answered both issues in the negative. From a judgment upon the verdict defendant appealed.

Hinsdale & Son and W. W. Clark, for appellant. W. D. McIver and O. H. Guion, for appellee.

CONNOR, J. (after stating the case). In the view which we take of this appeal, several of the questions presented by the exceptions and argued in the brief become im-

material. The inquiry to which the first issue is directed lies at the threshold of the controversy. The answer to that question, in our opinion, is decisive of the case. The authorities cited by the learned counsel for defendant fully sustain the validity of the contract contained in the policy, declaring that by mailing the notice, properly addressed, to the plaintiff, the defendant discharges its duty in that respect. The authorities are practically uniform in holding that a by-law of an assessment insurance company providing that notice may be given members of assessments by mailing, properly addressed, is valid and binding upon the members. *Yoe v. Mutual Ben. Ass'n*, 63 Md. 86; *Epstein v. Mut. Aid Ben. Ass'n*, 23 La. Ann. 938; *Niblack, Ben. Soc. § 260*. It is equally well settled that the by-laws of such association when assented to by the member, as provided in the charter, constitute the measure of duty and liability if the parties, provided they are reasonable, and not in violation of any principle of public law. There was evidence proper for the consideration of the jury tending to show that Dr. Duffy knew of the change in the by-law by which the assessment became payable in Philadelphia. The authorities are uniformly to the effect that when the duty is imposed upon the company to mail the notice, in order to sustain a forfeiture, it must show affirmatively that the notice was mailed, properly addressed, within the time fixed. "The giving of the notice is a condition precedent, and good standing is not lost by a failure to pay an assessment, of which no notice was given through the fault or misconduct of a supreme lodge, or society, or its officers." *Niblack on Ben. Soc. § 257*. In the absence of any contract or by-law to the contrary, actual notice must be shown, not only mailing, but the receipt of the notice. But, as we have seen, the parties here have contracted that mailing shall be taken as notice. The defendant seeks to show conclusively by the certificate of the treasurer that the notice was mailed, and excepts to the testimony of plaintiff that it was not received. For the purpose of sustaining this exception the defendant relies upon the by-law declaring that such certificate shall be taken as conclusive evidence of the fact of mailing. This contention presents the question whether the by-law so providing is valid. There can be no question that a corporation may make reasonable by-laws not inconsistent with its charter. "In its operation between the corporation and its members, a by-law, in order to be valid, must not be unreasonable, oppressive, or extortionate." 10 Cyc. 357; *Allnutt v. Sub. High Court*, 62 Mich. 110, 28 N. W. 802. Whether a by-law is reasonable is a question of law for the court. 10 Cyc. 358.

A diligent investigation by the learned and industrious counsel for both parties and ourselves fails to discover any authority or

discussion of the exact question presented by this appeal. The numerous cases sustaining contracts by which the parties agree to submit questions arising between them to arbitration, or to the estimate of one or more persons chosen in advance, give us but little aid in the solution of this question. "By-laws restricting the right to sue in the courts are generally void." 10 Cyc. 361. While the by-law relied upon by defendant does not in express terms undertake to deprive the plaintiff of his right, in common with all other citizens, to sue in the courts for redress of his grievance, the practical effect of the right claimed to close the door to inquiry in respect to the controverted fact is to keep the promise to the ear and break it to the heart. If one of the officers of the corporation may, by an ex parte unsworn certificate, conclusively close an inquiry into the fact, it would be an idle thing to go into court and impanel a jury only to be told that no evidence will be heard by them. While courts will, and should, cautiously exercise the power of declaring contracts, solemnly made by parties, void as being unreasonable, they should at the same time carefully scrutinize contracts, the purpose and effect of which is to prevent the citizen from having his rights passed upon and enforced by the courts of the state, by the means and methods which experience has shown to be best adapted to that purpose. It would seem that to sustain a by-law making such certificate presumptive evidence is as far as the courts should go in that direction. Without attributing to the officer any corrupt motive, we cannot fail to recognize the truth, taught by experience, that those whose duty requires the daily mailing of large numbers of letters cannot retain any personal memory of the particular letters mailed, and are compelled to rely upon the record made by them at the time. Such record should have, and always does have, great weight in establishing the fact recorded. It has never been held that such records made by persons engaged in private business are conclusive evidence of such facts. Based upon reasons of public policy, certain public records import absolute verity and may not be contradicted, but such reasons do not extend to private entries. The rules of evidence are relaxed to the extent of permitting them to be introduced as entries, within well-defined limitations. *Insurance Co. v. Railroad*, 138 N. C. 42, 50 S. E. 452; *Greenleaf*, Ev. § 120. To go beyond this, and allow private corporations, by means of by-laws, to make acts of their own officers conclusive evidence, is, so far as our researches inform us, without precedent, and we think would be an unreasonable and dangerous innovation upon common right.

55 S.E.—6

It will be observed that the by-law does not require the certificate of the treasurer to state a fact within his own knowledge. He is not required to certify that he mailed the notice or that he saw some other person do so, but may, as in this case he undertook to do, rely upon the statement of an office boy or any other servant or employé of the company. Certainly to permit such certificate to have the conclusive effect claimed would put every member of the defendant company in the absolute power of the corporation. It is said that there is a presumption, founded upon experience, that a letter duly posted, prepaid, and properly addressed reaches its destination. The jury have found upon the second issue that Dr. Duffy never received the notice. It appears from the mailing sheet that other notices mailed at the same time were received. The only reasonable explanation of this condition of the matter is that the notice was not mailed. The burden of proof was on the defendant to show the mailing. There is another view of the question upon which we think the testimony was competent. If a by-law of this character were valid, it should certainly be construed strictly and the certificate be required to comply with its terms. After stating the facts in regard to the mailing, the treasurer proceeds to say: "This certificate is made by me, the treasurer of said company, in conformity with the provisions of the by-laws of the said association, which are a part of said policy; and attached hereto is a true and correct transcript of the records of the company made at that time, showing the mailing of such notice, being the affidavit of the mailing clerk, and one of the sheets referred to therein." It is thus made apparent that he is relying upon the affidavit of Mr. Haines, which is attached to this certificate. His statement therefore is based upon hearsay, and we are thus invited to make a second departure from well-settled rules of evidence. To do so would further endanger the rights of the members of the association. We have carefully examined the numerous cases cited by counsel for the defendant, and, as conceded by them, they do not decide the question presented upon this record. The recognition by the courts of contracts to submit questions to arbitration is based upon a principle not applicable to this case. We are of opinion that his honor committed no error in admitting the testimony of Dr. Duffy. The jury having found the fact against the defendant's contention, upon the first issue, it is unnecessary to consider the other questions discussed in the brief. The by-law relied upon is unreasonable and invalid.

Upon an examination of the entire record, we find no error.

SHAKLEFORD et ux. v. MORRILL.
(Supreme Court of North Carolina. Oct. 9, 1900.)

1. DOWER—MORTGAGE BY HUSBAND—VALIDITY.

Land was conveyed to a husband who, with his wife, executed a purchase-money mortgage. There were no liens on the land and no homestead had been set apart. *Held*, that the husband had a right, prior to the payment of the purchase-money mortgage, to execute a second mortgage without the joinder of his wife.

2. MORTGAGES—FORECLOSURE—JUDGMENT.

Where land is ordered sold under a purchase-money mortgage, executed by a husband and wife, and a subsequent mortgage executed by the husband alone, the court is entitled to protect the contingent right of dower of the wife in case the land sells for more than sufficient to pay the first mortgage by adjudging that the foreclosure under the subsequent mortgage shall be subject to wife's dower right.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1438.]

Appeal from Superior Court, Greene County; Long, Judge.

Action by Green Shakleford and wife against L. V. Morrill. From a judgment for defendant, plaintiffs appeal. *Affirmed*.

Galloway & Albritton, for appellants. Aycock & Daniels, for appellee.

BROWN, J. Plaintiff and wife executed a mortgage for the purchase money of the land described in the complaint, concerning which there is no dispute. The deed for the land was made to the husband. Afterwards, the husband, without the joinder of his wife, executed a second mortgage for a loan of money to the defendant. It is contended that the second mortgage is void without the joinder of the wife, because of the embarrassed financial condition of the husband, manifested by the fact that the first or purchase money mortgage had not been fully paid. This position is untenable, it being admitted that there are no docketed judgment liens on the land, and that no homestead had been set apart, although its value is less than \$1,000. The land belonged to the husband, and he had the right to execute the second mortgage without the joinder of his wife. This is settled in this state. *Scott v. Lane*, 109 N. C. 154, 13 S. E. 772; *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 318; *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437; *Joyner v. Sugg*, 132 N. C. 591, 44 S. E. 122. If the land were to be sold under the second mortgage alone, it would be sold subject to the wife's right of dower, and the purchaser would acquire a good title except as to the contingent right of dower. He would acquire the husband's title and the right of present possession; but if the wife survived the husband, she could enforce her right of dower against the land.

The land, however, is to be sold under both mortgages; the first of which is not only given for the purchase money, but in the execution of which the wife joined. The

purchaser, upon confirmation of sale, will acquire an indefeasible title as against both husband and wife. It was, therefore, proper for the court to take into consideration and protect the contingent interest of the wife in case the land sells for more than sufficient to pay the first mortgage and costs.

Affirmed.

HANCOCK v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Oct. 2, 1900.)

1. TELEGRAPHS—DELAY IN MESSAGE—EVIDENCE.

In an action for defendant's delay in delivering a telegram to plaintiff's father, announcing the death of plaintiff's brother, and that plaintiff would arrive with the corpse at a certain station on the next day, evidence that on arrival the trainmen took the corpse from the baggage car and set it down on the platform in the rain, over plaintiff's objection, was irrelevant and improperly admitted.

2. SAME—DELAY IN DELIVERY—DAMAGES.

Where a telegraph company failed to promptly deliver a message, it could only be held liable for such damages as it should have anticipated, from the knowledge it had and that which the law imputes to it, would probably result from its default.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 64-68.]

3. TRIAL—MISLEADING INSTRUCTIONS.

In an action for delay in delivering a message, involving an issue as to the law of another state, certain lawyers testified as to their opinion concerning the law of such state, whereupon defendant requested an instruction that, if the jury believed the evidence of such witnesses, the jury should assess plaintiff's damages at 25 cents. *Held*, that such instruction was properly refused, as depriving the jury of the right to determine for themselves the weight to be given to the opinions of such witnesses.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 439-466.]

Appeal from Superior Court, Craven County; Long, Judge.

Action by H. S. Hancock against the Western Union Telegraph Company to recover damages for the negligent delay in the delivery of a telegram. From a judgment for plaintiff, defendant appeals. *Reversed*, and new trial granted.

F. H. Busbee & Son and W. W. Clark, for appellant. W. D. McIver and O. H. Gulon, for appellee.

BROWN, J. This case was before this court at spring term, 1905, and is reported in 187 N. C. 498, 49 S. E. 952, 69 L. R. A. 403. The facts are fully set out in the opinion there reported, and it is unnecessary to repeat them.

On the last trial the court, over defendant's exception, permitted the plaintiff to testify as follows: "The trainmen took the corpse from the baggage car and set it down on the platform in the rain. I put the widow in the

station, and then run down and asked them please not to set the body of my dead brother down in the rain. The body was out on the platform, and I ran and asked them not to set it there in the rain, but the train was moving off," etc. In the admission of this testimony and the refusal to withdraw its consideration from the jury we think that there was error. The contract for the transmission of the telegram was made on Saturday, July 11th, and it can hardly be supposed to have been within the reasonable contemplation of the contracting parties that there would be a rain on Monday morning, and that the employes of the railroad company, with whom defendant had no connection whatsoever, might leave the body of the deceased on the platform in the rain. The duty to remove the body and put it in a suitable place did not devolve upon the defendant, but upon the employes of the railroad company, and the defendant is not to be held responsible for their neglect. It has always been held in this state that the telegraph company is only responsible for such damages as were "reasonably in contemplation of the parties as the natural result of the failure of duty on the part of the defendant." *Kenyon v. Tel. Co.*, 128 N. C. 232, 35 S. E. 468. The case of *Telegraph Co. v. Turner*, from Texas, reported in 78 S. W. 362, and cited with approval in *Telegraph Co. v. McNairy* (Tex. Civ. App.) 78 S. W. 969, fully sustains the defendant's contention as to the inadmissibility of such evidence. See, also, *Telegraph Co. v. Mellon* (Tenn.) 33 S. W. 725, and *Telegraph Co. v. Stiles* (Tex. Sup.) 84 S. W. 438. In the latter case the court, speaking of the probable consequences of admitting such testimony, says: "The admission of such testimony would awaken in the jury a sympathy for the distressed sister, and, although it might be unconsciously done, would induce them to increase the amount of damages. If the evidence is not to influence the verdict, why should it be admitted at all? The jury has the right, and it is their duty, to consider all the evidence admitted by the court. But the telegraph company cannot be held liable for all damages which may arise from a failure to comply with its contract, no matter how great or real such damage may be. It can only be held for such as it should have anticipated from the knowledge it had, and that which the law imputes to it as the probable result of a failure to deliver the message." See, also, *Joyce on Electricity*, § 819; *Railroad v. Levy*, 59 Tex. 542, 48 Am. Rep. 289.

As this case is to be tried again, it is well to notice another of defendant's exceptions in order to prevent possible error on the next trial, and thus save time, labor, and expense. The defendant requested his honor to instruct the jury: "If you believe the evidence of the witnesses Judge Bryan, Attorney General Bryan, and Mr. Cross, you will as-

sess the plaintiff's damages at 25 cents, and this will be your answer to the second issue." As this request, or a similar one, is likely to be again proffered, it is well to notice it. The court decided in this case that if, under the laws of Maryland, "damages on account of mental anguish, not connected with or growing out of a physical injury to the plaintiff's person, could not be awarded, then the plaintiff in this action can only recover the cost of the telegram and costs." 137 N. C. 499, 500, 49 S. E. 952, 89 L. R. A. 403. It is true that the witnesses named were all who testified for the defendant as to what in their opinion was the law of Maryland on that subject, and the defendant had the right to have the court call attention to their evidence. Each of said witnesses gave it as his opinion that, under the law of Maryland, juries are not permitted to consider mental anguish as an element of damage, unless it grows out of a physical injury. It therefore follows that, if the jury should find as a fact that the law of Maryland is as stated by defendant's witnesses, then the plaintiff, under our former decision in this case, can recover only 25 cents, the charge for the telegram, and costs, for the plaintiff does not pretend to have suffered any physical injury. We think, however, that this prayer for instruction may be interpreted to refer only to a belief in the veracity and truthfulness of the witnesses. These witnesses were not testifying to a "fact" in the usual significance of that word. They were giving their opinion under oath as to what the law of Maryland was upon a certain matter. The jury may fully believe in the truthfulness of such witnesses and in the sincerity of their opinions, and yet have no confidence in their knowledge, learning, and ability as lawyers. In finding what is the law of Maryland the jury should consider, not only the veracity of witnesses who testify to their legal opinions, but their reputation, character, learning in the law, and standing in the legal profession, and determine for themselves how much weight the jury is willing to give to their opinions. These are matters within the province of the jury concerning which the judge cannot express an opinion. We think therefore the language of the prayer for instruction is ambiguous, and probably deprived the jury of the right to consider what weight they should give to the legal opinions of the witnesses offered by the defendant. The court could only say to the jury that, under the former decision of this court, if they found the law of Maryland to be as testified to by defendant's witnesses, viz., that mental suffering can only be considered as an element of damage when it flows from physical injury, and there being no physical injury in this case, the plaintiff can only recover the charge for the telegram and costs of the action.

New trial.

SAWYER v. ROANOKE R. & LUMBER CO.
(Supreme Court of North Carolina. Oct. 2, 1906.)

1. TRIAL—INSTRUCTIONS—REDUCTION TO WRITING.

Where, at the close of the evidence, before argument, defendant requested the court "to put its charge to the jury in writing, and in part to charge as follows," etc., and the whole charge on the law was not put in writing, as required by Revisal 1905, § 536, the court's failure constituted ground for a new trial.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 514-523.]

2. TRIAL—INSTRUCTIONS—WRITTEN INSTRUCTIONS.

Revisal 1905, § 536, requiring the trial court to put its charge in writing on request, does not require the recapitulation of the evidence to be written.

3. APPEAL—EXCEPTIONS TO CHARGE—TIME.

An exception to the failure of the trial judge to reduce his charge to the jury on the law to writing is taken in time if first set out in appellant's "case on appeal."

Appeal from Superior Court, Beaufort County; Neal, Judge.

Action by J. L. Sawyer against the Roanoke Railroad & Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Small & MacLean and Murray Allen, for appellant. Nicholson & Daniel, Ward & Grimes, and H. C. Bragaw, for appellee.

CLARK, C. J. The defendant at the close of the evidence and before the argument began, requested the court "to put its charge to the jury, in writing, and in part to charge the jury as follows." Here followed 17 paragraphs of special instructions asked. The whole charge on the law was not put in writing, and this entitles the defendant to a new trial (Revisal 1905, § 536), though this section does not require the recapitulation of evidence to be in writing (*Jenkins v. Railroad*, 110 N. C. 438, 15 S. E. 193; *Bank v. Sumner*, 119 N. C. 591, 26 S. E. 129). This exception, like all other exceptions to defects or errors in the charge, is taken in time, if first set out in the appellant's "case on appeal." *Drake v. Connelly*, 107 N. C. 463, 12 S. E. 251. It is like a failure to charge on a specific point when specially requested in writing which is deemed excepted to, provided the exception is set out in the case on appeal. *State v. Blankenship*, 117 N. C. 808, 23 S. E. 455; *Taylor v. Plummer*, 105 N. C. 58, 11 S. E. 266; *McKinnon v. Morrison*, 104 N. C. 363, 10 S. E. 513. This is not like *Phillips v. Railroad Co.*, 130 N. C. 582, 41 S. E. 805, where the request to the court was "to charge the jury in writing and as follows," which was held to be simply a request to give the written prayers which followed. Here the request is explicit to "charge the jury in writing" and as "part of its charge" to give the instructions specifically added.

It is but just to the learned judge who tried this case to add that he states that through inadvertence, in the haste of the trial, he did not observe that the prayer was to put his charge in writing, as well as to give the prayers subjoined.

But as the statute gives a party a right to have the whole charge as to the law put in writing, if asked "at or before the close of the evidence," we must direct a new trial.

BENNETT v. BEST et ux.

(Supreme Court of North Carolina. Oct. 2, 1906.)

1. USURY—ELEMENTS—INTENT.

That the amount received by a debtor is less than the apparent principal of the debt, so that treating the amount received as the principal will render the transaction usurious, does not show usury, as to establish usury, the debtor must, not only have paid more than the legal rate of interest, but the creditor at the time he received it must have known that it was usury, and must have had a purpose of taking more than the lawful rate.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Usury, §§ 23, 24.]

2. WITNESSES — COMPETENCY — INTEREST IN EVENT.

A son of a defendant in a mortgage foreclosure suit brought by the representative of the deceased mortgagee, has, in consequence of his residing on the mortgaged premises without payment of rent, no legal interest in the event of the action, within Revisal 1905, § 1631, declaring that a person interested in the event shall not testify against a representative of a deceased person, and he is competent to testify to a transaction with the deceased mortgagee.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 598-618.]

3. EVIDENCE—ADMISSIONS — EXECUTORS AND ADMINISTRATORS.

A declaration made by the personal representative of a decedent, which is germane to the issue involved in a suit brought by him, is competent against him.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 801, 802.]

Appeal from Superior Court, Duplin County; Webb, Judge.

Action by R. D. Bennett, executor, against W. R. Best and wife. From a judgment for plaintiff, defendants appeal. Reversed.

This was a civil action for the foreclosure of a mortgage tried before Judge Webb and a jury at February term, 1906, of Duplin superior court. Defendants set up as a defense usury in the note, secured by the mortgage. Issues were submitted to the jury and answered as follows: "(1) Has plaintiff or plaintiff's intestate charged, taken, reserved, or received from the defendant knowingly interest at a greater rate than 8 per cent. per annum on the debt sued upon in this action? No. (2) Did Francis C. Best sign the note sued on as surety? Answer: Yes. (3) Is the action barred by the statute of limitations as to defendant Francis C. Best? Answer: No. (4) Are defendants indebted to plaintiff; if so, in what amount? Answer: \$350.00 (three hundred and fifty dollars), with

interest at 8 per cent. from date of note less credit on back of note." From the judgment rendered, defendants appeal.

Kerr & Gavin and F. R. Cooper, for appellants. Carlton & Williams, for appellee.

BROWN, J. (after stating the case). We agree with the learned counsel for the plaintiff that the mere fact that the amount received by the debtor is less than the apparent principal of the debt, and that, treating the amount thus received as the true principal would render the transaction usurious, will not alone constitute proof of usury. *Gibson v. Wilkins*, 113 Ga. 32, 38 S. E. 374; *Tallman v. Sprague* (Super. N. Y.) 18 N. Y. Supp. 207. In order to establish usury, the jury must be satisfied by a clear preponderance of proof, not only that the debtor has paid more than the legal rate of interest, but that the creditor at the time he received it knew it was usury, and that there was in the mind of the lender a wrongful intent and purpose to take more than the lawful rate for the use of his money. As a step in the order of their proof the defendants should be permitted to prove the facts and circumstances connected with the matter, the amounts actually paid, amounts actually due, and the calculations made. In this case defendants contend that they originally borrowed on November 21, 1883, \$175 from plaintiff's intestate, and secured same by mortgage on certain lands; that on January 6, 1886, after crediting payments, a renewal note was taken for \$206.25, and that on March 22, 1892, another renewal note was taken for \$350, which is the note sued on. The complaint sets out the judgments which plaintiff admits have been paid on this note.

Defendants contend that they received no other consideration whatever for the \$350 except the original \$175, and that if all payments are credited, and only 8 per cent. interest calculated, there is only \$82.64 due. It is, of course, incumbent on defendants to satisfy the jury of the truth of such allegations before the question of intent is reached. In the course of the trial the defendants' counsel asked several questions of witness R. C. Best, which were excluded by the court and exceptions noted. We will notice only a few: "Q. Who, if anybody, acted as agent for Miss E. J. Bennett in taking the note and mortgage sued on in this action, and in calculating interest or parts of the principal, and in taking renewals on the note or notes during the time after the loan of the money claimed in the complaint?" "Q. State if you were present at any time when R. D. Bennett, the plaintiff in this action made any calculation of interest or caused any calculation of interest to be made by any other person for him on the note sued on in this action?" "Q. Did you at any time hear any calculation made or see any calculation made by the plaintiff and defendant or either of them about the note and

debt sued on in this action?" Defendants' counsel also asked witness Oats questions which were excluded and exceptions duly noted: "Q. State any conversation or any transaction you may have seen or heard between the plaintiff and the defendant W. R. Best relative to the note sued on in this action?" "Q. State whether or not you have had any conversation with R. D. Bennett since he became administrator of E. J. Bennett relative to the note or debt described in this action?"

The objection to the testimony of R. C. Best is to his competency as a witness under section 590 of the Code (Revisal 1905, § 1631), in that he is a son of the defendants and resides on the mortgaged land without payment of rent. He has no legal interest in the land, and, therefore, no legal interest in the event of the action. *Bunn v. Todd*, 107 N. C. 266, 11 S. W. 1043. The fact that he is the son of defendants and that they permit him to reside on their land, while it may go to his credibility does not affect his competency as a witness to testify to a transaction with plaintiff's intestate. *Sutton v. Walters*, 118 N. C. 495, 24 S. E. 357. These questions, however, point rather to transactions with the plaintiff himself, and do not come within the purview of the statute. Any declaration plaintiff made germane to the matter at issue is competent against him. We see no objections to the form of the questions asked witness Oats and, to his competency as a witness, to answer them if he can. The record does not state what defendant expected to prove by the witness. We can only surmise as to that from the tenor of the questions. The plaintiff, R. D. Bennett, is the personal representative of the deceased creditor. If he has made any declaration to the witness tending to prove that usurious interest was paid, it is competent for defendant to prove it.

New trial.

BUNN v. BRASWELL et al.
(Supreme Court of North Carolina. Sept. 25, 1906.)

MORTGAGES — CONSENT DECREE — CONSTRUCTION.

A consent decree declaring that defendant "has an equity to redeem" land on the payment to plaintiff of a specified sum, and in case of the failure to pay the same within the time limited "defendant shall stand absolutely debarred" of all equity, is not a contract for the purchase by defendant, for the right to redeem implies that he previously owned the land, redemption being an inseparable incident to a mortgage.

On petition for rehearing. Dismissed.
For former opinion, see 51 S. E. 927.

BROWN, J. The petition to rehear this case assigns two errors in the opinion of the court: (1) For that the court, in its application of the law to the facts of the case, inadvertently added to the facts which were

agreed upon in the lower court, and upon which the court's judgment was hypothecated, a finding of fact not in the record and not actually existing, viz., that the relation of mortgagor and mortgagee subsisted between the plaintiff and the defendant at the time of the institution of the action in ejectment in 1888. (2) For that granting the correctness of every legal proposition laid down by the court and that its findings and inferences of fact were supported by the record, yet the conclusion reached by the court in its opinion is erroneous.

As to the first allegation, the learned counsel for the plaintiff are themselves inadvertently inaccurate. In the well-considered opinion delivered for the court by Mr. Justice Connor, no finding of fact is made and none "added to the facts which were agreed upon in the lower court." It will be observed upon reading the opinion that the writer was reciting only the contentions of the defendant when he stated that the declaration in the decree of 1889 "that 'the defendant has an equity to redeem the land' shows clearly that the relation of mortgagor and mortgagee at that time and theretofore existed between the parties, and not that he was, by the judgment, given such equity; that the judgment was a recognition of the existence thereof." Upon a re-examination of the consent decree, we think there is much upon its face to support the defendant's argument. N. W. Boddie had, in 1888, recovered a final judgment by default for the land. Why set it aside by consent and substitute in its place such an instrument as the decree of 1889? It is not likely that Boddie would take such a method of selling to Braswell a tract of land which the latter had never theretofore had any interest in. Couple the language of the consent decree with the admitted fact of Braswell's prior possession, and the inference is very strong that the relation of mortgagor and mortgagee existed between the parties prior to 1888. Why use the words "that said judgment (of 1888) is so far modified as to declare that the defendant has an equity to redeem the land?" Where did the defendant get his equity of redemption which the decree says he had at that time? The plaintiff's counsel say that the decree does not confer any such equity and that the defendant never had it before. This argument is at variance with the plain language of the decree. The plaintiff contends that the decree is a contract to buy the land by the defendant. The word "redeem" does not mean to "buy." It means to "buy back," "to liberate an estate by paying the debt for which it stood as security," "to repurchase in a literal sense." Black's Law Dict. 1008. It therefore follows that the defendant could not have an equity to redeem the land unless he previously owned it. This argument is not based upon any agreed facts, but upon

the context of the decree itself. If the decree was intended to constitute a conditional sale of land which the defendant did not previously own, then the words we have quoted are very much out of place. "The right of redemption is an inseparable incident to a mortgage; while in the case of a conditional sale, the rights of the vendor are those expressly reserved to him by the agreement, and those only." Thomas on Mort. (2d Ed.) § 32.

We do not deem it necessary to consider the second ground of error in the petition to rehear. It is a broadside fired at the judgment of the court and points out no material point overlooked and no material fact that escaped the court's attention, and cites no new authority that is antagonistic to the conclusions reached by the court, viz.: First, that the language of the decree is strong evidence that the relation of mortgagor and mortgagee existed prior thereto; and second, that the decree itself creates by its very terms the relation of mortgagor and mortgagee. *Wilcox's Heirs v. Morris*, 5 N. C. 117, 8 Am. Dec. 678. It therefore follows that the mortgagee and those claiming under him, being continuously in possession since the decree, the plaintiff must show some judgment or other fact that will bar the running of the statute of limitation.

Petition dismissed.

RUFFIN v. ATLANTIC & N. C. R. CO.

(Supreme Court of North Carolina. Sept. 25, 1906.)

1. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—PLEADING—PROOF—ISSUES.

Where a defendant, specially pleading contributory negligence as required by Revisal 1905, § 483, offers evidence in support of the plea, the proper practice is to submit the issue of contributory negligence.

2. CARRIERS—INJURY TO PASSENGER—EVIDENCE—INSTRUCTIONS.

In an action against a carrier for injuries to a passenger alighting on the wrong side of the train, the evidence showed that the custom of the carrier up to a short time before the accident had been to pull into the station. This custom was known to the passenger, and he claimed that he had no notice of a change, consisting in the train turning around on a Y and backing into the station. *Held*, that the court properly charged that, if the carrier informed the passenger that the train would be backed into the station, the act of doing so was not negligence, and if it did so without informing the passenger, but the passenger in alighting failed to exercise ordinary care, he could not recover.

3. TRIAL—INSTRUCTIONS—FORM—CONCLUSION.

Instructions should conclude by directing the jury to answer the issue submitted as they find the facts.

4. CARRIERS—INJURY TO PASSENGER—INSTRUCTIONS—PREJUDICIAL ERROR.

An instruction, in an action against a railroad company for injuries to a passenger alighting on the wrong side of the train, that if the passenger was under the influence of liquor and that was the cause of his failure to get off on the right side, and he thereby "directly con-

tributed" to his injury, he was guilty of contributory negligence and could not recover, even if the carrier was guilty of negligence, was not prejudicial to the carrier because of the use of the word "directly," instead of the word "proximately."

5. APPEAL—INSTRUCTIONS—PREJUDICIAL ERROR.

The giving of an instruction stating a correct principle, but not called for by the testimony, held not prejudicial error.

6. CARRIERS—INJURY TO PASSENGERS—INSTRUCTIONS.

An instruction, in an action against a railroad company for injuries to a passenger, that the failure of the carrier to have a sufficient light on its wharf constituted continuing negligence if it continued during the landing and delivering of passengers, and if the failure to keep such light was the proximate cause of the passenger's injury, etc., he would be entitled to recover, was not erroneous for using the words "continuing negligence"; the court having charged that the failure to keep sufficient lights would entitle the passenger to a verdict, provided such failure was the proximate cause of the injury, and the instructions showing that the negligence, though continuing, was actionable only if it was the proximate cause of the injury.

7. NEGLIGENCE—INSTRUCTIONS.

An instruction which states that, if the jury find certain facts grouped in the instruction, there was no negligence, is objectionable, unless all the material elements of the case are included.

8. CARRIERS—OBLIGATION TO PROTECT PASSENGERS—NEGLIGENCE—QUESTION FOR JURY.

Where a carrier makes provision only on one side of its track for passengers to alight, and it is dangerous to alight on the other side, the question of its negligence in failing to provide some means to prevent passengers from alighting on the wrong side or to notify them not to do so is for the jury.

9. SAME.

A passenger was injured in alighting on the wrong side of a train. The custom up to a short time before the accident had been to pull into the station, but at the time of the accident the train before reaching the station was turned around on a Y and backed into the station. The passenger claimed that he had no notice of the change. Held, that the question of the negligence of the carrier was for the jury.

10. TRIAL—INSTRUCTIONS—SUFFICIENCY.

An instruction in a personal injury action, which authorizes the recovery of damages for past and prospective loss resulting from the negligent act, and that damages may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from ability to perform labor, or a capacity to earn money, and for actual suffering in body and mind, which are the immediate and necessary consequences of the injuries complained of, and which states that the court gives the instruction as laid down in a Supreme Court decision, is not objectionable as not applying the law to the facts.

11. DAMAGES—MEASURE OF DAMAGES—INSTRUCTION.

The instruction correctly states the measure of damages.

Appeal from Superior Court, Carteret County; Long, Judge.

Action by Thomas Ruffin against the Atlantic & North Carolina Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action is prosecuted by plaintiff for the purpose of recovering damages for per-

sonal injuries sustained by him while a passenger upon defendant's train. Defendant denied negligence, and for further answer alleged that the injury was "caused by the negligence of plaintiff, in that on the night in question he was under the influence of liquor and thereby contributed to his own hurt, and that plaintiff failed to act as a prudent man in alighting from said train." Defendant tendered an issue directed to plaintiff's alleged contributory negligence, which his honor declined to submit, and defendant excepted. His honor submitted the following issue: "Was plaintiff injured by defendant's negligence as alleged?" together with an inquiry as to damages. There was evidence tending to show that plaintiff went upon defendant's train at New Bern, as a passenger, for the purpose of going to Morehead City, thence by boat to Beaufort. He boarded the train at New Bern on the north side of the car. Before reaching Morehead, the train was turned around upon a Y, thereby backing into Morehead. The custom, up to a short time before the day of the injury, had been to pull into the depot. This was known to plaintiff, but he had no notice of the change. Defendant maintained a pier at Morehead, running into and over the waters of Bogue Sound. Passengers left the train on said pier, taking a boat to Beaufort. There was, upon the pier, an elevated platform between two railroad tracks. The platform was built for the accommodation of passengers, with approaches leading to and from it. On either side of the platform were trestles used exclusively for trains other than passenger. The spaces between the cross-ties on the trestles were open. There was no evidence of negligence in the construction of the platform. There was evidence tending to show that there were lights on the platform side of the train, but none on the ocean or south side. When the train backed upon the pier plaintiff left the car on that side, and after making one or two steps fell between the cross-ties and was injured. He did not know that the train had been turned around. He knew of the conditions on the pier at Morehead. There was no railing on the platform, or on the car, to prevent passengers alighting on the ocean side, nor was he warned not to get off on that side. There was evidence that plaintiff "was under the influence of liquor, not very much." The evidence was conflicting in regard to plaintiff being directed to get off on "platform side." There was evidence that the same condition on pier had existed for many years. The evidence regarding sufficiency of lights was conflicting. There were no lights on ocean side. Passengers were not expected to leave the train on that side. There were exceptions to his honor's rulings upon the admission of testimony and instructions given and refused, which are set out in the opinion. There was a verdict for plaintiff. Judgment and appeal.

C. L. Abernethy, for appellant, D. L. Ward and M. De Wit Stevenson, for appellee.

CONNOR, J. (after stating the case.) The defendant insists that his honor committed error in refusing to submit to the jury an issue in regard to plaintiff's alleged contributory negligence. It was held in *Scott v. Railroad*, 96 N. C. 428, 2 S. E. 151, that when the court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence and it was apparent that defendant had, in that way, been given the benefit of such testimony with its application, an omission to submit the issue was not reversible error. Since the decision of that case the statute was enacted requiring defendant to specially plead such negligence and thereby assume the burden of showing it. Revisal 1905, § 483. While we think it the better practice, and suggest that the issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, be submitted, we adhere to what is said upon the subject in *Wilson v. Cotton Mills*, 140 N. C. 52, 52 S. E. 250, and the cases therein cited.

Both sides submitted prayers for special instructions, several of which his honor gave. Among others he instructed them as follows: "(1) If you should find that the defendant company ran its train upon the Y about a mile from its station at Morehead City and reversed its engine and cars and backed its train into Morehead City and to its terminal at its pier, but informed the plaintiff that it had reversed its cars, aforesaid, this of itself would not make the defendant negligent. (2) If you find from the evidence that the defendant company ran its cars upon the Y about a mile from its station at Morehead City and reversed its engine and cars and backed its train into Morehead City and to its terminal at its pier without informing the plaintiff that it had reversed its cars and you still further find that the plaintiff in alighting from said train on the night of the alleged injury failed to exercise the ordinary care of a prudent person in like circumstances in alighting from said car and did not look or take notice of any danger, then plaintiff could not recover. It was the duty of the plaintiff to have acted the part of a prudent person in getting on and off the train, and if he did not act like a prudent person, then he cannot recover, if such failure if found by you was the cause of his injury." There can be no just criticism of the proposition involved in these instructions. The expression "he cannot recover" should not be used. The instruction should conclude in directing the jury to answer the issue accordingly, as they find. They clearly present the debated questions involving both plaintiff's and defendant's conduct.

He further charged: "(3) If you find from the evidence on the night of the alleged injury that the plaintiff was under the influ-

ence of liquor and that that was the cause of his failure to get off on the right side of the train and he thereby directly contributed to his own hurt, the plaintiff would be guilty of contributory negligence and you would answer the first issue, 'No.' Even if the defendants were guilty of negligence and the plaintiff was under the influence of liquor and intoxicated, and thereby contributed directly to his hurt, then the plaintiff cannot recover." Defendant excepts to the use of the word "directly" by his honor, insisting that it is not synonymous with "proximately." Our attention is called to several decisions in which it is held that the terms are not synonymous. We can well understand that, in some cases, the testimony may be such as to present the distinction urged by counsel, but in the connection in which it is used by his honor we cannot think that the jury could have been misled to defendant's prejudice. It occurs to us that plaintiff would have better cause to complain in this respect than defendant.

His honor further instructed the jury: "(4) It was the duty of the plaintiff in alighting from the cars on the night in question to look and see if he were getting off on the right or wrong side and if he did not use the ordinary care of a prudent man and failed to look before alighting from the car, he could not recover if his injury is due to such lack of care, if you find that he did not use ordinary care. (5) The defendants are only required to keep that portion of their platform safe that is used exclusively for the accommodation of passengers; also, they are required to keep in a safe condition the approaches leading to said platform; that is to say, the way used by passengers in going to and from said platform must be reasonably safe. (6) It is the duty of the defendants to keep their pier in such condition as to make it safe for the public to use it; that if the plaintiff was a passenger and had a right to be on the wharf and exercised reasonable care and diligence and was injured solely from a defect in the wharf, he is entitled to recover, unless the defect was so hidden and concealed that it could not be discovered by such examination and inspection as the construction, use, and exposure of the wharf reasonably required; that it was the duty of the defendants to take such a degree of care of their pier that those who had a lawful right to go there could do so without incurring danger to their persons, provided they exercise ordinary care and diligence." While the sixth instruction does not appear to be called for by the testimony, there can be no exception to the general propositions contained in it, and we do not see how the defendant could have been prejudiced thereby.

The instruction in regard to the duty of defendant to keep lights upon their wharf, upon which passengers are invited to alight, is clearly correct. His honor told the jury

that their failure to have a sufficient light, if they found that there was such failure, would constitute continuing negligence, if it continued during the landing and delivering of passengers, and if they should find that the failure of defendant to keep such lights, if it did so fail, was the proximate cause of the plaintiff's injury, and he would not have been injured if there had been sufficient light to enable him to pass safely over the pier, provided he used reasonable care and diligence, they would answer the issue, "Yes." The defendant criticises this instruction because his honor used the words "continuing negligence." The criticism is based upon a misconception of the sense in which the term is used. In *Greenlee v. Railroad*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 390, 65 Am. St. Rep. 734, and the line of cases in which the doctrine of "continuing negligence" is applied, the negligence of the defendant in failing to supply automatic couplers is declared to be the causa causans of the injury, thereby excluding the defense of contributory negligence. The basis of the doctrine and its limitations are pointed out by Mr. Justice Hoke in *Hicks v. Cotton Mills*, 138 N. C. 331, 50 S. E. 703. His honor expressly excluded any such principle in this case by telling the jury that the failure to keep sufficient lights would entitle the plaintiff to a verdict, provided such failure was the proximate cause of the injury. His language clearly shows that he used the term in its ordinary sense, that is, that such negligence, although continuing, was actionable only when it became the proximate cause of the injury. We do not think that any harm could have come to defendant by the use of this language taken in connection with the context. His honor carefully excluded any suggestion that the failure to have sufficient lights relieved the plaintiff of the duty to exercise due care in alighting from the train.

Defendant presented several prayers in which the court was asked to instruct the jury that if they found certain facts grouped therein there was no negligence. This form of instruction, unless all the material elements of the case be included, is objectionable because it excludes from the jury the duty of drawing such reasonable inferences as the testimony would justify. In those jurisdictions in which negligence is treated as a question of law, the facts alone being for the jury, this is a proper form of instruction. It was so held by this court until the decision of *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426, and *Russell v. Railroad*, 118 N. C. 1098, 24 S. E. 512. In *Emry v. Railroad*, 109 N. C. 589, 14 S. E. 352, 15 L. R. A. 332, this doctrine was recognized and adhered to as the law. The opinion of Merriman, C. J., clearly announces and sustains the principle that negligence is a question of law. The case was decided by a divided court. In *Russell's Case*, supra, Mr. Justice Avery, writing for a unanimous court,

overrules *Emry's Case* and adopts the rule followed by the federal courts and a large majority of the state courts, which treat, with certain exceptions which he states, negligence as a question of fact for the jury. These cases have been uniformly adhered to by this court in a number of decisions. In *Turner v. Lumber Co.*, 119 N. C. 387 (400), 26 S. E. 23 (25), it is said: "The court may submit issues of negligence with the instruction that it is the province of the jury to say whether the party whose conduct is in question has met the test rule of the prudent man." *McCracken v. Smathers*, 119 N. C. 617, 26 S. E. 157. There are a large number of illustrative cases in our Reports. When it is sought to apply the exception to the rule, the facts being undisputed or found by the jury, and being susceptible of but one reasonable inference, as in *Neal v. Railroad*, 126 N. C. 634, 36 S. E. 117, 49 L. R. A. 684, and *Bessent v. Railroad*, 132 N. C. 934, 44 S. E. 648, the court may either take the case from the jury and decide it as a question of law or instruct the jury that if the facts are found which exclude any other inference, to answer the issue accordingly. In this case his honor could not properly have given the instruction for several reasons. The testimony was not, in all respects, uncontradicted and the facts grouped in defendant's prayers did not include the several phases of the case. The real question presented in this case is whether, upon defendant's own testimony, in regard to the construction of the tracks upon the pier, the reversal of the train on the Y and the danger of passengers alighting from the train on the ocean side there was not sufficient evidence of negligence to carry the case to the jury under the rule of the conduct of the prudent man.

We are of the opinion that his honor properly submitted the case to the jury. The measure of duty imposed upon the carrier is thus stated in the latest work on the subject, "It must provide safe exits and reasonably safe platforms or facilities for entering and leaving cars." *Moore on Carriers*, 612. "A railway company has not discharged its whole duty to the passenger when it has provided a safe exit from its cars, while at the same time there exists another way which is not safe, and which is in general use by its passengers as to induce the belief that it is permitted in part at least for that purpose. Hence, when a railroad company makes provisions only on one side of its track for passengers to leave its cars and it is dangerous to leave on the other side, it is a question for the jury whether it is negligence for the company not to have provided some means to prevent passengers from leaving on the wrong side or to notify them not to do so." *Fetter, Carriers*, p. 153. This statement of the law, which we approve, clearly carried the case to the jury, and we think that, in the light of all of the testimony, they came to a correct conclusion. Experi-

ence teaches us that the reversal of a train in the night is well calculated to, and usually does, confuse passengers, and it would be but common prudence to notify them thereof. Again, when one side of a car, at the depot, is a dangerous place to alight, the company should have a porter, or some employé, to notify passengers not to do so, or to use the simple contrivance of a gate on that side to be closed to the exit of passengers. Some such means to prevent injury is but common prudence and should be used by carriers. The defendant insists that to permit a recovery in this case would "impose upon railroads great expense to protect their passengers and require them to deal with grown people as with children." We cannot perceive any heavy or unreasonable burden imposed by the rule of diligence prescribed by the law. The safety of passengers should be the first consideration of all who engage in the business of common carriers. His honor instructed the jury in regard to the measure of damages to which plaintiff would be entitled, as follows: "Where the plaintiff has been injured by the negligent conduct of the defendant he is entitled to recover damages for past and prospective loss resulting from defendant's wrongful and negligent acts, and these may embrace indemnity for actual expenses incurred in nursing and medical attention, loss of time, loss from inability to perform mental or physical labor, or of capacity to earn money, and for actual suffering of body or mind which are the immediate and necessary consequences of the injuries, but, in this case, as the plaintiff has not introduced evidence to show what he paid for nursing and medical attention or what his services for loss of time were worth, you will only consider such damages, if any, as he is entitled to recover for actual suffering of body and mind which are the immediate and necessary consequences of injuries sustained if you find by the greater weight of the evidence he was injured by the negligent conduct of the defendant." To this defendant excepts because his honor stated that he gave the instruction as laid down in *Wallace v. Railroad*, 104 N. C. 442, 10 S. E. 552, and did not apply the law to the facts. We think the instruction correct and not open to the criticism made by the exception.

We have examined the entire record and find no error.

PETERS GROCERY CO. v. COLLINS BAG CO.

(Supreme Court of North Carolina. Oct. 2, 1906.)

1. STATUTES—CONSTRUCTION—GIVING EFFECT TO ENTIRE STATUTE.

A statute composed of several sections relating to the same subject must be considered as a whole in ascertaining the meaning of any one section, and each section must be restricted in

its application by the language of any other section when the purpose so to do is apparent.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 282-288.]

2. PROCESS—PUBLICATION—CONDITIONS PRECEDENT—STATUTES—CONSTRUCTION.

Revisal 1905, § 442, providing that where it is made to appear by affidavit to the satisfaction of the court that, after due diligence, a defendant cannot be found within the state, an order shall be made for the publication of the process, requires the fact of the inability to find a defendant to be established by affidavit.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 108-120.]

3. SAME—ISSUANCE OF SUMMONS—NECESSITY—STATUTES—CONSTRUCTION.

Under Revisal 1905, §§ 429, 430, 442, providing that an action shall be commenced by summons and personally served by the sheriff on defendant, and that when it is made to appear by affidavit that after due diligence defendant cannot be found in the state, an order shall be made for publication, an action must be commenced by issuing a summons, unless defendant is not within reach of the process of the court, when it must be commenced by the filing of an affidavit showing that fact, followed by publication.

4. SALES—CONTRACT—BREACH—REMEDY OF SELLER—ACTION FOR DAMAGES.

Where a buyer fails to pay for goods delivered, and evinces a purpose either not to pay for future deliveries called for or not to abide by the terms of the agreement, but to insist on different terms, whether in respect to price or to any other material stipulation, the seller may rescind and sue for the goods delivered.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, § 263.]

5. SAME.

A seller agreed to sell to a buyer a specified number of peanut bags at a price named, and also a specified number of cotton sheets. The agreement was modified by a reduction of the price and an allowance of a credit of 10 days. The cotton sheets were delivered according to contract, but the buyer refused to pay for them, and insisted on a credit of 30 days to pay for all the goods. *Held*, that the seller was entitled to rescind and recover for the goods delivered.

Appeal from Supreme Court, Edgecombe County; G. W. Ward, Judge.

Action by the Peters Grocery Company against the Collins Bag Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The suit was commenced before a justice of the peace, first by a summons dated December 31, 1904, returnable January 3, 1905, on which there was no return, and then by publication dated January 16, 1905, and returnable the 16th day of the next month. There was no evidence that the summons was ever actually issued by the justice. The defendant relied on the fact that no summons had been issued, and upon sundry alleged defects in the mode of publication in support of a motion to dismiss the action which it submitted after entering a special appearance for the purpose. Plaintiff sued for \$172.50 alleged to be due as damages for failing to ship to them a certain number of peanut bags as by contract of April 30, 1904,

the defendant was required to do. It appears that on April 30, 1904, the defendant agreed to sell to the plaintiff 10,000 to 15,000 peanut bags of a specified description at a price named, the price to stand if the market advanced, but if the market declined, the defendant had the option to furnish the bags at the lowest price or to cancel the contract. There was a memorandum at the foot of this agreement calling for the shipment of 1,000 cotton sheets. It was shown that this memorandum was made by defendant's traveling salesman and the order for the sheets purports on its face to have been made by telephone. On the same day the salesman consolidated the two orders into one, which was signed by the plaintiff and addressed to the defendant. It was in the usual form of an order for goods, showing quantity, description, and price of the bags and sheets or burlaps, but not fixing the day of payment or time of credit. All the directions in the memorandum as to time and method of shipment and dating of bills, refer indiscriminately to the bags and sheets, as if they had been ordered at the same time. The sheets were deliverable in August, 1904, and the bags from October, 1904, to March, 1905. On June 11, 1904, the plaintiff by letter advised the defendant that the goods had been offered to them at lower prices, and asking if they "would meet them." This letter contained an itemized statement of the articles with the reduced price for each, and opposite these articles the following: "All delivered 10 days net." Defendant replied June 14, 1904, that it would meet the prices named. The subsequent correspondence shows that the cotton sheets were shipped by the defendant according to the contract and the plaintiff failed to pay for the same, its draft, which was sent to the defendant, having been afterwards presented and then returned by the collecting bank as unpaid, plaintiff all the time insisting that it was entitled to terms materially different from those contained in the contract of April 30th as modified by the letters of June 11th and 14th. As the plaintiff failed to pay for the sheets, and insisted on being allowed terms different from those in the contract, the defendant refused to ship the peanut bags. This was on December 2, 1904, when the purchase price had been long overdue. On September 19, 1904, the plaintiff wrote the defendant that they were entitled to 60 days' credit on the bags and \$8 discount on their draft. On the same day the defendant wrote to the plaintiff that the business had proved to be so unsatisfactory, as it had made so many threats and so often insisted on new terms, that they preferred to cancel the contract, and then requested payment of the draft sent for goods already purchased and shipped. Acknowledging receipt of this letter, plaintiff, on the 20th replied that it was willing to relieve the defendant of the contract, as it could do as well elsewhere, but before con-

sidering itself as released, the defendant must wait for a letter to that effect. Then comes the following passage: "We also desire to call your attention [to the fact] that there are no terms specified in the contract of April 30th, therefore, we will expect the same terms that we have been getting from John T. Bailey and other parties which is 30 days." The draft for the sheets having been returned by the bank and the plaintiff still insisting on terms which, as contended by the defendant, were not embraced by the contract, the defendant on December 2, 1904, wrote to the plaintiff rescinding the agreement and in that and subsequent letters declined to ship the bags. The court charged the jury that, if they found the facts to be as disclosed by the evidence, they should answer "No" to the issue, "Is the defendant indebted to the plaintiff, and, if so, in what amount?" The jury answered the issue accordingly. Judgment was entered for the defendant, and the plaintiff appealed.

W. O. Howard, for appellant. G. M. T. Fountain, for appellee.

WALKER, J. (after stating the case). An important question is distinctly presented in this case, namely, whether the issuance of a summons is necessary before the procedure by publication, when the defendant is a non-resident of the state? There appears, from the decisions of this court, to have been some diversity of opinion upon this question, and it being of the first moment that it should be settled, as it affects the integrity of judicial proceedings, we have given it the most careful consideration and have reached a conclusion entirely satisfactory to ourselves after thoroughly examining the several statutory provisions relating to the matter and weighing the reasons advanced on either side by those who have discussed it. Attachment, other than the common-law writ which issued out of the common pleas upon the nonappearance of the defendant at the return of the original writ, had its origin in the civil law and afterwards was adopted in England in the form of a custom of the London merchants and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. 4 Cyc. 396, 397; 1 Shinn on Attachment, §§ 1, 2. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. Under our former statutes, when the defendant was a nonresident, it issued either in the form of an original or a judicial attachment and without any notice until there had been a levy or caption of the goods of the debtor, when advertisement was required if the defendant resided without the jurisdiction. Rev. Code, c. 7, §§ 12, 13. By section 14 it was provided that "no judicial process shall be issued against the estate of any person residing without the limits of the state,

unless the same be grounded on an original attachment, or unless the leading process of the suit, has been executed on the person of the defendant when within the estate." This was the method of proceeding against nonresidents until the adoption of the Code system. The remedy then became ancillary to the principal suit for the recovery of the debt. But there was no essential change in the procedure by which the defendant was brought before the court and compelled to appear and submit his person to its jurisdiction or lose his property as the penalty for his default, or so much thereof as was necessary to satisfy the plaintiffs' demand. The very nature of the case, as shown by the fact of nonresidence, made it clearly futile to attempt to serve him personally. As he was presumed to have a constant regard for his property and always to keep a watchful eye upon it, the lawmakers at once concluded that the most effective and the speediest way of compelling his appearance was by seizing it, and at the same time this method had the further advantage of protecting his creditor. But in order that the cardinal principle of our judicial system should not be even seemingly violated, it was required that in the original action, instead of the idle and useless ceremony of issuing a summons for a man whom it was well known could not be found, publication in such manner as would be likely to give notice of the action should be made, and such is the meaning and clear intent of the statute as plainly manifested by its words. It is true that civil actions are commenced by issuing a summons, but this refers to cases where the defendant, being within the jurisdiction of the court, can be served personally, and the method of making such service is specially provided for in Revisal 1905, §§ 429-442. It is not permissible to construe a statute composed of several sections by the words of any one section, but all those relating to the same subject must be taken and considered together in order to ascertain the meaning and scope of any one of them, and each must be restricted in its application or qualified by the language of any other when the purpose so to do is apparent. This is a rule of construction which has for its basis a practical reason. Revisal 1905, §§ 429, 430, provide that a civil action shall be commenced by summons to be issued to the sheriff and personally served by him on the defendant, but where this cannot be done, the person to be served being beyond the jurisdiction of the court, section 442 provides that if it is made to appear by affidavit to the satisfaction of the court that, after due diligence, the defendant cannot be found within the state, an order shall be made for publication. By the evidence to satisfy the court was meant, not the sheriff's return on the summons, for, if it had been, the statute would have been so worded; and let us ask here, how could

the fact that the defendant could not be found in the state, for that is the requisite condition of publication, be determined only by the return of the sheriff that he cannot be found in his county, when there are now in the state 97 counties in all? It was intended that it should appear only in the way pointed out in the statute; that is, by affidavit. The affidavit is made the initial step in the case, and the order, or publication based upon it, is the leading process. The meaning is, therefore, that a civil action shall be commenced by issuing a summons, except in cases where the defendant is not within reach of the process of the court and cannot be personally served, when it shall be commenced by the filing of the affidavit to be followed by publication. We have mentioned the provisions of the Revised Code upon this subject, for the purpose of showing that this distinction between the two cases was clearly marked therein, and especially will this appear when reference is made to chapter 7, § 14, already quoted. This construction brings the different sections of the law in regard to commencing actions into harmony, precludes any suggestion that the Legislature requires to be done a vain and useless thing, and executes its intention according to the letter and spirit of what it has said. We are quite sure that it has the sanction of the profession.

But it is urged that the law has been otherwise declared in *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951, and that is true. Besides not being satisfied with the reasoning in that case, as contained in either the leading or the concurring opinions, we may remark that the case itself was in direct conflict with the decision of the court in *Best v. Mortgage Co.*, 128 N. C. 351, 38 S. E. 923, though that case is not cited by the justice who spoke for the court. The opinion by the present Chief Justice filed in that case was well considered, and it, together with his dissenting opinion in *McClure v. Fellows*, presents convincing reasons and an unanswerable argument in favor of the interpretation now given to the statute. It may be well to add that the conclusion reached by the court in *Best v. Mortgage Co.*, and by the dissenting judge in *McClure v. Fellows*, is thoroughly well supported by the numerous authorities cited therein. The fundamental error of the court in *McClure v. Fellows* is the assumption that a summons must be issued in all cases without regard to the residence of the defendant, and this resulted from taking a restricted view of section 209 of the Code of 1883 as isolated from other parts of the statute relating to the same matter, and looking more to the form than to the substance. Besides, the fact assumed was the one to be established and its existence the very subject of the inquiry. In *McClure v. Fellows* the court mainly relied upon *Marsh v. Williams*, 83 N. C. 371, and *Webster v. Sharpe*, 116 N. C. 466, 21 S. E.

812, and also, it is said in the dissenting opinion, upon *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827, 65 Am. St. Rep. 699. None of these cases is an authority for the construction as adopted by the court in *McClure v. Fellows*. In *Marsh v. Williams* the defendant was in the county and the language of Judge Dick is used with reference to that fact, as clearly appears in the case. Of course a summons was necessary under such circumstances. There was no publication there. *Webster v. Sharpe* was an action for slander. The statute of limitations was pleaded and the question was when the summons was to be considered as issued and the suit commenced, and the court decided it was issued, not when it was signed and then held by the clerk, but when it was delivered to the sheriff or to some one for him and passed out of the control of the clerk. That is all. The defendant had been personally served with the summons, so that the point was not in that case. The same may be said of *Houston v. Thornton*. The statute of limitations was there pleaded, the defendant was personally served and the only question was as to when the summons is deemed in law to have been issued. *Smith v. Lumber Co.* (at this term) 54 S. E. 788. The first case which directly involved the point, was *Best v. Mortgage Co.*, and that must be considered as the only precedent at the time *McClure v. Fellows* was decided. The opinion of the court in the *Best* Case was unanimous. It therefore had all the force and authority of a controlling decision if the doctrine, "*stare decisis et non quæta movere*," which means that we should adhere to decided cases and not disturb matters established, is to stand for anything. That case settled a principle which, as will hereafter appear, became substantially a rule of property, as a failure to issue a summons was held not to affect the title to any property sold under any final process issued in the case and *McClure v. Fellows* changed that rule so as to invalidate any such sale. The decision was, therefore, within the protection of the doctrine of *stare decisis*, and for that reason, if for no other, it should not have been reversed. It cannot be successfully argued that the *Best* Case only decided that a "return of the summons not served," is not a perquisite to publication, for it is distinctly held that the first step is the making an affidavit, which is the initial paper to be filed, without any reference to the issuing of a summons. The rule of *stare decisis* or, in other words, what is sometimes called the doctrine of precedents, does not forbid that we should disregard a former decision upon a matter of procedure if it can be done without substantial injury being suffered by litigants who may have relied upon the precedent so established, and if such is not likely to be the result, the court will not be governed by the former decision. 26 Am. & Eng. Enc. (2d Ed.) 163. Many may have

acted upon the construction placed upon the statute in *Best v. Mortgage Co.* even before that case was decided, and certainly it must have controlled the conduct of many since. Any title depending upon such a proceeding—that is, one where no summons has issued—would be utterly destroyed by the decision in *McClure v. Fellows*, while no title can be impaired by disapproving that case as, if the principle therein stated has been followed and a summons has been issued, no harm can possibly have been done, for "utile per inutile non vitiatur." Upon full consideration, therefore, all of us being of the opinion that the statute was correctly interpreted in *Best v. Mortgage Co.*, we overrule *McClure v. Fellows* and reinstate the former case in its position and authority as a binding precedent in this court. The defendant's objection to the publication based on the fact that a summons had not issued cannot be sustained. There are many other objections to the publication, more or less serious in their nature, which have been urged by defendant's counsel, but they need not be considered.

The remaining question is somewhat difficult owing to the lack of uniformity in the decisions as regards one phase of it. But we think this difficulty may be avoided by placing our decision upon a ground quite peculiar to this case. When a contract is in all respects entire, we find little trouble in determining what are the rights of the parties with reference to its enforcement or the recovery of damages where there has been a breach by either of them. But the law relating to a contract requiring several things to be done, whether treated as separate and distinct promises or not, is somewhat unsettled in respect to the right of one party who has broken it, as to one of its parts, to recover against the other who, on account of that breach by him, has refused to perform the remaining part of it. Upon this subject we are given the following general rules for our guidance: "Failure of one of the parties to a contract to perform an independent promise does not discharge the other party from liability to perform, but merely gives him a right of action for the breach. A promise may be independent in the following ways: (1) It may be absolute; that is, wholly unconditional upon performance by the other party. But promises, each of which forms the whole consideration of the other, will not be held independent of one another, unless the intention of the parties to make them independent is clear. (2) Its performance may be divisible—that is, the promise may be susceptible of more or less complete performance—and the damage sustained by an incomplete performance or partial breach may be apportioned according to the extent of the failure. But this rule does not apply: (a) Where the circumstances show an intent to break the contract. (b) Where such partial breach is made a dis-

charge by the terms of the contract. (3) It may be subsidiary; that is, the promise broken may be a term of the contract which the parties have not regarded as vital to its existence." Clark on Contracts (1st Ed.) 652. It appears, therefore, and the learned author so states, though more fully, in another part of his valuable treatise (page 660), that the courts are fairly well agreed upon this proposition: Although the performance, to a certain extent, is divisible, yet if the default in one item of a continuous contract is accompanied with an announcement of intention by the party thus in default not to perform it upon the agreed terms, the other party may treat the contract as being at an end. And he may likewise do so if it appears that the failure to perform is deliberate and intentional, and not the result of mere inadvertence or inability to perform. 9 Cyc. 649; *Stephenson v. Cady*, 117 Mass. 6; *Withers v. Reynolds*, 2 B. & Ad. 882; *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Bartholomew v. Barwick*, 109 E. C. L. 711; *Armstrong v. Coal & Iron Co.*, 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029; *Blackburn v. Relly*, 47 N. J. Law, 290, 1 Atl. 27, 54 Am. Rep. 159. It seems to be the clear result of the decisions that if the purchaser fails to pay for goods already delivered and further evinces a purpose either not to pay for future deliveries or not to abide by the terms of the existing agreement, but to insist upon new or different terms, whether in respect to price or to any other material stipulation, the vendor may rescind and maintain an action to recover for the goods delivered, and consequently he is not liable in damages for any breach if he has otherwise performed his part of the contract. We do not hesitate to hold that the contract of the parties was formed by their correspondence and is contained in the agreement of April 30, 1904, as modified by the plaintiff's letter of June 11, 1904 (which reduced the price and allowed a credit of 10 days), and defendant's reply thereto on June 14, 1904. The original contract did not allow any longer credit. The plaintiff had been notified before September 20th that its dealings had not been satisfactory, and that very day it insisted on having a credit in the future of 30 days to pay for all goods, assigning as the reason that it was getting the same terms from others, when the contract made no provision for selling on the same terms as others, but defendant thereby simply agreed to sell at the prices specified, even if the market advanced and if it declined, or the plaintiffs could purchase at lower prices, to sell at those prices or cancel the contract. That is all. There was not the slightest suggestion in the agreement that the terms of sale should, in any other respect, be in the least controlled by what others might thereafter offer to do. Without commenting upon the other parts of the correspondence, we find in the letter of September 20th a distinct avowal by the plaintiff that the future dealings between the

parties must be subject to terms and restrictions not expressed in the agreement. This was certainly equivalent to an announcement by the plaintiff of an intention to perform the contract, not upon the agreed terms, but upon its own terms, and as it had no right to impose any such condition or to interpolate any such stipulation, it was in law a repudiation of the contract as the parties had made it. There are other clear indications in the correspondence before and after the letter of September 20th was written that the plaintiff intended at least to embarrass the defendant in its effort to complete the deliveries, and if the inference cannot be drawn from the letter of September 20th alone, and we think it can, it is surely deducible from all the correspondence, that the plaintiff deliberately and intentionally refused to comply further with the contract; and its refusal to carry it out, except upon terms other than those expressed in it and to which they could not compel the defendant to submit, and which the latter rejected, was in itself virtually a refusal to perform it. When the plaintiff thus declined to go on with the contract, the defendant had the right then and there to rescind, as it did. Where parties have made an agreement for themselves, the courts will not substitute another for it. The law requires that parties shall perform their contracts as they make them, and if they fail to do so, they must abide the consequences. We have not inquired whether, as the plaintiff failed to pay for deliveries already made, the defendant was required to go on at the hazard of future loss or at the risk of having to litigate with the plaintiff the disputed matters between them, even if the contract may be regarded as a divisible one.

Many authorities of great weight are cited by the defendant's counsel in his brief to show that the seller is under no obligation to proceed in the fulfillment of the contract, but may treat the same as abandoned by the other party and stop delivery if the latter has defaulted on a payment, the seller being then entitled to sue and recover for the goods received and kept by the buyer. *Curtis v. Gibney*, 59 Md. 131; *Reybold v. Vorhees*, 30 Pa. 116; *K. S. Co. v. Inman*, 134 N. Y. 92, 31 N. E. 248; *McGrath v. Gegner*, 77 Md. 331, 26 Atl. 502, 39 Am. St. Rep. 415; and other cases above cited. The plaintiff's counsel contest the principle as thus stated and cite *Wooten v. Walters*, 110 N. C. 251, 14 S. E. 734, as holding the contrary. Which is right in this conflict of views we need not consider, as we decide the case upon another ground. If the contract was rescinded, nothing that supervened can have the effect to restore it without the consent of the defendant. *Reybold v. Vorhees*, supra.

As the evidence consisted of letters and was plain and direct, leaving nothing to inference, we are of the opinion that the instruction of the court to the jury was correct.

No error.

BANK OF ROCKY MOUNT v. FLOYD et al.
(Supreme Court of North Carolina. Oct. 2, 1903.)

1. BANKS AND BANKING—COLLECTIONS—NEG-LIGENCE—EVIDENCE.

After a bank, which had received a check for collection, received notice of the closing of the drawee bank, to whom it had sent the check for payment, the collecting bank telegraphed its customer of the reported closure, and that it did not assume any responsibility, to which plaintiff bank by wire replied that all liability for nonpayment of the check would fall on the drawee and the collecting bank. *Held*, that the admission of the latter telegram in evidence was not error.

2. SAME—CARE REQUIRED—AGENCY.

Where a check payable in another place is deposited with a bank for collection, the duty of the bank so receiving the check in the first instance is to seasonably transmit the same to a suitable bank or other agent at the place of payment for collection; the bank so selected under such circumstances being the agent of the owner of the check.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 562-566, 598, 602.]

3. SAME — SELECTION OF AGENT — DRAWER BANK.

A check payable in another place was deposited with defendant bank for collection, and by it sent to its correspondent at the place of payment, which was the drawee bank. The check was received by the latter and marked "Paid," and the drawer's account was charged with the amount, which was not remitted, however, to defendant prior to the failure of the drawee bank, though at the time the check was paid the drawee had sufficient funds on hand to make payment. *Held*, that defendant bank was guilty of negligence in sending the check to the drawee bank for collection, and was therefore liable for the amount thereof.

4. SAME—CUSTOM OF BANKS—VALIDITY—COLLECTING AGENTS.

A custom of banks to send checks to the drawee for payment by mail, where such drawee is the correspondent of the collecting bank at the place where the check is payable, is invalid, and does not relieve the sending bank from liability for negligence in so doing.

5. SAME — COLLECTING AGENT — LIMITED LIABILITY—CONTRACT—CONSTRUCTION.

Where a collecting bank received items for collection only at the owner's risk until full actual payment was received, such limitation of liability was effective only to exonerate it from the negligence or misconduct of its subcollecting agents when properly selected, and did not relieve it from liability for its own negligence in selecting the drawee of a check as an agent to collect the same.

Appeal from Superior Court, Edgecombe County; E. B. Jones, Judge.

Action by the Bank of Rocky Mount against W. J. Floyd and others. From a judgment in favor of plaintiff against defendant the Murchison National Bank, it appeals. Affirmed.

E. K. Bryan, for appellant. Gilliam & Bassett, for appellee Bank of Rocky Mount. Battle & Cooley, for appellee Floyd. F. S. Spruill, for appellee Griffin.

CONNOR, J. This action is prosecuted by plaintiff bank against the Murchison National Bank and the other defendants for the

recovery of \$1,059, being the amount of a check drawn by Griffin & Alken on the Merchants' & Farmers' Bank of Dunn. In the view which we take of the case, much of the testimony becomes immaterial. The plaintiff sets forth several causes of action against the different defendants. The facts material to the discussion and decision of the case, in regard to which there is but little, if any, controversy, are: Griffin & Alken on January 27, 1904, gave to defendant Floyd, in payment of a note held by his wife, their check on the Merchants' & Farmers' Bank of Dunn for \$1,059. On January 29, 1904, Floyd deposited the check for collection in the plaintiff bank, and, by an arrangement made with said bank, the amount was credited to him to be charged back if the check was not paid. Floyd drew several checks against the credit. On the same day the plaintiff bank forwarded the check for collection to defendant Murchison Bank, its correspondent at Wilmington, N. C. It was received on January 30, 1904, and on same day forwarded for collection to its correspondent, the Merchants' & Farmers' Bank of Dunn, N. C. The check was received by the bank at Dunn on February 1, 1904, was marked "Paid," and charged to Griffin & Alken, the drawers, who had funds to their credit in excess of the amount of the check. On February 2, 1904, the Murchison National Bank wrote plaintiff: "We have not been able to get any returns. Hope to get something by Monday." On February 2, 1904, the Merchants' & Farmers' Bank had in its vaults an amount of currency in excess of the check. On February 9, 1904, the Merchants' & Farmers' Bank closed its doors and went into liquidation. The proceeds of the check were never remitted by the bank at Dunn to defendant the Murchison National Bank. On February 10th the Murchison Bank wired the plaintiff bank: "Merchants' & Farmers' Bank, Dunn, reported closed. Check mentioned was taken, subject final actual payment. Have used every effort collect. We do not assume any responsibility. We notified you on sixth that it was unpaid." Plaintiff bank wired: "Telegram. All liability on us will fall on you and Dunn Bank. Notify it." The introduction of this telegram was objected to, and exception duly noted to its admission. While we think it competent, its admission was entirely harmless. It did not in any respect change the status of the parties. The Murchison Bank on February 9th wired the plaintiff that it had no returns from Dunn, and had sent a man there, advising that plaintiff's customer send some one there. Mr. Tillery, cashier of plaintiff bank, testified: "The Murchison National Bank notified us of the receipt of the cash item of \$1,059, and they had it on the same, or in substance the same, as our credit card had relative to our side collections. The usual credit card customary

among banks relative to collections of papers outside of the town in which the bank is located is to receive them with the understanding and agreement that the bank so receiving shall not be liable until it receives actual final payment and the credit card which acknowledged the receipt of the check of \$1,059 had printed on it the following: 'Items outside of Wilmington are remitted at owner's risk until we receive full actual payment.' And this is the usual custom among banks relative to out of town collections. I do not know which route the mail goes from Wilmington to Dunn. I think it goes by Goldsboro. Goldsboro is between Rocky Mount and Wilmington. We do not take Sunday mail out of the post office until Monday."

The Murchison Bank, at and about the time of this transaction, sent other collections to the Dunn Bank. There was much testimony in regard to the transactions between the Dunn Bank and the Murchison Bank between February 1 and February 10, 1904, which is immaterial in the view which we take of the case. The defendant Murchison Bank tendered a number of issues directed to the several aspects of the controversy, which are eliminated from this discussion. We have carefully examined them and find that several relate to matters in regard to which there is no controversy. The others are immaterial. The issues submitted by his honor cover the material questions in controversy. The answers to them establish the essential facts herein stated. The twelfth and thirteenth issues are as follows: "Was the Murchison Bank guilty of negligence in the discharge of any duty it owed in connection with the collection of said check of \$1,059? Ans. Yes." "If the Murchison Bank was guilty of negligence in the collection of said check, what loss was sustained thereby? Ans. \$1,059, with interest at 6 per cent. from February 6, 1904." Issues were submitted in regard to the conduct of the plaintiff bank and its liability to the owner of the check. The answers to these issues exonerated it from liability. This view renders it unnecessary to discuss the correctness of the instructions given.

The first question presented for our consideration is the duty of the plaintiff and the Murchison Bank to the owner in dealing with the check. While there is a diversity of opinion and the decisions of the courts are not uniform upon the subject, this court in *Bank v. Bank*, 75 N. C. 534, approved and adopted the following rule of conduct: "It is well settled that when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And, as a part of the same doctrine, it is well settled that, if the acceptor of a bill or prom-

issory note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor," or, we may add, drawee or payor. In an opinion expressed with his usual force and clearness, Bynum, J., says: "This decision is consonant with notions of justice." This case has been recognized as controlling in this state, and we think is sustained by the weight of authority in other courts and the reason of the thing. Mr. Morse, in his work on *Banks & Banking* (volume 1, § 235), thus states the law: "When the paper is payable in some other place than that in which the bank is located, its duty is (1) to forward the bill, or note, or check, in proper season to a subagent selected with due care; (2) to send to such agent any instructions bearing upon its duty that may have been received from its depositor; and (3) to make inquiry with due diligence if notice of the arrival of the paper does not come to it within such time as it might reasonably be expected." He further says: "If a bank fails to do its duty in the matter of collection with reasonable skill and care, it is liable for the damage resulting to any party interested in the paper, whether his name appears on the paper or not." Section 252. It is conceded that there is much diversity of opinion and decision in respect to the liability of the receiving bank for the default of its subagent, and the courts of the several jurisdictions holding variant views proceed upon entirely distinct and opposite constructions of the implied powers conferred upon the bank first receiving the collection. "If a bank receive a paper for collection on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank; and, if the bank selects a competent and reliable agent and gives proper instructions, its responsibility ceases." *Bank v. Bank*, 71 Mo. App. 451. The two rules are stated by Mr. Morse, and the cases classified, with a discussion of the reason upon which they rest. 1 *Banks & Banking*, §§ 272-287. As we have seen, this court has adopted the Massachusetts rule, which is based upon the following satisfactory reason: "The employment of a subagent is justifiable, because this manner of conducting business is the usual and known custom, and in a business which requires or justifies the delegation of an agent's authority to a subagent, who is not his own servant, the original agent is not liable for the errors or misconduct of the subagent, if he has exercised due care in the selection." Measured by this standard, there can be no doubt in regard to the conduct of the plaintiff bank in sending the check to defendant Murchison Bank; its standing and fitness to discharge the duty being conceded. His honor would have been justified in so in-

structing the jury. Measured by the same rule, the Murchison Bank would have been in the strict line of its duty in sending its collection to its correspondent in Dunn, but for the fact that the Dunn Bank was the drawee of the check.

This brings us to the pivotal question in the case: Is the drawee or payee of a bill, note, or check a suitable agent to which such paper should be sent for collection? This question has never been decided by this court; hence we must seek for an answer upon the reason of the thing, the general principles underlying the law of agency, and adjudged cases in other jurisdictions. By accepting the collection from the plaintiff bank the Murchison National Bank became, in respect to Floyd's interest, his agent; but, as the amount had been credited to him, the plaintiff was entitled to the proceeds. In this view of the case it is not material whether the Bank of Rocky Mount was the proper party plaintiff, as all of the persons interested were before the court and their relative rights and duties presented for adjustment. The Missouri Court of Appeals in *Bank v. Bank*, supra, in answering the question presented here, says: "It was negligence to place a collection, which as a matter of business required prompt attention, in the hands of the debtor to collect from himself. The evidence here discloses the impropriety of the transaction. The defendant sent the check to Burr Oak, where it arrived on the 9th. If it had sent it to some one other than the debtor, it would undoubtedly have been paid, since the bank continued to do business and meet its obligations on the 9th and 10th." *Morse on Banks*, § 236, says: "The debtor cannot be the disinterested agent of the creditor to collect the debt, and it cannot be considered reasonable care to select an agent known to be interested against the principal to put the latter into the hands of its adversary. Surely it is not due care in one holding a promissory note for collection to send it to the debtor, trusting him to pay, delay, or destroy the evidence of debt as his conscience permits. If this would not be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?" citing *Bank v. Bank*, 117 Ill. 100, 7 N. E. 601, 57 Am. Rep. 855. To the same effect are all of the authorities to which we have been cited and which we find in our investigation. The law is well stated in *Ger. Nat. Bank v. Burns*, 12 Colo. 539, 21 Pac. 714, 13 Am. St. Rep. 247, in which it is said: "Even if we can conceive of such anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by businesslike prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all

adverse to those of his principal. If the debtor is embarrassed, there is the temptation to delay. * * * The fact that the L. Bank was a correspondent of the defendant to a limited extent does not alter the rule. * * * As a matter of law such method of doing business cannot be upheld. It violates every rule of diligence." In *Bank v. Goodman*, 109 Pa. 428, 2 Atl. 687, 58 Am. Rep. 728, it is said: "Such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment." *Auten, Receiver, v. Bank* (Ark.) 54 S. W. 337, 47 L. R. A. 329; 1 Dan. Neg. Inst. 328. In *Farley Nat. Bank v. Pollak* (Ala.) 39 South. 612, 2 L. R. A. (N. S.) 194, the same principle is announced, and in the note it is said: "The American cases are almost unanimous in support of the doctrine that it is negligence in a bank having a draft or check for collection to send it directly to the drawee." The annotator gives a long list of authorities sustaining this proposition.

The defendant Murchison National Bank, however, insists that it has shown that the custom or usage prevails by which a bank, having a check upon its own correspondent in good standing, may intrust it with the collection. The same point has been frequently made and almost uniformly met with the declaration that such custom, if shown to exist, is invalid. In this connection it is said by the Court of Appeals of Missouri, in *Bank v. Bank*, supra: "It was said to be customary for banks to transmit collections to their correspondent, even though such correspondent was the debtor. To this we answer that it is not a reasonable custom, and therefore must fail of recognition by the courts. We concede it may be, and perhaps is, in many instances, the most convenient mode for the bank intrusted with the collection. But, if the bank adopts that mode, it takes upon itself the risk of the consequences." In *Min. S. & Door Co. v. National Bank* (Minn.) 78 N. W. 980, 44 L. R. A. 507, the court says: "We cannot agree with counsel that the usage and custom here relied upon as a defense to the claim that the defendant was negligent when forwarding this check to the Mapleton Bank for presentation and payment, as a general usage and custom will not justify negligence. It may be admitted that such a course is frequently adopted, but it must be at the risk of the sender, who transmits the evidence upon which the right to demand payment depends to the party who is to make the payment. Such a usage and custom is opposed to the policy of the law, unreasonable, and invalid." In *Farley Nat. Bank v. Pollak*, supra, *Simpson, J.*, says: "A custom must be reasonable, and the best-considered cases hold, not only that the bank or party who is to pay the paper is not the proper person to whom the paper should be sent for collection, but also that a custom to that effect is unrea-

sonable and bad." The same rule is laid down in the notes, and a number of cases cited to sustain it. *Morse on Banks*, § 236.

The defendant says: "However this may be, the check was received for collection pursuant to an express contract that 'items outside of Wilmington are remitted at owner's risk until we received full actual payment.'" This language was brought to the attention of the plaintiff bank, and we may assume entered into the contract under which defendant received the paper for collection. We cannot suppose that it was intended to be understood as releasing the defendant from the consequences of its own negligence. The extent to which it will be permitted to exonerate defendant bank is that it shall not be responsible for the negligence or misconduct of its subagents properly selected. If given its literal meaning, no liability whatever in respect to the collection of the check would attach to it. This construction would relieve it from the duty of using due care in the selection of a subagent. If such is the proper construction of the language, and, if thereby it is relieved from the responsibility for its own negligence, we should not hesitate to hold it unreasonable and invalid. An agreement to relieve an agent or fiduciary of all responsibility for its own negligence or misconduct is unreasonable and cannot be sustained. This is elementary learning as applied to common carriers. 6 Cyc. 392. It would seem equally so when it is sought to relieve a person or corporation from all responsibility for a breach of its contractual duty by negligence or otherwise. Doubtless, in view of the fact that many courts hold that the receiving bank sending a collection on a distant point to its correspondent at the place of payment is responsible for the negligence or misconduct of such subagent, the defendant bank, wishing to restrict its liability in this respect, placed upon its stationery the language in question. While, as we have seen in this state, no such liability attached, we can see no reason why, in those states where the law is otherwise, a contract to this effect would not be valid. It is simply an agreement that the receiving bank shall have the power to select the proper agent to collect the check at the place of payment, and that such subagent shall thereby become the agent of the owner of the check. But, when it is sought to relieve itself of all liability for negligence in the selection of such agent, quite a different question arises. Whatever may be the proper construction of the language, we do not think that the defendant Murchison Bank was authorized, in violation of a well-settled rule of law, to send the check to the drawee, and if, by reason of doing so, loss has been sustained, it must be held responsible therefor.

It appears that upon the receipt of the check by the Dunn Bank on February 2, 1904, the cashier of said bank immediately can-

celed the same and charged the amount to the drawer, who had funds sufficient to meet it. It further appears that on that day the Dunn Bank had in its vaults an amount sufficient to have paid the check. The defendant, however, contends that, as the Dunn Bank was insolvent, the status of the parties was in no respect changed, that it was "a mere playing with figures," and cites *Bank v. Davis*, 114 N. C. 343, 19 S. E. 280. It was clearly the duty of the Dunn Bank, upon presentation of the check, to pay it and to remit the proceeds. Its customer had funds for that purpose, and the bank had funds to meet this customer's check. There is no suggestion that on the 2d of February the Dunn Bank anticipated an immediate closing. The testimony is all to the contrary. It cannot be doubted, therefore, that it was a good payment of the check. If the check had been sent to some other person and presented on the 2d of February, there is no suggestion that it would not have been paid. The temptation to the Dunn Bank to retain the money, instead of immediately remitting, as was its duty, is a danger which the law guards against by prohibiting the sending of the check for collection to the drawee bank. It therefore seems clear that the failure of the plaintiff bank to receive the proceeds of the check was due to the breach of duty on the part of the Murchison Bank in sending it to the Dunn Bank; in other words, that such breach of duty was the proximate cause of the loss.

There are a large number of exceptions to his honor's rulings in the admission of testimony, and the instructions given and declined. The scope of the action, as set forth in the complaint, comprehends a number of questions affecting the rights and liabilities of the several defendants, which were properly discussed in the brief. We are of the opinion that, eliminating every other phase of the case, the right of the plaintiff to recover of the defendant Murchison Bank rests upon facts found by the jury, being largely upon undisputed testimony. We do not think it necessary to discuss or decide the other questions. They are not so related to the facts upon which the conclusion is based as to affect the result. The entire testimony, and the result of the action, in sending the check to the drawee bank, although entirely unexpected, strongly illustrates the wisdom of the law, which declares that the party whose duty it is to pay is not the proper party to assume the duty of collecting. The testimony shows diligence on the part of the officers of the Murchison Bank to secure its customers after the discovery of the trouble, but this cannot relieve it of liability for the original breach of legal duty. It has been held that, if the drawee be the only bank at the place of payment, an exception to the general rule is made. This holding is not in harmony with the best thought on the

subject or the principle underlying the law of agency. While the convenience of persons and corporations engaged in particular lines of business, and the general custom recognized and acted upon, are properly given consideration in the construction of contracts and fixing rules of duty and liability, elementary principles of law founded upon the wisdom and experience of the ages should not be violated.

Upon a consideration of the whole record, we find no error.

PEACOCK v. BARNES et al.

(Supreme Court of North Carolina. Oct. 2, 1904.)

1. LIMITATION OF ACTIONS—ACTION FOR MISTAKE—ACCRUAL OF RIGHT OF ACTION.

Under Revisal 1905, § 395, subsec. 9, providing a limitation of three years for an action for mistake, and that the cause of action shall not be deemed to have accrued until the discovery of the mistake, a cause of action for a shortage in the quantity of land represented to contain a specified number of acres does not as a matter of law accrue on the delivery of the deed containing an accurate description of the land by metes and bounds, so that the exact quantity may be readily ascertained by calculation.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 475, 476.]

2. SAME.

Under Revisal 1905, § 395, subsec. 9, providing a limitation of three years for an action for mistake, and that the cause of action shall not be deemed to have accrued until the discovery of the mistake, a cause of action for mistake will be deemed to have accrued at the time the mistake became known, or should have been discovered by the exercise of ordinary diligence.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 475, 476.]

3. SAME—ACTION FOR MISTAKE—ACCRUAL OF ACTION—QUESTION FOR JURY.

The court ordered a sale of the land of a decedent to pay debts. The land was sold by the acre, and was represented by the commissioner to contain a specified number of acres. There was a deficiency in the quantity of land. *Held*, in an action by the purchaser for the deficiency, brought more than three years after the delivery of the deed, that the cause should be submitted to the jury with a charge embodying the principle that the cause of action was barred by Revisal 1905, § 395, subsec. 9, in three years from the time the mistake was discovered, or could have been discovered by the exercise of ordinary diligence.

4. SUBROGATION—PURCHASER OF INCUMBERED PROPERTY AT JUDICIAL SALE.

An owner died seised of several tracts of land incumbered by mortgages. The property was sold by order of the court, and the proceeds were applied to the satisfaction of the mortgages. The land was sold by the acre. There was a deficiency in the number of acres represented. *Held* that, as the purchaser's claim does not arise from discharge of a specific lien, he was not subrogated to the rights of the creditors, and could not maintain an action for the deficiency after an action in assumpsit was barred, though the mortgages were not barred.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, §§ 41-43.]

Appeal from Superior Court, Wilson County; E. B. Jones, Judge.

Action by J. W. Peacock against Ida Barnes and others. From a judgment for plaintiff, defendants appeal. Reversed.

There was evidence to show that Harriss Winstead, late of Wilson County, died seised and possessed of several tracts of land, same being incumbered by liens and mortgages to secure an indebtedness of about \$4,500. Under proceedings duly instituted a portion of this land was sold by order of court for the sum of \$8,000, and the proceeds, to the extent required, was applied to payment and satisfaction of the liens and mortgages referred to, and a surplus, after paying costs and charges of administration, was turned over to two of the devisees under the will of the said Harriss Winstead. A portion of the land of the said Harriss Winstead was not sold, and the same is now opened and possessed by some of his devisees and heirs at law. At the sale referred to lot No. 5 was sold by the acre, and was represented by the commissioner to contain 416 acres, and the same was bought by plaintiff, J. W. Peacock, for \$11.10 per acre, and the purchase price at that rate, to-wit, \$4,618.60, was paid to commissioner by said purchaser, and a deed of conveyance executed and delivered to him in which the said land was accurately described by metes and bounds. Afterwards, and more than three years from the delivery of this deed, plaintiff discovered there was a shortage of more than 96 acres in said tract, and about six months after such discovery plaintiff instituted this action against the legal and personal representatives of Harriss Winstead, deceased, and the commissioner who sold the land, seeking to recover for amount of this shortage at the purchase price per acre. The sale occurred in November, 1899, and was reported to the next term of the court, presumably in December, 1899. Plaintiff put in evidence deed from Peacock to Thos. Williams, bearing date January 16, 1903, with testimony to the effect that he did not discover this shortage till at or near the time of this sale; also the summons on this present action, bearing date January 17, 1903; also report of Dawes, commissioner, showing that he applied the purchase money receiving from plaintiff for lot No. 5 to the discharge of the mortgage indebtedness on that land. Defendant offered in evidence the deed from John D. Dawes, commissioner, to J. W. Peacock for this land, accurately describing same by metes and bounds, and dated January 8, 1900. On the issue as to the statute of limitations, the court charged the jury that if plaintiff, J. W. Peacock, did not discover the error in the acreage until January 10, 1903, the date of the deed to Thos. Williams, they should answer the issue "No." Defendant excepted. There was verdict for plaintiff to the amount claimed, and

from judgment on verdict defendant excepted and appealed.

Connor & Connor, for appellants. F. A. Woodard and Pou & Finch, for appellee.

HOKE, J. (after stating the case). On a former appeal in this cause (*Peacock v. Barnea*, 139 N. C. 196, 51 S. E. 926) we have held that the plaintiff had a good cause of action, and this appeal presents the question whether the cause of action is barred by the statute of limitations. The statute applicable (Revisal 1905, § 395, subsec. 9) bars an action of this character, actions for recovery on account of fraud or mistake in three years, and provides that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting said fraud or mistake. The defendant contends that on the facts of this case the cause of action should be deemed to have accrued on the delivery of the deed; and for the reason that, as the deed contained an accurate description of the land by metes and bounds, the exact quantity could have been readily ascertained by a simple calculation. But we do not think this position can be sustained. There may be facts and attending circumstances from which the jury might fix this as the date when the statute begins to run; but we do not think it follows from the mere fact that the deed, on its face, contains an accurate description of the land by metes and bounds. In *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387, the court has held that the limitation for actions of this class is three years from the date of the discovery, and not from the date of the mistake, and there are or may be any facts pertinent to this question of discovery, besides the description of the land appearing on the face of the deed.

Nor do we hold with plaintiff that the statute begins to run from the actual discovery of the mistake, absolutely and regardless of any negligence or laches by the party aggrieved. This view was substantially adopted in the charge of the court below, and we think it puts an erroneous and too narrow a construction upon the statute. A man should not be allowed to close his eyes to facts readily observable by ordinary attention and maintain for its own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case a man's failure to note facts of this character should be imputed to him for knowledge, and in the absence of any active or continued effort to conceal a fraud or mistake, or some essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action will be deemed to have accrued from

the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence. The question does not seem to have been directly presented or passed upon in this court, but in *Day v. Day*, 84 N. C. 412, decided intimation is given that the construction of the statute here adopted is the correct one, and like intimation is given in *Meador v. Norton*, 11 Wall. (U. S.) 442, 20 L. Ed. 184. This, too, has been the principle adopted in jurisdictions where, before the enactment of such a statute, courts of equity, in cases of fraudulent concealment by defendant, interfered to prevent the operation of the statute of limitations except from the discovery. The time fixed being that when discovery was, or should have been, made by the exercise of ordinary diligence. And since the enactment of the statute incorporating this equitable principle as a feature of positive law decisions in other jurisdictions have put the same construction upon it. *A. & E. Ency. Law*, vol. 19, 257; *Township v. French*, 40 Iowa, 601; *Shain v. Sresovich*, 104 Cal. 402, 38 Pac. 51. In this case *Harrison*, judge for the court, said: "The rule is well established that the means of knowledge is equivalent to knowledge, and that a party who has the opportunity of knowing the facts constituting the fraud of which he complains cannot be supine or inactive, and afterwards allege a want of knowledge that arose by reason of his own laches or negligence"—citing *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807, and *Ware v. Galveston*, 146 U. S. 115, 13 Sup. Ct. 33, 38 L. Ed. 904.

In a well-considered note to *Pomeroy's Equity Jurisprudence* (3d Ed.) § 917, note 2, the doctrine is stated as follows: "This can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by any reasonable diligence discover it. If the statement means anything more than this, it is in direct conflict with the ablest authorities, and with the very principle upon which the rule itself is based. In *Rolfe v. Gregory*, 4 De Gex, J. & S. 576, Lord Westbury said: 'As the remedy is given on the ground of fraud, it is governed by this important principle: That the right of the party defrauded is not affected by the lapse of time, or, generally speaking, by anything done or omitted to be done so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed.' In *Vane v. Vane*, L. R. 8 Ch. 383, James, L. J., said that the statute will not begin to run 'until the fraud is first discovered, or might with reasonable diligence have been discovered.'" It will be noted that many of these authorities concern questions of fraud, but the section of the statute here considered applies equally to actions for relief on the ground of fraud or mistake; and

in determining the time when the statute begins to run the authorities, as a rule, pertinent to the one class of actions will be controlling as to the other. In the case before us there may be many facts to be considered in determining the proper date. The assurance of the commissioner as to the quantity of land, and how far the same should have been accepted and relied upon, the personal knowledge the purchaser may have had of the land, the opportunity to inform himself, the character of the boundary, the extent of the deficit, etc. And the cause should be submitted to the jury, with a charge embodying the principle that plaintiff's cause of action is barred in three years from the time the mistake was discovered by plaintiff, or could have been discovered by the exercise of ordinary diligence.

The plaintiff calls our attention to the fact that the mortgage indebtedness, paid off by the proceeds of the land, was not barred at the time of the sale, nor at the institution of this action, and we are asked to hold that, as plaintiff is subrogated to the right of creditors, the claim as a matter of law is therefore not barred. This principle may be correct where the same applies, and might be efficient to enable plaintiff to enforce his claim against the land relieved by his money, provided he has a claim. In order, however, to insist upon the right of subrogation, the plaintiff must first establish a valid claim, and if this has been lost by his own laches since his right arose the position insisted upon will not avail him. As a matter of fact, however, this is not a case where a purchaser of land, having paid off an existing incumbrance, may under certain circumstances be subrogated to the rights of the person whose lien or incumbrance he has discharged. Here there was no lien, so far as this purchase money now sued for is concerned. Plaintiff's claim rests on the proposition that there was a deficit of land, and his right arises, not from the discharge of a specific lien, but because purchase money paid by him under a mistake has been used to satisfy the indebtedness of the testator. He would seem, therefore, to have a demand of indebitatus assumpsit against the estate of the testator, to be enforced unless the same is barred by the statute as indicated.

Again a number of cases have been presented for our consideration where a plaintiff has been allowed to recover after a much longer period had elapsed before suit entered. But in these cases the additional time had passed when the purchaser was in the possession and enjoyment of the property, and no right to assert his demand arose to him until such possession was interrupted by an adverse claim. There is error which entitles defendant to a new trial, and it is so ordered.

New trial.

CONNOR, J., did not sit on the hearing of the appeal.

BECTON v. DUNN.

(Supreme Court of North Carolina. Oct. 2, 1906.)

JUDGMENT—VACATION—ERRORS OF LAW.

Where defendant lost his right to an appeal by failing to docket the record within the required time, his subsequent motion in the trial court to set aside the judgment was of no avail; the trial and judgment having been regular, and defendant's exceptions tending merely to show that the judgment was erroneous.

Appeal from Superior Court, Lenoir County; Webb, Judge.

Action by A. F. Becton against C. F. Dunn, in which judgment was rendered in favor of plaintiff, and defendant appeals from the denial of his motion to set aside the judgment. Affirmed.

Loftin & Varser, for appellee.

HOKE, J. This cause was before the court at Spring term, 1905, on an appeal by defendant from a refusal of the judge below to set aside a judgment by default rendered against defendant, and the decision recorded in 137 N. C. 559, 50 S. E. 289, directed that the judgment against defendant be set aside as having been entered contrary to the course and practice of the court. This decision having been certified down, the judgment was set aside as therein ordered, and at November term, 1905, the cause was tried before his honor W. R. Allen, judge, and a jury, and on issues determinative of the controversy verdict was rendered in favor of plaintiff and against defendant, and judgment was then and there entered in accordance with the verdict. Defendant took an appeal from this judgment, and, the case on appeal having been duly settled by the judge who tried the case, same was docketed for hearing in this court at Spring term, 1906. The case and record having been docketed by defendant too late, under rule 17 (28 S. E. V.) the appeal was dismissed and judgment to that effect duly entered. Later in the term defendant applied to the court to have his appeal reinstated, and the motion was denied. Defendant then appeared in the court below, and after notice given, at May term, 1906, made the present motion to set aside the judgment against him for errors noted during the progress of the trial at November term, 1905. His motion was denied, and the present appeal was taken.

The trial, verdict, and judgment entered in this cause in favor of plaintiff and against defendant at November term, 1905, were in all respects regular and according to the course and practice of the court, and we find no error which gives the defendant any just ground of complaint. And if it were otherwise—if the errors claimed by defendant in fact existed—he is not entitled to have them considered or passed upon in this proceeding. The trial and judgment were in all respects regular. Defendant was present

throughout the hearing, maintaining his defense, and the exceptions noted and insisted on by him tending as they do only to show that the judgment was erroneous, such judgment could only be corrected by appeal; and this he has lost by failing to docket as required by law. *May & Wife v. Lumber Co.*, 119 N. C. 96, 25 S. E. 721.

There is no merit in this appeal, and the judgment below is affirmed.

MANN et al. v. BAKER.

(Supreme Court of North Carolina. Oct. 9, 1906.)

1. PARTIES—DEFECTS—OBJECTIONS—AMENDMENT.

The court may, in its discretion, allow plaintiffs, suing an administrator for a settlement, to amend so as to make the action one brought by plaintiffs on the relation of the state.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 160-166.]

2. SAME—WAIVER.

Where an action by heirs against the administrator for a settlement was pending for years, and there was no objection that the action was brought by them, instead of by them on the relation of the state, the objection was waived.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Parties, §§ 167-177.]

3. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—ACTION BY DISTRIBUTEES—EVIDENCE—ADMISSIBILITY.

It is competent for heirs and distributees, suing the administrator for a settlement, to show any indebtedness due the estate.

4. SAME—BURDEN OF PROOF.

Where, in an action by heirs and distributees against the administrator for a settlement, plaintiffs show an indebtedness due the estate, the administrator has the burden of proving that he used due diligence to collect the same and was unable to do so, or, having collected it, has accounted for it.

5. SAME.

In an action by the heirs and distributees of a decedent against his administrator for a settlement, plaintiffs offered to show that a former administrator had received a specified sum as proceeds on a sale of decedent's real estate, pursuant to the order of court. *Held*, that the evidence was admissible, and, on it being admitted, defendant was obliged to show that he had used diligence to collect it, and, having done so, had accounted for it.

6. SAME—COMPLAINT—SUFFICIENCY.

In an action by the heirs and distributees of a decedent against his administrator for a settlement, it is sufficient to aver a breach of duty on the part of the administrator in failing to file final account and to fully settle.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, § 2043.]

7. SAME.

In an action by the heirs and distributees of a decedent against his administrator for a settlement, the complaint alleged a balance due on account collected by the administrator, as shown by his annual account, and that a further sum was due from the administrator, of which plaintiffs averred that they had but recently received information. *Held*, that the complaint was for an accounting of any sums which the administrator should have collected.

Appeal from Superior Court, Franklin County; E. B. Jones, Judge.

Action by W. H. Mann and others against G. S. Baker, administrator de bonis non of J. B. Mann, deceased. From a judgment for defendant, plaintiffs appeal. Reversed.

B. B. Massenburg, for appellants. P. H. Cooke, for appellee.

CLARK, C. J. This is an action by the heirs at law and distributees of J. B. Mann against G. S. Baker, administrator d. b. n., for an account and settlement. It was referred, and the referee found that J. B. Mann died in 1865, and H. H. Harris qualified as his administrator; that in 1870 Harris was removed, and W. H. Spencer was appointed administrator d. b. n.; that, he dying in 1877, G. S. Baker was appointed administrator d. b. n., and has filed no final account. The plaintiff offered to show that W. H. Spencer, the former administrator, sold certain real estate of his intestate under decree of court, and received therefor, as appears by his recorded returns, the sum of \$7,252.55. The referee excluded this evidence on the ground that this specific allegation was not made in the complaint, and excluded it in making up his findings on the facts and the law. The referee found that all the funds which had come to the hands of defendant as administrator d. b. n. of J. B. Mann had been properly accounted for, and held as conclusions of law: (1) That the action should be dismissed, because not brought by plaintiffs "on relation of the state." (2) That defendant, not having filed his final account, was not protected by the statute of limitations. (3) That, having disbursed all the funds which came into his hands, the defendant was entitled to recover costs against the plaintiffs, who were adjudged to have shown no cause of action.

The plaintiff excepted to the first conclusion of law. The court, in its discretion, allowed the plaintiff to amend. Besides, as the case had been pending for years, this purely technical objection had been waived and came too late. *Brown v. McKee*, 108 N. C. 387, 13 S. E. 8.

The plaintiffs further except because the referee's findings are based, as he states, upon an exclusion of the record evidence of the sums which came into the hands of the previous administrator, W. H. Spencer. This is the real point presented by the appeal. It is the duty of an administrator d. b. n. to investigate and collect in all sums due the estate, whether by the former administrator (*Latham v. Bell*, 69 N. C. 135, *Smith v. Brown*, 99 N. C. 377, 6 S. E. 667) or by other debtors. In an action by the heirs and distributees for a settlement, it is competent for them to show any indebtedness due the estate, and, such being shown, the burden is upon the administrator to show that he used due diligence in collecting the same,

but was unable to collect, or, having collected, has accounted for the same. It is not sufficient simply to show, as was done here, that the administrator has accounted for the sums he actually collected. Here the court records offered in evidence showed that the former administrator had received \$7,252.55, proceeds of realty of his intestate which had been sold by order of court. The defendant as administrator d. b. n. was the only person who could have taken steps to recover that sum or ascertain if it had been properly disbursed. It was his duty to take such steps in apt time, and he is responsible for any loss occurring from his failure to do so. When the plaintiff offered to show that such sums were reported by the former administrator as being in his hands, they should have been allowed to do so, and the defendant should have been allowed to show that he used due diligence and ascertained that said sum had been accounted for, or that he was unable to collect. It was error to exclude all investigation of that matter, and the referee's report, stating that his conclusions were based upon the evidence of the sums actually collected, excluding this evidence, it was error to confirm it.

It is true that the referee offered to allow the plaintiff to amend by specifically charging the failure to collect any sum due by former administrator, but it was not necessary in an action of this nature to specifically set out the debts which the administrator had failed to collect, and the plaintiff, fearing the amendment would work further delay in an action already long drawn out, declined. It was sufficient to aver a breach of duty in failing to file final account and to fully account and settle. In fact, however, the complaint does allege a balance of \$1,027.60 due on amount actually collected, as shown per defendant's annual account, and a further sum of \$7,280.42 due by said administrator, of which plaintiffs averred that they had but recently received information. The complaint is sufficient to show that the action was for a full accounting, and to recover, not only any balance actually collected, but for an account of any sums which the administrator "should have collected." It was error to exclude evidence offered with that view, and the judge erred in confirming the report.

Error.

HUDSON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 2, 1906.)

1. RAILROADS—LICENSES—INJURIES—NEGLIGENCE—EVIDENCE.

Defendant railroad company, moving cars for its own convenience on a spur track, cut a car loose on a downgrade, where by its own momentum it crashed into five other stationary cars, two of which were scotched, on the yard

track of an oil mills company with sufficient force to drive the cars from their position and against a bumping post, causing the death of plaintiff's intestate, an employé of the mills, who was standing on the track at the time. Defendant had no one in a position to note the conditions in the yard where the employés of the mills were accustomed, and had a right, to be, and no one was in a position to exercise any control over the detached car. *Held*, that defendant was guilty of negligence, which was the proximate cause of intestate's death.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 878-877.]

2 NEGLIGENCE—PROXIMATE CAUSE.

Where an act is negligent, the person committing it is liable for any injury proximately resulting therefrom if he should have anticipated that some injury would be liable to happen from the negligence, though the particular manner in which the injury occurred was not reasonably to have been anticipated.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 72.]

3. RAILROADS—LICENSES—DEATH—CONTRIBUTORY NEGLIGENCE.

Intestate, an employé of an oil mills company, was at work in a room, the door of which opened within 12 feet of a bumping post at the end of the oil mills' railroad switch, on which were certain stationary cars which were being unloaded at the time. Intestate went between the rear car and the bumping post, when he was crushed and killed by a car being switched onto the track without warning or any one to control the same, which caused the stationary cars to move and crush intestate between the bumper of the last car and the post. *Held*, that intestate was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 895.]

Appeal from Superior Court, Edgecombe County; Ward, Judge.

Action by Ned Hudson, as administrator of James Hudson, deceased, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The evidence on behalf of the plaintiff was as follows: "The defendant had constructed two tracks into the yard of the Edgecombe County Oil Mills for the receipt and delivery of freight of the mills. One of these tracks was along the side of the cotton-seed warehouse, so that the contents of cars on the track could be unloaded into the warehouse, the other track being placed some distance to the left of the first track as you entered the yard of the mills. At the end of the first track, and from 8 to 11 inches from one of the buildings of the mills, the defendant had placed a butting or bumping post to stop its cars. The distance between the mill building and this butting post was 8 inches at the bottom and 11 inches at the top, and the rail of the track for several feet approaching the butting post was raised at a very considerable angle, so that it would require force for a car to be shoved back to within 18 inches of the post, and between the butting post and the mill building there were old iron and other debris, so that one could not pass between the mill building and the butting post. The dis-

tance from the butting post to the rear end of the coupler of a car placed so that the door of the car would be opposite the door of the cotton-seed warehouse is 27 inches. The distance from the butting post to the western lines of the Southern Oil Company's property, over which the first track is laid, is 108 feet 6 inches. The distance from the butting post to the switch of the railroad company is 371 feet 11 inches. Just beyond the western line of the property of the Edgecombe County Oil Mills is the main street of the town of Tarboro and a plank sidewalk over and across which the track is laid. This street and sidewalk were greatly traveled by the general public. James Hudson, the intestate of the plaintiff, was in the employment of the Edgecombe County Oil Mills, and was a reliable young man earning 85 cents per day; he worked in a huller room, the door of which opened to the left and about 12 feet from the butting post. The evening before the accident the defendant's servants, with the shifting engine, placed two cars of cotton seed of the mills on the track next to its seed warehouse, the doors of the cars being opposite the doors of the seed warehouse, to be unloaded the following morning. These cars were detached from the engine and scotched to prevent them from moving. Three other cars of the F. S. Royster Guano Company were, without the knowledge or consent of the Edgecombe County Oil Mills, and for the convenience of the defendant company, temporarily placed on this track beyond the two cars loaded with seed as described and within the yard of the mills. The day after the two cars of seed had been placed as described for the mills, and while two employes of the mills were in the cars unloading the same, the defendant took another loaded car belonging to the Royster Guano Company from still another track, brought it to the switch, and, while the same was in motion, cut it loose from its engine, and it rolled down this track across the public plankway and the main street of the town and into the yard of the Edgecombe County Oil Mills, with such violence that it ran into the three cars already stationed there and caused them to run back and into the two cars placed for the mills and opposite its seed warehouse, while the cars were being unloaded, and caused them to roll back and into the bumping or butting post. When this car was cut loose from the engine, no signal was given to the employes of the mills or to the public that it was coming. No one was on this car that was turned loose. The men on the two cars unloading seed felt a slight jar and the cars moved back about 18 inches. The witness heard some one "holler" and went out and saw James Hudson, the intestate, standing and leaning against the bumper post with his arms on it. He was "hollering" and badly mashed, mashed sidewise, and died the next day. The cars then rolled back from

the post. No one saw Hudson go between the cars and the butting post. The grade from the switch to the scales, some 50 feet within the yard of the Edgecombe County Oil Mills is downgrade, and from the scales to the butting post up grade. A loaded car cut loose at the switch will run back and run into the butting post. There was a fence on the northern and northwestern side of the property of the mills and a great deal of wood was piled along this fence, and there were tanks and other obstructions so that one coming out of the huller room by the side of the butting post could not see an engine or cars at the switch. The cars standing on the track also obstructed his view."

At the close of the evidence there was a motion for nonsuit which was overruled, and the defendant excepted, and in apt time the defendant requested the court to instruct the jury as follows: "(1) That in law, upon the evidence, the injury to James Hudson was an accident, the defendant not being required by law to foresee that a person would pass between the coupling head and the butting post in so short a space, at about 20 inches, and you will answer the issue as to defendant's negligence. 'No.' (2) There being no disputed facts, what is contributory negligence is a question of law, and the court instructs you that, if you believe the evidence, the plaintiff's intestate was guilty of contributory negligence, and you will answer the issue as to contributory negligence 'Yes.' (3) That if you find, from the evidence, the fact to be that James Hudson exposed himself to danger in going between the bumper post and the end of the car, the space being 18 or 20 inches, then in law he would be guilty of contributory negligence, and you will answer the issue as to contributory negligence 'Yes.'" The court declined to instruct the jury as requested, and the defendant excepted. Verdict for the plaintiff. Defendant moved for a new trial for errors on the part of the court (1) in refusing the motion to dismiss as on judgment of nonsuit, and (2) for failing to instruct the jury as requested. Motion overruled, and defendant excepted, and appealed from the judgment rendered.

John L. Bridgers, for appellant.

HOKE, J. (after stating the case). There were two objections urged upon our attention by counsel for the appellant: First. That on the entire testimony, if believed, the judge should have held the killing of the intestate to have been an excusable accident. Second. That on such testimony, as a matter of law, the intestate was guilty of contributory negligence barring a recovery. In our opinion neither position can be sustained. We have held, in *Ray v. Railroad*, 141 N. C. —, 53 S. E. 622, that it is negligence to back a train into a railroad yard, where passengers are rightfully moving about, without warning

and without having some one in a position to observe conditions and to signal the engineer or warn others in case of impending peril. This being a correct position, a fortiori, would it be negligence under the conditions existing here? The evidence shows that the defendant company, moving cars for its own convenience on a spur track, cut loose a car on a down grade where, by its own momentum, it crashed into five other cars, stationary and two of them scotched, in the yard of the Edgecombe County Oil Mills, and with sufficient force to drive these cars from their position and against the bumping post, causing the death of the intestate, an employé of the mills, who was standing on the track at the time. The defendant had no one in a position to ascertain and note conditions in the yard where the employés of the mills were accustomed, and had a right, to be, and no one was in a position to exercise any control over the detached car, even if the peril had been noted.

We agree with the judge below that the undisputed testimony established a negligent act, causing damage on the part of the defendant, and very certain it is that the judge could not have held, as requested by defendant, that, as a matter of law, the defendant was in no way culpable. The reason assigned by the defendant for this contention is not well considered—"that the defendant was not required to foresee that a person would pass between the coupling head and the butting post in so short a space as about 20 inches." When one is guilty of a negligent act causing damage—negligent because some damage was likely to result—he cannot be excused because the damage in the particular case was more serious than he anticipated or different from what he had reason to expect. The doctrine is that "consequences which follow in unbroken sequence, without an intervening efficient cause, from the original wrong are natural, and from such consequences the original wrongdoer must be held responsible even though he could not have foreseen the particular result, provided that, in the exercise of ordinary care, he might have foreseen that some injury would likely follow from his negligence." 16 A. & E. Ency. (1st Ed.) 438. This was substantially held in *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528. In that case a school teacher threw a pencil at a pupil, which struck and injured the pupil's eye, and the judge below, on request of defendant, instructed the jury: "Unless you find from the evidence that a reasonably prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury complained of would likely result from the defendant's act in throwing or pitching the pencil, you will answer the first issue 'No.'" The jury answered the issue "No," and on appeal Walker, J., for the court, said: "It is not

necessary that he should actually intend to do the particular injury which follows, nor indeed any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed and many authorities cited to support it in 21 A. & E. Ency. (2d Ed.) 487: 'In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' It is not essential, therefore, in a case like this, in order that the negligence of a party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the parties sought to be charged with liability for the negligence should have foreseen by the exercise of ordinary care that some mischief would be done." In *Christianson v. Railroad*, 67 Minn. 94, 69 N. W. 640, it was held "that, where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not reasonably have anticipated that the injury would result in the form and way in which it did in fact happen." And Mitchell, J., in delivering the opinion of the court, said: "It is laid down in many cases and by some text-writers that, in order to warrant a finding that negligence (not wanton) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated. Such or similar statements of law have been inadvertently borrowed and repeated in some of the decisions of this court, but never, we think, where the precise point now under consideration was involved. The doctrine contended for by counsel would establish practically the same rule of damages re-

sulting from tort as is applied to damages resulting from breach of contract under the familiar doctrine of *Hadley v. Baxendale*, 9 Exch. 841. This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of negligence with that of proximate cause. What a man may reasonably anticipate is important and may be decisive in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then of course the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that, if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening cause from the original negligent act, are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. 1 Bevan, Neg. 97; Hill v. Winsor, 118 Mass. 251; Smith v. Railroad, L. R. 6 C. P. 14." These and other decisions of like import from courts of the highest authority show that the position contended for by the defendant in its prayer for instructions on the first issue cannot be sustained. The jury have found under proper instructions that the defendant was guilty of negligence causing damage; negligent as stated, because it permitted, without any control, a car to run on a down grade into the millyard, where it was likely to, and did, hurt one of the employes of the mills, and it cannot be excused because the employe, being in an unexpected and unusual position, received a greater injury than the defendant had reason to anticipate.

The position of the defendant on the question of contributory negligence is likewise untenable. The intestate, an employe of the mills, was at work in a room, the door of which opened in 12 feet of the place where the killing occurred. He had gone there, no doubt, for his own personal convenience, and the existing conditions gave little or no indication that his temporary position would be one of peril. The cars in the millyard were stationary and scotched, and other employes were at work in them at the time, unloading cotton seed. The circumstances did not require the intestate to anticipate that the defendant company, in disregard of its duty, would recklessly turn a car loose on a down

grade, which would run into the yard, drive the stationary cars from their position, and crush out his life. The charge of the court, in leaving it to the jury to determine the question under the rule of ordinary care of a prudent man, was as favorable as the defendant had a right to expect. To hold, as requested by the defendant, that the intestate was guilty of contributory negligence as a matter of law, would have been clearly erroneous.

We find no error to the prejudice of the defendant, and the judgment below is affirmed.

HICKS v. HICKS et al.

(Supreme Court of North Carolina. Oct. 9, 1906.)

1. WITNESSES—EXAMINATION—FORM OF QUESTIONS.

The competency of evidence is to be determined by the substance of the witness' answer, rather than by the form of the interrogatory.

2. SAME—COMPETENCY—WIFE—COMMUNICATION WITH HUSBAND.

In a proceeding by a widow to recover dower she was not necessarily incompetent to testify whether she left her husband's home prior to his death of her own volition, or by reason of cruel and inhuman treatment amounting to compulsion, under Revisal 1905, § 1631, prohibiting a wife from testifying with reference to a personal transaction or communication with her husband.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 737-739, 743.]

3. DOWER—BAR—ABANDONMENT OF HUSBAND—EVIDENCE.

Under the statute providing that abandonment of the husband which is willful and without just cause, continued to the time of his death, shall constitute a bar to the wife's dower, evidence as to whether plaintiff in a suit for dower left her husband's home of her own volition, or by reason of cruel and inhuman treatment, which by law would constitute compulsion, was admissible.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, §§ 100, 296, 301.]

4. TRIAL—RECEPTION OF EVIDENCE—OBJECTIONS—OFFER TO PROVE.

Where a question was objected to, and the answer might or might not be competent, the court should call on counsel to state what he expected to prove, or learn the answer of the witnesses in the absence of the jury before excluding the question.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 115-119.]

Appeal from Superior Court, Wake County; Ward, Judge.

Proceedings by Ammie Hicks against J. R. Hicks and others for dower. From a judgment in favor of defendants, petitioner appeals. Reversed, and a new trial ordered.

It was admitted that the plaintiff is the widow of Joseph Hicks, who owned the land described in the complaint, and is entitled to dower, unless she had willfully and without just cause or excuse abandoned her husband, and was not living with him at the time of his death, this being the defense set up

in the answer. The following issue was submitted to the jury: "Did the plaintiff willfully and without just cause abandon her husband, Joseph Hicks, and refuse to live with him, as alleged in the answer?" The jury answered the issue "Yes." Plaintiff admitted that she was not living with her husband when he died, but she alleged that she left him because he treated her cruelly, and offered such indignities to her person as to render her condition intolerable and her life burdensome, and that he had falsely charged her with infidelity. There was testimony on the part of the defendant tending to show that the plaintiff of her own will abandoned her husband without any lawful excuse. The defendant's proof tended to show that they had lived together 10 years and had one child who is now 8 years old and that plaintiff's character is good. It was admitted at the trial that she is and always had been a virtuous woman. The plaintiff's counsel proposed to ask the witness, C. W. Horton, what he had heard Hicks say about his wife's character, the witness stating that he had not told her about it. On objection, the testimony was excluded. It was in evidence that Hicks had told his wife to leave their yard and threatened, if she did not go, to shoot her. She used some offensive language, and seemed not to be afraid of him. Plaintiff's counsel also proposed to ask the plaintiff, who testified in her own behalf, the following question: "Did you leave him (her husband) of your own volition?" Defendant objected, and the question was ruled out. There was no objection to the charge of the court. Plaintiff moved for a new trial upon exceptions taken to the exclusion of testimony. Motion overruled. Judgment and appeal by plaintiff.

R. H. Battle and F. S. Sprull, for appellant. W. N. Jones, for appellees.

WALKER, J. (after stating the case). The court erred in excluding the question put to the plaintiff by her counsel while testifying in her own behalf. The competency of evidence is determined by the substance of the witness' answer rather than by the form of the interrogatory. *Sumner v. Candler*, 86 N. C. 71. Whether the plaintiff left her husband's home of her own volition, or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under Revisal 1905, § 1631, formerly Code, § 590. She may have left for valid reasons not arising out of any dealing with her husband. It cannot be seen, on the face of the question, that the plaintiff was induced to leave only by what her husband may have said or done. In *Thompson v. Onley*, 96 N. C. 9, 1 S. E. 620, this court held to be competent a question substantially similar to this one. It is there suggested that the party objecting to it, could by a preliminary ex-

amination have ascertained if the witness intended to refer to a personal transaction or communication with a party then deceased. We add that the judge here could have called upon the counsel to state what he expected to prove and thus have elicited the required information or he could have directed the jury to retire until it was learned what the witness would say and in that way not prejudice either side. Any one of the suggested methods of inquiry, would be in accordance with approved practice. *Sikes v. Parker*, 95 N. C. 232; *Fertilizer Co v. Rippy*, 123 N. C. 656, 31 S. E. 879. This case is not like *Davidson v. Bardin*, 189 N. C. 1, 51 S. E. 779, and *Stocks v. Cannon*, 189 N. C. 60, 51 S. E. 802 cited by the defendant's counsel, for in each of them it appeared from the very nature of the question that it could not possibly be answered without speaking of a transaction or communication with the deceased. Nor is it like *Peoples v. Maxwell*, 64 N. C. 818, *March v. Verble*, 79 N. C. 19, *Ducker v. Whitson*, 112 N. C. 44, 16 S. E. 854, and cases of a similar kind which were cited by the plaintiff's counsel, for there it was perfectly clear that no transaction or communication with the deceased was called for, but something very different from it was the object of the proof, such as sanity, insolvency, handwriting, and the like. The proposed evidence was relevant, as the statute provides that abandonment of the husband which is willful and without just cause and refusal to live with him followed by separation continued to the time of his death, shall constitute a bar to the right of dower. That the plaintiff did not leave her husband's home of her own volition, if she can establish the fact by competent proof, should certainly be considered by the jury upon the issue framed under that provision of the statute. What the witness will say, and whether she is qualified under Revisal 1905, § 1631, to speak of all or any of the matters that may be within the full scope of the proposed inquiry, we do not know, and, therefore, we are now unable to decide as to the extent of her competency and must leave the question with the presiding judge to pass upon, when the facts are all disclosed.

The question put to the witness, Horton, is rather indefinite in form and we can only conjecture as to what was intended to be proved. If the husband made what turns out to be a false accusation against his wife, and one very degrading to her and which ought to have been humiliating to him, it perhaps might be competent and relevant as a circumstance showing the state of his temper and disposition towards her, or his animosity, to be considered by the jury in connection with the evidence introduced by the plaintiff that he had driven her from the yard. It might have a tendency to show why he did it and as to who was the aggressor in this most unfortunate affair. That his anger and resentment would be aroused if he believed

the truth of what he had uttered against her, can hardly be denied, and if he did not believe it, he evinced an utter disregard for the duty of protection he had promised and that he owed to her, to say the least of it, which was likely to result in domestic infelicity and a marital breach sooner or later. In either view of such testimony, it may be regarded as furnishing some evidence of the motive with which it is alleged he maltreated her, if it is not a circumstance to show that the version of their separation, as given by her witnesses, is the true one. The question is so generally and vaguely worded, though, that we cannot pass definitely upon its competency or relevancy.

We order a new trial, because the court excluded the question propounded to the plaintiff herself.

New trial.

BROWN et ux. v. SOUTHERLAND et ux.
(Supreme Court of North Carolina. Oct. 9, 1906.)

1. JUSTICES OF THE PEACE—JURISDICTION—ACTIONS INVOLVING TITLE TO LAND.

Under Const. art. 4, § 27, and Revisal of 1905, § 1419, conferring jurisdiction on justices of the peace in civil actions when the sum demanded does not exceed \$200, and the title to land is not in controversy, a justice has no jurisdiction of an action for damages, in a sum less than \$200, for breach of covenant of warranty, where defendants set up an equitable defense that the land of which it was alleged they were not seised was included in the deed by mistake.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 93.]

2. SAME — APPEAL — PRESUMPTIONS—MATTERS NOT SHOWN BY RECORD.

Revisal of 1905, § 1424, provides that when an action before a justice is dismissed on answer and proof by defendant that the title to realty is in controversy, plaintiff may prosecute the action in the superior court, and defendant may not deny the jurisdiction by an answer contradicting his answer in the justice's court. *Held*, that where, on appeal from a judgment of the superior court in such a case, it does not appear that a previous similar action before a justice was dismissed on answer and proof by defendant that the title to realty was involved, such fact cannot be inferred.

Appeal from Superior Court, Wayne County; Webb, Judge.

Action by R. Q. Brown and wife against R. B. Southerland and wife to recover for breach of warranty. From a judgment dismissing the suit, the plaintiffs appeal. Reversed.

Plaintiffs sued in the superior court alleging that defendants conveyed to them certain lands by deed "with full covenants of seisin, against incumbrances, and with general warranty"; that defendants were not seised of a portion of the lands conveyed, and that, by reason thereof, there was a breach of said covenant of seisin whereby they had sustained damage to the amount of \$57.58, wherefore they demanded judgment,

etc. Defendants admitted the execution of the deed and denied that there was any breach of the covenant of seisin, except as set forth in the affirmative matter set up in the answer. Defendants, for a further defense, say that the land, in respect to which they had no seisin, was included in the deed by mistake of the draftsman. That plaintiffs contracted to purchase certain land and that when the deed was prepared the draftsman followed a survey which was furnished him and, by mistake, included in the description the land in controversy. When the cause came on for trial defendants moved the court to dismiss the action for that the court had no jurisdiction, the amount demanded being less than \$200. His honor being of the opinion that upon the pleadings the title to land was not in controversy, granted the motion. Plaintiffs excepted and appealed.

A. S. Grady and W. O. Munroe, for appellants. F. R. Cooper, for appellees.

CONNOR, J. (after stating the case). Counsel concede that the exact point presented by the appeal has not been before this court. The solution of the question depends upon the construction of the Constitution, art. 4, § 27. "The several justices of the peace shall have jurisdiction * * * of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars, and wherein the title to real estate shall not be in controversy." See, also, Revisal of 1905, § 1419. This section, when analyzed, confers jurisdiction on justices in actions "founded on contract" wherein: (1) The sum demanded shall not exceed \$200; and (2) the title to real estate shall not be in controversy. Here the sum demanded is within the jurisdiction of the justice, but plaintiffs say that the jurisdiction is not given because the title to land is in controversy. That, upon the pleadings, it is manifest that the issue raised—the alleged breach of the covenant of seisin—involves the inquiry whether the defendants were seised; that is, had title to the land conveyed in the deed. Defendants say that the answer admits that they had no title, therefore there was nothing to try. This position eliminates the defense that the land was included in the deed by the mistake of the draftsman, and presents the question upon the allegation and denial in respect to the breach of the covenant. The answer admits that the deed, as written, covers and includes the land in controversy. It is true that in their further defense defendants admit that they had no such land. The test by which jurisdiction is fixed, when the motion to dismiss is made upon the complaint, is whether, from the allegations of fact, the "amount in dispute" is more or less than \$200. *Froelich v. Express Co.*, 67 N. C. 1. This court has uniformly held that when the sum demanded in good faith is in excess of \$200 the jurisdiction is not ousted by the reduction of the amount

by failure of proof. *Martin v. Goode*, 111 N. C. 238, 16 S. E. 232, 32 Am. St. Rep. 799, in which the decided cases are cited. *Sloan v. R. R.*, 126 N. C. 488, 36 S. E. 21. Applying the same test here, it is clear that the complaint alleges a state of facts which, if true, involves the title to land. Defendants, by moving to dismiss on the pleadings, cannot oust the jurisdiction, provided the complaint sets forth facts which present a case in which the title to real estate is in controversy. The fact, if it be conceded, that the answer admits the plaintiffs' right to recover, cannot affect the question of jurisdiction. The defendants do not admit that plaintiffs are entitled to recover; on the contrary, they set up an equitable defense that the land was included in the deed by mistake. If they should succeed in establishing this defense, of course the plaintiff would not be entitled to recover, either upon the ground that the deed would be corrected and thereby the land, in respect to which there is a breach of the covenant, eliminated, or the plaintiff would take only nominal damages. It was the evident purpose of the framers of the Constitution, while enlarging the jurisdiction of the justices of the peace in respect to the sum demanded, to exclude from their jurisdiction the trial of title to real estate. We can readily see that, in actions for breach of covenants, it would be almost impossible to avoid the trial of issues involving such title. The very matter in controversy here is whether the defendants were seised of the land conveyed, thus presenting, necessarily, the question of title and thereby ousting the jurisdiction of the justice. It will be observed that the statute further provides that, if the question of title is not raised upon the pleadings, but shall appear to the justice, "on the trial," to be in controversy, he shall dismiss the action. We are of the opinion that his honor was in error in granting the motion to dismiss. In the case of *Templeton v. Summers*, 71 N. C. 269, cited by defendants, it was manifest that the title to land was not involved and what is said there does not conflict with our conclusion. Plaintiffs call our attention to the fact that the case on appeal states that an action between the same parties on the same subject-matter had been dismissed before a justice of the peace of Sampson county, thereby invoking the provisions of section 1424 of the Revision of 1905, which provides: "When an action before a justice is dismissed upon answer, and proof by the defendant that the title to real estate is in controversy in the case, the plaintiff may prosecute an action for the same cause in the superior court and the defendant shall not be permitted, in that court, to deny the jurisdiction by an answer contradicting his answer in the justice's court." Defendants insist that plaintiffs cannot take advantage of this section because the judgment dismissing the action by the justice was not pleaded. Without passing

upon that question, it is sufficient to say that it does not appear that the action was dismissed "upon answer and proof by the defendant that the title to real estate was in controversy" and this cannot be inferred.

Judgment dismissing the action must be reversed.

SIGWALD v. CITY BANK et al.

(Supreme Court of South Carolina. July 4, 1906.)

BANKS AND BANKING—NEGLIGENCE OF OFFICERS—ACTION BY STOCKHOLDER.

Where a stockholder sued the president and directors of a bank for negligence in conducting the business of the bank, it was not necessary to allege what particular loss was occasioned by the negligence of a particular officer, or to state who were on the managing board at the time of the particular loss, or to allege all the losses complained of.

Appeal from Common Pleas Circuit Court of Anderson County; Prince, Judge.

Action by Lucy M. Sigwald against the City Bank and others. From an order requiring plaintiff to amend her complaint, she appeals. Reversed.

Ellis G. Graydon, for appellant. Shepards, Grier & Park, for respondent.

GARY, A. J. This is an appeal from an order requiring the plaintiff to make her complaint definite and certain. That portion of the order which is necessary to understand the questions involved is as follows: "I am clearly of the opinion that the complaint 'is so indefinite and uncertain' that the precise nature of the charge is not apparent, and that the court should require the pleadings to be made more definite and certain by amendment. No one should be brought into court without being fully advised concerning the charges made against him, and this, whether it be in a court of law or in a court of equity. If it is claimed that on account of negligence certain losses have been sustained, then certainly the party charged has a right to require a statement of the facts upon which such charge of negligence is predicated. A general allegation of negligence will not do, because a defendant is not advised what he may be required to meet in the proof, and cannot possibly frame an intelligent answer. This is not an open question in this state, and both on reason and authority the courts always require a complaint which deals in mere generalities to specify the particular acts of negligence intended to be relied on. This complaint charges that every director named as defendant from the beginning to the last are jointly and severally liable and demands judgment against them all. Now it appears from the complaint that all of them were not directors from the beginning, and that different persons, at different times, have composed the board of directors, some of whom are

before the court and some of whom are not. It cannot be contended that a director is liable for losses which occurred before he had any connection whatever with the corporation or before he was a member of the managing board. The liability of these defendants is not one and the same. It appears upon the face of the complaint that some of the alleged acts of negligence, in the very nature of the case, must have been committed by some of the defendants at a time when others were not members of the board of directors. The alleged liability is not for a definite and fixed sum. The basis of their alleged liability is negligent discharge of official duty, and some did not hold office from the organization, and certainly are not and cannot be equally liable or equally guilty with others who were directors from the beginning. It seems to me on all fours with *Bulst v. Melchers*, 44 S. C. 46, 21 S. E. 449. It is, therefore, ordered and adjudged: That the plaintiff herein be and hereby is required to make her complaint more definite and certain in the following particulars, to wit: (1) By alleging specifically each act of negligence or omission on account of which it is sought to charge the defendants or either of them. (2) By alleging specifically what particular loss or losses, and the amount thereof, were occasioned by each act of negligence or omission, or if such loss or losses were occasioned by several acts of negligence or omission, combined and concurring with each other as proximate causes, so state and allege. (3) By alleging specifically who were the officers and directors of the said bank at the time of each particular act or acts of negligence or omission by reason of which the particular loss or losses were occasioned. (4) By alleging specifically who is and was responsible for each particular loss or losses and the amount thereof."

The exceptions assign error in the four particulars in which his honor, the circuit judge, ordered the complaint to be amended.

In the case of *Bulst v. Melchers*, 44 S. C. 46, 21 S. E. 449, there was not a motion to make the complaint definite and certain, but there was a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that its allegations were indefinite. This court ruled that such defects did not render the complaint subject to a demurrer, but that the remedy in such cases was by motion to make it definite. The court, however, did not determine that the complaint in that case was subject to amendment upon a motion to make definite and certain in the particulars urged upon the demurrer, as that question was not before the court. We do not, therefore, regard that case as conclusive of the question under consideration.

In *Encyc. of Pl. & Pr.* 97, 98, it is said: "It is necessary in order to obtain the eq-

uitable remedy of accounting that a plain case be made in the bill or complaint. But the courts are liberal in their construction of pleadings for an accounting, and the bill or complaint will be upheld if the allegations substantially make out a case." "A bill for an account must show by specific allegations that there was a fiduciary relation between the parties or that the account is so complicated that it cannot conveniently be taken in an action at law. But no allegation beyond those which establish the fiduciary relation or the complicated state of the account is necessary." In a note on page 97 we find the following: "The mere fact that items are not specified does not preclude the allowance of them in the settlement of the account."

In 1 Cyc. 436, 437, the rule is thus clearly and succinctly stated: "The bill must state the facts upon which complainant is entitled to call upon defendants to render an account, and which make defendants liable to do so. But it is sufficient to show the relation of the parties which entitles complainant to the relief and a general statement of the matters pertaining to which the account is sought will be sufficient. The items of the account need not be stated, and where the issues involve a general accounting the evidence need not be confined to the claims set up by either party." See *Devereaux v. McCrady*, 46 S. C. 133, 24 S. E. 77.

When, as in this case, there are numerous quasi trustees, and the accounts are complex, it is difficult to ascertain until the accounting the particular acts for which each of the defendants is accountable or the proportions in which they are liable. The object of the accounting is to determine these facts, and the law does not require that they should be alleged in the complaint with particularity, as this would frequently be impossible, and would tend to dispense with the necessity for a resort to the equitable powers of the court.

It is the judgment of this court that the order of the circuit court be reversed.

GAIN v. DALY et al.

(Supreme Court of South Carolina. July 9, 1906.)

1. INJUNCTION—ENFORCEMENT OF CRIMINAL LAW.

That the enforcement of a valid criminal law would materially injure plaintiff's business or property is no ground for equitable interference.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 178, 179.]

2. SAME.

Where a statute is clearly void and irreparable injury to property might result from its enforcement, prosecution thereunder may be enjoined.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 178, 179.]

2. SUNDAY—REPEAL OF SUNDAY LAW.

Cr. Code 1902, § 501, providing that no person shall expose to sale any goods whatsoever on the Lord's Day, is not repealed by nonuser or by implication.

4. INJUNCTION—CRIMINAL PROSECUTION.

A prosecution under a valid law will not be restrained because the statute is not enforced against some violators.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 178, 179.]

5. SUNDAY—ILLEGAL SALES.

Or. Code 1902, § 501, forbidding sale, or exposing for sale of goods on Sunday, applies to slot machines automatically vending wares.

6. MUNICIPAL CORPORATIONS—LICENSES—CONFLICT WITH STATUTE.

The fact that a person received a license to operate slot machine from a city does not authorize their use on Sunday in violation of a state law.

[Ed. Note.—For cases in point, see vol. 86, Cent. Dig. Municipal Corporations, §§ 1311-1314; vol. 82, Cent. Dig. License, § 70.]

Action by B. D. Cain against Owen Daly and others. Dismissed.

F. G. Tompkins, for plaintiff. Allen J. Green, for defendants.

JONES, J. This is a complaint in the original jurisdiction of this court for an injunction to restrain the prosecution of plaintiff for violation of section 501 of the Criminal Code of 1902, which declares that "no person or persons whatsoever shall publicly cry, show forth or expose to sale, any wares, merchandise, fruit, herbs, goods or chattels whatsoever, upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth or exposed for sale." The defendants are the chief of police and two policemen, the mayor and other members of the board of police commissioners and the recorder, who are officers of the city of Columbia, and two magistrates of the state located in said city. The plaintiff is engaged in the business of operating and leasing and selling the Doremus Vending Machine within the states of South Carolina and North Carolina, with headquarters at Columbia, S. C., where after procuring a license he installed and operated a number of said machines. The Doremus Vending Machine is described as a small receptacle for wares about 18 inches in height, 6 inches in width and 6 inches in depth, with two locks, one to attach the machine to a table or stand, and another to open the drawers for the goods and money; that it is operated by placing a coin in a slot and raising a lever, and the mechanism is such that if the proper coin is so placed, an article of merchandise, which can be plainly seen, will be ejected therefrom. The wares in this case were chewing gum and cigars. The vending machines being operated on Sundays prosecutions were begun February 27, 1906, against the plaintiff under the City Ordinances, §§ 380 and 381, relating to keeping open a shop or

store for the transaction of business on the Sabbath Day, and publicly working on the Sabbath Day except in cases of emergency. Plaintiff was found guilty by recorder's court and fined, but on appeal to the court of general sessions the judgment was reversed, March 3, 1906, and plaintiff discharged. After this plaintiff purchased and installed more of the machines, and on April 8, 1906, warrants were issued before the recorder for a forfeiture of the wares in 41 of said machines, under the statute quoted above. The cases were transferred to Magistrate Moorman, and judgment was rendered in one case declaring forfeiture of the goods, and appeal was taken therefrom to the court of general sessions, and pending this appeal the other cases were continued. Thereafter the machines were installed again, and on April 15, 1906, warrants were again issued and the goods seized. One of these cases was tried and the goods declared forfeited, and the other cases were continued pending appeal to the court of general sessions.

The complaint alleges on information and belief that it is the intention of the defendants to continue to take his goods whenever they are found in said machines on Sunday, and to continue to harass him with prosecutions and suits for forfeiture of the said goods, and to interfere with his business, representing an investment of several thousand dollars, and that if required to await the determination of said appeals in the lower courts he will suffer irreparable loss; that the nature of plaintiff's business and construction of the machines is such that to stop them on Sunday would require him to take in all the machines on Saturday and place them in their accustomed places on Monday, thereby losing the use of them for a greater part of each of these days and causing expense such as to materially injure and perhaps destroy the plaintiff's business. The complaint further alleges that numerous persons and corporations within the city of Columbia openly violate the sections of the Code referring to the observance of the Sabbath, and so far as the plaintiff is informed and believes no one has for a long time been arrested or interfered with in any way for the same, and the complaint charges that the defendants, the police commissioners, are making an unjust attack on his business and that they are actuated therein by prejudice and ill feeling toward plaintiff. It is also alleged that a number of machines of similar design and vending the same class of wares have been operated in the city of Columbia for a long time without interference. The plaintiff asserts that his business does not violate any laws of the city or state, and that the statute under which his goods were taken is obsolete and of no force in this state, having been superseded for a great many years by city and

town ordinances. The answer submits that plaintiff has a complete and adequate remedy at law for all the wrongs alleged and that the complaint shows no equity. The defendants deny that their conduct has been actuated by any improper motive or feeling or any purpose to discriminate against plaintiff or affect his business, and allege that their acts were for the purpose of discharging, and were within, their duty as officers; that they never assented to the operation by plaintiff of said machines on Sundays, and that if any other person has operated similar machines on Sunday, the matter has not been brought to their attention; that the only persons or corporations allowed to pursue their calling on Sunday within the city of Columbia are domestic servants, venders of ice and milk, street cars and their employes, livery stables, vehicles, etc., engaged in the transportation of passengers, etc., all of which they are advised fall under the head of necessities.

1. We are of the opinion that the injunction should be denied. Ordinarily a court of equity has no jurisdiction to restrain criminal proceedings unless such proceedings are instituted by a party to the suit in equity to try the same right in issue before the court of equity. In *re Sawyer*, 8 Sup. Ct. 482, 31 L. Ed. 402; *Crighton v. Dahmer*, 70 Miss. 602, 13 South. 237, 21 L. R. A. 84, and note, 35 Am. St. Rep. 666, and note at page 677; 5 Am. & Eng. Dec. in Equity, and citations at page 51. But when the ordinance or statute under which the prosecutions are had is clearly void and irreparable injury to property rights may result for its enforcement, equity may interfere. *Dobbins v. Los Angeles* (U. S.) 25 Sup. Ct. 22, 49 L. Ed. 169; *Georgia R. & Banking Co. v. Atlanta* (Ga.) 45 S. E. 258, following *City of Atlanta v. Gate City Gas Light Co.*, 71 Ga. 126; 16 Ency. Law, 372.

2. It is not even claimed in this case that the statute in question is void on constitutional grounds, but it is alleged to be obsolete; that is, repealed by nonuser. Courts should hesitate long to declare an act on our statute books obsolete from desuetude. *O'Hanlon v. Myers*, 10 Rich. Law, 130. The better view is that a statute is in force until repealed by the proper authority, either expressly or by clear implication, as, for example, by the enactment of inconsistent legislation. In this case, however, there is no foundation whatever to claim that the statute is obsolete. The statute is substantially in the words of the enactment of 29 Charles II in 1678; was first enacted here in 1691 (2 St. at Large, p. 68), re-enacted in 1712 (2 St. at Large, p. 396), embodied in the Revised Statutes of 1873 as section 2, c. 74, p. 390, and appears as section 1632 in the General Statutes of 1882, and as section 386 of the Revised Statutes of 1893, and finally as section 501 of the Criminal Code of 1902.

This shows the attitude of the law-making branch of the government towards the statute, and, in the absence of inconsistent legislation, conclusively rebuts any suggestion of repeal by implication. Indeed, it would be difficult to mention any law more generally approved and obeyed, or more applicable to these strenuous times, than the one under consideration. The constitutionality of a Sunday law like this is so generally recognized that there is no need to cite authorities in support of the proposition. But see *City Council v. Benjamin*, 2 Strob. 508, reported, also, in 49 Am. Dec. 608, and note at page 616. Conceding a valid law, the fact that its enforcement would materially injure plaintiff in his business or property affords no sort of reason for equitable interference.

3. It is also contended that the provisions of this act have been unlawfully enforced against the plaintiff while allowed to be inoperative against others. The charge made is denied by the defendants, but if it should be regarded as true, it would afford no reason to restrain a prosecution under a valid law. There would be no hope for the enforcement of law in a given case if the dereliction of duty by an official in other cases should be regarded as a complete protection to offenders.

4. It is further urged that the act merely forbids the labor of persons on the Sabbath, and, being penal, cannot be so construed as to embrace automatic machines. This point is novel. No case directly in point has been cited, and we have failed to discover any. But the language of the statute is plain, and its purpose was to prevent the selling and buying of goods, wares and merchandise on the Lord's Day, by prohibiting the public crying, showing forth or exposing to sale of such articles on that day. The intent is to prevent opportunity for buying as well as selling on the Lord's Day. It may be that the lawmakers in 1691 had no conception of such a vending machine, but that cannot be affirmed of the law-makers in 1902, and in any event the language of the statute clearly covers the operating of such a machine on Sunday. The goods in these machines are "exposed to sale" as actually and effectually as if the owner or operator were present showing the goods and delivering the same on receipt of price. The intent and effect is an actual sale and delivery of goods to every customer who will pay the price as directed by the seller. It would in large measure annul the statute if such contrivances to evade it should be held successful.

5. The fact that plaintiff received license to operate said machines from the city of Columbia is of no avail, as such a license, like other licenses, is subject to the Sunday laws of the state.

There being no ground for equitable interference with said criminal proceedings, the complaint for injunction is dismissed.

POTEET et al. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. July 9, 1906.)

1. TELEGRAPHS—DELAY OF TELEGRAM—LIABILITY.

A telegram, signed S. and addressed to P., "Come at once your baby is dead," does not give notice that the wife of P., for whom the message was sent, has any beneficial interest in the message, and the fact that after sending the message the operator had a conversation with S. sending another message to P., from which he learned that the latter's wife had an interest in the message, does not constitute such notice.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 37.]

2. SAME—MENTAL ANGUISH.

Where there was a delay in the delivery of a telegram, the telegraph company is not liable for the mental anguish of every one suffering by the failure to deliver the message, but only to those for whom, or in whose behalf, it has undertaken to transmit it.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 37.]

3. SAME—EVIDENCE.

A telegraph company promptly carried a telegram to the home of the addressee on Sunday, but he was away. The messenger went out of the city after returning the message to the office. The neighbors of the addressee notified him of the attempt to deliver the message, and he went to the home of the superintendent, who went with him to the office and delivered the message after office hours. No notice was given the sender of the message of the failure to deliver it. *Held* insufficient to show that the suffering caused to the wife of the recipient because he was not with her in a strange city in order to prepare the body of the dead child for carriage home was caused by the willful failure to deliver the telegram.

Appeal from Common Pleas Circuit Court of Richland County; Gary, Judge.

Action by Lottie Poteet and R. W. Poteet against the Western Union Telegraph Company. From a judgment of nonsuit, plaintiffs appeal. *Affirmed*.

Porter A. McMaster and D. W. Robinson, for appellants. Geo. H. Ferrons and Nelson & Nelson, for respondent.

WOODS, J. This is an appeal from an order of nonsuit in an action to recover damages for mental anguish of the plaintiff Lottie Poteet, caused by the alleged tort of the defendant in "willfully, wantonly, recklessly and negligently" failing to deliver a telegram. The complaint thus sets forth the telegram and Mrs. Poteet's connection with it: "That on July 17, 1904, Lottie Poteet, then sojourning in the city of Union, S. C., lost her infant child, and in the first agony of her grief, and desirous of the presence of her husband, the above-mentioned R. W. Poteet, father of said infant, she, the said Lottie Poteet, procured a friend to authorize the defendant company at its office in Union, S. C., to send a message to her husband, the said R. W. Poteet, a copy of which is as follows: 'Union, S. C., July 17. Mr. R. W. Poteet, 1910 Assembly St., Colum-

bia, S. C. Come on first train. Your baby is dead. W. R. Sox.'" The mental anguish for which damages are demanded is thus stated: "The plaintiff Lottie Poteet was deprived of the assistance and comfort of her husband, and she was in that time of great mental anguish and worry, in a city of strangers, and had to leave the tender duties of the shipment of the body of her dead infant to stranger's hands." The plaintiff R. W. Poteet joins in the action merely as the husband of Lottie Poteet and claims nothing in his own right.

1. The circuit judge ordered the nonsuit on the ground that the message failed to disclose on its face that Mrs. Poteet had any interest in it, and there was no extraneous proof of notice to the company of such interest. We do not think this conclusion has been successfully assailed. Mrs. Poteet was a visitor at the home of Sox, who sent the telegram at her instance, but its wording gave no intimation to the defendant of this fact, or that she was in Union with her dead child anxious for her husband to come to her in her distress; nor is there any evidence outside the telegram to charge the defendant with notice of plaintiff's interest. For this purpose reliance is placed by the plaintiff on the testimony of Sox as to statements made to him by the defendant's agent at Union. The telegram upon which the action is brought, and which was intended to announce to Poteet the death of his baby and bring him to Union, was delivered to defendant at the Union office between 8:45 and 9:45 o'clock on Sunday morning. For reasons which will be referred to hereafter it did not reach Poteet in time for him to take the train for Union that day. When Poteet failed to come in response to the death message, Sox, in the afternoon, sent another telegram in these words: "Make arrangements to meet Lottie to-night." Sox intended this message for Poteet, but wrote the name Boleet or Bohit, and the defendant's agent when he received this second message from Sox called his attention to the name and inquired: "Is this the same person that has been telegraphing up here about this child?" referring as we understand to telegrams sent by Poteet to his wife. When the witness answered in the affirmative, the agent then said, "You've got his name wrong," and the name of the addressee was changed to Poteet. If all this had occurred when the telegram upon which Mrs. Poteet sues was delivered in the morning to the defendant, there would be some ground for inference that the defendant's agent then knew that Mrs. Poteet was the wife of R. W. Poteet, the addressee, and the mother of the dead infant, and hence interested in the prompt delivery of the telegram which would probably alleviate her distress by bringing her husband to her. But, while there was a similar mistake in the name of the addressee in the first telegram, there is

no evidence whatever that the agent when he received that message for transmission connected in his mind the name of the addressee with Mrs. Poteet, or knew that it was intended for her husband or related to her child. The fact that the agent in receiving the second telegram suspected a mistake and made inquiry furnishes no ground to charge the company with notice of Mrs. Poteet's connection with the first telegram when that telegram came into the company's hands; there being no evidence whatever that the agent even suspected that the name was incorrectly written in the first telegram, and that the name of Mrs. Poteet's husband was intended. On this point, therefore, we agree with the circuit judge that there was no evidence to charge the defendant with notice of Mrs. Poteet's interest in the telegram.

2. But the plaintiff's counsel insist by their fourth exception, even if there was nothing to indicate to the defendant Mrs. Poteet's interest, yet it was error to grant the nonsuit, "because this was an action of tort, not arising ex contractu; the defendant was and is a public common carrier, and owes a duty to every one who is interested in its public services, and is responsible in tort for any injury or wrong which it may inflict upon any one under the mental anguish statute, whether such be as a contractual relation with it or not." The general distinction between contract and tort in this respect is thus well stated by Mr. Justice Jones, in *Hughes v. Tel. Co.*, 72 S. C. 516, 527, 52 S. E. 107, 111: "In actions for damages for breach of contract, it is usual to say that compensatory damages may be recovered for such consequences as are within the contemplation of the parties to the contract at the time of contracting; but in an action in tort it is usual and proper to say that compensatory damages may be recovered for such consequences as naturally and proximately result from the negligence of performing a duty imposed by law." In cases of this character the suit is usually for the tort committed in breach of the public duty owed to the plaintiff; but the duty springs out of the contract and depends on it, for manifestly the defendant owes no public duty concerning a particular telegram except to those for whom, or in whose behalf or interest, it has undertaken to transmit it. All others are of the outside public, and damages which they incidentally suffer cannot by any stretch be regarded the natural and proximate result of failure to transmit a particular telegraphic message. The contract fixes the relation, and he who sues for tort based on contract must show privity with the party to be charged by connecting himself with the contract as a party or a known beneficiary. *Hellams v. Tel. Co.*, 70 S. C. 83, 49 S. E. 12; *Jones v. Tel. Co.*, 70 S. C. 540, 50 S. E. 198; *Rogers v. Tel. Co.*, 72 S. C. 290, 51 S. E. 773; *Hughes*

v. Tel. Co., supra. In further support of this view, it may be remarked that as to the subject-matter of a telegram it is too well established for discussion, before there can be a recovery, the telegraph company must have notice that the particular result alleged as the basis of the claim was to be apprehended from delay in transmission. *Arial v. Tel. Co.*, 70 S. C. 418, 50 S. E. 6; *Hays v. Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Smith v. Tel. Co.*, 72 S. C. 116, 51 S. E. 537. The same principle makes it necessary to recovery that there should be no notice to the company of the beneficial interest of the particular person who claims compensation for suffering. The provision of the Constitution that telegraph companies shall be common carriers does not affect the principle now under discussion, and cannot avail the plaintiff. Common carriers of freight, it is true, as a general rule, are liable to the real owner, though such owner may not be party or privy to the contract of carriage; but, from the nature of the business, telegraph companies as common carriers of messages stand on a different footing from common carriers of goods. The damage in one case is for the loss of a tangible article of property having definite market value; in the other it is for failure to transmit the expression of an idea, intangible and presumably without value except as related to particular persons. Ordinarily the loss of freight can bring damage only to the owner; failure to deliver a telegram may bring anguish to scores of persons of whom the telegraph company has never heard. Before delivery to the company a message has no value, and the company in accepting it undertakes for a consideration to make it of value by transmitting it; but its undertaking and obligation to give it value by transmission are only to those for whose benefit it has knowingly undertaken the service, and its legal duty is limited to such persons. As we have seen, the company had no notice of Mrs. Poteet's interest in this telegram, and assumed no duty to her, and is therefore not liable to her.

3. But, even if the defendant company had owed any duty to the plaintiff, there is no evidence that the suffering alleged was caused by its willful, wanton, or negligent failure to discharge the duty. Defendant relied on this additional ground in the motion for nonsuit, and asks that it be considered by this court. The telegram was promptly received at the Columbia office and sent to R. W. Poteet at the place of address, 1910 Assembly street; but, Poteet not being at home, it was not delivered. He remained out from about 9 o'clock a. m. until about 12 o'clock m. The messenger left no notice of the telegram, but as soon as Poteet came home the neighbors told him of it, and he went out to find the boy who had it, but was told by another messenger the boy had

gone into the country. He then went to the residence of the superintendent of defendant's Columbia office, and he immediately accompanied him to the office and gave him the message; it being then a few minutes too late for him to take the afternoon train to Union. Assuming it was a breach of duty for the messenger not to leave notice of the telegram at the door of the addressee, this had nothing whatever to do with the delay in delivery, for the addressee received notice otherwise as soon as he reached home, and acted upon it with as much dispatch as he could have done if the messenger had given it. There is no evidence that the messenger carried the telegram with him into the country; on the contrary, it appears he took it back to the office, for it was from the office that defendant's superintendent delivered it. The day was Sunday, and it is not claimed that the defendant's office should have been open for the delivery of messages when Poteet went out to find it, or that he went there in search of the message until he went in company with the superintendent.

The plaintiff, however, insists that the defendant is liable for negligence in failing to notify Sox, the sender, of the nondelivery of the telegram. Even if we go so far as to assume that the messenger should have returned the message to the office, or that he did so return it before business was stopped for Sunday, and that the defendant owed a duty to give the notice which it neglected, this negligence could not support the action, for the suffering of which the plaintiff complains arose from her husband's failure to receive notice in time to come to her in her distress on Sunday, and there is nothing in the evidence to suggest that notice of the nondelivery of the message would have enabled her or any one in her behalf to give him notice of her trouble in time for him to come by the use of other means of communication. On the contrary, it seems clear that, even if notice of nondelivery had been promptly given, and another telegram sent to Poteet, on reaching Columbia it would have been in the same condition as the first, for Poteet did not get home so that he could receive it there until after the Sunday closing of the Columbia office.

It is the judgment of this court that the judgment of the circuit court be affirmed.

CASTLES v. LANCASTER COUNTY.

(Supreme Court of South Carolina. July 13, 1904.)

CRIMINAL LAW—CHANGE OF VENUE.

A judge at chambers has no power to grant a change of venue on the ground that the ends of justice would be thereby promoted under Code Civ. Proc. 1902, § 147, authorizing a change of venue "when the convenience of witnesses and the ends of justice would be promoted by the change."

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Chester County; Gage, Judge.

Action by W. T. Castles, administrator of John T. Morrison, against Lancaster county. Motion by plaintiff for change of venue. Motion granted, and defendant appeals. Reversed.

The following is circuit order:

"Motion by plaintiff, at chambers, to change the venue herein from Lancaster to Chester. Two grounds are stated for the change, to wit: (1) Because the convenience of witnesses, and the ends of justice, would be thereby promoted. (2) Because there is reason to believe that an impartial trial cannot be had in Lancaster. At the threshold defendant submits that the motion should be a removal from Lancaster, not to Chester, but to some other county in the Sixth judicial circuit. That is so; but so much of the motion papers as nominates Chester is surplusage. It does not affect the legality of the motion. And defendant further submits that this motion is now pending in the circuit court at Lancaster, where it was first made, Judge Buchanan presiding; and, pending there, it must be decided there. Judge Buchanan, sitting in term time at Lancaster, declined to hear the motion, for reasons satisfactory to himself. I think his action was equivalent to a dismissal of the motion without prejudice. Recurring now to the grounds of the motion stated at the start. I shall consider them in an inverse order, for the Code of Procedure states them in an order inverse to that stated in the motion papers. A motion to change the venue, upon the ground that there is reason to believe that an impartial trial cannot be had in Lancaster, 'must be made to the Judge sitting in regular term.' That is the language of the law. Code Laws (Civ. Code 1902, § 2735). The motion on that ground is made before me at chambers, and I have no jurisdiction there to hear and try it. On that ground, therefore, the motion is refused. It is not denied that a motion to change the venue may be made at chambers 'when the convenience of witnesses and the ends of justice would be promoted by the change.' The proof shows that the plaintiff has 9 witnesses nonresident in Lancaster, and the defendant has 13 witnesses resident there. It would be an abuse of my discretion to conclude from the proof that the convenience of witnesses demand that the cause shall be removed from Lancaster. Indeed, I am sure the cause should not be removed on that ground. But the plaintiff contends, that the statute names another and distinct ground than the convenience of witnesses, for a change of venue, to wit: When 'the ends of justice would be promoted by the change.' The Code of Procedure really states four grounds upon which a change of venue may be ordered, to wit: When the county designated in the complaint is not the proper one. When an impartial trial cannot be had in the county named. When

the convenience of witnesses would be promoted. When the ends of justice would be promoted. A plain reading of the statute, without any aid from the rules of construction, indicates that meaning. After naming three particular instances in which a court might change the place of trial, the Legislature finally granted full power to the court to make the change 'when the ends of justice would be promoted by the change.' A change might be warranted upon either of the three grounds first named above, and yet the ends of justice might warrant it. It is hard to conceive of a wider and juster provision of a statute, than the allowance of a remedy to promote the ends of justice. *Utsey v. R. R.*, 38 S. C. 405, 17 S. E. 141; *Willoughby v. Northeastern R. Co.*, 46 S. C. 320, 24 S. E. 308. So that, the enquiry now is, would the ends of justice be promoted by a change of the place of trial from Lancaster to another county in the Sixth circuit? The end sought is the accomplishment of justice, and every litigant ought to covet that. Justice, and the execution of the laws of the country, ought to be interchangeable terms. The complaint charges that one John T. Morrison, who, on October 1, 1904, was taken from the custody of an officer by a mob of unlawful persons, and hanged until he was dead, and that this occurred in Lancaster county. If that is so, the county of Lancaster is 'liable in exemplary damages of not less than \$2,000 to the legal representatives of' Morrison. That provision of the Constitution was enacted in an effort to save the state from the degradations of lynch law. While that law stands, it is right, and while organized society stands, lynching is wrong. The death of Morrison at the hands of a mob 16 months ago is more than probable. That it should be enquired into is not denied by law-abiding persons. The object of this action is to enquire into it, for that has not been hitherto done; and the object of this motion is to so inquire into it as that justice may be promoted. The affidavits and exhibits were numerous and voluminous. It is not necessary to recite them here; they are a part of the record. From their inspection I am altogether satisfied that the ends of justice will be promoted by a removal of the cause from Lancaster, and a trial of its issues in another county. As suggested by counsel for the defendant, there may be some reasons why the cause should not be removed to Chester. There are only two other counties in the circuit, York and Fairfield. Fairfield has but recently tried a cause for Lancaster, and York is more accessible from Lancaster than is Winnsboro. It is therefore ordered that the trial of this cause be changed from Lancaster to York; that the clerk of this court shall transfer the record to the clerk at York, which officer shall receive and file the same in his office, for trial as other causes are tried; that all the affidavits and

exhibits be first filed by the clerk at Lancaster."

The defendant appeals upon the following exceptions: "(1) Because the circuit judge had no power or authority to change the place of trial of this action upon the ground alone that the 'ends of justice would be promoted by the change,' the statute giving such authority only 'when the convenience of witnesses and the ends of justice would be promoted by such change.' (2) Because the circuit judge erred in holding that 'the Code of Procedure really states four grounds upon which a change of venue may be ordered,' and erred in holding that a change of the place of trial could be had upon the ground alone that 'the ends of justice would be promoted by such change.' (3) Because the circuit judge, having correctly concluded that in this case 'the convenience of witnesses' would not be promoted by a change of the place of trial, erred in ordering a change of venue upon the ground alone that 'the ends of justice would be promoted' by such change. (4) Because the circuit judge erred in the conclusion that the Legislature, 'after naming three particular instances in which the court might change the place of trial, finally granted full power to the court to make the change 'when the ends of justice would be promoted by the change.' (5) Because the circuit judge, having correctly concluded that he had no jurisdiction at chambers to pass upon the question as to whether or not a change of venue should be had for the reason that a fair and impartial trial could not be had in Lancaster county, erred in concluding that he had jurisdiction at chambers to change the venue upon the ground that the ends of justice would be promoted by the change, thereby doing by indirection that which he held himself to be without authority to do directly. (6) Because the county of Lancaster being the county fixed by law as the place of trial of this cause, it was and is in effect judicial legislation to hold that a change of venue may be ordered on the ground alone 'that the ends of justice would be promoted by the change of the place of trial' of a case of this kind to some other county."

Ernest Moore and W. C. Hough, for appellant. W. H. Newbold and J. C. Wilborn, for respondent.

JONES, J. The plaintiff, as administrator, brought this action against Lancaster county to recover damages for the alleged lynching of John T. Morrison by a mob within the limits of the county. A motion was made by plaintiff before Judge Gage at his chambers, Chester, S. C., upon notice and affidavits, for an order to change the place of trial. (1) Because the convenience of witnesses and the ends of justice would be promoted by the change. (2) Because there is reason to believe that an impartial trial cannot be had in Lancaster county. Judge Gage held that

he had no jurisdiction to hear the motion on the second ground, and as to the first ground found as matter of fact that the convenience of witnesses would not be promoted by the change, but, nevertheless, held that the ends of justice would be promoted by the change, and accordingly ordered a change of venue to York county.

The question now presented by the exceptions of defendant-appellant is whether Judge Gage had power at chambers to grant change of venue solely on the ground that the ends of justice would be promoted. The order of Judge Gage and the exceptions thereto are officially reported herewith. We think Judge Gage exceeded his power. Section 147 of the Code of Civil Procedure of 1902, states three cases in which the place of trial may be changed: "(1) When the county designated for that purpose in the complaint is not the proper county. (2) When there is reason to believe that an impartial trial cannot be had therein. (3) When the convenience of witnesses and the ends of justice would be promoted by the change."

A motion for change of venue may be tried at chambers on the first and third grounds above. *Utsey v. Railroad Co.*, 38 S. C. 399, 17 S. E. 141; *Fishburne v. Minott*, 72 S. C. 574, 52 S. E. 646; but, as Judge Gage correctly held, a judge at chambers has no jurisdiction to remove a case on the second ground. *Willoughby v. Railroad*, 46 S. C. 320, 24 S. E. 308. The effect of the order of Judge Gage is to construe the third ground mentioned in the statute as really constituting two separate and distinct grounds, as if the statute had read, "when the convenience of witnesses or the ends of justice would be promoted." But when the court in the *Utsey* Case held that a motion on the third ground could be entertained at chambers, it did not so construe the statute; on the contrary, the language of the court is as follows: "We agree with the appellant that the circuit judge in granting the order here in question should be controlled in his judicial discretion by the words of the statute, that 'the convenience of witnesses and the ends of justice would be promoted by the change.' But we are not able to see that the circuit judge has not observed both requirements here. Indeed, if we may be pardoned the observation, it seems to us that the ends of justice are subserved when the testimony of nine witnesses, all living in Sumter county, is, by this very order, submitted to a jury of Sumter county. The very object of our jury system, in requiring jurors from the vicinage to pass upon the credibility of witnesses, is the promotion of the ends of justice." Undoubtedly, the meaning of the statute, in coupling "the convenience of witnesses" and "the ends of justice" together as a single ground for change of venue, was to authorize a change on this ground only when both the convenience of witnesses and the ends of justice would be promoted, or to

prevent a change merely for the convenience of witnesses and without regard to the ends of justice. If we should give to the words "ends of justice" a meaning which embraces matters covered by the words "impartial trial" or "fair and impartial trial," and hold that a judge at chambers has power to change venue to promote "the ends of justice" solely, but has no power at chambers to make such change to promote an "impartial trial," we would contradict ourselves and allow a judge at chambers to do indirectly what he has no power to do directly. The circuit judge does not indicate in what way the ends of justice would be promoted by a change of venue, since he finds that the convenience of witnesses would not be promoted, and properly declines to consider whether a fair and impartial trial may not be had in Lancaster county, unless it be contained in the suggestion of the liability of the county to pay in the event of recovery. But this suggestion necessarily involves a consideration whether a fair and impartial trial may be had in a county which is sued, and in any event is not a matter for the determination of a judge at chambers.

The order of Judge Gage changing the place of trial from Lancaster county to York county, being in excess of his power at chambers, is reversed and set aside.

GARY, A. J., dissents.

STATE v. HENDERSON.

(Supreme Court of South Carolina. July 4, 1906.)

1. CRIMINAL LAW—CONFESSIONS.

The fact that the confession of a prisoner was made to an officer while under arrest is no ground for its exclusion.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1167–1174.]

2. SAME—REVIEW.

The conclusion of a trial judge as to whether a confession was voluntary will not be disturbed except for abuse of judicial discretion.

3. HOMICIDE—MALICE.

Where the evidence showed that defendant intentionally killed deceased, and no other fact is known, malice is presumed.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 263.]

Appeal from General Sessions Circuit Court of Sumter County; Klugh, Judge.

John Henderson was convicted of murder, and appeals. Affirmed.

Geo. D. Levy and H. D. Molise, for appellant. John S. Wilson, for the State.

WOODS, J. On the night of December 17, 1904, Mary Henderson was found lying on the street in the city of Sumter, bleeding profusely from cuts and stabs inflicted by a knife or other sharp instrument. She was taken to the hospital of Dr. Mood and thence to her home, where she soon afterwards died

from her wounds. Her husband, the defendant, John Henderson, was convicted of her murder, and sentenced to death. By the appeal to this court error is charged in the admission of evidence as to confessions alleged to have been made by the defendant, and in the court's instructions to the jury.

1. The defendant was arrested at night by two policemen, McKagen and Barwick, at Wisacky, some distance from Sumter. McKagen testified that defendant asked him while dressing to go with the officers, "How long do you reckon they will give me for this—five years?" and that he answered, "I don't know; they may not give you anything." McKagen was then allowed to testify further, over objection, that after he and Barwick had started to Sumter with the defendant, who was handcuffed, he asked him, "What did you cut that woman for?" to which the defendant answered, "I was drinking a little and didn't mean to cut her as bad as I did." The law is well settled against the contention of the defendant's counsel that a confession should be excluded as not voluntary merely because made to an officer having the custody of the prisoner. *State v. Branham*, 13 S. C. 389; *State v. Dodson*, 14 S. C. 628. In deciding the question of fact whether such a confession is free from threat or inducement, the conduct of the officer will be rigidly scrutinized, but the conclusion of the circuit judge on that issue of fact cannot be reviewed by this court unless so manifestly erroneous as to show an abuse of judicial discretion. Here the officers not only made no threats and used no force, but treated the prisoner with commendable consideration. Officer McKagen's answer to the defendant's inquiry as to the probable degree of his punishment cannot be regarded an inducement to confess. He merely told the defendant that he did not know whether he would be punished at all, and this was quite a judicious and fair answer, for, of course, he could not know whether defendant would be convicted until he had been tried.

2. The defendant next alleges error in the instruction to the jury contained in the first sentence of the following quotation from the charge: "The law implies malice, or presumes that a person was actuated by malice, where it appears that he intentionally killed another person, and no other fact in reference to the transaction is known. But if the facts attending the killing, the facts under which the killing was done, are known and are developed before the jury, then the implication of malice disappears." The position taken by defendant's counsel that malice is to be presumed from an intentional killing only when such killing is shown to have been without just cause or excuse, has no support. *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; *State v. Rochester*, 72 S. C. 194, 51 S. E. 685.

The absence from the case of any element of accident is too clear for discussion, and there was, therefore, no error in the omission to charge the law of accidental homicide. The circuit judge explicitly charged the jury: "And if the evidence in the case fails to satisfy you beyond a reasonable doubt that it is either a case of murder or manslaughter, then you cannot find the defendant guilty of any crime, but will find a verdict of not guilty." There is, therefore, not the slightest foundation for the exception that there was a failure to charge that on the whole case the state was bound to prove the guilt of defendant beyond a reasonable doubt.

It is the judgment of this court, that the judgment of the circuit court be affirmed, and the cause remanded to that court in order that a new day may be assigned for the execution of the sentence heretofore imposed.

STATE v. HAYNES.

(Supreme Court of South Carolina. June 30, 1906.)

1. CHATTEL MORTGAGES—WHAT CONSTITUTE.

An agreement certifying that the party signing the same has leased certain property, to be paid for in installments until the price is paid, and that it shall remain the exclusive property of the seller until paid for, is a mortgage.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 4, 5, 18.]

2. SAME—SELLING MORTGAGED PROPERTY.

Where personalty is sold, title to remain in the seller until paid for, and the purchaser took the same out of the state and pawned it, he could not be convicted of selling property under lien, in violation of Cr. Code 1902, § 337.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 489-493.]

3. SAME.

Where one takes property under lien out of the state, it has the effect of defeating the owner of the lien in getting his property, and is a violation of Cr. Code 1902, § 337.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 489-493.]

Appeal from Common Pleas Circuit Court of Anderson County; Aldrich, Judge.

J. P. Haynes was convicted of selling property under lien, and appeals. Affirmed.

Martin & Earle, for appellant. J. E. Boggs, for the State.

JONES, J. The appellant was indicted, convicted, and sentenced for selling and disposing of personal property under mortgage or lien, as prohibited in section 337 of the Criminal Code of 1902. At the close of the testimony for the state, the defendant's counsel made a motion to direct a verdict, which was refused, and the first, second, and third exceptions assign error to such refusal. Two questions are presented under these exceptions: (1) Whether the instrument introduced in evidence constitutes a chattel mortgage or lien. (2) Whether there was any evidence that defendant sold or disposed of mortgaged property, as prohibited in the statute.

The instrument in question reads as follows:

"Goods on long credit. Payments weekly.

"Contract.

"\$28.00. Anderson, S. C., 2-20-1905.

"This is to certify that I have this day rented or leased from Walter H. Keese the following articles of merchandise: One open face 18 McFays Montawk 7256757 with 21 Hamilton 268041 P. No. 7447 trade Waltham, amounting in value to \$28.00, on the following conditions: That I will pay Walter H. Keese \$30 cash on delivery and \$5.00 every 1 & 13 month until the amount of \$28.00 is paid in full. One week's failure to pay forfeits the goods. No money refunded if goods have to be taken back. Patrons are expected to read this contract.

"I expressly agree that the above mentioned goods remain the exclusive property of Walter H. Keese until paid for in full, and on default of one week's payment, to be subject to his order, and can be taken back or seized by him without process of law, and the payments made shall be considered as rental for the use of the above goods. Goods sold, traded or given away without consent will be subject to immediate seizure and forfeiture of all previous payments.

"[Signed] John R. Haynes."

1. Walter H. Keese, the party to whom the defendant executed this instrument, testified that he sold to defendant for \$28, a 21-jewel Hamilton movement, which he placed in a watch case belonging to defendant, and took the paper on both the case and movement to secure the debt. While the paper in question contains some expressions which indicate that the parties contemplated a lease, there are other expressions which indicate that a sale was contemplated. But the testimony of Keese makes it clear that, so far as he was concerned, the paper was intended as a mortgage to secure a debt not only upon the property which he sold to defendant, but upon defendant's watch case as well. If, in considering an appeal from refusal to direct a verdict in a criminal case, we may adopt the same rule applied in considering appeals from refusal of nonsuit in civil cases and consider the testimony offered after such refusal (as in *Scates v. Henderson*, 44 S. C. 554, 22 S. E. 724; *Hicks v. Southern Ry.*, 63 S. C. 567, 41 S. E. 753; and *Fales v. Browning*, 68 S. C. 19, 46 S. E. 545), it appears that the defendant also understood that the paper was given to secure the price of the watch movement sold to him by Keese. We think the circuit court committed no error in construing the instrument to be a mortgage, especially in the light of the circumstances surrounding the transaction. The case falls within the rule stated in *Singer Manufacturing Co. v. Smith*, 40 S. C. 529, 19 S. E. 132, 42 Am. St. Rep. 897.

With reference to the second question stat-

ed above, we think there was some evidence tending to show a disposal of property under mortgage, in violation of the statute. The testimony for the state tended to show that in March, 1905, after the execution of the said mortgage the defendant carried the watch case and movement out of the state and placed it in a pawn shop in Atlanta, Ga., where the mortgagee, Keese, secured it upon the payment of \$12, within a few days after defendant's departure from the state. The defendant had specially promised the mortgagee that he would not carry the property from Anderson, S. C., but would deliver it to the mortgagee before leaving. A letter was also in evidence from defendant to Keese in which defendant proposed to pay Keese \$20 to drop "that case against me," and there was no evidence that there was any case against him in which Keese was concerned except as to the matter of the watch. These circumstances afforded some testimony to go to the jury, under proper instructions, on the question whether the defendant carried said property out of the state with the purpose of defeating the mortgage lien, so as to constitute such a disposal of property as is punishable by the statute.

The fourth exception was withdrawn by appellant.

The fifth exception alleges error in excluding the testimony by defendant as to the circumstances attending the execution of the paper contract so as to clear up the ambiguity in the paper. The court ruled that defendant could not vary or contradict the paper contract by parol testimony, and was of the opinion that the contract was not ambiguous, but, as matter of fact, permitted defendant to testify most fully as to all the circumstances of the transaction. There is, therefore, no basis for the exception.

2. The sixth and seventh exceptions, relating to the court's charge to the jury, are as follows: "(6) Error of his honor, the circuit judge, in modifying defendant's first request to charge. Said request was as follows: 'Before the jury can convict in this case, the state must show beyond a reasonable doubt that the defendant sold or disposed of the property described in the county of Anderson, state of South Carolina, or at least that he removed it from the county of Anderson with existing purpose of defeating the lien. *State v. Rice*, 43 S. C. 200, 20 S. E. 986.' The modification is on the margin: 'Or if without any such purpose, the effect of his taking the mortgaged property beyond the jurisdiction should prove a defeat of the lien, he might still be liable.' It is respectfully submitted that this modification states the law too broadly, and that it would not be a violation of law to move property beyond the jurisdiction without any intention to defeat the lien thereon, and without actually disposing thereof. (7) Error of his honor, the circuit judge, in not charging defendant's second request without modifica-

tion. The request was as follows: "If the jury believe from the evidence that the defendant merely pawned this watch in Atlanta, that, as a matter of law, would not be selling the property, nor would it be disposing of the property, within the meaning of the statute, unless it was shown that the condition of the pledge was broken, and that the title to the property passed from the defendant to pledgee or pawnee, or at any rate not if it was not shown to be his purpose not to redeem the property pawned." His honor modified this request as follows: "Or if his pawning with such purpose, the effect of pawning the property should prove a defeat of the lien." It is submitted that such request is good law without this modification, and that this modification is an incorrect restriction of a correct principle." The record does not show that the court modified defendant's request as indicated in the exceptions. It does appear that the court charged the jury as follows: "I charge you this: you cannot try him and punish him in this state for selling or disposing of that property outside of the state; but if a party who gives a lien and takes it out of the state for the purpose, or when he leaves here takes it from the state with the purpose of defeating the lien, by selling or disposing of it, by selling or disposing of the property, then if he has that intention in this state and takes it out of the state, that is contrary to law. Or if he takes the property out of the state and it necessarily has the effect of defeating the owner of the lien or mortgage in getting his property, then that would be a violation of the law in this state, because he must carry it away from this state, disposing of it, so as that carrying it away necessarily defeats the provision of the law as I read to you." The charge was within the rule stated in *State v. Rice*, 43 S. C. 200, 203, 20 S. E. 986, from which we quote this language: "The mere fact that the property in question was carried by the defendant out of the state, and sold and disposed of in the state of Georgia, would not necessarily show that the offense was committed beyond the jurisdiction of this state. The statute forbids not only the sale but also the disposal of property covered by a lien; and, therefore, while a sale in the state of Georgia would not constitute an offense of which the court of this state could take jurisdiction, yet the carrying of such property beyond the limits of the state might or might not, according to the circumstances, constitute such a disposition of the property as would render one amenable to the provisions of the statute. For example, if a citizen of this state simply rides or drives a horse, covered by a mortgage, across the state line, that, of itself, would certainly not subject him to the penalties of the statute; but if he takes such horse out of the state for the purpose of putting the animal beyond the reach of the mortgagee, then clearly he would be liable to in-

dictment under the statute; and possibly, if, without any such purpose, the effect of his taking the mortgaged property beyond the jurisdiction should prove a defeat of the lien, he might still be liable." We think that removal of property from the jurisdiction of the state with the purpose or necessary effect of defeating the mortgage lien, is such a disposal of property as falls within the meaning of the statute. If intention to defeat the lien is essential, one must be presumed to intend the necessary consequences of his voluntary acts.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

STATE v. LANGFORD.

(Supreme Court of South Carolina. June 30, 1903.)

1. CRIMINAL LAW—EVIDENCE.

On trial for larceny, it was competent for a witness to take the shoes belonging to the accused and in his endeavor to describe the track of the party committing the larceny, alleged to correspond with such shoes, to describe the peculiarity of the track by reference to the shoes, and leave it to the jury to see whether or not the shoes made the track.

2. SAME—INSTRUCTIONS—CHARGE ON FACTS.

An instruction that the state relies on circumstantial evidence for conviction, and referring to the argument that there were three main circumstances relied on: First, tracks claimed to correspond with the shoes of accused; secondly, his escape after arrest; and, thirdly, gambling, and using such statement as a basis for an application of the rule as to circumstantial evidence—is not a charge on the facts, the defense introducing no evidence.

3. SAME—CIRCUMSTANTIAL EVIDENCE.

An instruction that it was not safe to convict on circumstantial evidence if the jury could draw from the circumstances any other conclusion than the guilt of the accused, was not erroneous on the ground that the court should have charged that the jury must acquit in such event.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1883-1888.]

4. SAME—NEW TRIAL—DISQUALIFICATION OF JUROR.

Const. art. 1, § 18, provides that accused shall have a speedy trial by an impartial jury. Civ. Code 1902, § 2946, providing that objections to jurors must be made before the jury is impaneled or charged with the trial. *Held*, that the fact that a juror sat on a former trial of the same case is not ground for setting aside the conviction at the second trial, where counsel for defendant and the juror had both forgotten such fact until after verdict.

Appeal from General Sessions Circuit Court of Edgefield County; Gage, Judge.

Jesse Langford was convicted of larceny, and appeals. Affirmed.

Simkins & De Vore, for appellant. George Bell Timmerman and S. M. Smith, Jr., for the State.

JONES, J. The defendant was tried in Edgefield county, August term, 1901, and convicted of grand larceny. A new trial was granted by the circuit court at said term. In

September, 1901, he escaped from jail. He was recaptured and again brought to trial, October term, 1905, convicted and sentenced. It appears that on the night of July 4, 1901, some one entered the dwelling of J. L. Smith, in Edgefield county, and stole therefrom his pants containing \$63. The theft was discovered early next morning and the pants were found in a field near the house without the money, and tracks were discovered leading from near the house to the place where the pants were found, thence on to within 80 or 40 yards of defendant's house. The tracking party, on going to defendant's house, found him absent, but secured a pair of his shoes. Testimony was offered that the shoe fitted the track exactly and that one of the party put the shoe on and made a track with it which corresponded with the discovered track, one circumstance being that the number and position of certain tacks on the shoe corresponded exactly with the indentations in the track.

1. Appellant's first exception alleges error in the court's ruling that it was competent for the witness to take the shoes, and, in his endeavor to describe the track, describe the peculiarity of the track by reference to the shoe and leave it to the jury to say whether or not the shoe made the track. We think the ruling was proper and in accordance with *State v. Green*, 40 S. C. 330, 18 S. E. 933, 42 Am. St. Rep. 872. The court was careful not to allow the witness to state his opinion that the defendant made the track, or even that the defendant's shoe made the track.

2. The second, fourth and fifth exceptions relate to certain sentences in the charge of the court, which we have italicized and stated in their connection as follows: "*The state relies upon circumstantial testimony for conviction.*" I am requested by counsel for defendant to state to you the rules with reference to circumstantial testimony. Circumstantial testimony is sufficient upon which to found a verdict provided it comes up to the rules which our Codes have announced through a long series of years. These are the rules: Circumstances must be proven to the entire satisfaction of the jury; that is the first rule. The circumstances must point conclusively—that is, to a moral certainty—to the guilt of the accused. Third, the circumstances must be consistent—the one with the other. Fourth, the circumstances must be inconsistent with any other reasonable hypothesis than the hypothesis upon which the state relies. Now, these are the four rules. Now, gentlemen, I heard a solicitor once define circumstantial evidence. This is the way he likened the crime, stealing in this case, to a corner tree, and he likened the circumstances to pointers around that tree. If you have ever been on a survey, you know what that means. He likened the crime, stealing in this case, to a corner tree, and the circumstances standing around it to the pointers. I thought it was a good illustration.

Now, put your fingers on the circumstances which the state relies on in this case. As I recall the argument, there are three main circumstances First, tracks; secondly, escape; thirdly, gambling. If there are any others I do not recall them. You will. Which of these circumstances have been proven to your entire satisfaction? Do those circumstances point surely to the guilt of the accused? Do they all point one way? Are they consistent one with the other? You put those circumstances together. Can you put those circumstances together and draw any other conclusion than the guilt of the party? *If all the circumstances can be believed as true, but you can draw from them another conclusion than the guilt of the accused, then the law says it is not safe to convict upon them.* This is as plain as I can make it. Now, the reason of the law is this: circumstances are mute things. I can swear I saw a rock in the road, but the rock cannot testify. If it could, it could tell who put it there. So all a man can do is to testify to circumstances. Circumstances themselves are mute things, and unless they speak to you, and speak conclusively, and unless you can draw only one inference from them, it is not safe to heed their warning." It is objected that the first and second portions of the above charge which we have italicized was a charge in respect to matters of fact, in violation of the Constitution. We do not so regard the charge. The case was manifestly one in which the state relied upon circumstantial evidence for conviction. The defendant offered no testimony and there was no dispute as to the facts testified concerning the tracks, the arrest of the defendant the day of the discovery of the theft while gambling with other negroes, and his escape from jail. The court made no allusion to the issuable facts. The inference to be drawn from these undisputed facts was the real matter in issue, and as to this the judge gave no intimation of his opinion to the jury. The court merely mentioned the state's contention in argument as a basis for instructing the jury as to the rules which should govern them in passing upon circumstantial evidence. In *Turner v. Lyles*, 68 S. C. 392, 401, 48 S. E. 301, 304, approved in *Pickett v. Railway*, 69 S. C. 451, 48 S. E. 468, the rule is thus stated: "Since the Constitution of 1895, Judges are not permitted to state the testimony to the jury, but it is not every statement of the testimony that will entitle the appellant to a new trial. The statement must be of testimony upon a fact in issue, and there must be reasonable ground for supposing that the jury may have been influenced by such statement in a manner prejudicial to the rights of the appellant."

3. It is further objected that the court erred in instructing the jury that it was not safe to convict if the jury could draw from the circumstances any other conclusion than the guilt of the accused; whereas, the court should have charged that the jury must

acquit in such event. This interpretation of the charge seems to be over critical. The charge was substantially and practically to acquit in the event stated. It is impossible to believe that the jury could receive the impression from the charge that they might convict, even though they did not believe the testimony brought the case within the rules of circumstantial evidence.

4. The remaining exception charges error in refusing the motion for a new trial made on the ground that R. L. Dunovant, one of the jurors in the last trial, was also a juror in the former trial. The affidavit of defendant submitted on the motion was to the effect that defendant previous to and during the last trial did not know that Mr. Dunovant sat on the former trial and that the knowledge did not come to him until after the verdict, and that he would have objected had he known it. It was further stated that when Mr. Dunovant was impaneled on the jury on the last trial he did not remember until after the verdict that he was one of the jurors who convicted the defendant on the former trial. It is contended that the refusal of the motion was in violation of article 1, § 18, of the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right of a speedy trial by an impartial jury. This exception cannot be sustained. Section 2946, Civ. Code 1902, provides that all objections to jurors must be made before the jury is impaneled or charged with the trial. It is true that in the case of *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 841, 34 S. E. 70, this court held that a new trial should be granted if a disqualified juror sat on the case, if neither the party nor his counsel knew of the disqualification until after the verdict; but in the subsequent cases of *State v. Robertson*, 54 S. C. 152, 31 S. E. 868, and *Mew v. Railway Co.*, 55 S. C. 95, 32 S. E. 828, the court states the rule that where the disqualification relied on might have been discovered by the exercise of ordinary care, it affords no excuse for failing to make the objection in due season, since a party should not be permitted to take advantage of his own negligence. In *State v. Robertson*, supra, the court sustained a refusal of the motion for a new trial based upon the ground that one of the jurors who last tried the defendant therein sat upon the jury in the same case at the preceding term which resulted in a mistrial; and in the case of *Mew v. Railway*, supra, this court refused to suspend appeal to allow motion for a new trial on circuit on the ground that one of the jurors was not a qualified elector for want of registration and, therefore, not a legal juror. In the present case, the fact that a juror sat on the former trial and so had formed and expressed an opinion as to defendant's guilt, was a fact of which defendant and his counsel, of course, once had

full knowledge; and conceding that they had forgotten the fact on the last trial, it was one spread upon the record of the trial of the case and falls within the rule stated in the *Robertson Case* and in the *Mew Case*. This is so conclusive that it is unnecessary to mention the fact that the juror Dunovant had also forgotten that he had served upon the former jury until after the verdict, and so could not have been influenced by such fact.

The judgment of the circuit court is affirmed.

Ex parte PARKER.

(Supreme Court of South Carolina. June 30, 1906.)

1. STATES—LEGISLATIVE COMMITTEES—CONTEMPT—POWER TO PUNISH.

A committee appointed under resolution of Legislature, January 31, 1905, to investigate the affairs of the state dispensary were empowered to send for persons and papers and require answers to any questions relevant to such investigation. *Held*, that the committee had power to commit a witness for contempt on refusal to answer a question as to whether a person stated to him that he had had dealings with the state dispensary and had given rebates or money or had improperly influenced the board of directors in the purchase of liquor.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. States, § 46.]

2. EVIDENCE—HEARSAY.

In investigation by a committee of the affairs of the state dispensary, a question to a witness as to whether a party who had dealings with the dispensary had said to him that he had given rebates or money or improperly influenced the board of directors does not call for hearsay evidence.

3. WITNESSES—PRIVILEGED COMMUNICATIONS.

In an examination by a committee appointed by the Legislature to investigate the affairs of the state dispensary, an answer to a question as to whether a person had stated to witness that he had corrupt dealings with the state dispensary could not be excluded on the ground that it would violate the implied confidence of a private conversation.

Application by Lewis W. Parker for writ of habeas corpus. Application denied.

H. J. Haynesworth, for petitioner. Fraser & Christensen, for committee.

WOODS, J. A committee appointed by the General Assembly to investigate the dispensary asked Lewis W. Parker, a witness testifying before it, a question which he refused to answer, whereupon the committee held him to be in contempt, and ordered its marshal to hold him in custody until he would answer. The witness Parker then sought by habeas corpus proceedings to be released by this court from the custody of the marshal of the committee. Upon the hearing of the return an order was made adjudging the confinement of the petitioner to be lawful and remanding him to the custody of the marshal. We propose now to give the reasons for the court's conclusion

that the committee did not transcend its powers in ordering the arrest.

It is necessary to understand first, the object for which the committee was appointed and the extent of the authority conferred upon it. The Senate and House of Representatives on January 31, 1905, passed a concurrent resolution providing for the appointment of three senators and four members of the House "to investigate the affairs of the state dispensary."

The second section of the resolution is important, and is, therefore, set out in full: "That said committee be, and is hereby, empowered to send for papers and persons, to swear witnesses to require the attendance of any parties whose presence shall be deemed necessary, to appoint an expert accountant and stenographer, and to investigate all transactions concerning said dispensary and its management, and to take testimony either within or without the state, and shall have access at all times during their service to all the books and vouchers and other papers of said institution, especially, in investigating the following facts: (a) Whether or not it is a fact that houses represented by agents who are near relatives of the members of the board of directors, receive large orders at each purchase. (b) Is it a fact that members of the board of directors are, or have been, agents for certain wholesale houses from which large purchases are made? (c) Is it a fact that parties to whom large orders are given are not wholesale dealers but brokers, and that the orders are filled by third persons, thus making the state pay the commissions of the middleman? (d) Was it necessary to purchase the large quantity of liquors ordered in December, 1904, to fill demands, and especially the new and fancy goods purchased which is unknown to the trade? (e) Are the extraordinary heavy purchases made necessary to the best interest of the dispensary system? (f) What is the financial standing of the business, and is it run on the best principles for the interest of the law as originally passed and amended? (g) Is it a fact that the state, through the dispensaries, is violating the Constitution of 1895, in that it is selling whisky in less quantities than one-half of one pint? (h) Is it a fact that the state is selling 5's in case goods to its customers and charging them for one quart? (i) Is it a fact that certain agents are traveling over the state and offering special inducements to county dispensers to "push" certain brands of liquors, and, if so, is it a fact known to the members of the state board of directors? (j) Is it a fact that certain requirements of the law are dispensed with by the county dispensers by order of, or by the consent of, the members of the state board of directors? (k) Has the whisky which has been recently purchased been ordered out from the dealer, or is it held in reserve for future delivery? (l) What is the indebtedness of

the dispensary for liquors which have been bought but not delivered? (m) And any and all other matters relating to the management of the state dispensary, and of any official or person in relation thereto. (n) Is it, or not, a fact that excessive freights have been paid to railroads for transporting liquors into the state, when said liquors could have been shipped into the state by water at less cost to the state? (nn) Whether there is any warrant of law or authority for the establishment and conduct of what is commonly known as "Beer Dispensaries" as they are now and have been conducted?"

After the committee had been appointed and entered upon the investigation, the General Assembly, on January 28, 1906, enacted a statute intended to enlarge its powers, and to remove any doubt as to its right to exercise the powers which the concurrent resolution had purported to confer. Only the preamble and the first and second sections of the statute are relevant to this inquiry: "Whereas, a committee has been appointed to investigate the state dispensary under the concurrent resolution of the General Assembly, dated the 31st day of January, 1905; and whereas, in the progress of the work of the said committee, some doubt has arisen as to the power of the said committee in the discharge of their duties; and it being provided in section 5 of said concurrent resolution that the said committee should apply to the General Assembly for such other power and authority as the circumstances arising during this investigation may seem to require; therefore, Section 1. Be it enacted by the General Assembly of the state of South Carolina, That the committee heretofore appointed under the terms of the concurrent resolution, dated the 31st day of January, 1905, or any other committee or committees that may be appointed, are hereby authorized and empowered to elect a marshal, who, upon being sworn, shall be and become a peace officer of the state and invested with all the power of sheriffs and constables in the service of any and all process issued by the committee aforesaid, and with the power to arrest and imprison upon the order of the said committee any and all persons who shall fail and refuse to obey any legal order of the said committee, or who shall be guilty of any disorderly conduct in the presence of said committee during any session thereof, or who shall be guilty of any contempt of said committee. Sec. 2. The said committee be, and are hereby, authorized and empowered to call before them by summons or notice, in such form as the committee may adopt, and to be served by the marshal of said committee, or such other officer of the state as may be by the committee required, such person or persons as the committee deem proper, and to require such person or persons to answer, upon oath, any and all questions that the committee may deem relevant and may pro-

pound to him or them; and upon the failure or refusal of such person or persons to obey such summons or notice, or to answer such question or questions, such person or persons shall be deemed to be in contempt of the authority of said committee, and may be imprisoned upon the order of the said committee in the common jail, to be there held until he or they shall comply with the order of the said committee: Provided, That no testimony given by said witnesses shall be used against them in a criminal prosecution."

Under the authority thus conferred, Lewis W. Parker was summoned by the committee of investigation and sworn as a witness. After testifying to the fact that he had conversed with a person who told the witness he had dealt with the dispensary, the witness refused to answer this question: "Mr. Parker, wasn't this statement that this party made to you to the effect or of the nature that he had given rebates or graft or money in some improper way or had improperly influenced this board of directors to give him business?" The witness earnestly contended before the committee, and in this court in the habeas corpus proceedings, that he should be excused from answering (1) because he could not be required to violate the implied confidence of a private conversation; and (2) because the evidence sought to be adduced was hearsay and, therefore, not admissible. Clearly neither of these reasons is sufficient. The power of the General Assembly to obtain information on any subject upon which it has power to legislate, with a view to its enlightenment and guidance, is so obviously essential to the performance of legislative functions that it has always been exercised without question. After the decision of the Supreme Court of the United States in the case of *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 877, some doubt seems to have arisen as to the right of the Congress or even of a state Legislature in seeking such information to imprison contumacious witnesses. In that case, it is true, the right of a committee of the House of Representatives to imprison a witness for refusing to answer was denied, but the case presented peculiar features. The committee was not appointed, and was not conducting its investigation under a statute or resolution of the Congress, but of only one branch of the legislative department, which undertook to confer upon it the power to send for persons and papers. The investigation related to a particular claim of the federal government, the status of which, having been already fixed by a settlement, could not have been altered by legislation. And, in the view of the court, the question propounded to the witness involved merely an inquiry into the private affairs of the citizen in a matter outside of the domain of the legislative department and within the jurisdiction of the judicial department; the court holding in

this connection that the judicial power residing in the British House of Commons was not conferred on the Congress by the Constitution, and hence precedents from the English courts sustaining the power of a committee of the House of Commons to punish for contempt were not applicable.

Distinguishing the case of *Kilbourn v. Thompson*, in some of the features above mentioned, the Supreme Court of the United States subsequently held that a committee of the Senate had the right, under a resolution of that body, to require a broker to answer whether any senator had employed the firm of which he was a member to buy or sell shares of stock the price of which might be affected by the Senate's action. The investigation having been instituted to inquire into charges made in newspapers of bribery of senators, the court held the subject-matter of the inquiry was within the range of the constitutional powers of the Senate. In *re Chapman*, 166 U. S. 661, 17 Sup. Ct. 877, 41 L. Ed. 1154. The case now under consideration is much stronger than the *Chapman Case*. In the first place, it is to be observed the Congress possesses no powers of legislation except those conferred by the Constitution of the United States, while the General Assembly is invested with all the legislative power of the state except that denied by the Constitution. The dispensary is a public institution, created by the General Assembly, through which it undertakes to control and conduct the sale of liquor in the entire state. The principal officers of the dispensary are elected by the General Assembly, and directions for its management are laid down with particularity in the statutes. The business is so enormous, and the problems it presents are so novel and difficult and vital to the public welfare that, not only the fullest and widest information as to the practical operations of statutes enacted for its control, and as to the competency and honesty of its officers, is essential to wise legislative action, but it is also important that the General Assembly should be advised as to the methods used or attempted by those who deal with the dispensary by the sale of liquor, or otherwise. Offering a bribe to a public officer is a criminal offense under the laws of the state; and it is difficult to see any support for the position that a statement of one engaged in selling or seeking to sell to the dispensary to the effect that he had given or even offered bribes to its board of directors would be beyond the legitimate scope of legislative inquiry. It concerns the General Assembly to know of the dishonest dealings, if they exist, of those who sell to the dispensary almost as much as to know of such dealings by those who buy for it. In this view the answer to the question here asked could not be objectionable as hearsay, even applying the rules of evidence obtaining in strictly judicial tribunals.

But aside from this, rules of evidence are subject to legislative control, unless the

changes go to the extent of the practical denial of a constitutional right. Here the statute is very broad. It does not relate to the trial of a cause involving the life, liberty, or property of an individual, but provides for legislative investigation of a great public enterprise, and it requires answer to any question the committee deems relevant to such investigation. This discretion of the committee was, of course, subject to the limitation that a witness could not be compelled to answer questions when such compulsion would be in derogation of a constitutional right; and it may be that a reasonable construction of the statute is that the committee's discretion was intended to be subject also to the rules of evidence as to the exclusion of privileged communications, and of evidence as to facts affecting the witness personally, falling under his ordinary privilege, but upon this last point we express no opinion. It is not pretended that the witness was required to disclose a privileged communication, or that any personal privilege or constitutional right of the witness himself was involved in requiring an answer to the question asked. As to the position that the witness should not have been required to repeat a private conversation, it is hardly necessary to say that the law cannot take account of purely sentimental considerations as against the public interests or substantial rights. We conclude there is no ground for the interference of the court in behalf of the witness.

The conclusions reached as to the power of legislative committees are sustained by the following authorities: *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; *In re Chapman*, 166 U. S. 681, 17 Sup. Ct. 677, 41 L. Ed. 1154; *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676; *Keeler v. McDonald* (N. Y.) 2 N. E. 615, 52 Am. Rep. 49; *People v. Sharp* (N. Y.) 14 N. E. 319, 1 Am. St. Rep. 851; *In re Gunn* (Kan.) 32 Pac. 470, 948, 19 L. R. A. 519.

GARY, A. J., did not sit in this cause.

GREEN v. CATAWBA POWER CO.

(Supreme Court of South Carolina. Aug. 16, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

The fact that a servant is injured by the failure of the machinery furnished by the master does not raise a presumption of negligence on the latter's part.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 884.]

2. DAMAGES—PERSONAL INJURIES—FUTURE SUFFERING.

The verdict in an action for personal injuries may include damages for mental and physical pain which it is "reasonably certain" will result in the future, but not damages for such suffering as plaintiff is liable to endure.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, §§ 71, 100-105.]

Appeal from Common Pleas Circuit Court of York County; Hydrick, Judge.

Action by Ben Green against the Catawba Power Company. Judgment for plaintiff. Defendant appeals. Reversed.

Wilson & Wilson, for appellant. Greene & Hines and Thomas F. McDow, for respondent.

WOODS, J. The plaintiff, a laborer in the defendant's employment, was injured by the falling of a battle-post which he was assisting to raise and place in position as a part of the bench of a bridge by means of a jim-pole. The allegation of negligence under which plaintiff obtained judgment was that the jim-pole to which was attached the blocks and tackle used to raise the battle-post was not braced or made secure by guys at the bottom, and consequently under the strain applied more on one side than the other it slipped at the bottom, causing the battle-post and jim-pole both to fall.

1. The first exception charges error in this instruction to the jury: "The servant is not required by law to see whether the machinery, tools, and appliances furnished are suitable and safe, for he has a right to rely on the presumption that the master will do his duty; and when it is made to appear that a servant was injured by reason of the machinery and appliances furnished by the master, it is prima facie evidence of negligence on the part of the master, and the burden is then thrown upon the master to show that he used due care and diligence in keeping in repair the machinery or appliances in question." The principle is well established that proof of injury to the servant from the failure of the machinery or appliances furnished by the master does not raise the presumption of negligence by the master. *Green v. Ry. Co.*, 72 S. C. 398, 52 S. E. 45. For a greater reason, it was error to charge that the mere fact of injury "by reason of the machinery and appliances" furnished by the master raises against him the presumption of negligence. Doubtless the circuit judge intended to say the presumption of negligence would arise when the servant was injured by reason of defects in the machinery and appliances; but there is nothing in the charge from which the jury could see that the omission of the word "defects" or some similar expression was an inadvertence. The plaintiff's contention that the error was harmless because the proof of negligence was overwhelming, with practically no evidence to the contrary, cannot be sustained, for there was evidence that it was not usual to brace the jim-pole at the bottom as the plaintiff contended it should have been braced, for the reason that the weight on the pole would usually sink it deep enough in the ground to hold it fast without braces; and this was sufficient to raise an issue for the jury as to whether the ap-

paratus and appliances furnished by the master were reasonably safe.

2. The second exception charges error in this instruction to the jury: "If you find for the plaintiff, then you can take into consideration these elements of damages, * * * his physical and mental pain and suffering, and that which he is liable to endure in the future by reason of his injury." The word "liable," in such a connection, signifies something that might happen without importing reasonable certainty that it would happen, and, therefore, the charge indicated the jury might enter into the field of conjecture as to possible future suffering and injury. The instruction in such cases should be that the verdict may include not future damages which the plaintiff is liable to suffer—that is, may suffer—but such damages as it is reasonably certain will of necessity result in the future from the injury. *Ayres v. Del., etc., Co.* (N. Y.) 53 N. E. 22; *Stutz v. Chicago, etc., Ry. Co.* (Wis.) 40 N. W. 653, 9 Am. St. Rep. 769; *Louisville R. R. Co. v. Minogue* (Ky.) 14 S. W. 857, 29 Am. St. Rep. 378, and note; *Ford v. Des Moines* (Iowa) 75 N. W. 630; *McBride v. R. R. Co.* (Minn.) 75 N. W. 231; 8 Am. & En. Ency. 648; 13 Cyc. 138. The case of *Jennings v. Edgefield Mfg. Co.* (S. C.) 52 S. E. 113, is not relevant. In that case the circuit judge did use the word "liable" in the same connection as it was used here. The exception, however, did not charge it was incorrectly used, but related to an entirely different matter, as will be seen by reference to the case.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded for a new trial.

COLE v. BLUE RIDGE RY. CO.

(Supreme Court of South Carolina. Sept. 11, 1906.)

1. APPEAL—REVERSAL—ERROR IN INSTRUCTIONS.

A judgment should be reversed for error in instructions, though there may be other grounds on which it may reasonably be based.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4219, 4221-4224.]

2. RAILROADS—FAILURE TO SIGNAL—PUNITIVE DAMAGES.

Under Code 1902, § 2139, punitive damages may be awarded for willful or reckless failure to give the signals required by section 2132, at a railroad crossing, where the complaint alleges that defendant recklessly failed to give such signal.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1157.]

3. NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

An instruction that, if plaintiff contributed to the injury as the immediate cause of it, then he could not recover, though defendant company was negligent, was not an improper definition of contributory negligence.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, §§ 83, 85, 93-95, 382-399.]

Appeal from Common Pleas Circuit Court of Anderson County; Dantzler, Judge.

Action by George M. Cole against the Blue Ridge Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

T. P. Cothran, for appellant. Martin & Earle, for respondent.

POPE, C. J. The plaintiff in his complaint seeks to recover the sum of \$1,000, together with costs, as damages for the killing of his horse by the defendant on the crossing of the defendant's railway over a public highway, in the town of Pendleton, in this state, on the 20th of July, 1904. It is also alleged that the engine and tender of the defendant at the time of the killing of the horse was being run recklessly and at a high rate of speed, and that neither the bell nor the whistle of the engine was sounded, as required by law, at the time of such collision. The defendant in its answer admits its corporation under the laws of this state, and also the killing of plaintiff's horse by a collision at the crossing of a public road and defendant's line of railway, but it denies that such road is a public highway and is much used by the people. It also denies that the engine of the defendant struck the plaintiff's horse and buggy while the engine was being negligently and recklessly run by the defendant at a high rate of speed in the town and over said highway crossing; and also it denied the failure to ring the bell and sound the whistle on said engine for the distance of 500 yards from the said crossing and to keep the same ringing or sounding until the engine crossed said highway. It also alleges that the plaintiff's damage was caused by his own gross negligence contributing therewith as proximate cause of the action. The cause came on for trial before his honor Judge Dantzler, and a jury. Both sides offered testimony tending to prove the respective issues of the parties litigant. After a charge by the judge, the verdict of the jury was for the plaintiff for \$200. After entry of judgment thereon, the defendant appealed upon two grounds, and these we will now consider.

"(1) The presiding judge erred in charging the jury, in relation to the alleged statutory ground of liability, that the plaintiff would be entitled to punitive damages if the jury found that the failure of the defendant to give the signals required by section 2132, Civ. Code 1902, was the result of willfulness, wantonness, or recklessness. Specifications: (1) The complaint does not allege either willfulness or wantonness. (2) The statute, section 2139, does not allow or warrant recovery under it of punitive damages for a neglect to comply with section 2132; under it there can be a recovery of actual damages only, and for neglect only to give the signals. It is a statute of exceptional liability, and contains no provision for punitive damages

for a willful, wanton, or reckless failure to give the signals." We might remark just here that the plaintiff respondent insists that it is unnecessary to consider this appeal because he alleges that it was harmless error, even if we admit that it was error, for the circuit judge to so charge, as herein complained of, because it is evident from the testimony introduced in the case that the jury only gave a verdict for the value of the horse killed, thus eliminating any question as to punitive damages. There is no question that the plaintiff alone introduced testimony as to the value of the horse killed. Several witnesses testified that the horse was worth \$200. No one gave testimony as to a less or greater value of the horse killed than \$200. The defendant offered no testimony on this issue. In disposing of this point raised by the plaintiff respondent, we must remark that the decision of this court in *Bonham v. Bishop*, 23 S. C. 96, 105, is conclusive against the plaintiff's point. This court there declares: "The additional grounds upon which the respondent seeks to sustain the judgment, notwithstanding there may have been error in the charge, cannot be considered. While it is true that a judgment below in a case tried by the court may be affirmed upon other grounds than those upon which the circuit judge placed it, the same is not true of a case tried by a jury. If erroneous instructions have been given to the jury, we cannot know that the conclusion reached by the jury was not the result of such instructions, and therefore this court is bound to grant a new trial, even though there may be other correct legal propositions applicable to the case, which, if they had been laid before the jury, might have induced them to find the same verdict; because, if such additional instructions are not given and not asked for, we cannot conjecture what effect they would have upon the minds of the jury. A verdict is a compound result of the legal instructions given to the jury by the court and of their findings of fact applied to the legal principles laid down for their guidance, and if there is error in the instructions then there is necessarily error in the judgment, and it must be reversed." So we must decline to hold that the verdict is conclusive against the defendant in the particular there set up.

Recurring to the exception itself, we are inclined to hold that there was no error in the circuit judge as here complained of, for section 2139, vol. 1, of Code of Laws S. C. 1902, provides: "If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals required by this chapter and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by an indictment, as

provided in the preceding section, unless it is shown that, in addition to a mere want of ordinary care, the person having charge of his person or property was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury." The signals referred to in section 2139 are set out in section 2132. The circuit judge was laying down the law relating to punitive damages as well as actual damages. There is no limitation or restriction in the statute relative to the character of damages to be recovered. Indeed, the language used would seem to imply and to cover all damages, and we so hold. The term "reckless" was charged in the complaint, and although the words "willful" and "wanton" were not included in the complaint, the word "reckless" has been held sufficient to allow the jury to apportion exemplary damages as properly applicable thereto. The circuit judge in his charge defines punitive damages. *Pickett v. Railway Co.*, 69 S. C. 445, 48 S. E. 466; *Proctor v. Railway Co.*, 61 S. C. 170, 39 S. E. 351; *Glover v. Railway Co.*, 57 S. C. 228, 35 S. E. 510; *Appleby v. Railway Co.*, 60 S. C. 49, 38 S. E. 287; *Boyd v. Railway Co.*, 65 S. C. 326, 43 S. E. 817. In *Proctor v. Railway Co.*, 61 S. C. 189, 39 S. E. 358, it is said: "Now it is quite true that negligence may be so gross as to amount to recklessness, but when it does, it ceases to be mere negligence and assumes very much the nature of willfulness; so much so, that it has been more than once held in this state that, a charge of reckless conduct will justify the jury, if the same be proved, in awarding punitive, vindictive or exemplary damages; while it has never been held, so far as we are informed, that the jury, under a charge of mere negligence, would be justified in awarding vindictive or exemplary damages. One in charge of so powerful and dangerous a piece of machinery as a locomotive is bound to use care in operating it, so as to avoid so far as practicable doing injuries to others; and if he uses such machine recklessly and without regard to the rights of others, his conduct may be characterized as well by the term 'willful' as by the term 'reckless.'" We must overrule this ground of appeal.

"(2) The presiding judge erred in charging the jury as follows: 'Under the common-law liability, if a defendant company is negligent, even if a defendant company fails to observe due care, yet if the plaintiff himself contributed to the injury as a proximate cause of the injury, as the immediate cause of it, then the plaintiff cannot recover. Although the defendant company is negligent itself, if the plaintiff contributed to the injury by his own negligence, as the proximate cause, or immediate cause, then he cannot recover. Specifications: (1) The error consists in not having given a proper definition

of contributory negligence. It is a want of ordinary care upon the part of the person injured by the negligence of another, combining and concurring with that negligence and contributing to the injury as a (not the) proximate cause thereof; it can never exist except when the injury has resulted from the negligence of the defendant as a concurring proximate cause; the negligence of both, plaintiff and defendant, being a proximate cause and of the two combining and concurring, being the proximate cause." It does not seem to us that the circuit judge was in error, as here pointed out by the appellant. It would have been better for him to have adhered strictly to the language used by this court in referring to contributory negligence, yet the language used is so near akin to that used by this court that we scarcely feel justified in objecting to it. The circuit judge was not asked to make the definition of contributory negligence to the jury, yet he, in what he remarked to the jury in this connection, pointed out the necessity of proximate cause. This exception must be overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

LAWTON v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Aug. 16, 1906.)

LIMITATION OF ACTIONS—CONTINUING TORT.

Where a railroad constructed an embankment across a water course, in consequence of which plaintiff's lands were injured by flooding, the negligent construction was a wrong, continuous in its nature, so that an action might be brought for damages more than six years after the construction and damages awarded for the six years before commencing the action.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 304, 305.]

Appeal from Common Pleas Circuit Court of Hampton County; Purdy, Judge.

Action by W. H. Lawton against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Lyles & McMahan and James W. Moore, for appellant. W. B. DeLoach and W. S. Smith, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the defendant's negligent construction of an embankment across a water course, in consequence of which the plaintiff's lands were injured. The complaint alleges that on or about the ——— day of May, 1897, the South Bound Railroad Company negligently constructed an embankment on its right of way, over and across Meeting House Branch, a natural water course, running through plaintiff's land, having a well-defined channel, with bed, sides, and bank; that in the erection of said dam, the South Bound Railroad Company neglected to build a cul-

vert, or any opening whatever, through which the said waters could flow; that said embankment was erected to a height of about 15 feet, and since its construction it has been maintained and continued, as originally constructed, whereby said stream was deflected from its natural channel and thrown back upon the plaintiff's lands; that on or about the ——— day of May, 1901, the South Bound Railroad Company merged and consolidated its capital stock and franchises with those of the Seaboard Air Line Railway Company, under the name of the latter corporation, which became the owner of the property, and subject to all the duties and liabilities of the South Bound Railroad Company.

The defendant relied upon the statute of limitations, and in its answer alleged as a defense, that the cause of action did not accrue within six years before the commencement of the action. It seems that the action was commenced in September, 1904. The jury rendered a verdict in favor of the plaintiff for \$500, and the defendant appealed upon a single exception, which is as follows: "Because, upon defendant's request to charge as follows: 'If the injury complained of occurred six years before the commencement of this action, you must find for the defendant railway,' his honor modified the same by saying: 'I charge you, adding this: "If the railroad company here has obstructed a water course, as charged in the complaint, and damage has resulted to Mr. Lawton from that source, under the law, as I have given it to you, and under the facts, then you could not consider any damages that accrued to Mr. Lawton six years before the commencement of this action, because the statute bars any recovery where it is brought beyond six years. If any damages have accrued since that time, you could consider them, but nothing beyond a period of six years,"' thereby indicating that, although the injury and wrong complained of had occurred more than six years before the commencement of the action, if damages had resulted to the plaintiff within the six years, the jury might consider the same and allow compensation therefor."

The vital question in the case is whether the alleged negligent construction of the embankment across the water course, whereby the plaintiff's lands were overflowed and damaged, was a wrong, continues in its nature. The facts in the case of *De Laney v. Railway*, 58 S. C. 357, 359, 36 S. E. 699, were very similar to those in the case under consideration. Mr. Justice Jones, who delivered the opinion of the court, used this language: "It should not be understood that *Hammond's Case*, 16 S. C. 574, meant to assert that in every action against the grantee for the continuance of a nuisance created by the grantor, it was essential to allege and show that the grantee increased the obstructions continuing the nuisance. That is merely one

way by which the delict of defendant may be shown, and was a proper way under the complaint in that case. We understand it also to be the law in this state, that the grantee or lessee of the creator of an obstruction constituting a private nuisance, has no duty to remove said obstruction, until after notice and demand for removal; but after such notice and demand, the continuance of the nuisance becomes a nuisance, and the duty to remove or compensate arises."

In *Elliott v. Rhett*, 5 Rich. Law, 405, 420, 57 Am. Dec. 750, the court says: "Where a defendant was not the original creator of the disturbance of an easement, an action will not lie against him, until he has been requested to remove the cause of the disturbance which is on his land." In *Angell on Water Courses*, 103, the doctrine is announced as follows: "Where a dam was erected and land in consequence flowed by the grantor of an individual, the grantee will not be liable for the damages in continuing the dam and flowing the land as before, except on proof of notice of damage, and of a special request to remove the nuisance." In the case of *Leltzey v. Water Power Co.*, 47 S. C. 464, 25 S. E. 744, 34 L. R. A. 215, it appeared that the dam was constructed and the water raised in the channel of the river by the grantors of the defendant; and that the defendant was not the creator of the alleged nuisance. The alleged grievances were caused by the "keeping up, maintaining, and continuing the dam," after notice of the nuisance, and request for its removal, were received by the defendant. The court said: "It is clear that the complaint alleges injury after, as well as before, the notice to remove the nuisance, and up to the commencement of the action," and held that the demurrer on this ground was properly overruled. These authorities conclusively show that the alleged wrong was continuous in its nature; and that it was not alone the original negligent construction of the embankment that was capable of giving rise to a right of action.

It is the judgment of this court that the judgment of the circuit court be affirmed.

EAKER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Aug. 16, 1906.)

1. TELEGRAPHS—DELAY IN DELIVERY OF MESSAGE.

Where a telegram was not delivered for 27 hours, the jury has a right to infer that the delay was unreasonable.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 33, 61.]

2. SAME—CLAIM FOR DAMAGES—WAIVER OF TIME LIMIT.

Where a telegram company, in response to a letter of an addressee of a telegram, asking

as to what point a message addressed to him was sent from, at what date, and the name of the sender, this does not show an intent on the part of the company to waive its right to require claim to be presented in writing within 60 days after the message is filed for transmission.

Appeal from Common Pleas Circuit Court of Cherokee County; Townsend, Judge.

Action by William Eaker against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. H. Ferrons, Evans & Finley, and J. C. Jeffries, for appellant. J. B. Bell and Sanders & De Pass, for respondent.

GARY, A. J. This is an action for damages, under the mental anguish statute, alleged to have been sustained by the plaintiff through the negligence and willfulness of the defendant in failing to deliver a telegram. The allegations of the complaint that are material to the issues involved are as follows: "That on November 8, 1902, J. A. Eaker, a brother of plaintiff, presented and filed with defendant at its office in the said town of Shelby the following message: 'G. W. Eaker, Cowpens, S. C. Father worse; can't last much longer. Come at once. J. A. Eaker.' That defendant at said time and place received said message and promised promptly to transmit the same to G. W. Eaker, and that the said J. A. Eaker, in consideration thereof, prepaid to the defendant its charges therefor. That at said time plaintiff did not reside within the delivery limits of the defendant, but plaintiff had previously arranged with his brother, J. A. Eaker, to send plaintiff a telegram over defendant's lines in case plaintiff's father grew worse. That in anticipation of the receipt of said message plaintiff appointed one James Williams, policeman at Cowpens, to receive such message as might be sent, and to transmit same to plaintiff at his residence, and also notified defendant's agent at Cowpens to deliver any message sent to plaintiff to the said James Williams, and said agent agreed to same. That said message was received by the defendant at its office at Cowpens on the 8th day of November, 1902, at 12:30 p. m. That although at the time of the receipt of said message, and for 24 hours thereafter, the said James Williams was in the town of Cowpens continuously, within the delivery limits of the defendant and within easy access of defendant, the defendant willfully, maliciously, carelessly, grossly, negligently, and without regard to the rights of the plaintiff, and with notice of the importance of said message to plaintiff, failed and refused to deliver same to plaintiff's agent, as it had agreed to do, and held said message in its office until the next day, in consequence of which said message did not reach plaintiff until 3 o'clock p. m., on November 9, 1902. That if defendant had

delivered said message promptly to the said James Williams in accordance with said instructions and agreement, as was its duty, the said Williams could and would have promptly transmitted the same to plaintiff; or if the defendant had sent said message out to plaintiff, as it had contracted to do for a valuable consideration, plaintiff could and would have been present with his father in his last illness and at his death with his family in their grief and bereavement. That the said father of plaintiff died on the morning of November 9, 1902."

The defendant denied the allegations of the complaint and set up the following as a defense to said action: "That if a message was sent, as set forth in the complaint, it was written upon a regular sending blank furnished by defendant, and plaintiff agreed, before said message was sent or accepted by defendant, to the following terms and conditions printed on said sending blank: 'Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance, a special charge will be made to cover the costs of such delivery. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.' That plaintiff has filed no claim for damages with defendant within 60 days from the receipt of said message by defendant, as he was in duty bound to do, nor has he ever claimed such damages until the filing of the complaint herein."

At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit as to the cause of action based upon willfulness, and also as to the cause of action based upon negligence, on the grounds that there was no testimony tending to show either willfulness or negligence. This motion was refused. Thereafter the plaintiff withdrew his claim for punitive damages. The defendant renewed its motion for nonsuit after all the testimony on both sides had been introduced, on the ground that there was no testimony tending to show waiver on the part of the defendant to insist upon the fact that the claim was not presented in writing within 60 days after the message was filed with the company for transmission. This motion was likewise refused. The jury rendered a verdict in favor of the plaintiff for \$250, and the defendant appealed.

1. The first question that will be considered is whether there was any testimony tending to show negligence in delivering the telegram. There was testimony tending to show that the delay in delivering the message was so great that the jury might very properly have drawn the inference that it was unrea-

sonable, which would have established a prima facie case against the defendant. *Poulnot v. Telegraph Co.*, 69 S. C. 545, 48 S. E. 622. There was no error, therefore, in refusing the nonsuit on this ground.

2. The next question for consideration is whether there was any testimony tending to show waiver of the requirement that the claim should have been presented in writing within 60 days after the message was filed with the company for transmission. The only statements made by those having authority to bind the company are contained in the following letters:

"Richmond, Va., Feb. 15, 1904. Mr. G. W. Eaker, Converse, Spartanburg Co., S. C.—Dear Sir: Referring to your letter of 13th inst., I beg to advise that same has been referred to Supt. J. M. Stephens, of this company's service at Atlanta, Ga., who will give the matter the necessary attention. Yours truly, F. E. Clary, Supt. S."

"Atlanta, Ga., March 4th, 1904. Mr. G. W. Eaker, Converse, S. C.—Dear Sir: Your letter dated February 13th, addressed to the superintendent of this company at Richmond, Va., has been forwarded to me. You do not state in your letter from what point the message was sent, neither do you give the date. I will be glad if you will furnish me this information, and also the name of the party who sent you the message. Yours truly, J. M. Stephens, Superintendent."

The case under consideration is quite different from the case of *Hays v. Telegraph Co.*, 70 S. C. 16, 48 S. E. 608. In this case the letters show that the defendant only desired information as to such facts as would identify the telegram which had been delivered for transmission; and it is but reasonable to suppose that the plaintiff could have furnished the desired information without incurring expense or in any manner endangering his rights. Otherwise he was not in a position to present a correct statement of his claim. There was nothing in said letters calculated to induce the plaintiff to change his course in the assertion of his rights, or to make him believe it was the intention of the defendant to waive any of its rights. His honor, the presiding judge, therefore erred in refusing to sustain the motion for nonsuit on this ground.

This practically disposes of the exceptions relating to waiver. There are other exceptions assigning error in the charge of the presiding judge; but, where the portions of the charge set forth in the exceptions are considered in connection with the entire charge, it will be seen that there was no error.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

CALDWELL v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Aug. 18, 1908.)

1. APPEAL—REVIEW—EXCEPTIONS TO EVIDENCE.

An exception to evidence will not be considered where the ground of objection is not stated and the record does not show a ruling on the objection.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1621.]

2. SAME—LEADING QUESTIONS.

The refusal to exclude a question on the ground that it is leading is not reviewable unless an abuse of discretion is shown.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3855.]

3. CARRIERS—FAILURE TO STOP AT STATION.

In an action against a railroad for failure to stop its train at a station and take on a passenger, the cost of the ticket is an element of damage.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1082.]

4. TRIAL—INSTRUCTIONS—CHARGE ON FACT.

An instruction that if the evidence showed that plaintiff bought a ticket, and that the railroad company failed to stop its train, he could either decline to use the ticket and demand his money "because the railroad had failed to keep their contract with him" is not objectionable as a charge on the facts, where the court carefully left all questions of fact to the jury.

5. SAME.

In an action against a carrier for failing to stop its train to take on a passenger, an instruction "in other words, gentlemen, you must make the punishment fit the crime," was not erroneous, as encouraging the jury to find a verdict for punitive damages, where the court instructed that if the jury found there was willfulness, they should give such damages as would punish defendant.

Appeal from Common Pleas Circuit Court of Colleton County.

Action by C. C. Caldwell against the Atlantic Coast Line Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

W. Huger Fitz Simmons, Mordecai & Gadsden, and Rutledge & Hagood, for appellant. J. M. Walker and J. G. Padgett, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence and willfulness of the defendant, in not causing its train of cars for passengers to stop at a regular station on its road. The complaint alleges that the defendant sold the plaintiff a ticket from Caldwell to Charleston; that Caldwell is a regular station for receiving passengers; that, although the servants of the defendant in charge of the train which was advertised to stop at the time the plaintiff desired to become a passenger saw and answered the signal of the agent at the station, they nevertheless negligently and willfully ran the train past the station without stopping. The jury rendered a verdict in favor of the plaintiff for \$500, and the defendant appealed.

1. The first exception is as follows: "Because the presiding judge erred in admitting the following testimony, over the objection of defendant's counsel: A. Griffith, plaintiff's witness, being on the stand, was asked: 'Q. Was there any effort made on the part of the agent there to stop the train? A. I heard Mr. Caldwell say to Jesse—(Objected to.) A. Mr Caldwell told Jesse to flag that train, and Jesse made a movement with his handkerchief to stop it; told him to stop it as it was running so fast.' The error being that such testimony was not competent. The witness could not say what Caldwell said to him." This exception cannot be sustained, because the ground of objection to the testimony was not stated, nor does the record disclose the fact that his honor, the presiding judge, ruled upon the objection.

2. The second exception is as follows: "Because the presiding judge erred in admitting the following testimony, over the objection of defendant's attorneys: Jesse Caldwell, being on the stand, was asked this question: 'Q. Did it ever run by there before that way? (Objected to as leading.) The Court: That question is not objectionable.' The error assigned here being that this was a leading question and suggested the answer to the witness, and also that it was irrelevant to any issue in this case." It will be observed that the only objection related to the form of the question, to wit, on the ground that it was leading. The form in which a question shall be propounded relates to the conduct of the case, which must necessarily be left in great measure to the sound discretion of the presiding judge, and is not appealable unless there is an abuse of discretion, which does not appear in this case.

3. The third exception is as follows: "Because the presiding judge charged the jury as follows: 'If he purchased a ticket from the railroad company and made a contract with them to transport him on that day, and the company failed to do it, a part of his actual damage would be the price he paid for the ticket.' The error assigned being that this was a statement to the jury that the plaintiff had suffered actual damage, of which the price of the ticket was a part; whereas, it is exclusively for the jury to say whether plaintiff had suffered actual damage or not, and of what it consisted, or there being no testimony of any other actual damage, the cost of the ticket should not be regarded as a part of actual damage." When the portion of the charge set out in the exception is considered in connection with the entire charge, it will be seen that it simply meant that the jury might consider the price of the ticket, as an element of damages in case the plaintiff was entitled to a recovery. It was therefore not subject to the objection specified in the exception.

4. The fourth exception is as follows: "Because the presiding judge erred in charging the jury as follows: 'In other words, gentlemen, if you should find from the testimony, the greater weight of the evidence, that he did buy the ticket and that the railroad company failed to stop its train, then it was optional with him to decline to use the ticket and to demand the payment of his money, because the railroad had failed to keep its contract with him—it had breached the contract, and he would have a right to demand back the consideration for the ticket that he had paid.' The error assigned being that this was a charge on the facts, in that the judge states as a conclusion that the defendant had failed to keep its contract—it had breached the contract." The quotation from the charge cannot properly be considered, without referring to the entire charge, by which it will be seen that his honor, the presiding judge, was careful to leave all questions of fact to the jury.

5. The fifth exception is as follows: "Because the judge charged the jury as follows: 'He cannot hold the railroad company responsible for that, but he can hold the railroad responsible for all damages that flowed naturally from its breach, and as a direct consequence of its breach of duty to him, such as the items I have mentioned; and I have only mentioned those to indicate what class of items would enter in it. There may be others of a similar class, like items that enter into actual damages that flow as a natural consequence of the breach of the duty on the railroad's part, and that ought to have been anticipated by any reasonable man operating a railroad.' The error being that this was a charge on the facts, stating to the jury by indirection what actual damages had been proved, and indicating that other actual damages might be found by the jury, when there was no proof of such actual damages." This exception is disposed of by what was said in considering the fourth exception.

6. The sixth exception is as follows: "Because the judge charged the jury as follows: 'In other words, gentlemen, you must make the punishment fit the crime.' The error assigned being that such language was calculated to encourage the jury to find a verdict for punitive damages, and a suggestion to them that the case was a serious one, requiring punishment, thus indicating the opinion of the court on the whole case." When this portion of the charge is considered in connection with the charge in its entirety, it will be seen that the presiding judge merely instructed the jury that in case they found there was willfulness, they should give such damages as would punish the defendant, for its disregard of the plaintiff's rights.

It is the judgment of this court that the judgment of the circuit court be affirmed.

**GREENVILLE COLLEGE FOR WOMEN
et al. v. BOARD OF EDUCATION OF
GREENVILLE COUNTY.**

(Supreme Court of South Carolina. Aug. 21, 1906.)

**MANDAMUS—WHEN GRANTED—REMEDY BY
APPEAL.**

Under Civ. Code 1902, § 1183, providing that the state board of education can review, on appeal, all decisions of county boards of education, mandamus to require a county board of education to issue a teacher's certificate to a graduate of Greenville College for Women on its diploma, is not the proper remedy, but appeal to the state board of education.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 9.]

Appeal from Common Pleas Circuit Court of Greenville County; Dantzler, Judge.

Application by the Greenville College for Women and another for writ of mandamus against James B. Davis and others, county board of education for Greenville county. From an order requiring the writ to issue, respondents appeal. Reversed.

Le Roy F. Youmans, Atty. Gen., for appellants. Mauldin & Townes, for respondent.

GARY, A. J. This is an appeal from an order of his honor, the circuit judge, granting a writ of mandamus, whereby the county board of education for Greenville county were required to issue to the petitioner, Julia Lipscomb Turner, a certificate to teach in the public schools of said county. The petitioner alleges that Greenville College for Women is a chartered college, under the laws of this state, and that she was presented with a diploma by said college, upon completing its prescribed course of instruction; that on the 15th of September, 1905, she exhibited her diploma to said board of education, and requested that a teacher's certificate be issued to her, but the board in writing refused her request; that she has no other adequate remedy at law.

A rule was issued against said board, to which it made return as follows (omitting the formal portion thereof): "(1) That the action of the county board of education, in refusing to issue the teacher's certificate in question, was in accordance with the orders and directions of the state board of education, who had by regulation fixed the institutions, naming them, whose graduates were exempt from examination, under section 1200, vol. 1, Code of Laws S. C. 1902; that the list of these names did not include that of the petitioner, Greenville College for Women, and these respondents are advised that the said state board of education, in making this regulation, acted within the scope of their duties and powers. (2) That if the petitioners, or any of them, were in any manner aggrieved by the action of the county board of education of Greenville county com-

plained of, they had full, complete and adequate remedy provided by law without aid of a writ of mandamus, by an appeal from the said action of the county board of education to the State Board of Education through the county board of education made in writing and distinctly setting forth the question of law as well as the facts of the case, upon which the appeal was taken, and the decision of the State Board of Education shall be final upon the matter at issue, and that such appeal was never taken."

Section 1200 of the Code of Laws of 1902 contains the following provisions: "The county board of education shall examine all candidates for the position of teacher, and give to each person found qualified a certificate, setting forth the branches of learning he or she may be capable of teaching, and the percentage attained in each branch; said certificate to be valid for a term of two years, unless sooner revoked, and it may be renewed with or without examination, at the discretion of the board, all of which shall be done under such regulations as the state board of education may prescribe. No teacher shall be employed in any of the free public schools without a certificate from the county board of education or the state board of education: Provided, that no examination as to qualification shall be made in the case of any applicant who produces a full diploma from any chartered college or university of this state or Memminger Normal School of Charleston, and furnishes satisfactory evidence of good moral character." In construing said section, his honor said: "Neither the state board of education nor any county board of education is clothed with any discretionary power or right whatsoever under the proviso, supra. Under that proviso, it is a conclusive legal presumption that any college chartered under the laws of this state has such a standard of scholarship as shall qualify its graduates, producing full diplomas, to teach in the public schools of this state, satisfactory evidence of the good moral character of any applicant being furnished. "By section 1134, Civ. Code of 1902, certain general powers are conferred upon the state board of education; but it is declared therein that the 'rules and regulations' to be adopted 'for the government of free public schools' of the state 'shall not be inconsistent with the laws of the state. * * * The provisions of this section cannot convert into a discretionary power the ministerial duty required by the proviso of section 1200, supra."

The first assignment of error that will be considered is whether the circuit judge erred in overruling the objection, that proceedings in mandamus were not appropriate, as the petitioner had an adequate remedy under the statute.

Section 1183 of the Code of Laws of 1902 provides that "the state board of education

* * * shall have power to review on appeal, all decisions of the county boards of education, as hereinafter provided for. Appeals to the state board of education must be made in writing through the county board of education, and must distinctly set forth the question of law as well as the facts of the case upon which the appeal is taken, and the decisions of the state board shall be final upon the matter at issue." Section 1203 of the Code of Laws of 1902 is as follows: "The county board of education shall constitute * * * a tribunal for determining any matter of local controversy in reference to the construction or administration of the school laws, with the power to summon witnesses and take testimony if necessary; and when they have made a decision said decision shall be binding upon the parties to the controversy: Provided, that either of the parties shall have the right to appeal to the state board of education, and said appeal shall be made through the county board of education in writing, and shall distinctly set forth the question in dispute, the decision of the county board and the testimony as agreed upon by the parties to the controversy, or if they fail to agree, upon the testimony as reported by the county board."

The cases of State ex rel. Williams v. Hiers, 51 S. C. 388, 29 S. E. 89, State ex rel. Bryson v. Daniel, 52 S. C. 201, 29 S. E. 633, and Sligh v. Bowers, 62 S. C. 409, 40 S. E. 885, show that the petitioner has another adequate remedy, and, therefore, that she did not have the right to resort to proceedings in mandamus. These cases are not in conflict with Hughes v. School District, 66 S. C. 259, 44 S. E. 784, in which the court uses this language: "The case before us, however, is not a 'matter of local controversy in reference to the construction or administration of school laws,' and does not come within the rules stated in State v. Hiers, 51 S. C. 388, 29 S. E. 89, and State v. Daniel, 52 S. C. 201, 29 S. E. 633. This case is for damages for breach of contract. Section 1205, Code 1902, provides that organized school districts 'may sue and be sued and be capable of contracting and being contracted with, to the extent of their school fund.' And by section 15, art. 5, Const., courts of common pleas have jurisdiction 'in all civil cases.'" Not only is there the difference arising from the fact that the proceedings under consideration relate to a similar "matter of local controversy in reference to the construction or administration of school laws," but the petitioner herein seeks the extraordinary remedy of mandamus, while in the Hughes Case, there was an action in a court of general jurisdiction, where the question as to another adequate remedy could not be successfully urged. Having reached the conclusion that mandamus is not the petitioner's appropriate reme-

dy, the merits of the controversy are not properly before this court for consideration.

It is the judgment of this court that the judgment of the circuit court be reversed.

LATHAN v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Sept. 6, 1906.)

1. TELEGRAPHS—FAILURE TO DELIVER—DAMAGES.

Where a delay in delivering a commercial telegram offering meal at a certain price was shown, and caused a delay on the part of the addressee in purchasing meal, whereby he was compelled later to pay an advanced price, he could recover damages, though there was no evidence that he would have accepted the offer.

2. SAME—WANTON NEGLIGENCE.

Where a telegraph company changed the name of the addressee of a commercial telegram to that of his competitor, and delivered the message to him, it is evidence of reckless disregard of the addressee's rights.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 82.]

3. APPEAL—REVIEW—HARMLESS ERROR.

Admission of irrelevant evidence is not reversible error, where no abuse of discretion was shown.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153-4160.]

Appeal from Common Pleas Circuit Court of Chester County; Purdy, Judge.

Action by S. R. Lathan against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action for damages, alleged to have been sustained by the plaintiff, through the negligence and willfulness of the defendant, in failing to deliver a telegram. The complaint, omitting the formal portions thereof, alleges: "(1) That on the 30th day of May, 1903, the Lynchburg Milling Company, of Lynchburg, Va., presented to and filed with the said defendant, at its office in said city of Lynchburg, the following message: 'May 30th, 1903. S. R. Lathan, Chester, S. C. One Thirty June shipment near time stated as possible. Quick. Lynchburg Milling Company.' (2) That said defendant had notice of the importance of said message, and the loss and damage that would likely fall upon the plaintiff, if said message was not promptly and correctly transmitted and delivered to said plaintiff. (3) That said message was not delivered to the plaintiff, but to R. R. Moffatt, who, as defendant well knew, was his competitor in business. (4) That said Lynchburg Milling Company sent said message to said plaintiff to reponse to said plaintiff's request for quotations on five carloads of meal, containing 300 sacks, each to be shipped to said plaintiff, as follows: One car on June 5th, one car on June 10th, one car on June 17th, one car on June 23d, and one car on June 30th, following. (5) That, at the same time said request for quota-

tions as above was made of the Lynchburg Milling Company, similar requests were made of other meal manufacturers, who do business in plaintiff's territory, and the lowest price made plaintiff in reply by any of them was \$1.38 per sack. (6) That at said time said plaintiff's stock of meal was low, and his trade in said article exceedingly good; that the market price of said article was constantly and rapidly advancing; and that, but for the gross carelessness, negligence, and wantonness of the said defendant, in failing to correctly and promptly transmit and deliver said message, said plaintiff would have accepted said quotation in said telegram contained, and thereby have bought five carloads of meal, containing 300 sacks each, at \$1.30 per sack. (7) That by reason of the gross carelessness, negligence, and wantonness of the defendant, in failing to correctly and promptly transmit and deliver said message as aforesaid, said plaintiff was not only prevented from buying the five cars of meal in which he would have had profit, of some \$230, by the advance in the market price alone, by the time it would have reached his warehouse, but was prevented from making several sales at a great profit, was damaged greatly in his reputation for promptness and for ability to supply his trade, and was forced to buy what meal he did buy at a much higher price—all to his hurt and damage in the sum of \$500." At the close of the plaintiff's testimony the defendant made a motion for a nonsuit, which was refused. The defendant did not offer any testimony. The jury rendered a verdict in favor of the plaintiff for \$150, and the defendant appealed.

Geo. H. Ferrons and J. H. Marion, for appellant. Caldwell & Gaston, for respondent.

GARY, A. J. (after stating the facts.) 1. The first question that will be considered is that presented by the exceptions, in which the appellant contends that the right to recover damages was dependent upon the fact that the plaintiff would have accepted the offer mentioned in the telegram, and that such fact was conjectural and uncertain, and therefore could not be considered in determining the defendant's liability for damages. A reasonable interpretation of the telegram is that it related to a contemplated contract of sale, in which the article of merchandise was to be shipped during the month of June at the time stated in a previous communication to the Lynchburg Milling Company, to which the message was a reply, and that it was necessary for the addressee to act promptly. The message showed upon its face that a failure to deliver it might naturally and reasonably be expected to cause delay on the part of the plaintiff in purchasing the desired article, and, as a probable result, that he would be compelled when he thereafter went into the market to pay a higher price than that stated in the telegram. There was testimony

to the effect that the plaintiff received notice on or about the 3d of June of the defendant's failure to deliver the message. That on the 3d of June he sent a telegraphic message to the Lynchburg Milling Company, offering \$1.31 per sack for three carloads of meal, and on the same day the Lynchburg Milling Company, in response, sent the following telegram: "One thirty-five, lowest June shipment. Quick reply. Market strong." That, instead of sending a telegram, he wrote a letter to them accepting the offer, for one carload of meal; but, as their offer had not been accepted with promptness, they declined to sell at \$1.35. That on the 11th of June he bought three carloads at \$1.40, and a few days thereafter purchased more meal at \$1.44. That he would have accepted the offer of \$1.30 on the 30th day of May. That the delay in buying was directly caused by the failure to deliver the message, in consequence of which he was compelled to buy at an advanced price. Among the cases upon which the appellant relies to sustain the proposition that evidence, as to whether the plaintiff would have accepted the offer contained in the telegram, cannot be considered on the ground that it is conjectural and uncertain, is that of *Beatty L. Co. v. Tel. Co. (W. Va.) 44 S. E. 309*, in which the authorities are reviewed. The case was well considered and strongly supports the appellant's contention. It is predicated upon the theory that, when there is a failure to deliver a telegram containing an offer to sell, and the market advances in price, the addressee cannot recover damages, unless it is made to appear that he would have accepted the offer; and that the testimony of the addressee that he would have accepted the offer cannot be considered in determining the company's liability, on the ground that it is conjectural and uncertain. The fallacy in the reasoning of the court in that case is in supposing that the telegraph company would not be liable, unless it was shown that the addressee would have accepted the offer. If the failure to deliver the telegram was the direct and proximate cause of the delay on the part of the plaintiff, in postponing the purchase of meal, whereby he was compelled, when he went into the market, to pay the advanced price, he would be entitled to recover damages, although there was no testimony establishing the fact that he would have accepted the offer. Such testimony, however, is admissible for the purpose of showing the intent and motive of the plaintiff, in postponing his purchases, on the ground that it is explanatory of the delay.

2. The next question that will be considered is whether the presiding judge erred in overruling the motion for nonsuit, on the ground that there was no testimony tending to show wantonness, willfulness, or recklessness, entitling the plaintiff to punitive damages. The entire name of the addressee was changed, and the message was delivered to his competitor in business. This afforded

at least some evidence of a reckless disregard of the plaintiff's rights.

3. These views practically dispose of all the exceptions, except those assigning error on the part of the presiding judge in permitting the plaintiff to introduce certain testimony, which the appellant contends was irrelevant. Such testimony must necessarily be left in great measure to the discretion of the presiding judge, and his ruling will not be reversed, unless there was abuse of discretion, which the appellant has failed to show in this case.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. I concur in affirming the judgment. The case of *Wallingford v. Tel. Co.*, 53 S. C. 410, 31 S. E. 275, is authority for the proposition that a telegraph company is liable in damages for failing to deliver a telegram containing an offer to buy a carload of mules at a specified price, whereby the plaintiff lost the opportunity to make said sale, which he would have made had the telegram been delivered in time, thereby compelling the plaintiff to keep the mules for a time at expense and subsequently sell them at a price less than the price offered. In that case, the measure of damages was the difference between the price offered and the best market price for which the mules could have been then sold, if less than the price offered. The present case is a corollary of that. The telegram contained an offer to sell, and there was testimony from which it could be inferred with reasonable certainty that the purchase would have been made, if the telegram had been delivered. By reason of the failure to deliver the telegram the plaintiff was rendered unable to buy meal at \$1.30 per sack and was compelled to buy later at an advance, \$1.40 and \$1.44 per sack; but as plaintiff had it in his power to buy at \$1.35, after being aware of the nondelivery of the telegram, his actual loss must be limited to the difference between the price offered and the price at which he could have bought. As there are 1,500 sacks in five cars of meal, plaintiff's actual loss as a result of the nondelivery of the telegram did not exceed \$75. But as I agree with the view that there was some evidence of recklessness, as pointed out by Mr. Justice GARY, there is no ground for disturbing the verdict for \$150.

This case is easily distinguishable from the case of *Beatty Lumber Co. v. W. U. Telegraph Co. (W. Va.) 44 S. E. 309*, as in that case there was no purchase at a higher price in consequence of the failure to deliver the telegram, and hence no certain loss. In so far as the West Virginia case holds that there could be no actual damages for nondelivery of a telegram containing an offer to sell, unless it appears with legal certainty that the offer would have been accepted and a sale or contract of sale consummated, it is in accord with *Wallingford v. Tel. Co.*,

53 S. C. 410, 81 S. E. 275; but, in so far as the West Virginia case may be construed as holding that it is not a provable matter whether an offer to sell would have been accepted, it is inconsistent with the Wallingford Case. In the Wallingford Case, the fact that the offer would have been accepted and a sale consummated was made legally certain by the allegations of the complaint admitted by the demurrer. In this case, the fact that the offer would have been accepted was made legally certain, not merely by the declaration of the plaintiff as to what he would have done, but by the other circumstances in the case tending to show that a reasonably prudent person in his situation would have accepted the offer. The evidence tended to show that his business was to buy and sell meal, that it was necessary for him to have meal to supply his customers, that he had asked for quotations with a view to purchase and was awaiting the telegram before purchasing, and especially that he actually did purchase at a higher price when the non-delivery of the telegram was discovered. The loss sustained, to the extent of five cents per sack, was not contingent or speculative, but certain and definite, and was the natural and proximate result of the failure to deliver the telegram.

CITY OF LAURENS v. ANDERSON.

(Supreme Court of South Carolina. Aug. 13, 1906.)

1. CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAWS.

24 St. at Large, p. 441, providing that soldiers and sailors of the Confederate States who enlisted from the state of South Carolina should be exempt from any license for carrying on business within the state, is unconstitutional and in violation of Const. art. 1, § 5, and Const. U. S. Amend. 14, § 1, forbidding the denying to any person of equal protection of the laws.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 687.]

2. SAME—UNJUST DISCRIMINATION.

24 St. at Large, p. 441, exempting Confederate veterans who enlisted from the state from any license for carrying on any business, is unconstitutional, as providing only for soldiers and sailors who enlisted from the state, and ignoring veterans of other wars, as well as soldiers of the confederacy who enlisted from other states.

Appeal from Common Pleas Circuit Court of Laurens County; Prince, Judge.

John Wade Anderson was convicted of a violation of a city ordinance, and from a judgment of the circuit court, affirming judgment of the mayor, he appeals. Affirmed.

Ferguson & Featherstone, for appellant. Dial & Todd, for respondent.

GARY, A. J. The exceptions assign error on the part of his honor, the presiding judge, in declaring the following statute unconstitutional to wit: "Be it enacted by the General Assembly of the state of South Carolina, that

all soldiers and sailors of the Confederate States, who enlisted from this state, and who were honorably discharged from such service, shall hereafter be exempt from any license for the carrying on of any business or profession within this state, or any city, town or village therein: Provided, that such soldiers and sailors shall file with the clerk of the court of the county in which he resides, the proper evidence of his service in the Confederate War: Provided, further, that no partnership shall exist in any such business or profession with any person not a bona fide soldier or sailor of the said Confederate States." 24 St. at Large, p. 441. The defendant was tried in the mayor's court upon the charge of running a beef market and grocery store without license. He pleaded that he was exempt from the payment of a license tax under the provisions of said act. The mayor ruled that the statute was unconstitutional, and imposed a sentence upon the defendant, from which he appealed to the circuit court.

The respondent contended that the statute was in violation of the following constitutional provisions: Section 5, art. 1, Const. S. C., which provides that no person shall be denied the equal protection of the laws. Section 1 of the fourteenth amendment of the United States Constitution, which prohibits any state from denying to any person the equal protection of the laws. Section 1, art. 10, Const. S. C., which contains the provisions that: "The General Assembly shall provide by law for a uniform assessment and taxation, and shall prescribe regulations to secure a just valuation for taxation of all property: * * * Provided, that the General Assembly may provide * * * for a graduated license on occupations and business." Section 2, art. 4, Const. U. S., which is as follows: "The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." The presiding judge ruled that the act was in violation of the first and second, but not of the third and fourth, of said provisions. The respondent gave notice that, in case it was necessary, it would rely upon the additional grounds that there was error in overruling the third and fourth of said objections.

We will proceed first to state the general principles touching the subject of classification under the state and federal Constitutions. The case of Gulf, C. & S. F. Ry. Co. v. Ellis, 163 U. S. 150, 155, 163, 17 Sup. Ct. 255, 257, 41 L. Ed. 668, decides that the classification must not be arbitrary—that is, "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed"—also, that such classification must be "based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and is not a merely arbitrary selection." In Am. Sug. Ref. Co. v. Louisiana,

21 Sup. Ct. 43, 45, 45 L. Ed. 102, the court, in discussing the provisions of the Constitution as to the equal protection of the laws, says: "The power of taxation under this provision was fully considered in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 233, 10 Sup. Ct. 533, 33 L. Ed. 892, in which it was said not to have been intended to prevent a state from changing its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property, altogether; may impose different specific taxes upon different trades or professions; may vary the rates of excise upon various products; may tax real and personal estate in a different manner; may tax visible property only, and not securities; may allow or not allow deductions for indebtedness. 'All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state Legislature or the people of the state in framing their Constitution.'" The court, in *Sutton v. State*, 96 Tenn. 696, 36 S. W. 697, 33 L. R. A. 589, says that legislation to be constitutional "must possess each of two indispensable qualities: First, it must be so framed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances; and, secondly, the classification must be natural and reasonable, not arbitrary and capricious." In *Cooley's Constitutional Limitations*, 482, we find the following statement of the principle: "Privileges may be granted to particular individuals, when by so doing the rights of others are not interfered with; * * * but every one has a right to demand that he be governed by general rules, and a special statute, which without his consent singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as 'is not in the province of free government. Those who make the laws 'are to be governed by promulgated, established laws, not to be varied in particular cases, but to have one rule for the rich and poor, for the favorite at court and the countryman at the plough.'" The court, in *State v. Goodwill* (W. Va.) 10 S. E. 285, 286, 6 L. R. A. 621, 623, 25 Am. St. Rep. 863, uses this language: "The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void." In the case of *Oil Co. v. Spartanburg*, 66 S. C. 37, 45, 44 S. E. 377, 380, there was an ordinance requiring dealers in oil to pay a license tax, and providing that it should not apply to dealers handling oil, on

which the license had been paid. The court, in declaring the ordinance unconstitutional because there was no reasonable ground for such classification, said: "It cannot be successfully contended that the exemption from payment of license tax was intended for the benefit of the municipality, for the tendency of the classification was to lessen its revenues. Nor can it be argued that the exemption was in any sense an encouragement to commerce, for the merchants and dealers under this classification conducted their business in no respect different from those who paid the license tax. It can scarcely be insisted that it was for the benefit of those who paid the tax, as its tendency was to create a larger number of competitors in business with them, especially when we have before us one of the parties who paid the tax objecting to its legality. We are irresistibly forced to the conclusion that the exemption was intended as a mere favor to those included within the classification, and that it was therefore unconstitutional."

We will proceed next to review some of the authorities in which the question before the court was similar to that now under consideration. In the case of *State v. Garbroski* (Iowa) 82 N. W. 959, 960, 56 L. R. A. 570, 572, 82 Am. St. Rep. 524, the court had under consideration the constitutionality of an act granting immunity from a license tax to peddlers who had served in the army of the United States during the Civil War. The court said: "The classification here attempted rests solely on a past and completed transaction, having no relation to the particular legislation enacted. All citizens are divided into two classes—those who served in the army and navy 35 years ago, and all those who did not. True, as suggested, the veterans came from no particular class; but the trouble with this statute is that it attempts to make of them a class in legislation, in the operation of which there can be no substantial distinction between them and others. In present conditions and circumstances, there are no differences between them, in their relation to society and the administration of the law, and other citizens of the state. * * * The work of a peddler calls for no qualities such as a soldier or sailor acquires in the service. Equality in right, privilege, burdens, and protection is the thought running through the Constitution and laws of the state, and an act intentionally and necessarily creating inequality therein, based on no reason suggested by necessity or difference in condition or circumstances, is opposed to the spirit of free government, and expressly prohibited by the Constitution. * * * The classification attempted by this statute is based on no apparent necessity, or difference in conditions or circumstances that have any relation whatever to the employment in which the veteran of the Civil War is authorized to engage without paying license. It savors more of philanthropy

(worthy of the highest commendation, in its proper sphere) than of reasonable discrimination, based on real or apparent fitness for the work to be done."

In the case of *State v. Shedroi* (Vt.) 54 Atl. 1081, 1082, 63 L. R. A. 179, 180, 98 Am. St. Rep. 825, the court was called upon to determine whether the statute was constitutional which provided that persons residents of that state who served as soldiers in the Civil War, and were honorably discharged, were exempt from the payment of a license tax. In that case the court used this language: "Upon what basis does the attempted classification rest? There is no basis upon which it can rest, except that persons in one class served as soldiers in the Civil War, and were honorably discharged, and those of the other class did not so serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since passed, and not on a present condition or situation, nor on a substantial distinction having reference to the subject-matter of the law enacted. The veterans were originally from no particular class, and, when discharged from the army, they returned to no particular class—they again became a part of the general mass of mankind, with the same constitutional rights, privileges, immunities, burdens, and responsibilities as other citizens similarly circumstanced in law in the same jurisdiction. Assuming that thus to have served as a soldier, and to have received an honorable discharge, may well merit reasonable considerations at the hands of the state in recognition of patriotism and valor in defense of a common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole, for equal protection of the laws requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. * * * It cannot be said that the service as a soldier in the War and the receipt of an honorable discharge bear any relation to the business of a peddler as defined by the law under consideration. There is no difference between the present conditions and circumstances of such veterans, and those of other citizens regarding the relations to the law, or the attempted classification. In fact, according to their relations, they are of the same class, and any attempted classification between them is but a mere arbitrary selection and based upon no reasonable grounds."

The statute hereinbefore set out shows upon its face that it denies to those not included within its provisions the equal protection of the laws. It provides only for soldiers and sailors who enlisted from this state and were honorably discharged, but ignores the veterans of other wars, as well as those soldiers and sailors of the Confederacy, who enlisted from other states and were honora-

bly discharged. In fine, there is not a single feature of the act upon which a classification can be based, without violating the provisions of the state and federal Constitutions.

These views render it unnecessary to consider the additional grounds upon which the respondent gave notice that it would rely.

It is the judgment of this court that the judgment of the circuit court be affirmed.

TALBERT v. OCHARLESTON & W. C. RY.
(Supreme Court of South Carolina. Sept. 7, 1906.)

1. CARRIERS—INJURY TO PASSENGER—MISCONDUCT OF CONDUCTOR.

Where a conductor failed to consider the condition of a one-armed man desiring to enter the train after he had made known his intention so to do, the jury had a right to consider this fact in determining whether the failure of the conductor to observe the plaintiff's condition was due to willful misconduct.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1093.]

2. NEGLIGENCE—WILLFULNESS.

An instruction that "willful is what the word implies, it means an act proceeding from a will; done of a purpose; an intention to do it"—was not error where the court, in connection therewith, illustrated the difference between "negligence" and "willfulness."

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 13.]

3. APPEAL—REVIEW—HARMLESS ERROR.

That the judge in his charge stated that he was not permitted to say whether there was any willfulness shown or not was not prejudicial error where, as a matter of fact, there was evidence tending to sustain the allegations of willfulness.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4220.]

Appeal from Common Pleas Circuit Court of Edgefield County; Gage, Judge.

Action by W. M. Talbert against the Charleston & Western Carolina Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

S. J. Simpson and Sheppard Bros., for appellant. J. Wm. Thurmond, Jas. H. Tillman, and S. M. Smith, Jr., for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the negligence and willfulness of the defendant; and it is the second time it has been before this court on appeal (72 S. C. 137, 51 S. E. 564). The allegations of the complaint are substantially as follows: That the plaintiff went into the ticket office of the defendant at McCormick, S. C., for the purpose of buying a ticket and becoming a passenger on the train of cars that had stopped at said station; that the agent was not in his office, but the conductor of said train was there, to whom plaintiff made known his business, whereupon the conductor replied: "The agent is not in. I am going. You had better get on the

train," and seemed in a hurry; that they went out, and the conductor directed him to get on the train. The alleged acts of negligence and willfulness on the part of the defendant, according to plaintiff's analysis of the complaint, are: "First, absence of a ticket agent; second, the act of the conductor in signaling the train to start when plaintiff was obviously in the act of boarding it, knowing it would start before he could board it; third, the conductor's act in inviting plaintiff to board the train, and in not holding, but signaling it forward before he could board it; fourth, the conductor's failure to help plaintiff on the train, as he saw plaintiff had but one hand; fifth, in allowing a trunk to be and remain so near the track as to endanger persons getting on and off the train; sixth, in moving the train rapidly while plaintiff was in a perilous position, and throwing him against the ground, and then moving away from him, leaving him injured without giving him any attention." The complaint is set out in full in 72 S. C. 137, 51 S. E. 564. The jury rendered a verdict in favor of the plaintiff for \$2,750, and the defendant appealed.

The first question that will be considered is whether there was error in refusing the motions for nonsuit and a new trial, on the ground that there was an entire failure of testimony tending to sustain the allegations of negligence. Under the ruling of this court upon the former appeal, the first of the alleged acts of negligence is eliminated from consideration. There was testimony, however, tending either positively or inferentially to establish at least some of the other acts of negligence, and the exceptions raising this question are overruled.

1. The next question that will be considered is whether there was error in refusing the motions for nonsuit and new trial, on the ground that there was no testimony whatever tending to show willful misconduct on the part of the defendant. Apart from the general trend of the testimony indicating a disregard of the plaintiff's rights, we would call special attention to the following testimony of E. L. Foster, the conductor in charge of said train, to wit: "Q. Did you know that this gentleman was a one-armed man when he spoke? A. I did not know the man. I did not even look up. All my conversation was with that man while I was writing. I did not look around to see who he was, because I did not care. Q. You knew you did tell him to go ahead and get on? A. Yes, sir. * * * I told him to get on the train, that it did not cost any more, and that we were not going to stay there all day." This conversation took place in the ticket office. The appellant, however, contends that this testimony does not tend to show willfulness, for the reason that the remark was made in connection with and in reference to the act of negligence, which has been eliminated from consideration, to

wit, the alleged failure to have a ticket agent in the depot at that time, and that said remark was not made in connection with nor in reference to the other acts of negligence upon which the plaintiff relied. There might be much force in this argument, if the conductor had confined his remarks to giving information in regard to the ticket office. He, however, not only did this, but directed the plaintiff to get aboard the train, which was then under his supervision and control. If the conductor failed to disregard the condition of the plaintiff after he had made known his intention to become a passenger, through a disregard of the fact as to who might be the intended passenger, then the jury had the right to consider this fact in determining whether the failure of the conductor to observe the plaintiff's condition was due to willful misconduct. Why did not the conductor care who was about to get aboard his train? The jury has answered, "Because he was reckless of the plaintiff's rights"; and this court cannot say that there was no testimony whatever tending to prove this fact. The exceptions raising this question cannot be sustained.

2. The third question to be considered is presented by the following exception: "Because the presiding judge erred in charging the jury as to the right of the plaintiff to punitive damages for willfulness, as follows: 'Willful is what that word implies; it means an act proceeding from a will, done of a purpose, an intention to do it.' And again: 'Willfulness is an act which proceeds from the will so as to make the act a purpose act.' And, further, that if the railroad company had been guilty of willfulness, as defined, then the jury should render a verdict for punitive damages; the error being that the definition of willfulness as forming the basis for punitive damages as given was incorrect in law, in that it made the test of willfulness the question whether the act complained of was, or was not, intentional, and altogether omitted the essential element of consciousness of invading another's right, or doing another a wrong." The charge set out in the exception must be construed in connection with the following, which preceded it: "Now, the difference between 'inadvertence' and 'willfulness' is this: I will illustrate it in a simple way: If you send your little boy, Mr. Foreman, on an errand for you, and tell him to feed your horse, and he returns to you, and you say to him, 'Did you feed my horse.' He says, 'No.' You say, 'Why?' He says, 'I forgot it.' This is inadvertence. But suppose he said to you, 'No; I did not feed your horse. I recalled the fact you told me to feed your horse, but I did not want to feed him.' That is willfulness. You know the difference between a negligent child and a willful child." When the charge mentioned in the exception is considered in connection with the explanatory illustration, it is free from

error. Furthermore, if the appellant desired a more extended charge, there should have been requests to that effect.

3. The last question for consideration is presented by the following exception: "Fourth. Because the presiding judge erred in charging the jury as follows: 'I am not permitted to say there is, or is not, any testimony tending to support willfulness. I am not permitted to say whether there was any willfulness or not—that is a question for the jury.' Whereas, under the law, he did have the right, and was under the duty to charge the jury that there was no evidence tending to show willfulness, if, in point of fact, there was no such evidence, and his failing to so charge the jury in this case was error of law." While his honor erred in stating that he was not permitted to say there is, or is not, any testimony tending to show willfulness (as this is a question of law), nevertheless the error was not prejudicial, because we have shown that there was testimony tending to sustain the allegations of willfulness.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES and WOODS, JJ., concur in the result.

BETCHMAN v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Aug. 16, 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DEFENSES—PLEADING.

In an action by a servant for personal injuries, defense of assumption of risk or contributory negligence must be pleaded to be available.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 858, 859.]

2. SAME—FELLOW SERVANTS—NEGLIGENCE.

Under Const. art. 9, § 15, providing that an employé of a railroad company shall have the same right to recover for injuries received from the negligence of employés as is allowed to persons not employés when the injury results from the negligence of a fellow servant engaged in another department of labor, a watchman at a railroad crossing is engaged in another department of labor from his fellow servants running a train across the crossing.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 479, 497.]

3. SAME—EVIDENCE.

Evidence of failure of persons in charge of a train to give notice of approach at a railroad crossing is competent to show negligence, in an action by the watchman at that crossing for injuries received.

4. SAME—CONTRIBUTORY NEGLIGENCE.

That a servant was guilty of an error in judgment in attempting to pass around a moving train, or in stepping out of his way, does not relieve the master from liability unless the conduct of the servant was the proximate cause of the injury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 795.]

5. SAME.

A railroad company is liable where a watchman at a crossing is seen by an engineer of a

moving train on the crossing with a lantern in his hand, if the engineer was carelessly inadvertent as to whether he would get out of the way or not.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 801, 802.]

Appeal from Common Pleas Circuit Court of Lexington County; Gage, Judge.

Action by Walter P. Betchman, administrator of John Betchman, against the Seaboard Air Line Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

Lyles & McMahan and Eford & Dreher, for appellant. W. Boyd Evans, Lawson D. Melton, and E. M. Thomson, for respondent.

GARY, A. J. This is an action at common law to recover damages for the alleged wrongful death of John Betchman, plaintiff's intestate. The complaint alleges: That on the 21st of December, 1903, John Betchman was in the employ of the defendant as a night watchman or flagman, in the city of Columbia, at the intersection of Gervais and Lincoln streets, where the car line of the Electric Railway Company crosses the main line and side tracks of the defendant. That, among the duties of the plaintiff's intestate, it was incumbent on him to give warning of the approach of any trains over the main line or side track of the defendant, and in doing so it was necessary to watch for street cars, vehicles, and pedestrians approaching and passing over said crossing, which is one of the most frequented and hazardous in the city. That while so engaged, between the hours of 8 and 9 o'clock in the evening of said day, he was killed by defendant's train of cars. That the cause of the death of said deceased was the negligence, recklessness, and wantonness of the defendant; (1) in that it was backing its train of cars at an unlawful and reckless rate of speed, in violation of an ordinance of the city; (2) without any lights to give warning of its approach; (3) without ringing the bell or blowing the whistle; (4) without maintaining a proper lookout; and (5) without using due care or caution on the occasion. The answer was a general denial. At the close of plaintiff's testimony the defendant made a motion for a nonsuit which was refused. The jury rendered a verdict in favor of the plaintiff for \$1,500, and the defendant appealed.

The first and second exceptions assign error in refusing the motion for nonsuit. The first ground of the motion for nonsuit was that "the deceased being a watchman, charged specially with watching this crossing of the Seaboard Railway and the street railway, and the street, the failure to give the statutory signals, or even the violation of the speed ordinance of the city, would not be a violation of duty as to him, which would be the approximate cause of the injury to him." The second ground was that the plaintiff's intestate had notice of the approach of the

train, and that the failure to give the signals was not, therefore, the cause of the injury.

1. Before proceeding to consider these exceptions, it may be well to determine what issues were raised by the pleadings. The answer does not interpose either the defense of assumption of risk or contributory negligence. When a person enters into the employment of another as a servant, he assumes, in law, those risks that are ordinarily incident to the service. In an action by the servant for damages sustained through the alleged negligence of the master, the latter may show, without pleading the facts as a defense, that the injury was the direct and proximate result of an ordinary risk, as such risks are presumed to have been within the contemplation of the parties, when they entered into the contract, and testimony to that effect tends directly to refute the allegation of negligence. When, however, the defendant relies upon facts occurring after the parties had entered into the agreement to show that the plaintiff had, by his conduct, assumed the risk which caused the injury, such facts must be set forth as a defense, as they are in the nature of a plea of confession and avoidance. *Montgomery v. Railway*, 74 S. C.—, 53 S. E. 987. The general rule in regard to contributory negligence is that it must likewise be pleaded as a defense. Under the pleadings in this case, the defendant is not entitled to the benefit of either the defense of assumption of risk or contributory negligence.

2. There was testimony tending to sustain each specific act of negligence alleged in the complaint, and ordinarily this would be a sufficient reason for refusing the motion for nonsuit. There is one instance, however, in which the court will grant a nonsuit, although there is testimony tending to prove the allegations of the complaint, to wit, when it fails to state facts sufficient to constitute a cause of action. *Roseman v. R. R.*, 68 S. C. 91, 44 S. E. 574; *Austin v. Mfg. Co.*, 67 S. C. 122, 45 S. E. 135. Even if we should regard the motion for nonsuit as in effect a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, in that the acts of negligence specified in the complaint were the ordinary risks, which plaintiff's intestate assumed at the time the contract of service was made, nevertheless it could not be sustained. Article 9, § 15, of the Constitution, provides that "every employé of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employés as are allowed by law to other persons not employés, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow serv-

ant, engaged in another department of labor from that of the party injured, or of a fellow servant of another train of cars, or one engaged about a different piece of work. Knowledge by any employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them." This action shows that John Betchman was either engaged in another department of labor from that of the fellow servants in charge of the train, or that he and they were engaged in a different piece of work. Therefore their negligence was not one of the ordinary risks which he assumed upon entering into the contract aforesaid. These exceptions are overruled.

3. The defendant requested his honor, the presiding judge, to charge as follows: "Employés of the company, injured at crossings, cannot take advantage of the omission of signals required by law to be given at crossings. Such statutes and ordinances are for the benefit of passengers, strangers, and travelers on the highways." The presiding judge modified the request by adding: "But the omission to give signals may be considered as circumstances tending to show negligence." This is made the basis of the third exception. A similar question is presented by the fourth and sixth exceptions. The request was erroneous, in that it was too favorable to the defendant, for plaintiff's intestate was entitled to the same rights and remedies as are allowed by law to other persons not employés, and as to such other persons evidence of omission to give signals would have been competent, as tending to show negligence. *Cooper v. Ry. Co.*, 65 S. C. 214, 43 S. E. 682, and the cases therein cited. These exceptions are overruled.

4. The defendant requested his honor, the presiding judge, to charge as follows: "So, if an employé make an error in judgment in attempting to pass around a moving car, and fails to do so, or fails to step out of the way in time, he cannot recover for injury inflicted by the car." The presiding judge modified the request by adding: "If his conduct was careless and was the proximate cause of the accident," and this is made the basis of the fifth exception. The request was erroneous, in that it ignored the element of proximate cause, and the modification which cured the defect was proper. This exception is overruled.

The seventh exception assigns error on the part of his honor, the presiding judge, in refusing to charge that there was no evidence of willfulness in this case. The appellant seems to have abandoned this exception, as it was not argued. The request, however, was properly refused, as the testimony tended to show a reckless disregard of the flagman's rights.

5. The defendant requested the presiding judge to charge as follows: "If a watchman at a railroad crossing is seen by those in charge of an approaching train, standing on or near the railroad track, with his lantern in his hand, in the night time, they have the right to assume that he will get out of the way, and if, acting upon such assumption, an injury occurs to such watchman, the railroad company is not liable." The presiding judge added: "If, however, the engineer did not consciously assume that, but was carelessly inadvertent about what the watchman would do, then the railroad is liable, if such carelessness was the proximate cause of the watchman's death." This was made the basis of the eighth exception. The request was erroneous, in that it ignored the element of proximate cause, and the modification which cured this defect was proper.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES and WOODS, JJ., concur in the result, saying: "Assumption of risk by an employé is not available unless pleaded as a defense. *Montgomery v. Seaboard Air Line* (S. C.) 53 S. E. 988."

HASSELLTINE v. SOUTHERN RY. CO.
(Supreme Court of South Carolina. Sept. 8, 1906.)

1. NEW TRIAL—DISREGARD OF INSTRUCTIONS.

Where the evidence was susceptible of two inferences, a new trial will not be granted because the jury disregarded an instruction applicable to one of them only.

2. CARRIERS—CONTRACT OF CARRIAGE.

Where a carrier is fully advised of quarantine, and a passenger asks of the conductor of one of its trains for information on the subject, it is liable for failing to give him information as to the quarantine, which would manifestly make his uninterrupted journey impossible.

Jones, J., dissenting.

Appeal from Common Pleas Circuit Court of Lancaster County; O. W. Buchanan, Special Judge.

Action by J. A. Hasseltine against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

B. L. Abney, E. M. Thomson, and W. H. Townsend, for appellant. J. Henry Foster, for respondent.

WOODS, J. The plaintiff, a passenger on the defendant railroad on his way from Jacksonville, Fla., to Columbia, S. C., for lack of a health certificate was required by the quarantine officers of the city of Savannah to leave the train at the village of Burroughs, where he was unable to obtain food or lodging for the night; was forced to incur the expense of traveling to Jessup, 50 miles in the opposite direction, and resume his journey to Columbia from that point; and was delayed 24 hours in reaching his destina-

tion. For all this he recovered a judgment against the defendant railroad company for \$1,000 damages, under the allegations that he was ignorant of the Savannah quarantine, while the defendant company which sold him the through ticket had full knowledge of it and the requirement of a health certificate by the Savannah health authorities: that the ticket agent who sold the ticket failed to stamp it subject to quarantine or to notify plaintiff of the quarantine being in force; that the conductor, while informing plaintiff of Columbia quarantine, said nothing of the Savannah quarantine. There was evidence on the part of the plaintiff tending to sustain all these allegations. On the contrary, the conductor and other employés of the defendant testified to giving plaintiff express notice of the quarantine and that a health certificate would be required of him before he could pass through the city of Savannah, and received the reply from him that he would take his chances of getting through without the certificate. There is, therefore, no dispute that the conductor, defendant's agent in charge of the train, undertook to inform the plaintiff as to quarantine; and the issue of fact was whether, knowing of the Savannah quarantine, he misled the plaintiff by failing to tell him of it, or the plaintiff took the risk of the quarantine after full notice. This issue was submitted to the jury, and the finding was against the defendant.

1. The circuit judge charged the jury: "If the plaintiff by exercising the care of a man of ordinary care and reason, knew, or ought to have known, of these quarantine regulations, and did not do it, it is his own fault." The defendant by his first exception insists a new trial should have been granted, because the verdict of the jury was in disregard of this instruction. The exception is not well founded, because the evidence was not such as to admit of no other inference than that a man of ordinary reason ought to have known of the existence of the Savannah quarantine, and the jury did not go beyond their right in finding against the defendant on this issue. If the plaintiff's testimony is credible, and that was for the jury, the conductor, by mentioning the Columbia quarantine, misled him into supposing he would have no trouble until he reached that point. As to the Columbia quarantine, the plaintiff testified he concluded to go on and undertake to get a health certificate from Lancaster, his former place of residence, which was not far from Columbia, and if he had been detained in Columbia he would have had no remedy, for as to that he took the risk. The evidence of the railroad employés is very strong, it is true, to the effect that they gave him specific notice of the Savannah quarantine; and it seems highly improbable, with full knowledge of the quarantine there, they would have failed to impart their knowledge to

plaintiff when notifying him of the Columbia quarantine. Yet all this was for the jury to decide, and without rejecting the scintilla doctrine, we can see no way for this court to interfere.

2. The defendant further insists that the circuit judge erroneously instructed the jury in effect that it was the duty of the conductor or some agent of the railroad company to inform the plaintiff as a passenger of the existence of the quarantine. The interesting question does not arise in this case whether a passenger may rely on a railroad company to advise him on purchasing a ticket of a quarantine regulation which will interfere with his continuous journey. The much simpler question here is whether, when the railroad company is fully advised of the quarantine and undertakes, through its conductor, to give information on that subject to one of its passengers, it is liable for the consequences of failing to give him information as to a quarantine which would manifestly make his uninterrupted journey impossible. There can be no doubt that the principle laid down in *Gillman v. Railway Co.*, 53 S. C. 210, 31 S. E. 224, and other cases, that a passenger is entitled to ask for and receive all information necessary to enable him to reach his destination comfortably, safely and promptly, is applicable, and if the testimony of the plaintiff be accepted, the carrier would be liable. Under the admitted facts of this case, the company was bound to inform the passenger, and there was no error in the charge on this point.

It is the judgment of this court that the judgment be affirmed.

JONES, J. (dissenting). I think there should be a new trial in this case.

1. The only reasonable inference from the testimony is that plaintiff was informed by defendant's agents that his passage from Jacksonville, Fla., to Columbia, S. C., would probably be interrupted because of quarantine regulations unless he had a health certificate, and plaintiff was willing to take passage subject to that risk. The plaintiff, at folios 46-47, testified: "Q. State precisely what that conductor stated to you. A. When I started to get on the train he asked me where I was going. I told him I was going to Columbia. He said, 'Have you a health certificate?' I said, 'No.' He said, 'You can't get into Columbia unless you have a health certificate.' I asked him why. He said Columbia was quarantined. I thought a moment, and thought if I could get that close home I could get a health certificate and get home. I told him I was willing to take my chances of getting a health certificate at Columbia, and put my grip in the car, and walked out the other end of the car, and there was a trainman there, I guess. I asked him did he know anything about Columbia being quarantined. He said 'No,' and he never said a word about Savannah being

quarantined." At folios 50-51, he testified: "Q. Why didn't you make some effort to get a health certificate after your conversation with the conductor? A. Well, it was so near train time, and I thought if I was going to be put off at Columbia I could get a health certificate from here (Lancaster, S. C.), quicker than I could from Miami, Fla. So, from what the conductor told you, you thought you wouldn't be required to get a health certificate until you got to Columbia? A. Yes, sir. Q. Did he mislead you? A. He certainly did. Q. Did you rely on the information he gave you? A. I did." A. A. Morrison, a flagman of defendant, testified, at folios 221-224: "I am stationed at the train there (Jacksonville), to see that passengers have the right tickets for our train, and he (plaintiff) came there to board the train. I asked him where he was going, asked him to see his ticket. He showed me his ticket, and I asked him if he had a health certificate. He said he could have gotten one at Miami if he had known it, but they told him he didn't need a health certificate, and on his arrival in Jacksonville he would have to have a health certificate. And that he was told in Miami he wouldn't need one? A. Yes sir. Q. And he had been informed after he reached Jacksonville? A. Yes, sir. And he asked me what I thought about his getting through. I told him I didn't think he would be able to get through; and he asked me if I knew whether Columbia was quarantined or not. I told him I did not, not that I knew of. I asked him to go and talk with the conductor in regard to the quarantine of Savannah. So went then to the conductor. After talking with the conductor— Q. You say he went off to talk, as you supposed, with the conductor? A. Yes, sir; I showed him the conductor. Q. How long before he came back? A. I think between 5 and 10 minutes. Q. Did he have anything to say then? A. Yes, sir. When he came back the baggage master was there at that time. He and I were talking about it, and I asked him if he had made any arrangements to get a health certificate. He said no, that he had not. Said he was going to chance it through any way; and the baggage master told him his ticket was good on train 84 the next morning. Q. Now, what time was this conversation when he came to you? A. When he first came to the train it was about 7:10. Q. About 7:10? A. Yes, sir. Q. And it was soon after that that he had the conversation? A. I notified him that he had 35 minutes before the train left. Q. What time does that train leave Jacksonville? A. 7:55. Q. When does the next Southern leave for Columbia? A. 9:10. Q. The next day? A. Yes, sir. Q. 9:10 the next morning? A. Yes, sir. Q. After talking with you and the baggage master, then what did he do? A. Well, he said he was anxious to go through, and said he was going to chance it." R. B. Price, the conductor of de-

defendant, testified, at folios 237, 238: "Q. Do you remember seeing the plaintiff, Mr. Hasseltine, here, in Jacksonville? A. Yes, sir. Q. Where did you first see him? A. Well, about 25 or 30 minutes before leaving time. Q. 25 or 30 minutes before leaving, what conversation did you have with him, if any? Just state. A. He asked me if that was the Southern train to Columbia. I told him it was. Asked him if he had a health certificate. He said no, he didn't. I told him they would require him to get one before he could get through Savannah. He said, well, he didn't have one, he didn't know what he would do; and he walked across the platform, I suppose about 20 or 30 feet, and engaged in conversation with a couple of gentlemen standing there for about 5 minutes. Q. Were those gentlemen he went off talking to employes or strangers? A. No, sir; They were strangers to me. In about 5 minutes he came back to me and said, well, he guessed he could get through all right, he guessed he would chance it. That was all that was said." J. V. Nichols, baggage master of defendant, testified, at folio 248: "Q. Do you remember seeing Mr. Hasseltine, the plaintiff here, at Jacksonville? A. Yes, sir. Q. Where did you first see him, and what took place between you? A. Why, he came up to the train to get on the train, and asked the flagman if that was the train for Columbia. The flagman says, 'Yes.' I was standing there at the time. The flagman says 'Yes,' and asked him if he had a health certificate. He says, 'No; they informed me in Miami I didn't need any.' The flagman says, 'Well, I don't think you can get through here without one.' And I told him, 'I think you will have trouble getting through without a health certificate.' He says, 'I am going to chance it.'" This witness further testified that he told plaintiff that Savannah was quarantined. H. R. Cramer, a quarantine inspector, testified that he had a conversation with plaintiff at Jessup, the next day, in which the plaintiff said, "When I left Miami, I didn't know anything about it; and when I reached Jacksonville I was informed that I would need a health certificate to get to Columbia, to go through Savannah. I told him, well, personally I felt sorry for him, but as an official I couldn't sympathize with him, he couldn't blame us. He said, 'No, I don't blame any of you. It was my fault. I should have a health certificate.'" The plaintiff, in reply, did not dispute any of the foregoing testimony for defendant, except to say that he did not tell the quarantine inspector, Mr. Cramer, that it was all his (plaintiff's) own fault. The court charged the jury: "I charge you, that if the plaintiff, by exercising the care of a man of ordinary care and reason, knew, or ought to have known, of these quarantine regulations and did not do it, it is his own fault. If you

find from the testimony that the plaintiff had notice or knowledge of the fact, or knowledge of such facts that a man of ordinary care and prudence would have drawn that inference; that a man of ordinary care and prudence would have been led by the information to the fact that quarantine was in vogue, then it was his own lookout." The jury must have disregarded this charge, as the evidence left no reason to doubt that plaintiff, when he boarded the train in Jacksonville for Columbia, received notice that his continuous passage would be interrupted by reason of quarantine regulations unless he had a health certificate. Under such circumstances the circuit court erred in not granting a new trial. *Buist Co. v. Lancaster Mercantile Co.*, 68 S. C. 526, 47 S. E. 978.

2. In further support of the view that there should be a new trial, I submit that there was no evidence that the delay, expulsion from the train, the inconvenience, annoyance, and expense resulting from the acts of the quarantine officers were proximate results, or even the remote results, of any negligent act or omission of the defendant's agents. It must be observed that a distinction exists as to the liability of a carrier of goods and a carrier of passengers. As to goods, the carrier is an insurer, and can only exonerate itself by showing that the loss or injury there-to occurred by the act of God or the public enemy; but as to passengers, the carrier is not an insurer, and is only liable for injuries resulting from negligence or failure to exercise the care required by that particular business. The injuries alleged in this case were the result of the acts of quarantine officers of the state of Georgia, and there is no dispute that they acted under valid police laws. There was no evidence that any agent of defendant in any way assisted the quarantine officers in expelling plaintiff from the train. The defendant merely submitted to the exercise of admittedly valid quarantine regulations by officers of the law. It was not the duty of defendant as carrier to resist such officers. It was as if a sheriff had entered the train and arrested the plaintiff for violation of some valid law or ordinance. Tracing results back to their causes the plaintiff's injuries were the result of an act of the officer of the law, the officer's act was a result of the plaintiff's violation of quarantine law in failing to have a certificate, and there was no evidence that the plaintiff failed to have such certificate at that time through any breach of duty which defendant owed him, because, even if it be conceded that the highest degree of care to passengers demands that the carrier give notice of quarantine regulations requiring a health certificate, the testimony of plaintiff shows that sufficient notice was given him to make it his own negligence not to provide himself with such health certificate.

STATE ex rel. BETTS et al. v. CITY OF RALEIGH.

(Supreme Court of North Carolina. Oct. 9, 1900.)

1. MANDAMUS—GROUNDS OF RELIEF—COMPLIANCE WITH STATUTES.

Under Acts 1903, p. 288, c. 233, providing for the holding of a local option election on 30 days' notice in any year in which a petition therefor may be filed, but not within 90 days of any city, county, or general election, the court cannot by mandamus compel the holding of a local option election during the year subsequent to the filing of the petition therefor, nor within 90 days of any city, county, or general election; mandamus not being granted to compel a prohibited act.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Mandamus, §§ 41, 42.]

2. SAME—INEFFECTIVENESS OF REMEDY.

Where, pending proceedings by mandamus to compel the holding of a local option election, authorized by Acts 1903, p. 288, c. 233, the application to perform the duty imposed by the act or the right of the relator to exact performance has expired by lapse of time, mandamus will be denied.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 48.]

Appeal from Superior Court, Wake County; Webb, Judge.

Mandamus by the state, on the relation of S. J. Betts and others, against the city of Raleigh to compel the holding of a local option election. From a judgment directing the issuance of the writ, defendant appeals. Proceedings dismissed.

Proceedings in mandamus to compel the board of aldermen of Raleigh to order an election to determine the question as to whether prohibition shall be established in said city under the provisions of Acts Gen. Assen. 1903, p. 288, c. 233. From a judgment directing the issuing of the writ, defendants appealed.

W. B. Snow, for appellant. W. A. Montgomery and J. C. L. Harris, for appellees.

BROWN, J. It is contended by the defendants that the form of the petition presented to the board of aldermen is not in compliance with the act, in that it fails to designate the questions which the petitioners desire to be voted upon at the election. In the view we take of the case it is unnecessary for us to pass on that contention. The writ of mandamus should have been denied, for the reason that it is never granted to compel an unlawful or prohibited act. The statute is express in terms and unmistakable in meaning. The election petitioned for is required to be held in same year in which the petition is filed. It cannot be held during the subsequent year. The statute also prohibits the holding of the election within 90 days of any city, county, or general election. These provisions of the statute are as binding upon the courts as upon any other departments of the state government, and effectually bar the holding of the election petitioned for. The

fact that the petitioners aver they were compelled to resort to legal proceedings to compel the defendants to order the election is immaterial. Had the mandamus proceedings been commenced much earlier, and before their final determination the obligation of defendants to perform the alleged duty required of them, or the right of the relation to exact its performance, expired by lapse of time, the relief will be denied, since courts will not grant the writ, when, if granted, it would be fruitless, or require the performance of an illegal or prohibited act. *High on Extraordinary Remedies*, p. 20; *Colvard v. Commissioners*, 95 N. C. 515; *Mauney v. Commissioners*, 71 N. C. 486; *Topping on Mandamus*, p. 67.

Proceedings dismissed.

EDGERTON & EDGERTON v. GAMES.

(Supreme Court of North Carolina. Oct. 9, 1900.)

VENUE—ACTION TO RECOVER PERSONALTY.

The complaint in an action commenced in W. county alleged that defendant obtained a horse from plaintiff and took the horse to J. county, on an understanding that, if defendant liked the horse, he would bring him back and give plaintiff a horse left with plaintiff and a certain sum to boot; that defendant refused to return plaintiff's horse; and that he obtained him by fraudulent representations. Plaintiff asked judgment for the boot money, for a decree that defendant's horse be declared plaintiff's property, for a lien on the horse in his possession for the boot money, and that it be sold to pay the same, and that plaintiff recover the horse in possession of defendant, and for damages. Proceedings in claim and delivery were also commenced. *Held*, that plaintiff had set out three causes of action—affirming the trade, asking for judgment for the boot money, and that defendant's horse be decreed to be plaintiff's property, and for the declaration of a lien; second, disaffirming the contract and seeking to recover the horse that defendant carried off; third, alleging that defendant obtained the horse by fraud and asking recovery of damages—and that hence, in view of the second cause of action and the fact that, in case of recovery thereon, the horse could not be applied on any recovery on the other causes of action, the cause was properly removed to J. county.

Appeal from Superior Court, Wayne County; Council, Judge.

Action by Edgerton & Edgerton against Charles Games. From an order granting a motion to remove the cause to another county, plaintiffs appeal. Affirmed.

W. C. Munroe, for appellant. Dortch & Barham and J. A. Wellons, for appellee.

CLARK, C. J. The complaint alleges that the defendant procured a horse from the plaintiffs in Goldsboro on an agreement that if the plaintiffs would let him take the horse to his home in Johnston county to see if he would plow, and if he liked the horse, he would bring him back the following Monday, and would give plaintiffs in exchange a horse which he left with them and \$80; that the defendant has not returned the horse, and

has refused on demand to give him up; and that the defendant obtained the possession of the horse by false and fraudulent representation, with the fraudulent intent to defraud plaintiffs and asks for judgment for \$80, for a decree that the horse of defendant left in their possession be decreed their property, that it be adjudged that they have a lien upon the horse defendant has for \$80 and that he be sold to pay the same and that they recover possession of their horse in possession of defendant and for recovery of \$500 damages. Ancillary proceedings in claim and delivery were taken out. The defendant gave bond and retained possession of the horse.

The plaintiff has practically set out three different causes of action, though they are not separately and distinctly stated and numbered: (1) Affirming the "swap," asking for judgment for \$80 boot and that the defendant's horse left with them be decreed to be their property, and for declaration of a lien for \$80 on the horse the defendant has in possession. (2) Disaffirming the contract, and seeking to recover the horse the defendant carried off. (3) Alleging that the defendant obtained the horse by fraud and misrepresentation, and asking recovery of \$500. Whether his honor was correct in holding that the second was the chief cause of action, it is certainly one cause of action, and the judge properly granted the defendant's motion to remove the cause to Johnston county. This case differs vitally from *Woodard v. Sauls*, 134 N. C. 274, 46 S. E. 507. In that case there was but one cause of action, the recovery of the amount due plaintiff on a promissory note, and the recovery of sundry collaterals was asked for the purpose of applying their proceeds to the discharge of the judgment on the note. Here on either the first or third cause of action there is no legal ground to recover possession of the horse. That could be had only upon the second cause of action, and if had upon that cause of action the horse could not be applied, as in *Woodard v. Sauls*, supra, upon any recovery upon the other causes of action.

No error.

STATE v. SHEPPARD.

(Supreme Court of North Carolina. Oct. 2, 1906.)

CRIMINAL LAW—INDICTMENT—COUNTS—GENERAL VERDICT—EFFECT.

An indictment charged defendant in the first count with unlawfully carrying on the business of putting up lightning rods in N. county without having obtained a license and paid the tax as required by law, and in a second count with unlawfully carrying on the business of selling lightning rods under like circumstances. There was ample evidence to support a general verdict of conviction on the first count, on which the verdict was rendered. *Held*, that such verdict was sufficient to sustain the judgment, though the evidence showed that the sales referred to in the second count constituted interstate

commerce, and were therefore not within the state laws.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 2098-2101.]

Appeal from Superior Court, Nash County; M. B. Jones, Judge.

A. J. Sheppard was convicted of unlawfully carrying on the business of selling lightning rods without first having obtained a license and paid the tax required by law, and he appeals. *Affirmed*.

The defendant was convicted under the following bill of indictment:

"The jurors for the state upon their oath present: That A. J. Sheppard, late of the county of Nash, on the 30th day of April, 1906, and for 12 months prior thereto, with force and arms, at and in the county aforesaid, was then and there unlawfully and willfully engaged in carrying on the business of putting up lightning rods without first having paid the license tax and obtained the license required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors upon their oath aforesaid do further present: That the said A. J. Sheppard afterwards, to wit, on the day and year aforesaid, with force and arms, at and in the county aforesaid, was then and there unlawfully engaged in carrying on the business of selling lightning rods without first having paid the license tax and obtained the license required by law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state. Daniels, Solicitor.

"A true bill. Miles Bobbitt, Foreman of the Grand Jury."

There was evidence on the part of the state tending to show that within two years prior to finding the bill of indictment the defendant had engaged in the business of putting up lightning rods at and in said county of Nash without having obtained a license or paid the license tax as required by law. The evidence for defendant was as follows: A. J. Sheppard, the defendant, testified: "I am agent for Cole Bros., of St. Louis, Mo., with factory in Greencastle, Ind. I only solicit orders for future delivery. I carry no rods for sale or delivery, but only samples for exhibition, and deliver none except such as have been sold before they left the factory. This is the contract under which I made sale of rods to Mr. Yarborough. (Here contract introduced and read in evidence, and attached as a part of this case on appeal. Contract has not been filed. T. A. Sills, C. S. C.) I did business in no other way than that specified in this contract with Yarborough. The delivery is not complete until the rods are put up. The sale and delivery of the rods under the contract includes the putting up of rods whenever the purchaser requests, for which no extra charge was to be made." Cross-examination. "I am in the lightning rod business as agent. I have put up rods

on half dozen houses or more. I was in different parts of the county. I got the rods from Cole Bros. that I put on Mr. Yarborough's house. They were delivered to me in the station at Tarboro. I took them by wagon to Springhope. There were other rods in the shipment—900 feet in all. This shipment was sent to Day & Hodges, Tarboro, N. C. They charged me up with what I got and gave me credit with what I put up. The rods were shipped from the factory in Indiana to fill the orders. As soon as I signed contract with Mr. Yarborough, I sent it to Cole Bros., and they sent it back to me at Springhope. There were no shipments of rods made to me except upon contracts already taken, in form the same as in this case."

Counsel for the defendant requested the court to instruct the jury that the defendant was not guilty upon the foregoing evidence, which request was declined by the court, and to which the defendant excepted. His honor charged the jury as follows: "If you find from the evidence that this man was in the business of putting up lightning rods, carrying on the business of putting up rods in Nash county; that he made contracts with people to rod their houses, and the rods were shipped to him, and he personally superintended and had the rods put on, after having made contracts for that purpose—it makes no difference where the rods came from. If he carried on the business of putting up rods, then he would be guilty; otherwise, not." To the above charge the defendant excepted. Verdict of guilty, and the defendant fined \$200 and the costs of the action. The defendant moved for a new trial for errors of the court in refusing the instruction as above stated, and in the instructions given to the jury as above set forth. Motion denied. Notice of appeal to the Supreme Court given in open court. Appeal granted.

Gilliam & Gilliam, for appellant. F. S. Sprull and the Attorney General, for the State.

HOKE, J. (after stating the case). The bill of indictment charges the defendant with unlawfully carrying on the business of putting up lightning rods in the county of Nash without having obtained license and paid the tax as required by law. There is also a count in the bill for unlawfully carrying on the business of selling lightning rods under like circumstances. Both acts are made criminal offenses of the grade of misdemeanors by the state revenue law in force at the time of the transaction, and on this bill of indictment there was a general verdict of guilty. It is well established that such a verdict, on an indictment containing several counts charging offenses of the same grade and punishable alike, is a verdict of guilty on each and every count; and if the verdict on either count is free from valid objection, there being evidence tending to

support it, the conviction and sentence for that offense will be upheld. It was accordingly held for law in this state that: "When there is a general verdict of guilty on an indictment containing several counts, and only one sentence is imposed, if some of the counts are defective, the judgment will be supported by the good count; and in like manner, if the verdict as to any of the counts is subject to objection for admission of improper testimony or erroneous instruction, the sentence will be supported by the verdict on the other count, unless the error was such as might or could have affected the verdict on them." *State v. Toole*, 106 N. C. 736, 11 S. E. 168. If it should be conceded, therefore, that a conviction on the second count for an unlawful sale could not be upheld by reason of the interstate commerce clause of the federal Constitution, this would in nowise invalidate a conviction on the first count, to wit, for unlawfully carrying on the business of putting up lightning rods in Nash county, which was, undoubtedly, a domestic or intrastate business. This was charged in the first count as a distinct and separate offense. There was ample evidence to support it, and the charge of the court excepted to shows clearly that the conviction was had for this offense, and for this alone. In this aspect of the case the conviction of the defendant is sustained and controlled by the decision of this court in *State v. Gorham*, 115 N. C. 721, 20 S. E. 179, 25 L. R. A. 810, 44 Am. St. Rep. 494, and we do not consider that further discussion or citation of authority is required.

There is no error, and the judgment of the court below is affirmed.

No error.

JONES v. EAST CAROLINA R. CO.
(Supreme Court of North Carolina. Oct. 2, 1906.)

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE.

Intestate, a section master, was directed to go to a certain station on defendant's road, and for this purpose took his place on the platform of defendant's passenger car, to which a certain flat car was attached. There was no railing around the end of the platform, and as the train approached the station the conductor came out on the platform and moved to step around intestate, when the latter started to step across from the passenger to the flat car. As he was about to do this, the car was uncoupled from the passenger car, and intestate fell between them, and was killed. *Held*, that the conductor was not bound to anticipate that intestate would attempt to cross from one car to the other, and was not guilty of negligence in failing to take steps to prevent such injury.

Appeal from Superior Court, Duplin County.

Action by Thad Jones, as administrator, etc., of the estate of Willie Brock, deceased, against the East Carolina Railroad Company. From a judgment in favor of de-

defendant on a nonsuit granted at the close of plaintiff's case he appeals. Affirmed.

Stevens, Beasley & Weeks and Rountree & Carr, for appellant. John L. Bridgers, for appellee.

CONNOR, J. Plaintiff alleged that prior to, and on the day of, the accident his intestate was employed by defendant as a section master; that he was directed to board the train at Fountain, with certain section hands under his charge, and enter the passenger car, to which a flat car was attached, and go to Toddy and other stations on the road, for the purpose of loading certain flat cars with iron, etc.; that while sitting on the platform of the passenger car the defendant's conductor negligently and without notice or warning to his intestate caused the said flat car to be detached from said passenger car, at which time his intestate was walking from the rear end of said passenger car to the flat car, and by reason of such negligence said intestate fell between the cars and was killed. Defendant admitted the employment and the direction given to enter the passenger car for the purpose alleged, and denied that its conductor was guilty of negligence, etc. The testimony showed that the passenger car was divided into three compartments. The rear one was for the accommodation of white passengers, the middle for colored, and the front end for baggage. There was sufficient room in the compartment for whites to permit plaintiff's intestate to ride therein. There was no railing around this end of the platform. It was used for loading trunks, etc. The plaintiff sets forth the testimony relied upon to sustain the charge of negligence as follows: "As the train was approaching Toddy station, Mr. Stamper, the conductor, came out on the platform and moved like he was going to step around Willie Brock. Mr. Brock got off the box on which he was sitting and started to step across from the passenger car to the flat car, where I and some of the laborers were. They pulled ahead; that is, the engine went on to place the flat cars on the side track. At this time the train was running at a good rate of speed, 8 or 10 miles an hour, and the train slackd up and butted together, so that Frank Dancy could cut the flat cars aloose from the passenger car, for the purpose of putting the flat cars on the side track. Just at the time that Willie Brock got up from the box Mr. Stamper signed the engineer ahead, and about the same time Mr. Brock went to make a step the car suddenly pulled aloose, and Mr. Brock stepped and fell between them, and the passenger coach, which was still running at the rate of 8 or 10 miles an hour, ran over him. Frank Dancy was a colored man, and he was a brakeman on the train, and he was working for the railroad at that time. I saw the signal given to go ahead when the cars was cut loose.

The conductor threw up his hand for the engineer to go ahead. As soon as this was done, Mr. Brock fell through. Mr. Brock had gotten up from the box and was walking around to make his step when the signal was given. I do not think Mr. Brock saw Mr. Stamper give the signal. I was about 2½ feet from the end of the flat car when I saw the signal given by Conductor Stamper for the engineer to pull ahead. I was four or five feet from the conductor when he signaled the engineer to go ahead. The conductor said nothing to me. Mr. Brock was standing kinder with his back to the conductor when the signal was given. I heard the conductor say nothing. I reckon the conductor saw us on the platform. He came out on the platform."

Before proceeding to discuss the main question involved in the plaintiff's appeal, it will be well to understand clearly the position of the parties at the moment the conductor signaled the engineer. The plaintiff's intestate was sitting on a box on the platform of the passenger car. The conductor as he came out on the platform "moved like he was going to step around Brock." "Just at the time Brock got up from the box the conductor signed the engineer ahead, and about the same time Brock went to make a step, the car suddenly pulled aloose and Brock fell between them." We need not consider Brock's conduct in attempting to cross the space between the cars in discussing the question of the conductor's negligence, which lies at the threshold of the case. We attach no importance to the fact that Brock was on the platform, instead of inside the car, nor to the fact there was no railing around the platform. Neither of these conditions is proximately related to the injury. The pivotal question is, what duty did the conductor owe to Brock, in the light of the conditions as they existed and as he saw them, in ordering the cars to be cut loose? There is no evidence tending to show that Brock was called upon in the discharge of any duty in the course of his employment to go upon the flat car, or that there was any circumstance suggesting to the mind of the conductor that he would do so. So far as the evidence shows, the movement of Brock was the result of an instantaneous mental operation of which the conductor had no suggestion and no reason to anticipate. We assume, in this connection, that Brock did not see the conductor "sign the engineer." Adopting the definition of negligence given by Baron Alderson (25 L. J. Ex. 212), which is practically accurate, as "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do," the question arises, what duty did the conductor owe the plaintiff's intestate at the time of and in regard to directing the flat car to be cut

loose? It is conceded that the act itself was proper to be done, and that there was no negligence in the means employed for doing it. There is no suggestion that there was any breach of duty in either respect. It is said that the act was the proximate cause of the injury, or that, if the cars had not been cut loose at that moment, the plaintiff's intestate would not have been injured. This must, for the purpose of this decision, be conceded.

The case then comes to this: The conductor was doing a lawful act in a lawful way, and by reason thereof the intestate was injured. What, if any, element is wanting to give plaintiff a complete cause of action? Defendant says that there is no evidence from which a reasonable man could have foreseen the result from the act. The plaintiff denies this, and insists that the question should have been submitted to the jury. It is upon the answer to this contention that the legal liability of the defendant depends. If one, in a lawful manner, does what he has a right to do, and he can, or should by the exercise of reasonable care, foresee that his act will inflict injury upon another, he should either desist or at least give the other warning, so that he may avoid the injury. It will at once occur to the mind that this proposition is not strictly and without limitation accurate. It is sufficiently so for the purpose of this discussion. It is difficult, if not practically impossible, to lay down general propositions upon so evasive and complex a subject which are not open to qualification. Applied to such cases as the one before us, the language of Sir Fred Pollock is applicable: "The substance of the wrong itself is failure to act with due foresight. * * * Now, a reasonable man can be guided only by a reasonable estimate of probabilities. If men go about to guard themselves against every risk to themselves or others which might by ingenious conjecture be considered as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precautions by the measure of what appears likely in the known course of things. This being the standard, it follows that, if in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability." Pollock on Torts, 39, 40. In *Drum v. Miller*, 185 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 328, Mr. Justice Walker, in a well-considered opinion, discussing the several phases of the question involved herein, says: "There is a distinction we think between the case of an injury inflicted in the performance of a law-

ful act and one in which the act causing the injury is in itself unlawful, or is, at least, a willful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but, when the act is lawful, the liability depends not upon the particular consequences, or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act." The same principle is well stated by Mr. Justice Hoke, in *Ramsbottom v. R. R.*, 188 N. C. 38, 50 S. E. 448: "The plaintiff is required to show, * * * first, that there has been a failure to exercise proper care in the performance of a legal duty which the defendant owed to the plaintiffs under the circumstances in which they were placed, * * * and, second, that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." Barrows on Neg. 10, quoting the language of Channell, B., in *Smith v. London & S. W. Railroad*, L. R. 6 C. P. 21, says: "Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not." He further says: "It must be kept in mind that a breach of duty is essential to a recovery in an action for negligence. Harm may result directly from a nonnegligent act. There may be *damnum* without *injuria*. A person, in a careful and prudent manner, attempts to separate two dogs which are fighting, and accidentally injures plaintiff. Here the defendant's act was unquestionably the proximate cause of the injury, but it is equally unquestionable that no one in defendant's position could have foreseen the possibility of injury resulting to any one, and, if he used the proper degree of care to separate the dogs, there can be no liability." Barrows, 12. Many cases are cited illustrating the principle, but as the author well says it is difficult to classify them. *Hudson v. Railroad*, at this term, is an illustration of the rule. There the act of "kicking the cars" was negligent, and the defendant is responsible for the injury which proximately flowed from the negligent act, although he did not and could not have foreseen the particular injury. In the case which we are considering we do not find any evidence, and by this we mean any fact or reasonable inference to be drawn from the facts tending to show that the conductor could, under the existing conditions, have foreseen that plaintiff's intestate would step on to the flat car.

That was the only duty which he owed him; and, there being no breach in that respect, his honor properly rendered judgment of nonsuit. Of course, as is illustrated by the ingenious argument of plaintiff's counsel, it is not impossible to speculate or form conjectures raising inferences remote and improbable that the conductor may, by the most careful analytical process, have suspected that plaintiff's intestate would step on the flat car. This is not the standard by which to measure his conduct. The law consists of practical, workable rules, based upon observation and experience, not scholastic speculation. As was said by a philosophical writer upon another subject, courts must cease to be pedantic and endeavor to be practical. *Ins. Co. v. Railroad*, 138 N. C. 42, 50 S. E. 452.

We have not considered the question of contributory negligence for manifest reason. Plaintiff relied upon the case of *Whisenant v. Railroad*, 137 N. C. 349, 49 S. E. 559. That case is distinguished from this in that there the train was approaching and near to the station at which the plaintiff, with the other hands, usually alighted, and the engineer gave a sudden jerk whereby plaintiff was injured. Here the car was some distance from the depot and running at 8 or 10 miles an hour. In *Whisenant's Case*, supra, *Clark, C. J.*, says: "The engineer, instead of stopping as usual at that point in response to a signal from the conductor, suddenly put on steam which caused a sudden and violent jerk, which threw the plaintiff on the track," etc. The distinction between the cases is manifest.

The judgment of nonsuit must be affirmed.

KNOTT et al v. CAPE FEAR & N. RY. CO.
(Supreme Court of North Carolina. Oct. 9, 1906.)

1. RAILROADS—FIRES—FOUL RIGHT OF WAY.

Where fire escaped from a railroad right of way and burned plaintiff's woods, the railroad's negligence in permitting its right of way to remain covered with inflammable material was an act of negligence, sufficient of itself to cause the damage and operate as a proximate cause thereof; the fire having immediately spread from the right of way to plaintiff's property without any intervening efficient or independent cause.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1687-1693.]

2. APPEAL—ADMISSION OF EVIDENCE—HARMLESS ERROR.

Where, in an action for damages to plaintiff's land by fire communicated from defendant's locomotive, plaintiff alleged that the spark arrester on the locomotive was defective, but also charged generally that the fire was caused by a spark emitted from the locomotive which ignited the combustible material negligently permitted to remain on defendant's right of way, which fire spread thence to plaintiff's standing timber, which was destroyed, and the proof was sufficient to show that defendant's negligence in permitting its right of way to remain in a foul condition was the proximate cause of the

fire being communicated to plaintiff's land, the admission of evidence that the spark arrester and the fire box of defendant's locomotive which emitted the fire were defective was harmless.

3. RAILROADS—FIRES—EVIDENCE.

In an action for loss by fire set out by sparks from defendant's locomotive on or about April 4, 1904, evidence that witnesses had seen sparks flowing from the smokestack of the same locomotive between February and April, which set fire on the right of way near where plaintiff's timber stood, was admissible as bearing on the actual condition of the locomotive and to show that it was defective.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1721, 1727.]

Appeal from Superior Court, Wake County; Council, Judge.

Action by J. B. Knott and others against the Cape Fear & Northern Railway Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

The plaintiff alleged that he owned a tract of land through which the defendant's railway ran and that defendant permitted its right of way to become foul with leaves, brush, and other combustible material, and also used an engine without a proper spark arrester to its smokestack. The seventh and eighth sections of the complaint read as follows: "That on or about the 4th day of April, 1904, the said combustible matter, then and there being on the defendant's said right of way, which said combustible matter the defendant had negligently and carelessly failed to remove, was set on fire by a spark emitted from one of defendant's engines, and the fire thereby started was communicated to the lands of the plaintiffs; that the fire communicated as aforesaid to the lands of the plaintiffs spread through the woods upon the lands and burned over nearly the whole of said land; that the land so burned over amounted to 130 acres, to the great damage of the plaintiffs." The material allegations of the complaint were denied in the answer. The plaintiff introduced testimony tending to establish the allegations of his complaint, and the defendant's proof tended to show the contrary. The plaintiff's counsel on the cross-examination of defendant's witness W. J. Angier asked him the following questions, which were admitted and the defendant excepted: "When the steam was shut off and the train was rolling downgrade, were not sparks shaken frequently out of the fire box? Ans. Yes; but when they fall out of the fire box they fall into the ash pan. Q. When they fall out of the ash pan where do they fall? Ans. I do not know." A witness for the plaintiffs, J. W. Adcock, was permitted to testify that sparks could be seen coming from the engine in question every night between February 15, and April 15, 1904, and that it set the right of way "along there" on fire, and another of the plaintiffs' witnesses, D. H. Fuquay, testified that he had taken notice of the engine; that "in the daytime you could seldom see any sparks or fire, but occasionally you could see fire at

night flowing from the smokestack and falling from the ash pan." All of this testimony was duly objected to by the defendant. The defendant did not ask for any special instructions. The court thus charged the jury upon the first issue: "The negligence charged in the complaint is that the defendant permitted its right of way to become foul by the accumulation of inflammable matter upon it, and that its engine was not equipped with the proper kind of spark arrester, and that by reason of the condition of the right of way and engine a spark was emitted from the engine of defendant, No. 99, and came in contact with the matter on the right of way, and in this manner set out the fire that burned plaintiff's woods and land. The plaintiffs having alleged that defendant negligently burned their property and pointed out in the complaint the negligence charged, before the plaintiffs are entitled to have this issue answered 'Yes,' they must satisfy you by the greater weight of evidence that the defendant so negligently burned their property." There was no exception to the charge. The issues with the answers thereto were as follows: "(1) Was plaintiffs' property burned by the negligence of the defendant as alleged in the complaint? Ans. Yes. (2) What damage, if any, are plaintiffs entitled to recover? Ans. \$600." Judgment was entered upon the verdict, and the defendant appealed.

H. E. Norris, for appellant. Graham & Devin and Argo & Shaffer, for appellees.

WALKER, J. (after stating the case). The contention of the defendant based upon the testimony of the witness W. J. Angler, which was admitted by the court over defendant's objection, is that the plaintiff in his complaint alleges as the only acts of negligence on the part of the defendant that the right of way was foul and the spark arrester attached to the smokestack was defective, and, there being no allegation in regard to the fire box, any evidence as to a defect in that was irrelevant and prejudicial. It does not appear to us after a careful reading of the complaint, and giving it that liberal construction with a view to substantial justice between the parties which is required by the law (Revisal of 1905, § 495), that the plaintiff has thus restricted himself to proof only of the defect in the spark arrester and the bad condition of the right of way. It is true he alleges that the spark arrester was defective, but in the seventh section of the complaint he states generally that the fire was caused by a spark emitted from the engine which ignited the combustible material on the right of way, and thence spread to his standing timber, which was destroyed. But can it make any difference in the legal aspect of the case whether the spark or live coal came from the smokestack or the fire box, even assuming them to have been in the

best condition, if eventually it fell upon the foul right of way and produced the conflagration? We think not, because the permitting its right of way to remain in a dangerous condition was an act of negligence, sufficient of itself to cause the damage and necessarily proximate to it, if the fire immediately and without any intervening, efficient, and independent cause spread to the plaintiff's woods. *Aycock v. Railroad*, 89 N. C. 321; *Phillips v. Railroad*, 138 N. C. 12, 50 S. E. 462; *Railroad v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. If one does an act lawful with respect to the complaining party, and does it in a proper way, the ensuing loss, if there is any, is not in the legal sense an injury, but *damnum absque injuria*. If the act is unlawful or is done in an unlawful manner, it is an actionable wrong, and, of course, if it is done negligently—or, in other words, if in doing it he fails to exercise the foresight of a man of ordinary prudence and by reason thereof does not see that some damage will follow, when otherwise he would have discovered it—the wrongdoer is liable for the damage which proximately results. *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528; *Jones v. Railroad*, 55 S. E. 147, and *Hudson v. Railroad*, 55 S. E. 108, at this term. The quality or particular character of the act of negligence is immaterial, so that it is sufficient to produce the injury. The judge, after reciting substantially the allegation of the complaint, charged the jury in this case that before they could bring in a verdict for the plaintiff they must find that the defendant committed the very acts of negligence so set forth by him; that is, that the spark arrester was defective and the right of way foul and that by reason of the defect in the spark arrester a spark was emitted from the engine and fell on the right of way where it ignited the inflammable material there lying, and caused the destruction of the plaintiffs' property. So that the jury must have found that the spark arrester was defective and the right of way was foul, as they gave the plaintiff their verdict. By the charge the testimony as to the fire box and ash pan was virtually taken from the jury. There were two acts of carelessness specified by the plaintiff in one part of his complaint, namely, having a defective spark arrester and keeping a foul right of way, but when he came to allege in another part the negligence that caused the injury he departed from this specific allegation and charged generally that the spark fell from the engine, without describing the particular place from which it was emitted, and that by reason thereof the fire was started on the right of way.

In no view of the matter is it material to inquire how it happened to fall from the engine, so that it lighted on the right of way, which was in bad condition and caused the

fire. *Simpson v. Lumber Co.*, 133 N. C. 95, 45 S. E. 469; *Troxler v. Railroad*, 74 N. C. 377; *Wise v. Railroad*, 85 Mo. 178. It does not necessarily require two acts of negligence to make a wrong. The jury must have found, as we have already said, that the right of way was foul, for there was no allegation that the spark fell outside of it, but on it, and if they followed his honor's charge, and it must be assumed that they did, we are bound to conclude that they so found, as the foulness of the right of way was one of the integral elements of the negligence charged in the complaint, and they were clearly instructed, as has been shown, that unless they found the facts to be as therein alleged they should return a verdict for the defendant. Having found this act of negligence, it was sufficient to sustain the verdict, and any error as to the fire box and ash pan, if there be any, was, of course, harmless.

The view we have taken is fully supported, we think, by the recent decision of this court in *Williams v. Railroad*, 140 N. C. 623, 53 S. E. 443, where the Chief Justice, with great clearness, summarizes the law of negligence bearing upon cases of the class to which this belongs. We said in *Simpson v. Lumber Co.*, supra: "It can make no difference with respect to the plaintiff's right to recover whether the burning [of plaintiffs' timber] was caused by a defective engine or by setting on fire combustible material carelessly left by defendant on its right of way." See, also, *Craft v. Timber Co.*, 132 N. C. 151, 43 S. E. 597, in which the question of the liability of a railroad or a logging-road for fires started on its right of way by its engines is considered. The decisions in other jurisdictions seem to be in perfect accord with our own on this question. 8 *Wood on Railways* (Ed. 1894) § 329; *Baldwin, Am. Railroad Law*, 440; *Railroad v. Salmon*, 39 N. J. Law, 299, 23 Am. Rep. 214; *Railroad v. Rogers*, 62 Ill. 346; *Longabaugh v. Railroad*, 9 Nev. 271; *Salmon v. Railroad*, 38 N. J. Law, 5, 20 Am. Rep. 356. In *Baldwin, Am. R. Law*, p. 441, it is said: "To support the action in these cases for burning property, it is not necessary to show that there was negligence in letting the engine scatter sparks. It is inevitable that some sparks should escape. The actionable negligence is that, notwithstanding this, the company left material on its premises upon which such sparks would naturally fall, and which they would naturally set ablaze." A typical case upon this subject is that of *Railroad v. Medley*, 75 Va. 499, 40 Am. Rep. 734, where *Staples, J.*, says for the court: "A railway company may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks and operated by the most skillful engineers. It may do all that skill and science can suggest in the management of its locomotives, and still it may be guilty of gross negligence in allowing the accumulation of dangerous combus-

tible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most improved and best constructed machinery." It all comes to this: That whether the spark arrester or the fire box was defective or not, if a spark was emitted from the engine and kindled the fire on defendant's right of way because it was foul, it is liable to the plaintiff for the loss of his timber caused thereby, and, that fact having evidently been found by the jury, all evidence as to the defectiveness of the fire box or as to live coals dropping therefrom, and even that as to the spark arrester, was irrelevant and harmless.

The testimony of the witnesses *Adcock* and *Fuquay* was clearly competent, and there can be no doubt that it was relevant to the issue being tried. That they had seen the same engine which caused the fire when plaintiff's timber was burned as it passed and repassed, and that sparks were flowing from the smokestack, and that between February and April, as stated by one of the witnesses, "it set fire on the right of way" near where the timber stood, must be some evidence bearing upon the actual condition of the engine and showing that it was defective in some way. But the very question has been recently decided by this court and such evidence held to be relevant. *Johnson v. Railroad*, 140 N. C. 581, 53 S. E. 362. It is therefore useless to prosecute the inquiry any further. The case of *Ice Co. v. Railroad*, 128 N. C. 797, 36 S. E. 279, instead of being an authority against the admissibility of the testimony, by the plainest implication decides it to be competent and relevant. But, as was the case with the other evidence to which the defendant objected, the questions put to the witnesses *Adcock* and *Fuquay* were immaterial, and the answers thereto did no harm, as it made no difference whether the engine was defective or not; the bad condition of the right of way, which fact was manifestly found by the jury, being fully sufficient to sustain their verdict.

We find no error in the trial of this case. No error.

DU BOSE v. GLADDEN.

(Supreme Court of South Carolina. Aug. 16, 1906.)

1. ADMINISTRATORS—RECOVERY OF ASSETS—EVIDENCE.

In an action by the personal representative of a wife against a vendee of her husband's heir at law to recover personal property on the

ground that the husband was the agent of the wife, a nonsuit held properly granted.

2 HUSBAND AND WIFE—AGENCY—PRESUMPTIONS.

Though the husband may be presumed to be an agent of his wife from the fact that he took charge of her property, there is no presumption that in buying other property of like kind he acted as her agent.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 525.]

Appeal from Common Pleas Circuit Court of Chester County; Frank B. Gary, Special Judge.

Action by Sarah F. Du Bose, administratrix of Susan C. Kell, against William A. Gladden. From an order granting a nonsuit, plaintiff appeals. Affirmed.

Halcott P. Green and Henry McLure, for appellant. J. H. Marion, Glenn & McFadden, and Caldwell & Gaston, for respondent.

GARY, A. J. This is an action in claim and delivery, to recover the possession of five mules, one portable steam engine, two cotton planters, and farming implements of the alleged value in the aggregate of \$715. At the close of the plaintiff's testimony, the defendant made a motion for a nonsuit, which was granted, on the ground that there was no testimony tending to show that the plaintiff's intestate was the owner of the property described in the complaint.

1. While there are several exceptions, they present, practically, but the single question whether there was error on the part of his honor, the presiding judge, in granting the nonsuit on the ground just mentioned. There was testimony to the effect that Mrs. Jane Hemphill, the mother of plaintiff's intestate, departed this life in 1861, leaving a will, whereby she advised and bequeathed to her said daughter (then the wife of Dr. Wade Douglass, who died during the war), one-third of all her real and personal estate, which was not to be subject to the debts, contracts, or control of her then living or any future husband. Shortly after the death of Mrs. Jane Hemphill, Mrs. Wade Douglass entered into possession of the lands devised to her, and also took possession of the personal property used for farming purposes on said lands. In 1864, Miss Mary E. Hemphill (a sister of Mrs. Douglass) died, leaving a will, by which she disposed of her real and personal property. Under the provisions of her will, Mrs. Douglass took possession of the two plantations known as the "Home Place" and the "Rocky Creek Place." In 1866, Mrs. Douglass became the wife of B. E. Kell, who took charge of the lands in her possession, together with the stock and farming implements thereon. In 1873, an action to marshal the assets of Miss Mary E. Hemphill's estate was commenced by her executor against Mrs. Susan C. Kell and her husband, B. E. Kell. The latter filed an answer, in which he alleged that he was the owner of the work animals, cattle, and farming imple-

ments on said plantations. There does not seem to have been any specific adjudication of this claim, but there was a report by a referee, in which it was stated that Mrs. Kell was then (1873) "in possession of the personal property on said plantation, except the mules, horses, cattle, and other personal property, lost or destroyed by the casualties of war, during the winter of 1865." This report was confirmed and made the judgment of the court. Under and by virtue of the order of the court in said action, the two plantations known as the "Home Place" and the "Rocky Creek Place" were sold, and Mrs. Kell became the purchaser thereof. B. E. Kell died in August, 1902, and at the time of his death was in charge of the plantation known as the "Home Place," and also in possession of the property described in the complaint, claiming it as his own. After his death his nephew, Dr. B. E. Kell, took charge of the place and property in question. The defendant came into possession of the property in dispute under claim of right from Dr. B. E. Kell. Mrs. Kell died in December, 1902, but did not live on said plantation after the death of her husband. From time to time, B. E. Kell bought other stock and farming implements, some of which were used in the cultivation of said lands, as necessity required. In fact, he bought, sold, and raised stock to a considerable extent for his own profit, and at times became surety for his tenants when they bought stock with which to work the said lands. There was no testimony that the mules described in the complaint were the offspring of the animals owned by Mrs. Kell, nor that the machinery or farming implements were at any time her property. It cannot be presumed that the property described in the complaint, and that on the premises when B. E. Kell first took possession thereof, was the same, because, in the first place, such presumption would be against the laws of nature and the usual course of events, and, in the second place, the testimony shows that other animals, etc., were purchased by him during the time he was in possession, to replenish those that had been consumed in the use, and that during the years in which the lands were rented to tenants they owned the stock used in farming.

2. The main proposition upon which the appellant seems to rely is that B. E. Kell was the agent of his wife, and that as such he bought the stock, etc., necessary to replenish that which had been consumed in the use. There was no direct testimony that he was her agent, nor are we able to discover any facts from which it could be legally presumed that he was acting as such, when he made the purchases from time to time. But, even if there was a presumption of agency in the first instance in taking charge of her property, it could not be presumed that he acted as her agent in buying other property, for this would be to presume upon a presumption.

In 22 Enc. of Law, 1236, it is said: "A presumption can arise only from facts actually proven by direct evidence; one presumption cannot form the basis for a second presumption." The reason for the rule is thus stated in the note on said page: "To hold that the fact presumed becomes an established fact, for the purpose of serving as a base for a further presumption, 'would be to spin out the chain of presumptions into the regions of the barest conjecture.' *Diel v. Missouri Pac. R. Co.*, 87 Mo. App. 454."

It is the judgment of this court that the judgment of the circuit court be affirmed.

TUCKER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 16, 1906.)

1. APPEAL—EXCEPTIONS—SUFFICIENCY.

An exception setting forth merely an extract from the charge, without specifying the error, is insufficient.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1621.]

2. SAME—HARMLESS ERROR.

Though an instruction as to the measure of damages is erroneous, the error is harmless where the jury find for defendant.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4033, 4223.]

3. DAMAGES—PUNITIVE DAMAGES.

An instruction that to warrant punitive damages, in an action for personal injuries for failure to transport a passenger, there must be willfulness, wantonness, recklessness, and an utter disregard of the rights of others, is not erroneous.

Appeal from Common Pleas Circuit Court of Charleston County; Memminger, Judge.

Action by Robert P. Tucker against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

The following are plaintiff's exceptions:

"First exception. Upon the plaintiff being asked on direct examination the following question, the presiding judge erred in ruling and holding: 'But I do hold that the plaintiff cannot go and prove the value of those business engagements.' 'Q. What was the effect of that delay in reaching Gainesville upon your business engagements that you had in Gainesville that afternoon?' Objected to as incompetent, as what went on after his arrival at destination is not the proximate and natural consequence of the delay, and cannot be estimated by the jury in considering damages in this case. The Court: 'As I understand, the object of the testimony is not to prove any remote or speculative damages, or loss, that may have arisen by reason of the failure to meet these engagements, but simply to establish the allegation of the complaint. But I do hold that plaintiff cannot go on and prove the value of those business engagements.'

"Second exception. The presiding judge erred in ruling and holding, as follows, during the direct examination of the plain-

tiff, Robert P. Tucker: 'Q. What were your hotel bills? A. They were nominal, about \$3 a day. Objected to and motion to strike out by counsel for defense, except as it may refer to hotel bills in transit, in the ground that such damages are remote and speculative, and not the natural and proximate results of the contract of carriage. The Court: That objection should be sustained. That is my understanding of the law, that hotel bills should be confined to loss which occurred in transit.'

"Third exception. The presiding judge erred in refusing to charge the ninth request of the plaintiff in the words as prayed, to wit: '(9) The jury is further instructed that a railway company is liable in compensatory damages for a breach of its contract of carriage made with a passenger, for any loss directly resulting to the passenger, such as the value of the time thereby lost to the passenger and expenses necessarily incurred thereby.' And in modifying the same by adding thereto the words: 'Up to his arrival at the destination, or which could have been reasonably anticipated by the parties when the contract was entered into.'

"Fourth exception. The presiding judge erred in charging the jury the fourth request of the defendant, as modified by him, as follows: 'That if the jury find from the evidence that the defendant company was negligent in not transporting the plaintiff to destination with promptness, under the pleadings in this case, and under the charge of negligence, they can only find for the plaintiff such compensatory damages which may fairly and reasonably be considered as naturally arising from the violation of their duty to carry the plaintiff according to the usual course of things, and not damages which arise from circumstances peculiar to this case, unless they find willful and wanton negligence, as elsewhere explained.'

"Fifth exception. The presiding judge erred in charging defendant's fifth request, as follows: 'That if the jury find from the evidence that the defendant company is liable for damages under the charge of negligence, they cannot find damages against the defendant to compensate him for the breaking of his business engagements, if any, nor for the delay in his business after his arrival at destination; but plaintiff would be entitled to be compensated for any expenses incurred reasonably during the time of his delay before arrival at destination, in case the jury find that such delay occurred through the negligence of the defendant.'

"Sixth exception. The presiding judge erred in charging the jury as follows: 'A common carrier owes a duty to the public, and the negligent violation of that duty is such an act as will imply damages. But in such a case, unless there is proof of some substantial damage, you can only give nominal damages; that is, a trifling sum, and awarded where a breach of duty or an in-

fraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained, given by a jury, not to compensate for the wrong, but to maintain the right, because for every violation, invasion, or infringement of a legal right the law implies damage.'

"Seventh exception. The presiding judge erred in charging the jury as follows: 'When substantial damage is not shown, it implies the smallest amount of damages; but still an amount sufficient for the maintenance of the action.'

"Eighth exception. Presiding judge erred in charging the jury as follows: 'So, in this case, if you come to the conclusion that defendant is liable, you are not to consider any damages you might think the plaintiff sustained by missing any engagement, because that was ruled out; unless you find willful, wanton, and reckless conduct on the part of the defendant, in which case you might consider it, if it has been proved as an element of the mental suffering of the plaintiff, if any has been proved, on the line of punitive damages.'

"Ninth exception. The presiding judge erred in charging the jury as follows: 'If you come to the conclusion the defendant is liable, you consider first what damages to give him, and then you say: Is there any proof of any substantial damages, any expense, or direct loss he has been put to by the delay in his transportation up to the time of his arrival at his destination, from the facts of the case? If so, you can give that; but, if there are no facts to show any actual damages suffered, then you can give only nominal damages.'

"Tenth exception. The presiding judge erred in charging the jury as follows: 'There must be willfulness, wantonness, recklessness, and utter disregard of the rights of the other person before the party that inflicted the injuries can suffer damages at the hands of a jury by way of punishment, to deter him and others in the future.'

Bryan & Bryan, for appellant. B. L. Abney and Joseph W. Barnwell, for respondent.

GARY, A. J. This is an action to recover damages, alleged to have been sustained by the plaintiff, through the negligence and intentional wrong of the defendant, in failing to carry him to his destination, in accordance with its published schedules. The complaint alleges that on the 15th of February, 1904, the plaintiff, having important business in the city of Gainesville, Ga., made a business engagement therefor, on the 16th of said month, at 3 o'clock p. m., relying upon a contract with the defendant to transport him from Charleston to Gainesville, according to the published schedules of the defendant. That, before purchasing his ticket, he inquired of defendant's agent whether said schedules were correct, and was informed that they were then of force. That, accord-

ing to the published schedule, train No. 15 would leave Charleston at 3:20 a. m. daily, and passing through Columbia, Spartanburg, and Greenville, would arrive at Atlanta at 3:15 p. m., and at Gainesville at 2:43 p. m. That the defendant, well knowing the plaintiff's business engagements and their importance, negligently and willfully failed and refused to carry him to his destination promptly, and according to the published schedules, whereby he was delayed in reaching Gainesville until the night of the 16th of February; his business engagements were broken; he was delayed in his business three days and lost three days from his business; and was put to the further expense of hotel bills—to his damage in the aggregate of \$2,000. The defendant denied all the allegations of the complaint. The jury rendered a verdict in favor of the defendant, and the plaintiff appealed upon exceptions which will be set out in the report of the case.

1. Several of the exceptions are obnoxious to the objection that they merely contain excerpts from the charge, without specifying the particulars in which they are erroneous. But, waiving this objection, none of the exceptions can be sustained.

2. The first nine exceptions relate to the measure of damages, and, conceding that his honor, the presiding judge, erred in his statement of the rule, nevertheless such error was not prejudicial. The verdict, being in favor of the defendant, shows that the jury found as a fact that the defendant was not guilty of negligence or intentional wrong, because there was, not only undisputed testimony of the fact that the plaintiff suffered damage, but, under the charge of the presiding judge, the jury would have been compelled to render a verdict in favor of the plaintiff, at least for nominal damages, if they had found that there was either negligence or willfulness. When the plaintiff was on the stand, he was asked: "Q. What is the value of your time as a business man, independent of profits—value day by day? A. If I had to put value on it, I would say \$50 a day. Q. What were your hotel bills? A. They were nominal—about \$3 a day." The hotel bills were, however, only allowed to be introduced in evidence for the purpose of showing expenditures made in transit. The presiding judge charged the jury: "There is one kind of damage known to the law as damage implied; that is, the law implies damage from the breach of a legal duty, or the unlawful act of another. A common carrier owes a duty to the public, and the negligent violation of that duty is such an act as will imply damages. But in such a case, unless there is proof of some substantial damage, you can only give nominal damages; that is, a trifling sum, and awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained, given by a jury, not to compensate

for the wrong, but to maintain the right, because for every violation, invasion, or infringement of a legal right, the law implies damage." The principle is thus stated in the case of *Mobley v. Railway*, 42 S. C. 306, 310, 20 S. E. 83: "In an action to recover damages for the breach of contract, the first inquiry necessarily is: What was the contract, and whether there had been any breach of it, and, until this has been determined, no question as to the amount or the measure of damages can possibly arise. *Devereux v. Champion Cotton Press Company*, 17 S. C. 66. Where, therefore, as in this case, the first and controlling inquiry has been determined in favor of the defendant, as we have seen, no inquiry as to the damages can arise, and hence the several grounds of appeal, in which error is imputed to the circuit judge in his instructions to the jury as to the measure of damages, need not be considered, for, even if error should be found therein (which we neither affirm or deny), such supposed error cannot possibly affect the result." In the case of *Devereux v. Champion Co.*, 17 S. C. 66, the court uses the following language: "As the question of damages was secondary, and could not arise until the question of injury had been determined in the affirmative, and a verdict was generally for the defendant, it is not clearly perceived how the plaintiff was prejudiced, even if the judge committed error in indicating the mode of ascertaining the damages in case there should be a recovery. In the case of *O'Brien & Fryer v. Bound et al.*, 2 Spears, 501, 42 Am. Dec. 384, it was held that: 'The jury having found the contract of the defendants to be joint, the charge of the presiding judge that the jury might find against one, even if a misdirection, was immaterial, as it could not have influenced the verdict.' Vide [*State v. Slack*] 1 Bailey, 330; [*Peeples v. Smith*] 8 Rich. Law, 103; [*Fleming v. Gilbert*] 3 Johns. (N. Y.) 533; [*Dole v. Lyon*] 10 Johns. (N. Y.) 451." See, also, *Hill v. Railway Co.*, 48 S. C. 461, 21 S. E. 337.

3. The tenth exception assigns error in charging that: "there must be willfulness, wantonness, recklessness, and utter disregard of the rights of the other person, before the party that inflicted the injuries can suffer damages at the hands of the jury by way of punishment, to deter him and others in the future." The exception fails to state in what particular the charge was erroneous, but the appellant's attorney, in his argument, contends that, if any one of these four elements are present, it is sufficient for exemplary or punitive damages. This exception cannot be sustained, for the reason that each of said elements creates the same liability. The case would be quite different if the presiding judge had included the element of negligence.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. I concur in the result only, entertaining the opinion that, standing by itself, there was error in the charge that there could be no recovery for punitive damages without proof of "willfulness, wantonness, recklessness, and utter disregard of the rights of the other person." Willfulness, wantonness, and recklessness are not the equivalents of each other, and the presence of any one of them is a sufficient basis for punitive damages. But the circuit judge had previously so explicitly instructed the jury to that effect that the use of "and" instead of "or" in this connection must have appeared to the jury to be a mere inadvertence. Besides, there was no finding of even nominal damages, and hence it seems clear an erroneous instruction as to punitive damages could not have been prejudicial.

PRICE v. MIDDLETON & RAVENEL

(Supreme Court of South Carolina. Aug. 31, 1906.)

1. PARTNERSHIP—AGREEMENT—CONSTRUCTION.

Where parties contract that one of them shall contribute to a common business, connections in foreign countries valuable for such business, and receive as his compensation one-third of the net profits, and that a set of books shall be kept open for inspection at all times, and neither party is to enter into contracts in connection with the business without the consent of the other, it constitutes a partnership.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partnership, §§ 13, 15, 16.]

2. TRIAL—EQUITY CALENDAR.

Where a long and intricate accounting by defendant is required in a suit by one partner for share of profits as damages for breach of a partnership contract extending over several years, in part before and in part after the breach of the contract, the books and funds being in the possession of defendant, the case should be tried in equity, though the complaint states the damages for each business year in separate causes of action.

Appeal from Common Pleas Circuit Court of Charleston County; Dantzler, Judge.

Action by Thomas M. Price against Middleton & Ravenel. From an order placing the case on calendar 1 for trial, defendants appeal. Reversed.

Wm. Henry Parker and Legare & Holman, for appellant. Mitchell & Smith, for respondent.

WOODS, J. This appeal is only from an order of Hon. C. G. Dantzler, circuit judge, refusing a motion made by the defendants to transfer the cause from calendar 1 to calendar 2, but it involves important questions as to the right of trial by jury and the equity jurisdiction of the court of common pleas. The complaint thus states the contract, which is the basis of the suit, and its consideration: "That heretofore, to wit, on the 1st day of April, 1896, the plaintiff was well informed, skilled, and equipped in

the manner of the conduct of the export cotton business in the city of Charleston. That, in addition thereto, through his associations with and employment by cotton exporters for years previous, the plaintiff was in the possession of the names and addresses, with business references to and connections with firms and persons concerned in the export cotton business in foreign countries, to wit, in Europe, the possession of which was a necessary and important element in the conduct of the said export cotton business. That on the said 1st day of April, 1896, the above-named defendants, carrying on the business as copartners as aforesaid, desiring to enter into the cotton export business, made and entered into the following agreement and contract in writing with this plaintiff, which was duly accepted by him, as follows, to wit: "Charleston, S. C., April 1, 1896. Thos. M. Price, Esq., Charleston, S. C.—Dear Sir: In return for the assistance that you are to give us in building up an exporting business in cotton and naval stores, we agree to pay you in return one-third of the net profits arising from such business, including the profits arising from any ship brokerage business, or any other business done in connection with the exporting business, the said profits to be paid you at the end of each business year, such business year to start on the first day of April and end on the last day of March of each year. We also promise that we will not enter into any contracts in connection with this business without your consent, and that we will keep a separate set of books for this business, to which you will at all times have free access. This promise to continue good as long as we use the connections given or acquired through you. Yours truly, Middleton & Ravenel." In the statement of the first cause of action it is then alleged: "The said defendants, together with the plaintiff, entered into and carried on the export cotton business according to the terms of said contract and agreement." And on account of the business for the first year, ending March 31, 1900, a balance of \$2,000 is alleged to be due the plaintiff as his share of the profits. As a second cause of action the plaintiff sets out the contract and alleges: "That in pursuance of the said contract the said defendants, together with the plaintiff, entered into and carried on the export cotton business together according to the terms of said contract and agreement until the 30th day of June, 1900, when the defendants refused any longer to carry on the same with the plaintiff, in spite of plaintiff's protest and requirement that the said defendants should perform said contract. That, notwithstanding said refusal, the defendants continued to carry on the export cotton business after said date, and, as plaintiff is informed and believes, continue to use the connections given or acquired through the plaintiff. That plaintiff has performed all his part by him to be performed under said contract and agree-

ment, but the defendants have failed to perform theirs, and, while, as plaintiff is informed and believes, still using the connections given or acquired through the plaintiff, have refused to pay to plaintiff his share of the net profits as required in said contract and agreement. That plaintiff is informed and believes, and so alleges and charges on information and belief, that the net profits for the year ending 31st March, 1901, were \$15,000." Then follow causes of action third, fourth, fifth, and sixth, for the years 1901-02, 1902-03, 1903-04, 1904-05, respectively, identical with the second cause of action, except as to the profit for each year covered by said causes of action, which on information and belief is alleged at \$21,000. The prayer is for judgment for the aggregate sum of \$36,800.33, with interest on plaintiff's alleged share of the profits for each year from the close of the year for which they accrued.

The defendants' view is that under the contract set out in the complaint plaintiff was a copartner with them, and though there are in form several causes of action for separate and specific sums of money as the plaintiff's share of profits, yet having regard to the substance the suit contemplates, and for its just determination, requires the taking of the accounts of a partnership running over a number of years to ascertain the share of one of the partners, and therefore the court of equity has exclusive jurisdiction. The plaintiff maintains he was merely an employé of the defendants, and not a partner; but, whether partner or employé, the action is nevertheless on the law side of the court for breach of the contract either of employment or partnership, the profits being referred to only as the measure of damages for the breach, and that therefore he is entitled to a jury trial.

1. We consider first the legal relation of the plaintiff to the defendants—whether he was a mere employé or a copartner. It is said by Mr. Justice Gray, in *Meehan v. Valentine*, 145 U. S. 611, 620, 12 Sup. Ct. 972, 975, 36 L. Ed. 835: "In the present state of the law upon this subject, it may, perhaps, be doubted whether any more precise general rule can be laid down than, as indicated in the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions." This definition accords with the views expressed in the recent cases of *Providence Machine Co. v. Browning*, 68 S. C. 9, 46 S. E. 550, *Id.*, 72 S. C. 427, 52 S. E. 117, *Spool Cotton Co. v. King*, 68 S. C. 198, 46 S. E. 1005, and other cases. Participation in profits alone does not determine the question, for one may contract to serve another for a compensation to be measured by the profits, and yet own no part of the profits themselves as his own specific property. Nor is the question determined by the fact

that there is community of interest and that each party is a principal with authority to act as agent for all the others concerned, nor by the lack of such authority; for there may be common ownership of property and a power of attorney to each owner from the others to sell and divide the proceeds, but this would confer no right on each to bind the others as partners or to do anything beyond the express authority conferred, and, on the other hand, a valid contract of partnership may be made stipulating that one of the partners would have the management of the business to the exclusion of all the others, and the stipulation would be good between the parties. Between the parties themselves the intention, as in all other contracts, is controlling, and if the contract does not expressly provide for a partnership, and indicate an intention not to confer a particular right, or not to impose a particular obligation usually recognized as an inherent quality of the partnership relation, that relation will be held not to exist. For example, while the sharing of profits is presumptive evidence of a partnership, yet it is universally held that one who contracts to serve another for a compensation to be measured by the profits, but without power in the conduct of the business, and without interest in the profits as a joint owner thereof, is not a partner. On the other hand, when the contract provides for all the incidents of partnership, contribution to the common property, sharing of profits, mutual agency in the conduct of the business, it will be held to create a partnership, though there is no expressed intention to that effect, and the parties may have had no intention of incurring the liabilities of partners; and if the contract leaves any doubt on these points, from omission or otherwise, the doubt may be solved and the intention gathered from the course of dealing of the parties with each other and with the public. A particular review of the many cases on this subject would not be profitable, for each case depends largely on its peculiar facts. Indeed, the general principles we have stated seem obvious enough to make reference to the authorities unnecessary; but it may be well to cite some of them: *Pierson v. Steinmyer*, 4 Rich. Law, 309; *Bartlett v. Jones*, 2 Strob. 471, 49 Am. Dec. 608; *Berthold v. Goldsmith*, 24 How. (U. S.) 536, 16 L. Ed. 762; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972, 36 L. Ed. 835, note; 30 Am. St. Rep. 828, note; 22 Am. and Eng. Ency. 22-34; note to *Cox v. Hickman* and other cases, 19 Eng. Ruling Cases, 402.

We are not now concerned with the difference in the degree of proof necessary to establish partnership liability to creditors and the actual existence of a partnership as among the parties themselves. When one is actually a partner, he is liable as such to creditors, without respect to whether the credit was extended on the faith of his lia-

bility; but he is also liable to creditors as a partner, though not one in fact, if he has held himself out as one or allowed others to do so, on the principle that he is estopped from denying his liability to those who have acted in reliance on the character he has voluntarily assumed. But the controversy here is between the parties themselves, and the inquiry is not whether they are liable to third persons as partners, but whether they are in fact partners. Having in view the general principles to which we have adverted, the conclusion cannot be avoided that the plaintiff and defendants were partners. Under the express language of the contract, and as a consideration of it, the plaintiff agreed to contribute to the common business, as an asset, connections in Europe which were valuable in the exporting of cotton for profit, which was the commercial enterprise undertaken; and he was to share in the net profits. The word "partnership," it is true, is not used in the contract itself, and there is no expression clearly showing that the plaintiff was to exercise the usual powers of a partner to act for all in the common enterprise; the language used by the defendants in their letter to plaintiff, which embodies the contract, being: "In return for the assistance you are to give us in building up an export business in cotton and naval stores, we also promise that we will not enter into any contracts in connection with this business without your consent, and that we will keep a separate set of books for this business, to which you will at all times have free access." But any doubt as to the meaning of these expressions and the intention of the parties is set at rest by their course of conduct, set out by the plaintiff himself in the following allegation: "That in pursuance of the said contract the said defendants, together with the plaintiff, entered into and carried on the export cotton business according to the terms of said contract and agreement." There is in this no implication that one party exercised more authority than another. On the contrary, it seems clear the plaintiff means to say he and the defendants prosecuted the business together, each recognized as having legal authority to act for all in the promotion of the common business.

2. The finding, however, that this is a suit by one partner against another, as has been forcibly argued by respondent's counsel, does not carry the conclusion that this is necessarily a cause cognizable exclusively by the court of equity. It is said in *Karrick v. Hanaman*, 168 U. S. 328, 335, 18 Sup. Ct. 135, 42 L. Ed. 484: "No partnership can efficiently and beneficially carry on its business without the mutual confidence and co-operation of all the partners. Even when, by the partnership articles, they have covenanted with each other that the partnership shall continue for a certain period, the partnership may be dissolved at any time, at the will

of any partner, so far as to put an end to the partnership relation and to the authority of each partner to act for all, but rendering the partner who breaks his covenant liable to an action at law for damages, as in other cases of breaches of contract." To the same effect is *Bagley v. Smith* (N. Y.) 61 Am. Dec. 756. These cases are relied on by respondent as fully sustaining the view of the circuit judge. We should not be disposed to question the general proposition, even if it were not supported by such high authority, that there are cases where a court of law may entertain an action brought by one partner against another for damages for breach of his contract to maintain the partnership where the items going to indicate profits which are to constitute the measure of damages are few and simple. But we have been able to find no case in which a court of law has undertaken to adjust partnership affairs, arising either before or after dissolution, where it was necessary for the jury to take a strict accounting covering a long period and many transactions. In *Karrick v. Hannaman*, the accounts were referred by consent to a referee and the right to have a jury pass on them did not arise. In *Bagley v. Smith*, the action was for damages for expulsion from a partnership. It was held that future profits to be anticipated at the time of expulsion should be considered in estimating the damages, and that evidence as to past profits was admissible as bearing on future profits; but there seems to have been no dispute as to the amount of the past profits, and hence no necessity to take an accurate accounting. In this case, on the contrary, the plaintiff measures his damages by the exact future profits actually made, and these can only be ascertained by an accounting. In *Kinloch v. Hamlin*, 2 Hill, Ch. 19, 27 Am. Dec. 441, our court went to the extent of holding that, where the claim of one partner against another in the circumstances could not be justly extended to include anything beyond "fifty cents per cord for one-half of the wood consumed" in the manufacture of brick, he was limited to an action at law and could not maintain a bill for account. The court, however, distinguishes the case by the use of the language we have italicized in the following quotation from the opinion: "It is not every agreement that constitutes a partnership, which, when broken, entitles the party injured to compensation or relief in equity. *It is only for an account or settlement on dissolution that the aid of that court is necessary; and this, not merely on the ground that they are partners, but because of the trust and confidence reposed, and the necessity of a discovery.* But a court of law is generally competent to give adequate relief in cases of the breach of particular stipulations. It cannot enforce specifically, but can compensate in damages. Partners may sue each other at law for the breach of any distinct

and positive engagement contained in their agreement, as to account annually, or to adjust and to make a final settlement of the joint concerns on dissolution. Then a breach by one will vest a right of action which may be enforced at law upon the covenant and adequate damages recovered. Gow on Part. 106, 107; 2 T. R., 483, and in note. 'And the same rule applies to every other species of lawful covenant, by which partners reciprocally and severally bind themselves, inter se, to the performance of any particular act or thing.'" The court, in *Course v. Prince*, 1 Mill, Const. 416, 12 Am. Dec. 640, refused to entertain an action at law of one partner against another involving a partnership adjustment, because the accounts had not been stated and a promise made to pay the balance. The case of *Kerr v. Steamboat Co.*, Cheves, Eq. 194, though not involving the right of partners, throws much light on the subject. Chancellor Harper there says it is impossible to draw with precision the line of jurisdiction between the courts of law and equity, but the question always depends on whether there is an adequate remedy at law. The court holds, further, that whenever the relation of agency or other trust exists, and an accounting is necessary to determine the rights of the parties, the court of equity has jurisdiction, and this jurisdiction may be invoked by either party.

It is argued, however, that when the partnership was dissolved by the wrongful expulsion of the plaintiff from the business, the partnership relation being at an end, there was thenceforth no agency or trust of any kind between the parties, and therefore no ground for the intervention of equity. The argument is not convincing. Equity, it is true, cannot take jurisdiction of an ordinary action at law on an ordinary account, merely because the trial will involve many items. *Smith v. Bryce*, 17 S. C. 544. But this cannot be regarded an ordinary action at law on account, as, for instance, an action by a merchant on a single account against his customer; for there the charges and credits may be readily established by simple proof of the books, or, at most, of the items by one or two persons, and the subtraction of one from the other establishes the balance. Here the rights of the parties can only be determined by an accounting of the entire export business, probably involving many transactions in foreign countries, and possibly requiring evidence from these countries; and even when the books are proved, and the correctness of the items established, intricate computations and statements will be requisite to ascertain the balance of profit for each year. No argument is necessary to show that the performance of such a task could not be expected from a jury with the opportunity which an ordinary trial affords. To require that it be attempted would not only make a just judgment extremely improbable, but would tend to bring trial by jury into dis-

repute. Again, while it is true that the plaintiff's demand in four of his alleged causes of action is for the profits of four separate years, accruing entirely after his alleged expulsion from the business, the claims for the years from March 31, 1899, to March 31, 1900, made in the first cause of action, and for three months of the second year, from March 31, 1900, to March 31, 1901, made in the second cause of action, are for profits which accrued during the existence of the partnership or other trust relation, and involve, not an investigation into a simple breach of contract, but of the entire partnership affairs for that period. As to this period of the continuance of the trust relation the case stands just as if any other trustee had undertaken to throw off the trust. The cestui que trust could not in such case sue at law for a specific sum, alleging that to be the amount due, and thus deprive the trustee of his right to account in equity for the administration of the trust.

It is to be considered, too, that the law regards the partnership dissolved by the expulsion of one member, only because it is impossible to force the parties to continue in a relation implying so much confidence. And on this principle the action of the plaintiff, when the substance is considered, rests on the assertion that even for the years the business was conducted after his expulsion, the plaintiff had the same right to demand his share of the profits as if he had continued in the business. To ascertain these profits an accounting cannot be less necessary or difficult than it would be if the partnership had continued, and it cannot be allowed that, though the whole partnership business must be gone into, the tribunal best fitted for the task must lose its jurisdiction, to the detriment, not only of the parties, but to the public, because by the wrongful act of one of the parties their technical relationship has been changed. In *Taff Vale Ry. Co. v. Nixon*, 1 H. L. C. 111, 1 Eng. Ruling Cases, 406, the jurisdiction of the Court of Chancery was asserted on the sole ground that the account was so complicated that a just result could not be expected from a trial at nisi prius. The Lord Chancellor, after remarking "that each case must be decided according to the peculiar circumstances that belong to it," says: "It is, therefore, nothing to the purpose to show that there are cases where the court will not entertain jurisdiction, because it is a matter of law. Each case must be investigated, in order to see whether it comes within the rule laid down as that upon which a court of equity exercises its jurisdiction." In *Devereux v. McCrady*, 46 S. C. 146, 24 S. E. 82, this court quoted with approval the following from *Pomeroy's Equity Jurisprudence*: "The instances in which the legal remedies are held to be inadequate, and, therefore, a suit in equity for an accounting proper, are: (1) Where there are mutual ac-

counts between the plaintiff and the defendant; that is, where each of the two parties has received and paid on the account of the other. (2) Where the accounts are all on one side, but there are circumstances of great complication, or difficulties in the way of adequate relief at law. (3) Where a fiduciary relation exists between the parties, and the duty rests upon the defendant to render an account." Though the facts of that case were different, the general principles laid down are applicable and controlling here. See, also, 1 Cyc. 423.

Not only will a complicated accounting be necessary to determine the rights of the parties, but this accounting must be by the defendants, who were copartners with the plaintiff, or at least trustees for a portion of the time, and who for the remainder of the time are liable to account, and with the same right to do so as if the relation of trust had never ended. This court will rarely disturb the conclusion of the circuit judge on such a matter, but it seems to us very clear that the cause should be tried on the equity calendar.

It is the judgment of this court that the judgment of the circuit court be reversed.

RICE v. LOCKHART MILLS.

(Supreme Court of South Carolina. Sept. 11, 1906.)

1. CONTINUANCE—ABSENCE OF COUNSEL—REFUSAL.

Refusal of the court to continue a case is not an abuse of discretion, though the leading counsel is at court in another county, but knew of the conflicting engagement because of the law fixing the terms of court, and another counsel is ill, but able to participate in the trial, and a third counsel is expected to be absent at the sickbed of his father, but arranges to assist in the trial.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 51-57.]

2. TRIAL—INSTRUCTIONS—CHARGE ON FACT.

An instruction as to the duty of a master to furnish a safe place and proper appliances for a servant is not a charge on the facts.

3. SAME—REQUEST FOR INSTRUCTIONS.

Failure of the court, in an action for injuries to a servant, to instruct as to the proximate cause of the injury by reason of defective machinery and dangerous place in which to work, is not error in the absence of a request.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 627-641.]

4. SAME.

An instruction setting forth the acts of negligence charged in the complaint and referring to them as alleged is not a charge on the facts.

5. NEW TRIAL—SUFFICIENCY OF EVIDENCE.

It is a question for the jury to determine on which side the greater weight of evidence is, and not for the court on motion for a new trial.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, §§ 146-148.]

Appeal from Common Pleas Circuit Court of Union County; Klugh, Judge.

Action by John S. Rice against the Lockhart Mills. Judgment for plaintiff. Defendant appeals. Affirmed.

Mordecai & Gadsden, B. F. Townsend, and H. L. Scaife, for appellant. Stanyarne Wilson and V. E. De Pass, for respondent.

POPE, C. J. The plaintiff sought \$10,000 damages of defendant because he alleged that while he was in the employment of the defendant his left hand and arm were caught in the machinery of the defendant and was so badly torn and broken that the arm had to be amputated above the elbow, causing him great suffering, injury, and damage. That such injury was directly due to and caused by the negligence of the defendant in the following respects: First. In not furnishing him a safe place in which to work; in that the said machinery was not sufficiently lighted so that he could see the danger which afterward injured him, and by reason of which he was unconscious of such danger. Second. In not instructing him as to the danger of the machine, which was not evident to him and of which he was unconscious, and in not warning him of the danger of putting his hand at said place, where it was caught as aforesaid while attempting to clean said box. The answer of the defendant admits its corporate capacity and that the plaintiff was in the defendant's service at its cotton mill, and that he suffered an injury to his arm which was afterward amputated, but it denies each and every allegation contained in the complaint outside of these facts. The defendant asserts that the injury of the plaintiff was sustained by him through his negligence as the sole cause thereof, in that said plaintiff put his hand into an obviously dangerous place in said machinery when it was in motion, when it was not necessary for him to do so, and when he had been warned and instructed not to do so by the proper servants of the defendant. The issues came on to be tried before his honor, Judge Klugh, and a jury at the September term, 1905, of the court of common pleas of Union county. Both sides introduced testimony. After the charge of the judge, the jury rendered a verdict in favor of the plaintiff for \$3,500. After a judgment upon this verdict, the defendant appealed to this court upon several grounds, which we will consider in their order.

"(1) Because his honor erred in refusing to grant the continuance asked for in this case, such refusal amounting to an abuse of his judicial discretion, in that by the showing made on the motion for continuance, it appeared that the defendant was put to great disadvantage by reason of the absence of its leading counsel, the illness of another of its counsel, and the necessary absence, as it then appeared, of the third of its counsel, preparation for and conduct of the trial, therefore, being carried on under circum-

stances making it very difficult for the case to be properly handled." The defendant thinks that the circuit judge should have granted its motion for a continuance on the grounds set up in this ground of appeal. It seems that Mr. Mordecai, who was the leading counsel for the defendant, made affidavit that he had been ready at the previous term of court to try this case, having his witnesses all present, but, owing to the crowded condition of the docket it could not come on for trial, but at the present, September, term, 1905, Mr. Mordecai had a number of other cases in the county of Beaufort which were being pressed for trial at this same September term, and that he was also sole counsel in another case ordered by the Supreme Court to be heard at the same time fixed by law for the trial at Union and Beaufort. Also, it appeared by the affidavit of Mr. Scaife that he had no previous connection with the present case until called upon by Mr. Mordecai to present his affidavit and to ask for the continuance of this cause. The circuit judge allowed Mr. Scaife to present other affidavits for continuance when the case should be called for a hearing; he did so by producing an affidavit showing that Mr. B. F. Townsend had also been retained by the defendant, and that he had been summoned by telegraph to attend the bedside of a sick father. Mr. Simeon Hyde, who was in the employment of Mr. Mordecai, was also present in Union, but did not expect to take part in the trial. The circuit judge, however, ordered the trial to proceed, and at that trial Mr. Scaife, Mr. Townsend and Mr. Hyde participated. We do not think the circuit judge made any mistake here. The date of the court at Union and at Beaufort were, as before said, fixed by law. It was the duty of defendant counsel to prepare for these trials. While he could not be in two places at the same time, it was his duty to provide counsel to be in attendance upon the court, and as usual, he provided for the presence of such counsel, such counsel were present by his careful provision. The circuit judge committed no error in holding him to the trial. This ground of appeal is overruled.

"(2) Because his honor erred in charging the jury: 'Where a person employs another person to do work, it is the duty of the employer to furnish his employé reasonably safe tools or implements or appliances or machinery, whatever the work is to be done with, and to furnish a reasonably safe place in which to do the work, and if the employer fails to furnish reasonably safe implements or tools or machinery or appliances or fails to furnish a reasonably safe place in which to do the work, and the employé is injured thereby, the employer is liable in damages for the injury'—the specific errors assigned in this charge being as follows: (a) It being error so to charge the jury, because this was charging on the facts, in that the judge stat-

ed that certain omissions on the part of the employer constituted negligence and rendered the employer liable in damages. (b) This charge is erroneous, in that it eliminates the necessary doctrine of 'proximate cause' of the injury, which is essential to the charge. (c) This charge invades the province of the jury by passing upon the facts, in that the hypothetical statements therein contained do not embrace all the circumstances of the case. (The circumstances detailed in plaintiff's testimony, wherein he testified that he went to the machine, the dangers of which were known to him, before the time to go to work and before his instructor had come, raised the protectors, and in the dark stuck his hand in the blades, which the plaintiff testified he knew would cut a piece of pine plank in two, if put in there, etc.) (d) Because this charge, not including in the hypothetical statement of facts which would have justified the jury in finding that the plaintiff was negligent; the jury under such charge could find for the plaintiff, or if he willfully suffered the injury to occur, and even if the plaintiff's own act of negligence were the proximate cause of the injury." A reference to this charge shows that the circuit judge considered this matter with great care and that the specific errors are not well founded. (a) It was not a charge upon the facts. (b) The circuit judge was not requested by the defendant to charge as to proximate cause of the injury, but he was requested by the plaintiff to charge generally upon the master's duty to provide reasonably safe appliances and a reasonably safe place in which to work. (c) This charge does not invade the province of the jury by passing upon the facts. The judge leaves a finding of the fact to the jury itself. (d) No request was made by the defendant to add to his charge in any particular. This ground of appeal is overruled.

"(3) Because his honor erred in charging the jury: 'He [plaintiff] alleges that because of Lockhart Mills failure to do this, that it was negligent in its duty to him, and his hand was caught in the machinery, and he suffered injury, which has been detailed to you,' thereby charging on the facts, and in effect charging the jury that the injury detailed to them by the plaintiff was to be accepted by them as a fact." The language of this suggestion of error on the part of the circuit judge relates to the statement by the circuit judge of what the pleadings allege. There was no request presented by the defendant nor was there any suggestion that the circuit judge was in error in setting forth what issues the complaint set up. This ground of appeal is overruled.

"(4) Because his honor erred in charging the jury: 'If the plaintiff fails to establish those facts by a preponderance or greater weight of the evidence—that he did suffer

injury because of these acts of negligence of the defendant—then he is not entitled to recover'; thereby charging the jury upon the facts, and thereby charging the jury in effect that certain acts were acts of the defendant, and, furthermore, that they were acts of negligence." There is no error here. The circuit judge merely summed up the result of the complaint showing that if the plaintiff failed to establish his grounds of wrong by the defendant, he must necessarily fail in his action. This ground of appeal is overruled.

"(5) Because his honor erred in charging the jury: 'As a matter of course, the plaintiff can't recover, if he suffered injury from negligence of the defendant in any other particulars than those specified in the complaint'—thereby charging the jury upon the facts by intimating and charging that 'those' particulars specified in the complaint amounted to negligence." The same objection obtains here as was pointed out in considering the fourth ground of appeal. It is, therefore, overruled.

"(6) Because his honor erred in charging the jury: 'There is no ground for punishing the defendant for injuring the plaintiff'—thereby charging upon the facts and allowing the jury to infer that in his honor's opinion the defendant had proximately caused plaintiff's injury." The circuit judge is clearly right in stating as a part of his charge, that "There is no ground for punishing the defendant for injuring the plaintiff." Because the circuit judge distinctly and repeatedly states in his charge that the plaintiff is bound by the allegations of his complaint, and is careful to repeat exactly what those allegations are, and it is well that the circuit judge is careful in placing this responsibility upon the plaintiff that the words quoted are used, and as usual they are only part of his general charge. This exception is overruled.

"(7) Because his honor erred in refusing to grant the motion for a new trial on his minutes, made upon the ground that the verdict was contrary to the greater weight of evidence, in that it appears from the record that the plaintiff was his only witness upon the material facts alleged in the complaint, and was contradicted at every point by a number of witnesses." There can be no possible ground for this exception to his honor's refusing a motion for a new trial. There was testimony on both sides by the witnesses upon the matters alleged in the complaint. The weight of such testimony must be determined by the jury. There is no duty devolved by law upon the circuit judge to say which has the greater weight. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be affirmed.

GARY, A. J., concurs in the result.

BUSSEY v. CHARLESTON & W. C. RY. CO.
(Supreme Court of South Carolina. Sept. 6, 1906.)

1. CARRIERS — REFUSAL TO TRANSPORT PASSENGER—ACTION—PLEADING.

Where a complaint alleged that defendant willfully and recklessly failed and refused to furnish transportation, and that plaintiff was ejected from the train, and that such ejection was due to the unlawful, willful, and reckless conduct of defendant, the latter words refer to conduct other than the failure to transport.

2. SAME—EVIDENCE.

Where, in an action for failure to transport plaintiff, the complaint makes no reference to the defendant acting as agent in selling tickets over connecting lines, but defendant relies on that fact as a defense, plaintiff may show that the ticket sold was defective over such other lines.

3. SAME—DEFECTIVE TICKET.

Where, in an action against a carrier for refusal to furnish transportation, the ticket sold showed on its face that it was intended to have coupons for several connecting lines, over which defendant sold it, attached to it so that plaintiff could go to a certain place and return, and defendant warranted the ticket to be good, the fact that the conductor over the connecting line passed it on the outgoing trip, does not bind such connecting line, so as to require another conductor on the same road to receive it on the return trip.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1033.]

4. APPEAL — EXCEPTIONS TO EVIDENCE — REVIEW.

Exceptions to evidence will not be considered, where the objection stated no ground therefor, and where like evidence was admitted without objection.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1021.]

5. SAME—HARMLESS ERROR.

That the court admitted irrelevant evidence is no ground for reversal, where no abuse of discretion is shown.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153-4160.]

6. CARRIERS — SALE OF DEFECTIVE TICKET — EVIDENCE.

Where a carrier sold a ticket which showed on its face that it was intended to have coupons attached, and no such coupons were in fact attached, and there was testimony that defendant's conductor told plaintiff that a ticket, in the form in which it was, was not good, such facts were admissible to show recklessness and disregard of plaintiff's rights.

7. NEGLIGENCE—WANTONNESS.

Wantonness is properly defined as conscious failure to observe due care and intentional doing of an unlawful act, knowing such act to be unlawful.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 13.]

8. SAME—RECKLESSNESS.

Recklessness is the equivalent of willfulness or intentional wrong.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. Negligence, § 13.]

Appeal from Common Pleas Circuit Court of Greenville County; Dantzeler, Judge.

Action by Julia Emmie Bussey, by her guardian, against the Charleston & Western Carolina Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The following are defendant's exceptions:

"1. Because, as it is respectfully submitted, the presiding judge erred in his rulings upon the introduction of testimony in the following particulars: (1) In allowing the plaintiff to testify that the defendant's conductor between Fountain Inn and Laurens, when he took up her ticket, told her that the form of it was not good, when such testimony was not in support of any allegation in the complaint, but was entirely outside of the issues made therein, and it was, therefore, incompetent. (2) In allowing the testimony just mentioned when, under the law, statements or admissions of this character by the defendant's conductor cannot bind the defendant, as there was no testimony that he had authority to so bind defendant, and the testimony was further incompetent on this ground. (3) In allowing the plaintiff to testify to conversations between her and one Richardson in the city of Louisville, and that the said party stated to her that her ticket was all right, in support of a claim for damages on the ground that such ticket was not a good ticket, when there was no such issue raised in the case, and such testimony was, therefore, incompetent. (4) In allowing the plaintiff to testify that the conductor on the Queen & Crescent Road said to her that the ticket she had was not a valid one, and was not worth the paper it was written on, in support of her claim for damages on the ground that she was not furnished a valid ticket, when there was no such allegation in the complaint and no such issue in the case, and when such conductor had no authority to bind defendant to such admission, and, therefore, such testimony was incompetent. (5) In allowing the plaintiff's counsel to ask the question of the defendant's witness, Aiken, and requiring the same to be answered, as to whether or not the ticket in this case was valid or invalid, regular or irregular, and why the same was irregular, when there was no allegation in the complaint that the defendant had failed to furnish a good and valid ticket, and there was no such issue raised in the pleadings, and such testimony was, therefore, incompetent. (6) In allowing the plaintiff's counsel to ask the question of the defendant's witness, Aiken, and requiring the same to be answered, as to whether the ticket in this case was valid or invalid, regular or irregular, and why the same was irregular, when the answer to such question was a mere matter of opinion upon a legal question of the validity of such ticket, and for that further reason, such testimony was incompetent. (7) In allowing the plaintiff's counsel to ask the following question of the defendant's witness, Aiken, and requiring such witness to answer the same, to wit: 'Did you recognize that that ticket was binding upon your railroad?' when such question and the answer thereto was incompetent, for the reason that it was

simply giving the opinion of the witness upon a matter of law, which should have been decided by the court. (8) In not allowing the witness, C. L. Townsend, to answer the following question, and in sustaining the plaintiff's objection thereto, namely: 'Did you think that was a good ticket when you sold it?' when such question and the answer thereto was competent in this case, being in support of the defense that there was not a particle of malice, or willfulness in the conduct of the said Townsend, as agent of the railway company, in issuing such ticket. (9) In allowing the plaintiff's counsel to ask the witness, Townsend, the question, and requiring him to answer it, 'Did you have any other tickets for sale at the time except this?' the error being that such testimony was incompetent, for that it tended to prove facts not alleged in the complaint, and it was, therefore, irrelevant. (10) In ruling that the testimony referred to in the ninth exception was competent on cross-examination, for the reason, as alleged by the court, that defendant's counsel had been allowed to ask the same witness in relation to the ticket, when, it is respectfully submitted, that the question referred to by the presiding judge had been ruled incompetent, and when, further, even if allowed, such ruling would not be a justification, for the reason that the question asked by defendant's counsel was merely for the purpose of showing that there was no willful issuing of an illegal or irregular ticket by the defendant.

"2. Because, as it is respectfully submitted, the presiding judge erred in refusing to grant the defendant's motion for a nonsuit at the close of the plaintiff's testimony, when such motion should have been granted on the following grounds, and it was error of law to refuse to do so: (1) There was absolutely no testimony tending to show any facts to go to the jury to entitle the plaintiff to punitive damages. (2) There being no testimony to go to the jury, upon which a verdict for punitive damages can stand, there was no issue for the jury at all, for the reason that the action was for punitive damages only, and hence, there could be no recovery of compensatory damages. (3) There was no testimony upon which the jury could render a verdict against the defendant, Charleston & Western Carolina Railway Co., for either punitive or compensatory damages, because the contract introduced in evidence showed that the Charleston & Western Carolina Railway Co. was not to be liable beyond its own lines. (4) Because the evidence showed that if there was any wrong done to the plaintiff, it was done by a railroad company other than the defendant Charleston & Western Carolina Railway Co.

"3. Because, as it is respectfully submitted, the presiding judge erred in holding on the motion made by the defendant at the close of plaintiff's testimony for a nonsuit,

that such motion should not be granted, because there was no evidence that the Queen & Crescent Railroad was a party to the contract evidenced by the ticket of the defendant Charleston & Western Carolina Railway Co., when the undisputed evidence on the part of the plaintiff showed that the ticket issued by the defendant had been recognized by the Queen Crescent Railroad as a valid ticket, and that that company had allowed the plaintiff to ride on it on her trip to Louisville, Ky.

"4. Because, as it is respectfully submitted, the presiding judge erred in refusing to grant the defendant's motion for a nonsuit at the close of all the evidence in the case, and in not then holding that there was no evidence to go to the jury tending to show that the defendant, Charleston & Western Carolina Railway Company, had been guilty of any willfulness or wantonness whatsoever towards the plaintiff, and in not therefore granting the defendant's motion for a nonsuit.

"5. Because, as it is respectfully submitted, the presiding judge erred in charging the jury as a matter of law that the defendant, in the ticket issued by it, guaranteed the plaintiff transportation from Fountain Inn, S. C., to Louisville, Ky., and from Louisville, Ky., to Fountain Inn, S. C., when in such ticket the defendant did not make such guaranty for itself, but only as agent beyond its own lines.

"6. Because, as it is respectfully submitted, the presiding judge erred in charging the jury that the clause in the contract upon the face of the ticket in evidence, reading as follows: '(10) Responsibility, in selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and it is not responsible beyond its own line'—could not bind the plaintiff, unless the lines over which she was to pass were attached to and made a part of the contract, or unless she had knowledge of the lines over which she was to pass, when, we submit, under the law, the plaintiff was bound by such stipulation, whether the lines over which she was to pass were or were not mentioned in the ticket, and whether she did or did not know what such lines were to be.

"7. Because, as it is respectfully submitted, the presiding judge erred in refusing to charge the jury in the language of the defendant's third request, as follows: 'The complaint does not allege willfulness or wantonness in the matter of furnishing a ticket to the plaintiff, and, therefore, there can be no recovery for any act of the defendant or any of its agents, in or about the furnishing of a proper ticket, or the failure to do so'—when, we submit, under the law, the defendant was entitled to have this instruction given to the jury, as the plaintiff had not alleged in her complaint against the defendant any negligence in failing to furnish a proper tick-

et, but, on the contrary, had alleged that the defendant furnished to the plaintiff a first-class round trip ticket, which carried her safely from Fountain Inn to Louisville, and when her right to recovery was based entirely upon the alleged willfulness of the Charleston & Western Carolina Railway Co. in ejecting the plaintiff from a train on the Queen & Crescent Road on her return trip.

"8. Because, as it is respectfully submitted, the presiding judge erred in his instruction to the jury in defining wantonness, to be where one consciously fails to observe due care, when we submit that such definition was erroneous in law, and tended to prejudice the rights of the defendant.

"9. Because, as it is respectfully submitted, the presiding judge erred as a matter of law in refusing to grant a new trial on the first ground upon which motion for new trial was based, to wit: Because there was no evidence showing or tending to show that any agent of the defendant railway company had committed a wrong toward the plaintiff, knowing it was a wrong.

"10. Because the presiding judge erred as a matter of law in not granting a new trial on the second ground upon which motion therefor was based, to wit: Because the verdict was contrary to the charge of the court. The jury was instructed that unless they found from the preponderance of the evidence that some agent or agents of the railway company did a wrong to the plaintiff, knowing it was a wrong, they could not find in favor of the plaintiff. There was not a title of evidence that any such wrong was committed, and, therefore, the failure to grant a new trial was error of law.

"11. Because the presiding judge erred as a matter of law in refusing to grant a new trial on the third ground upon which the motion was based, namely: That there was absolutely no evidence tending to show that there was any willfulness on the part of the defendant or its agents in the particulars stated in the complaint, and to allow a verdict to stand which was based upon willful acts not alleged in the complaint, was error of law.

"12. Because the presiding judge erred in not granting a new trial on the fourth ground upon which motion therefor was based, namely: That the agent of the defendant committed no wrong toward the plaintiff knowingly, and showing, further, that the only damage or injury sustained by the plaintiff was a delay of one day, and a verdict for \$2,500 was excessive, and we submit the failure to set it aside was error of law."

S. J. Simpson and M. F. Ansel, for appellant. McCullough & McSwain, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff, through intentional wrong on the

part of the defendant. The allegations of the complaint material to the questions involved, are substantially as follows: "(1) That on the 12th of June, 1905, the plaintiff applied to defendant's agent at Fountain Inn, S. C., for transportation to Louisville, Ky., and return, paid the agent the fare demanded for the ticket, and the agent delivered to her a round-trip ticket for one first-class passage and return, from Fountain Inn to Louisville, Ky., via Spartanburg, S. C. (2) That on the said day, plaintiff boarded one of defendant's trains, and was carried to Louisville; after arriving there, she applied to Jas. Richardson, special agent of the defendant, as directed by it, for an extension of her ticket, until the 10th of July, 1905, which request was granted. (3) That she complied with all the requirements and conditions of the defendant, with reference to said transportation, and the defendant unlawfully, carelessly, recklessly, willfully and wantonly failed and refused to furnish to her transportation to Fountain Inn from Louisville, and on the 10th of July, 1905, she was ejected from the train upon which she was traveling, and which was a train on the same road over which she traveled in going to Louisville, which ejection was due to the unlawful, willful, wanton and reckless conduct of the defendant. (4) That plaintiff was ejected at Danville, Ky.; she was an utter stranger in the town, did not have but \$2 on her person, nor was there any one to whom she could appeal for relief; in her humiliated and deplorable condition, she telephoned to a relative at a distance, who advanced money enough to pay her hotel bill, and to buy another ticket home, where she arrived on the 13th of July, 1905."

The defendant denied the material allegations of the complaint, and alleged: "That the contract between plaintiff and defendant was, that the defendant, in selling said reduced rate return ticket, for passage over other lines than his own, acted only as agent, and is not responsible beyond its own line, said ticket having the following conditions attached to the same, which was duly accepted and agreed to by the plaintiff herein, to wit: '10. Responsibility. In selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and is not responsible beyond its own line.' That Danville, Ky., is not upon the line of road belonging to this defendant, nor operated by it."

The jury rendered a verdict in favor of the plaintiff for \$2,500, and the defendant appealed upon exceptions, which will be set out in the report of the case. Before proceeding to consider the exceptions, it will be necessary to determine what issues are raised by the pleadings.

1. The complaint alleges that the plaintiff applied to the defendant's agent for transportation to Louisville, Ky., and re-

turn, and paid to the agent the fare demanded for said ticket. The third paragraph of the complaint not only alleges that the defendant willfully and recklessly failed and refused to furnish transportation, and that the plaintiff was ejected from the train, but also that said ejection was due to the unlawful, willful, wanton, and reckless conduct of the defendant. Unless the last-mentioned words refer to conduct other than failure to transport, then they are without force and effect, as that allegation had already been made. Pleadings under the Code are to be liberally construed, with a view to substantial justice between the parties, and, if possible, effect should be given to all the language of the complaint, instead of a part only. We are constrained, therefore, to rule that the word "conduct" did not have reference solely to the failure to furnish transportation.

2. The complaint makes no reference whatever to the fact that the defendant was only acting as agent, in selling the ticket over connecting lines; but the defendant relies upon this fact in its answer. The plaintiff had the right to offer testimony for the purpose of showing that the ticket was vitally defective over connecting lines, as this fact would render ineffectual the defense set up in answer. It was only incumbent upon the plaintiff, in the first instance, to introduce testimony tending to sustain the allegations of the complaint, in order to make out a *prima facie* case.

3. Before proceeding to consider the specific assignments of error, we deem it advisable to state our construction of the contract. The ticket was composed of two parts, which, evidently, were not intended to be attached together for general use, as they contained inconsistent provisions. The heading or red part of the ticket states the following conditions: "Good subject to conditions printed below for one first class passage to Louisville, Ky., and return, *via route designated in coupons attached.*" "This ticket if presented by any other than the person named hereon, shall be forfeited, and any agent or conductor of any line over which it *reads*, shall have the right to take up and cancel the entire ticket." "The holder of this ticket agrees, that the liability of the lines, over which this ticket *reads*, shall be," etc. "This ticket is subject to the rules and regulations of each line, over which it *reads.*" "No agent nor employé of *any line* has power to *alter, modify or waive* any of the conditions named in this contract." "In selling this reduced rate ticket for passage over other lines, and in checking baggage on it, this company acts only as agent, and is not responsible beyond its own line." (All the italics ours.) The only coupons attached are in the blue part of the ticket and are as follows: "Charleston and Western Carolina Ry." "Round Trip Party Ticket—Going Coupon." "Good for 1st class passage 1

persons as punched in margin of return coupon, from Fountain Inn, S. C., to Louisville, Ky., *via Spartanburg.*" The return coupon is similar, except the starting point and destination are reversed. The words "via route designated in coupons attached" clearly show that the heading or red part of the ticket was intended to be attached to the coupons, designating the route over the connecting lines, and that the ticket was defective in form. (E. N. Aiken, traveling passenger agent of the Queen & Crescent Road, a witness for the defendant, testified that it is the universal rule to exchange coupon tickets with any road, that is financially sound; and that the plaintiff was ejected because her ticket was irregular. The other words italicized also show that coupons designating the route over connecting lines were contemplated so as to make the ticket complete. The words, "no agent nor employé of any line has power to alter, modify, or waive any of the conditions named in this contract," are important, as they manifest an intention on the part of the defendant to reserve the right to designate the route over the connecting lines, in the ticket itself, and to prevent a connecting line from recognizing the ticket unless it was mentioned in a coupon attached, and then setting up the claim that the ticket was sold over its line, and that the defendant acted as its agent in such sale. A conductor, therefore, on a connecting line, did not have the right to interpolate into the ticket provisions that would make it apply to his line, and he was not bound to receive it in its vitally defective form. The words, "in selling this reduced rate ticket for passage over other lines, this company acts only as agent, and is not responsible beyond its own line," must be construed in connection with the other provisions of the ticket, when it will be seen that "other lines" mean other lines mentioned in coupons attached. When the defendant sold the ticket, there was an implied agreement that it had made arrangements with connecting lines to accept the ticket in the form in which it was sold. In other words, it warranted the ticket to be good in form, for one first class passage from Fountain Inn to Louisville, Ky., and return, not only over its own but connecting lines. The appellant's attorneys seem to recognize this principle, for in their argument they say: "She might have complained, if, on the going trip, she had been unable to ascertain the route she was to take, and on one of the defendant's connections had been willing to recognize her ticket, as a legal contract on its behalf." They, however, contend that there was no failure in this respect; that as her ticket was recognized from Fountain Inn to Louisville, there was no ground for such complaint; and that the Queen & Crescent Road, having once recognized her ticket, it was legally bound to recognize it on her return

trip. This view cannot be sustained, for the reason that the failure of one conductor to discharge his duty to eject a person attempting to ride upon a fatally defective ticket, would not bind the company, to the extent of preventing another of its conductors on a different train and at another time, from refusing to recognize the said ticket.

We now proceed to consider the exceptions in their regular order:

First exception: All the particulars in which error is assigned, except the eighth, must be overruled, for the reason, either that the grounds of objection to the introduction of the testimony were not specified, or testimony to the same effect was afterwards introduced without objection, or the testimony was irrelevant. The introduction of irrelevant testimony must be left, in large measure, to the discretion of the presiding judge, and his rulings are not appealable, unless there was an abuse of discretion, which does not appear in this case. The eighth specification of error mentioned in said exception cannot be sustained, because the witness afterwards answered the question in the affirmative.

Second exception: The very irregular form of the ticket, especially under the circumstances of this case, and the conduct of the validating agent, after being notified that the plaintiff had been warned that her ticket was defective, tended to show recklessness and a disregard of the plaintiff's rights.

Third exception: This exception has been disposed of by what has been already said.

Fourth exception: The question presented by this exception has been disposed of.

Fifth exception: The language of the presiding judge, mentioned in this exception, forms only a part of his charge on the subject, and was explained and qualified by the words immediately following said language, in which he referred to the tenth clause of the ticket set out in the answer. But without the qualification, the charge was in conformity with our construction of the contract.

Sixth exception: While this charge was erroneous, it was not prejudicial, under our construction of the contract.

Seventh exception: This exception is disposed of by what was said in determining what issues were raised by the pleadings.

Eighth exception: This exception seems to have been abandoned, as it is not discussed by the appellant's attorneys in their argument. It forms only part of the sentence, which is as follows: "Wantonness is a conscious failure to observe due care, a conscious invasion of the rights of another, an intentional doing of an unlawful act, knowing such act to have been unlawful." It is not necessary to cite authorities to show that the exception, even if it has not been abandoned, cannot be sustained.

Ninth, tenth, eleventh, and twelfth ex-

ceptions: These exceptions must be overruled for the reason that we have already shown there was testimony tending to prove recklessness, which is the equivalent of willfulness or intentional wrong. *Pickett v. Railway*, 69 S. C. 445, 48 S. E. 406.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WRIGHT v. STATE.

(Supreme Court of Georgia. Aug. 13, 1906.)

WRIT OF ERROR—VERDICT—CONCLUSIVENESS.

No errors of law are complained of, and, there being sufficient evidence to authorize the verdict, the judgment of the court below, refusing a new trial, will not be disturbed.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3075.]

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Walter Wright was convicted of crime, and brings error. Affirmed.

Hardeman & Jones, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

RUMSEY v. STATE.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE.

In passing upon the diligence of a defendant in a criminal case with regard to taking steps to secure the presence of a material witness at his trial, the fact is to be considered that he could not procure a subpoena for a witness "out of the county" until the return of an indictment against him; and if it appears that he promptly procured a subpoena when the opportunity to do so was offered, but that it could not be served because the witness had left the county in which he had been domiciled and gone to a different locality in the state, the defendant should, on proper and timely motion, be afforded such time as is necessary to secure the presence of the witness, or be granted a continuance.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1335-1337.]

2. HOMICIDE—MURDER—MANSLAUGHTER.

In order to reduce a homicide from the grade of murder to that of voluntary manslaughter, where there was neither an actual assault upon the slayer, nor an attempt to commit upon him a serious bodily injury, it is not necessary that the proof should show that the circumstances of the killing were in the nature of an assault or an attempt to seriously injure his person, but only that the circumstances were such as would as much justify the excitement of passion as would an actual assault or attempt to commit a serious personal injury.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Homicide, § 67.]

3. SAME—ADMISSIBILITY OF EVIDENCE.

The purpose of the deceased in going late at night to the home of the defendant being a pertinent subject-matter of inquiry, it was competent to show that the former had made an engagement to there visit a young woman of unchaste character, who was temporarily an

inmate of the dwelling; and additional evidence to the effect that this woman had a general reputation for lewdness was admissible as tending to show the defendant knew, or had reason to suspect, the object of the deceased in calling at the house and persisting in his endeavor to see her.

4. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY TO CASE.

The law relating to the defense of one's habitation against a riotous intruder was not applicable to the facts of the case, either as disclosed by the evidence or as narrated by the defendant in his statement before the court and jury.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1979.]

(Syllabus by the Court.)

Error from Superior Court, Stephens County; J. J. Kimsey, Judge.

Parker Rumsey was convicted of voluntary manslaughter, and brings error. Reversed.

J. B. Jones, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

EVANS, J. The defendant was indicted for the crime of murder, and convicted of voluntary manslaughter. He made a motion for a new trial, which being overruled, he sued out this bill of exceptions.

1. A written motion was submitted by the defendant, requesting the court to continue the case for the term or to at least postpone the trial to some future day, in order to allow him an opportunity to obtain the testimony of a material witness. The defendant alleged in the motion that on the night of the shooting there was staying at his home a young woman by the name of Della Farmer, who occupied a bed in the front room with his eight year old child; that the shooting occurred at the door within eight feet of the bed, and this absent witness saw all that happened and heard all that was said; that she and his child (who is too young to testify) were the only persons in the room at the time of the shooting; that before he shot the deceased advanced on him with an oath, swearing he was going to kill him, and threw his hand back to his hip pocket and attempted to draw out what appeared to be a weapon, and as the deceased did so the defendant shot, it appearing that his life was in danger; and that defendant would be able to further show by Della Farmer that the deceased was a dangerous and violent man when drinking, and that he was drinking at the time. The motion also set forth the statement that the absent witness was raised in an adjoining county, that her parents lived within two or three miles of Royston, and either in Franklin, Madison, or Hart county, and defendant believed she was there or with other relations in that section of the state. The defendant represented that his motion was made solely for the purpose of having time to prepare for trial and procuring the attendance of this witness, and that, if he was granted a reasonable time, he could procure

her attendance. The bill of indictment was returned into court just before it was adjourned late in the evening of the day preceding that on which the case was called for trial and the motion for a continuance made, and the defendant had procured a subpoena for the absent witness and had placed it in the hands of the sheriff. From testimony offered by the state it appeared that the prosecuting attorney had been unable to procure the attendance of Della Farmer as a witness before the grand jury; a subpoena for her having been issued, but she having left the county before it could be served. The state also showed the futility of a postponement on the idea that the presence of the witness could be secured before the court adjourned for the term, but did not attempt to show that she had gone beyond the jurisdiction of the court and could not be served with a subpoena and brought before the court at the succeeding term. Counsel for the defendant stated that he had just been informed that she had been in Bowman the previous day and was going to Athens. It further appeared that before the witness had left the county she had evaded service of the subpoena calling on her to attend upon the grand jury. The presiding judge, after hearing the evidence submitted by the prosecution in connection with the motion of the defendant, declined to either continue the case for the term or to postpone the trial. We are of the opinion that a continuance ought to have been granted. For some time before the indictment was returned the defendant had been confined in jail in another county. It is true that he might have undertaken, through friends or relatives, to ascertain the whereabouts of Della Farmer and keep informed as to her movements, in anticipation that an indictment would be found against him. But until the indictment was returned he could procure no subpoena to issue for this witness who was "out of the county" (Pen. Code 1895, § 918), so as to detain her until the trial, and was in no way responsible for her absence from the county when the case was called.

2. In one of the grounds of the motion for a new trial complaint is made that the court charged the jury on the subject of voluntary manslaughter; the contention of the accused being that there was nothing in the evidence nor in his statement to justify a charge on that subject. The homicide occurred upon the veranda of the defendant's residence, late at night. There was evidence from which the jury could find that a lewd woman was temporarily domiciled at the defendant's residence, that the deceased had visited her during the afternoon and had made an engagement to call upon her that night; that, some time after the members of the defendant's household had retired for the night, the deceased came to his house and knocked on the door, and when defendant came to the door the deceased inquired if the woman was

there, and defendant denied that she was, and warned the deceased not to come to his house again; that within a short time thereafter the deceased returned and tapped upon the window of one of the rooms, whereupon a guest of the defendant, who occupied the room with him, called his attention to the fact that there was some one outside the window; that the defendant went to the window, but saw no one there; that within a few minutes the deceased repeated his knocking upon the window, and defendant was again aroused by his guest and went to the window, saying, "I will see if I can't put them away from there," that, seeing no one outside, defendant then went to the door, opened it, and was confronted by the deceased, who insisted that the woman was in the house and repeated his demand to be allowed to see her, refusing to go away when ordered by the defendant to do so; and that the defendant, angered by the past conduct of the deceased, and losing all control of his temper when the deceased persisted in his efforts to gain admission into the house in order to gratify his lustful desires, suddenly snatched up a pistol which was lying on a shelf over the fireplace of the room, shot at the deceased, and inflicted upon him the mortal wound. From this state of facts the jury might infer that the killing was not premeditated by the defendant when he for the second time went to the door, but was the result of sudden and irresistible passion, aroused by the persistent misbehavior of the deceased and his refusal to leave the defendant's home in peace. It was for the jury to determine whether the circumstances were such as to incite passion of such a character as to exclude the idea that the shooting was done with cool deliberation and malice. It is true that mere provocation by words, threats, menaces, or contemptuous gestures can in no case suffice to reduce the killing from murder to voluntary manslaughter, and that there must be some actual assault upon the slayer, or attempt by the person killed to commit a serious injury upon his person, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, express or implied. Pen. Code 1895, § 65. The "equivalent circumstances" contemplated by this section of our Penal Code are not necessarily such attendant facts as are in the nature of an actual assault or an attempt to commit serious injury upon the person of the slayer, but are such mitigating circumstances as are reasonably calculated to produce the same state of mind as would an actual assault upon him or an attempt to do him serious bodily injury. *Murray v. State*, 85 Ga. 378, 11 S. E. 655; *Edwards v. State*, 53 Ga. 428. Besides the element of hot blood, which must always be present in the crime of voluntary manslaughter, there must be, in addition thereto, another element, viz., an actual assault, or

attempted serious injury to the person, or other equivalent circumstances which exclude the idea of malice. *Jenkins v. State*, 123 Ga. 523, 51 S. E. 598. It may be conceded that there was neither an actual assault upon the accused nor any attempt to do him bodily injury; yet if the circumstances attending and leading up to the homicide were such as to justify sudden and irresistible passion on his part, and such as to negative the idea that he acted deliberately and with malice, the jury would be authorized to find that the crime was not murder, but voluntary manslaughter. Thus, in *Hill v. State*, 64 Ga. 453, it was held that if a man suddenly comes upon another who has debauched his wife, and with a belief that the seducer is armed, and becoming enraged upon seeing him for the first time after learning of his guilt, and acting without premeditation, shoots him and kills him, the offense is voluntary manslaughter. The state of mind produced by these circumstances, although there was no actual assault upon or attempted personal injury to the slayer, was recognized as being similar to the uncontrollable passion which is calculated to be aroused by an actual assault or attempted bodily injury of a serious character. The colloquy which passed between the deceased and the defendant in the case at bar could not arouse that passion which the law ascribes to human infirmity, when grading a homicide as voluntary manslaughter; but there were other elements in the case which would seem to warrant the conclusion that the intrusion of the deceased upon the premises of the defendant and the persistent endeavor of the former to see an inmate of the dwelling for an unlawful purpose, against the will of the defendant and in defiance of his orders to go away, amounted to such provocation as would arouse his uncontrollable passion and produce a sudden irresistible impulse to slay the offender when peaceful attempts to induce him to abandon his lustful mission proved unavailing. The shooting was not necessarily attributable to a wanton and premeditated desire to take the life of the deceased to avenge any real or supposed wrong done to the defendant; and the trial judge properly charged the jury as to the law of voluntary manslaughter, and left them to determine whether the killing was done with deliberation and malice, or under a sudden impulse of passion which the law supposes to be irresistible, when aroused by an actual assault or an attempt to commit serious bodily injury upon the slayer, or by equivalent circumstances such as exclude all idea of premeditation, deliberation, or malice, express or implied.

3. It was all-important to inquire into the purpose of the deceased in going, late at night, to the home of the defendant and demanding to see a young woman who was temporarily an inmate of his dwelling; and it was no less important to ascertain, if possi-

ble, whether the defendant knew or had reason to suspect what that purpose was. Proof that the woman was unchaste and had made an engagement with the deceased to call to see her at night was admissible as directly bearing upon the inquiry into the purpose of the deceased in going to the defendant's house and persisting in his efforts to see one of its inmates. Evidence that the woman had a general reputation for lewdness was relevant as tending to show that the defendant was acquainted with her true character, and was advised of, though not in sympathy with, the object of the untimely visit of the deceased. *Price v. State*, 72 Ga. 454; *Gossett v. State*, 123 Ga. 431, 51 S. E. 394. The accused had no cause to complain of the admission of such light upon the tragedy.

4. The deceased went to the dwelling of the defendant upon a peaceful, though unlawful, mission. The evidence did not disclose that he made any endeavor, in a riotous manner, to enter the habitation of the defendant for the purpose of assaulting or offering personal violence to any person therein; and, this being so, the court properly eliminated from the charge to the jury all reference to the law relating to the defense of one's habitation against riotous intruders, embraced in Pen. Code 1895, § 70. The court did charge section 72, which declares under what circumstances a forcible invasion of one's habitation may be resisted and prevented by the slaying of the intruder. This instruction was inapplicable to the facts of the case, but it did not operate to the prejudice of the accused, as it gave to him the benefit of a defense upon which he did not rely.

As there must be another trial because of the erroneous ruling of the court upon the defendant's motion for a continuance, we are not called on to deal specifically with the complaint that a new trial was not granted on the ground of newly discovered evidence.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

DEAS v. SAMMONS.

(Supreme Court of Georgia. Aug. 9, 1906.)

EJECTMENT—TITLE OF PLAINTIFF.

When an action is brought for the recovery of land, either under the common-law form or under the Code, the plaintiff must recover, if at all, upon the state of his title as it subsisted at the commencement of the suit. Evidence of any after-acquired title is wholly inadmissible.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 28.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Action by Nancy Sammons against Julia Deas. Judgment for plaintiff, and defendant brings error. Reversed.

Nancy Sammons brought suit to recover a certain tract of land against Julia Deas.

To the petition was attached an abstract of title, the last link of which was as follows: "Winney Inlow to Nancy Sammons, sole heir at law of Winney Inlow." After both sides announced ready for trial, plaintiff amended the abstract of title attached to her petition, so that it appeared that Winney Inlow died intestate about 1894, and left as her heirs at law two brothers and two sisters, one of whom was the plaintiff. There were no debts due by the deceased, and there was no administration. The other heirs at law of Winney Inlow conveyed to the plaintiff by a deed, not recorded, the property sued for. This deed was dated October 10, 1905, which was subsequent to the date the petition was filed. The defendant demurred to that portion of the amendment embracing the last demise, on the ground that the plaintiff could not maintain an action on a title acquired after the commencement of her suit. The demurrer was overruled. Evidence was admitted, over objection of defendant, establishing the last demise; and the court charged the jury that the plaintiff could recover on a title acquired after the commencement of the action. To all these rulings the defendant excepted.

Wm. H. Fleming, for plaintiff in error.
F. W. Copers, for defendant in error.

COBB, P. J. (after stating the foregoing facts). When the common-law form of ejectment is adopted, the plaintiff may lay as many demises as he pleases, and, if he show title under any one of them, he may recover. He may also add new demises by way of amendment at any time when it is necessary to maintain his suit. When the plaintiff does not adopt the common-law form of ejectment, he is required to attach to his petition an abstract of the title relied on. This abstract is treated, for many purposes, as containing what would be the demises under the common-law form. It may be amended by adding different and other muniments of title under which the plaintiff claims. *Willis v. Meadors*, 64 Ga. 721. The general rule is that there can be no recovery unless the plaintiff had a complete cause of action at the time the suit is filed. A cause of action accruing pending the suit will not entitle the plaintiff to recover. *Baker v. Tillman*, 84 Ga. 402, 11 S. E. 355; *Wadley v. Jones*, 55 Ga. 329; *Gentry v. Walker*, 101 Ga. 123, 28 S. E. 607; *Harris v. Moss*, 112 Ga. 95, 37 S. E. 123 (3). This rule is applicable both to the common-law form of ejectment and the action to recover land authorized by the Code. The English Court of King's Bench would not suffer a demise to be laid subsequent to the day of the delivery of the declaration, on the ground that this would be to give to the lessor of the plaintiff a right of action which did not subsist at the time of the commencement of the action. *Tyler on Ejectment*, 402. The same rule has been announced in this country in numerous cases.

15 Cyc. 29. In *Johnston v. Jones*, 66 U. S. 224, 17 L. Ed. 117, Mr. Justice Swayne remarked: "In ejectment the plaintiff must recover, if at all, upon the state of his title as it subsisted at the commencement of his suit. Evidence of any after-acquired title is wholly inadmissible." And the same justice, in *McCool v. Smith*, 66 U. S. 470, 17 L. Ed. 218, said: "The rule of the common law is inflexible that a party can recover only upon a title which subsisted in him at the time of the commencement of the suit."

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

JONES v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. CRIMINAL LAW—CONTINUANCE—SHOWING ON APPLICATION.

In his application for a continuance the movant failed to show that the same was not made for the purpose of delay, and there was no abuse of the court's discretion in overruling the motion for continuance.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1311.]

2. SAME—INSTRUCTIONS—EVIDENCE.

The portions of the charge excepted to were not erroneous for any of the reasons assigned. The evidence authorized the verdict, and the judgment of the court refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kimsey, Judge.

Zeb Jones was convicted of crime, and brings error. Affirmed.

W. S. Paris, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

PICKENS v. GEORGIA R. & BANKING CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

CARRIERS—TRANSPORTATION OF PASSENGERS—STOPPING AT DESTINATION—LIABILITY OF LESSOR.

A railroad company which as a common carrier receives a passenger, and accepts a ticket sold by it or a connecting line to a particular station on its road is charged by law with the duty of stopping the train at the station, and affording the passenger an opportunity to alight; and the failure to perform such a duty is a breach of a public duty, which renders the lessor liable where the road was being operated by a lessee.

(Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by Nellie Pickens against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Reversed.

Nellie Pickens sued the Georgia Railroad & Banking Company, alleging that it was the owner of a line of railroad which it had

leased to two other companies which were operating the same. The Gainesville, Jefferson & Southern Railroad Company, herein-after called the "Gainesville Company," owned a line of road running from Gainesville by Hoschton to Social Circle on the line of the defendant. The defendant sold tickets from points on its road to points on the line of the Gainesville Company, and the Gainesville Company sold tickets from points on its road to points on the defendant road. The plaintiff purchased from the agent of the Gainesville Company a ticket from Hoschton, a station on that road, to Stone Mountain, a station on the road of the defendant. The agent told her at the time of the purchase that the train upon which she would leave Hoschton would make connection at Social Circle with a train of the defendant which would stop at Stone Mountain. When she reached Social Circle she boarded a train of the defendant when it arrived at that point. The conductor in charge of the train took her ticket, examined it carefully, punched it, and placed it in his pocket, after having been informed that she desired to leave the train at Stone Mountain. When the train reached Stone Mountain the conductor failed to stop the train, and carried her to Atlanta, 16 miles from her destination. The petition alleges that the defendant was negligent in not stopping the train at Stone Mountain, and allowing her to alight therefrom after having accepted her ticket. It was further alleged that the train was scheduled to stop at Lithonia, where she could have boarded another train, and reached her destination if she had been informed that the train would not stop at Stone Mountain. The petition distinctly alleges that upon the acceptance of her ticket by the conductor a duty on his part arose to stop the train at the point of destination indicated by the ticket. Upon general demurrer the petition was dismissed, and the plaintiff excepted.

Hulsey & Field and A. M. Brand, for plaintiff in error. Jos. B. & Bryan Cumming and M. A. Candler, for defendant in error.

COBB, P. J. (after stating the foregoing facts). A railroad conductor should not accept from a passenger a ticket to a particular station, knowing that she intends and desires to get off there, unless he expects to stop the train at that station, and allow her to alight. If he accepts a ticket, a duty arises to stop the train at the point of destination fixed by the ticket. *Caldwell v. Railroad Co.*, 89 Ga. 550, 15 S. E. 678. In the present case the conductor not only accepted the ticket but he was distinctly informed that plaintiff desired to alight from the train at Stone Mountain. If he did not intend to stop the train at that station, he should have promptly informed the plaintiff to that effect, and refused to accept her ticket, and either have stopped the train immediately and al-

lowed her to alight, or should have informed her at what station the train would make the next stop in order to allow her to alight at that point. The failure to stop the train at Stone Mountain and carrying plaintiff beyond her point of destination to Atlanta was a breach of duty, which renders the company liable. The plaintiff certainly had a cause of action against the lessee of the defendant for this breach of duty which it owed to her, growing out of the acceptance of her ticket. The defendant, being by its charter a carrier of passengers for hire, could not throw off the responsibility which it owed to the public by a lease of its property to another company; and the plaintiff therefore had a right of election, whether she would hold the lessee liable or bring her action against the lessor. "A breach of a contract made by a common carrier with one of its passengers is a breach of its public duty for which it is liable in tort." *Caldwell v. Railroad Co.*, supra. The petition being challenged simply by a general demurrer, it will not be subjected to that scrutiny which the filing of a special demurrer would require. As against a general demurrer the petition set forth a cause of action.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

HALL v. STULB.

(Supreme Court of Georgia. Aug. 17, 1906.)

RECEIVERS—COMPENSATION—CONTRACTS—VALIDITY.

The compensation of the receiver, and the party or parties to be charged with the payment of the same, are matters to be determined exclusively by the court from which the receiver derives his appointment; and an agreement between the receiver and a party who is also the purchaser at a sale of the receiver, under which the latter is rendered liable for the payment of the compensation of the receiver, is contrary to public policy and void, unless the agreement is entered into with the authority of the court, or is thereafter approved by it.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 397-401.]

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by A. W. Stulb against H. L. Hall. Judgment for plaintiff, and defendant brings error. Reversed.

A. W. Stulb brought suit against H. L. Hall, and alleged the following facts: On July 16, 1902, petitioner was appointed receiver of the firm of Hall & Wyly, and took possession of the property of said firm, and after conducting the business for some time, finally sold the assets for \$11,000, the same being bought in for the benefit of Hall. Hall had promised to pay petitioner his fee as receiver, and, relying upon this promise, petitioner presented no claim to the court for fees, "nor did he object to the confirmation of the sale."

The amount to be paid was not fixed, but it was agreed that he should be paid the reasonable value of the services rendered as receiver, which is alleged to be \$500. Hall is further indebted to petitioner in the sum of \$25, by reason of an agreement made by said Hall in writing to assume a debt due petitioner by A. E. Wyly. The defendant demurred generally and specially to the petition, and to the overruling of his demurrer excepted.

Salem Dutcher and B. B. McCowen, for plaintiff in error. Wm. H. Barrett, for defendant in error.

COBB, P. J. (after stating the foregoing facts). A receiver is an officer of the court from which he receives his appointment. He is sometimes described as an impartial and indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or fund in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it. He is in no sense an agent or representative of any party to the action. He exercises his function in the interests of no individual interested in the litigation, but for the common benefit of all concerned. High on Receivers (3d Ed.), § 1; Alderson on Receivers, § 2. His compensation is determined by the court from which he receives his appointment. The court in fixing the compensation takes into consideration the fidelity exercised by him in the discharge of his duties. A receiver is frequently spoken of as the "hand of the court." High on Receivers, § 2. He has been called "the executive end of a court of equity." Beach on Receivers, § 2. His possession is the possession of the court. An interference with the property in his possession is a contempt. Under some circumstances, at least, his person is protected as much as the property in his possession. The receiver may apply to the court for instructions whenever he is in doubt as to the proper course to be pursued in the discharge of his duties. He may look with confidence to the court for protection against any one interfering with him in the administration of the property in his hands. He should, at all times, strive to maintain in the discharge of every duty impartiality between the parties interested in the litigation. He should never sacrifice or jeopardize the interests of one party in order that another may be benefited. He should not place himself in a position where he would be tempted to serve one rather than the other. If the receiver were allowed to make an agreement as to his compensation with one of the parties to the case, this would place him in a position where he would be more than apt to guard the interest of him from whom his compensation was to come rather than other parties whose interests might be involved. More than this, it would have the effect to weaken his sense of

responsibility to the court from which he received his appointment, and the right to contract with a litigant for his fee would weaken the control which the court should at all times have over the receiver, which can be exercised more efficaciously than in any other way by the amount allowed for his compensation.

Strictly speaking, a receiver is not a public officer, but his position is such that rules which would be applicable to a public officer can, with propriety, be applied to him. An agreement by a public officer to accept less than the fees or salary allowed by law is contrary to public policy and void, and the same is true of a promise to give a public officer more than the amount which the law fixes as compensation for his services. The rule is well settled that where fees or salaries are established for the services of public officers, the policy of the law prohibits special contracts between them and the public. 9 Cyc. 496; 15 Am. & Eng. Enc. Law. 964; Greenwood on Public Policy, 337; Clark on Contracts, 282, et seq. In *National Exchange Bank v. Woodside* (St. Louis Court of Appeals) 80 S. W. 715, the receiver of a bank consented that his receivership should remain open for the benefit of a purchaser of certain of the bank's assets, and the purchaser might use the receiver's name in suits brought to collect such assets, the purchasers agreeing to pay the receiver for the use of his name. It was held that this agreement was contrary to public policy and void; that the receiver's compensation was within the exclusive jurisdiction of the court by which he was appointed and payable from the estate. Some of the text-writers have laid down the proposition that a direct liability may be imposed upon parties to the action, or some of them, for the remuneration of the receiver, and that this may result out of an agreement between the parties. Alderson on Receivers, § 866; Beach on Receivers, § 841. In each of the works above cited the authority for the proposition is the case of *Kelsey v. Sargent*, which is reported in 2 N. Y. St. Rep. 150, and 40 Hun (N. Y.) 150, and 633. The volume first referred to is not accessible to us, but we have examined the case as reported in the last volume. On the first page cited there appears a case of the name indicated, but a careful examination of this case fails to disclose anything remotely bearing on this subject. On the second page cited, appears a case of the name indicated, along with other cases, and the only matter reported is in the following language: "Order granting additional allowance affirmed with costs." It may be that the matter referred to was adjudicated in the case last cited. We find no case which sustains the proposition that a receiver may bargain with a litigant as to the compensation to be paid for his services. It has been held that a receiver may waive his right to compensation. 2 Current Law, 1479.

But if a receiver intends to insist upon compensation for his services, he must look to the court, and the court alone, to determine the amount to be paid, and by whom the payment shall be made. It follows that a contract made by a receiver with a party who is also the purchaser at a sale by the receiver, under which the latter is to be liable for his compensation as receiver in the cause, at a stated amount or an amount to be thereafter determined, is contrary to public policy and void, when it appears that the agreement was not authorized or approved by the court appointing the receiver. The judge erred in overruling the demurrer to those portions of the petition which sought a recovery from the defendant based upon a contract between him and the plaintiff to pay the latter for services rendered as receiver.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

SOUTHERN RY. CO. v. BORN STEEL RANGE CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. CARRIERS—CARRIAGE OF GOODS—INABILITY TO FIND CONSIGNEE—DUTY OF CARRIER.

Upon inability to locate a consignee and deliver to him a shipment of freight, a common carrier, if informed that the ownership of the property is in the consignor, is under a duty to hold the shipment a reasonable length of time subject to his order.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 316, 329.]

2. SAME—FREIGHT CHARGES—ENFORCEMENT—SALE OF GOODS.

While the consignor may be called on to pay charges for freight and storage, the carrier cannot lawfully, pending an adjustment of its claims and without affording the consignor an opportunity to pay all just demands against him, dispose of the shipment at public auction sale for the purpose of enforcing collection of freight and storage charges. To do so amounts to a conversion of the property, notwithstanding the sale was brought about by officials of the carrier who were misinformed as to the true status of the matter.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 427-433, 895, 900.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Action by the Born Steel Range Company against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

By consent of the parties this case was tried by the presiding judge, without the intervention of a jury, upon the following agreed statement of facts, together with certain documentary evidence thereto attached: On October 25, 1901, the Born Steel Range Company shipped by the Wheeling & Lake Erie Railroad Company, at Cleveland, Ohio, one range, with accompanying fixtures, to F. W. Foster, at Savannah, Ga. The shipment was transported by that company and its connecting lines, being duly turned over to

the Southern Railway Company as one of the connecting carriers. By accepting and receiving the shipment the Southern Railway Company became a party to, and adopted, the contract entered into by and between the initial carrier and the plaintiff, and agreed to transport and deliver the shipment to the consignee in Savannah. The range and fixtures arrived in Savannah, over the Southern Railway, on November 11, 1901. In accordance with the local custom prevailing in that city as to giving notice to consignees, the Southern Railroad Company sent notice through the mail, addressed to the consignee in Savannah, Ga., on November 11, December 21, 28, 30, and 31, 1901, of the arrival of the shipment, all of which notices were returned by the post-office authorities with the information that the consignee could not be located. The shipment was kept on hand by the Southern Railway Company, in Savannah, until June 7, 1902, when the same was sent to Toccoa, Ga., and disposed of at a sale of the accumulated freight of the company. A request was received by the Southern Railway Company from the plaintiff to return the shipment, which request was made before the shipment was sent to Toccoa and while it was in the possession of the company; but as storage charges had accumulated thereon, the company claimed it had no authority to waive the same, and it was necessary to take the matter up with the Southeastern Car-Service Association. This consumed time, and when the Southern Railway Company was ready to consign the shipment to the plaintiff, it was ascertained that the range and fixtures had already been disposed of by the company at Toccoa, as aforesaid, for accumulated freight charges thereon in compliance with the Code. The value of the shipment in October, 1901, was \$74, and it was of that value at the time of its arrival in Savannah. At the sale the range, etc., did not bring enough to pay storage, freight, and other charges thereon.

From letters attached to, and forming a part of, the agreed statement of facts, it appears that the explanation given by the railroad officials concerning the failure to deliver the shipment to the consignee or to return it to the plaintiff was that the consignee was not a resident of Savannah, and the local agent could not locate him; that the Born Steel Range Company, though aware that the shipment had arrived at destination, did not exhibit much interest in getting it disposed of, and when that company finally asked that the shipment be returned, storage charges to a considerable amount had accrued, and it took some little time to get that feature of the case straightened out; and that when the manager of the Southeastern Car-Service Association finally consented to cancel the storage, the shipment had been sent to Toccoa for sale, had been advertised in accordance with law, and the company realized nothing

whatever, as charges amounted to considerable more than the freight. The officials took the position that "it was the shipper's fault in not showing consignee's post-office address in the shipping directions," coupled with "the fact that the consignee himself did not apparently make an effort to get the range." It appears from a letter dated January 27, 1902, written by the Born Steel Range Company to an agent of the initial carrier, that the consignor had, after repeated efforts to have the shipment traced, concluded it was lost, and thereby notified the agent that unless the shipment was located by the first of the month, it would be charged to the account of his company; and if found, the shipper would require its return free of all expenses, "on account of being astray." The bill of lading, which was attached to the agreed statement of facts, recited that the consignee was "F. W. Foster, Savannah, Ga.," and did not disclose that his post-office address was McIntosh, Ga. After hearing the argument of counsel, the trial judge announced his finding in favor of the plaintiff, and judgment against the defendant was subsequently entered up for the sum of \$74, with interest from November 19, 1901. To this judgment exception is taken by the railway company.

Osborne & Lawrence, for plaintiff in error.
O'Connor, O'Byrne & Hartridge, for defendant in error.

EVANS, J. (after stating the facts). It affirmatively appears that the defendant railway company duly performed its duty as a common carrier to safely transport the shipment to destination. After placing the shipment in a place of safety, the liability of the company as an insurer ceased, and its liability as a warehouseman began, unless the local custom prevailing in Savannah as to giving notice to consignees entered into and became a part of the contract of shipment. *Ga. & Ala. Ry. v. Pound*, 111 Ga. 6, 36 S. W. 312. However this may be, the company is not chargeable with any default in failing to observe this local custom or in not making delivery to the consignee, who could not be located. Relatively to him, the company had a statutory right to dispose of the shipment at public auction, upon compliance with the requirements of Civ. Code, 1895, § 2303, after waiting upon him without avail until June 7, 1902, to appear and pay freight and warehouse charges. But some time prior to that date, the company had received notice that the consignor was the owner of the shipment; and even if it was under no legal duty to have previously notified the consignor of its liability to locate the consignee (*American Sugar Co. v. McGhee*, 96 Ga. 27, 21 S. E. 383), the company was under a duty, after becoming informed of the ownership of the property, to hold the shipment a reasonable time subject to the order of the consignor. Of course, the company had a lien on the property for freight charges (Civ. Code, 1895

§ 2287), and the consignor would be under an obligation to settle with the company for the freight and storage charges before exercising the right to receive the shipment at Savannah or to direct a reshipment of the property. *Penn Steel Co. v. Ga. R. Co.*, 94 Ga. 636, 21 S. E. 577. Before it was sent to Toccoa for sale at public auction, the consignor had requested the railway company to return the shipment. The charges claimed thereon were not, it is true, tendered to the company by the consignor; yet the reason why this was not done appears to be that the officials of the company undertook to get the consent of the Southeastern Car-Service Association that the claim for the accumulated charges might be waived. As pointed out by counsel for the railway company, there seems to have been no consideration for this undertaking, and the company was not bound to carry out its understanding with the consignor as to remitting storage charges in the event the necessary consent of the association could be secured. Still, the company's officials having gratuitously entered upon the project, the consignor was relieved for the time being of offering to pay the company's demand, and, until the matter was finally adjusted, no right to sell the shipment at public auction could arise. Having induced the consignor to rely upon the promise to endeavor to remit a portion of the charges, the company is estopped from asserting that the promise was without consideration. It was at liberty at any time to abandon its efforts along this line and to demand, as a condition precedent to the surrender of the shipment, payment in full and of all lawful charges for freight and storage; but until such a demand and a refusal by the consignor to comply therewith, the company could acquire no right to sell the property upon the idea that there had been a default in making payment of its just demands. The sale of the property, pending the negotiations with respect to fixing the amount which the consignor would be called on to pay, was a conversion. That this conversion was brought about through a misunderstanding on the part of some of the company's officials as to the true status of the matter cannot affect the question of the company's liability; it, at least, was bound to know how the matter stood, and is responsible for the wrongful acts of its officers in disposing of the property at auction sale. It may be that it was the right of the company to plead that it acted in good faith and through the mistake of some of its officers or servants, and for this reason should be allowed to set off against the plaintiff's claim such lawful charges as the plaintiff would have been under a duty to pay before getting possession of the shipment. But no such plea was filed, no evidence was submitted as to the amount of the charges which the company was entitled to collect, and the sole contention urged upon the trial was that

the company was not liable in any amount to the plaintiff. This being true, the admitted value of the property was the only measure by which the plaintiff's recovery could be fixed; and, ruling only upon the single question presented for our determination, viz., whether or not a conversion of the property was shown, we hold that the trial judge arrived at a proper solution of this question.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

PATTERSON v. DRAKE et al.

(Supreme Court of Georgia. Aug. 18, 1906.)

1. EVIDENCE—SHERIFF'S DEED—DOCUMENTARY EVIDENCE—PRODUCTION AND AUTHENTICATION.

A sheriff's deed is admissible in evidence as a muniment of title, when accompanied by the execution under which the land was sold. If the execution is lost or destroyed, and the same was not recorded with the sheriff's deed, parol evidence as to its contents is admissible, after proper proof of its loss or destruction.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1536.]

2. SAME—JUSTICE'S TRANSCRIPT.

A transcript from the docket of a justice of the peace, showing a judgment entered thereon and other entries relating to the case, when certified by the justice in office having custody of the docket, is admissible in evidence in the courts of the county in which the justice holds office. *Civ. Code* 1895, §§ 5214, 5215.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1298.]

3. JUDGMENT—EVIDENCE OF JUDGMENT AS ESTOPPEL.

When it is sought merely to establish the fact that a judgment has been rendered, a certified copy of the judgment, without the proceedings prior thereto, is admissible. Aliter, when the judgment is sought to be used as an estoppel upon the parties thereto. *Little Rock Cooperage Co. v. Hodge*, 37 S. E. 743, 112 Ga. 521; *Stringfellow v. Stringfellow*, 37 S. E. 767, 112 Ga. 494.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1522½; vol. 30, Cent. Dig. Judgment, §§ 1809-1812.]

4. EVIDENCE — SECONDARY EVIDENCE — GROUNDS FOR ADMISSION—DETERMINATION.

If an original deed, which was duly recorded, is lost or destroyed, a certified copy from the registry is admissible in evidence, whenever the court is satisfied of the fact of the loss or destruction. *Civ. Code* 1895, § 3630. The sufficiency of the evidence as to the loss or destruction of the original deed is within the discretion of the court. *Cox v. McDonald*, 45 S. E. 401, 118 Ga. 414 (2).

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 674, 675.]

5. SAME—RECITALS IN SHERIFF'S DEED.

The recitals in a sheriff's deed of an execution and a seizure and sale thereunder may be looked to as secondary evidence of the contents of the execution, when it appears that the execution has been lost and is not recorded. *Ellis v. Smith*, 10 Ga. 253 (2).

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 583-585.]

6. EVIDENCE — PRESUMPTIONS — EXECUTION — RETURN—LEVY.

When a sheriff's deed to land, regular upon its face, reciting a levy and sale under au

execution issued from a justice's court, has been admitted in evidence, and there is evidence showing the loss of the execution, there is a presumption that before the land was levied upon a proper officer had made upon the execution an entry of no personal property to be found. *Vaughn v. Biggers*, 6 Ga. 188 (6).

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 105.]

7. JUSTICES OF THE PEACE—PROCESS—RETURN—COLLATERAL ATTACK.

An entry of service by a constable on a summons issued from a justice's court may be set aside on a traverse of the entry duly filed, but it cannot be collaterally attacked.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 262, 263.]

8. EXECUTION—SALE—PERSONS WHO MAY PURCHASE—ATTORNEY.

The relation of debtor and creditor arises between client and attorney as to the amount due the attorney as compensation for services rendered, and the attorney may enforce the demand against the client in any way in which an ordinary creditor would have a right to enforce such a demand against his debtor. If suit is brought upon the demand, and judgment is rendered in favor of the attorney, the fact that the demand arose out of the relation of attorney and client will not prevent the attorney from becoming a purchaser at the sale under the execution.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Execution, §§ 642-647.]

9. TRIAL—DIRECTION OF VERDICT—EVIDENCE.

If there was any error at all in the rulings on the admission of evidence which were made the subjects of assignments of error, the error was not of such a character as to require a reversal of the indictment. The direction of the verdict in favor of the defendant was not erroneous for any of the reasons urged in the brief of counsel for plaintiff in error.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between W. B. Patterson and Annie Drake and another. Judgment in favor of the latter parties, and Patterson brings error. Affirmed.

Robert L. Rodgers, for plaintiff in error.
W. H. Terrell, for defendants in error.

COBB, P. J. Judgment affirmed.

FISH, C. J., absent.

PARKS v. PARKS.

(Supreme Court of Georgia. Aug. 9, 1906.)

HUSBAND AND WIFE—TEMPORARY ALIMONY—APPLICATION—DISCRETION OF COURT.

This being an application for temporary alimony and counsel fees, and the evidence as to the cause of the separation being conflicting, the discretion of the judge in refusing the application altogether will not be controlled.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, §§ 1084-1088.]

(Syllabus by the Court.)

Error from Superior Court, Morgan County; H. G. Lewis, Judge.

Action by Kissie Parks against Lee Parks. Judgment for defendant, and plaintiff brings error. Affirmed.

M. C. Few, for plaintiff in error. W. C. Thompson, for defendant in error.

COBB, P. J. Whenever an action of divorce is brought by either party, the judge is authorized to grant to the wife temporary alimony, including expenses of litigation. Civ. Code 1895, § 2457. This may be also done upon proper application by the wife, when there is no action for divorce pending. Civ. Code 1895, § 2467. In either event the judge may inquire into the cause and circumstances of the separation, and in his discretion may refuse the application for alimony altogether. Civ. Code 1895, § 2460. Counsel fees allowed to the wife under such circumstances, or "suit money," as they are sometimes called, are allowed as necessities to the wife, and she is authorized under the law to pledge her husband's credit for the same. 2 Bishop on Marriage, Divorce, and Separation, 973; 2 Nelson on Divorce and Separation, § 876. In *Sprayberry v. Merk*, 30 Ga. 81, 76 Am. Dec. 637, Judge Stephens said: "It is worthy of remark that counsel fees are allowed as part of her necessary maintenance, and are allowed before it is ascertained whether she has valid grounds of divorce or not." See, also, *Killiam v. Killiam*, 25 Ga. 186; *Weaver v. Weaver*, 33 Ga. 172. In some instances counsel fees have been allowed, although temporary alimony was refused. 2 Nelson on Divorce and Separation, § 824. But in all cases the allowance both of alimony and counsel fees, or the allowance of one and the disallowance of the other, is a matter addressed to the sound discretion of the judge, after an examination into the causes of the separation and the circumstances of the parties. He may grant both. He may grant one and refuse the other, or he may refuse both. Unless this discretion is abused, this court will not interfere with the order of the judge granting or refusing the application for alimony. In the present case the evidence as to the cause of separation was conflicting, and on other material points there was also a conflict. The judge, after a hearing, having seen fit, in the exercise of the discretion vested in him by law, to refuse the application, not granting either alimony or counsel fees, we cannot say that he has abused the discretion which the law allows him. See, in this connection, *Vinson v. Vinson*, 94 Ga. 492, 19 S. E. 898; *Williams v. Williams*, 114 Ga. 772, 40 S. E. 782; *Pearson v. Pearson*, 125 Ga. 132, 54 S. E. 194.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

HERNDON v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. CRIMINAL LAW—EVIDENCE—INSTRUCTIONS.

The rulings of the court as to the admission of the testimony which was complained of, and

the portions of the charge excepted to, were not erroneous for any of the reasons assigned.

2. SAME.

The evidence authorized the verdict, and the judgment of the court in refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Clarence Herndon was convicted of crime, and brings error. Affirmed.

J. A. Ansley and Williams & Harper, for plaintiff in error. F. A. Hooper, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

BENNETT v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. ADVERSE POSSESSION—INSTRUCTIONS.

Where, in an action to enjoin a trespass upon its right of way, one of the supports of the railroad company's title is prescription by 20 years' adverse possession, it is error for the court to instruct the jury that, if the company "opened out" and "cleared up" the right of way to the full width claimed 20 years prior to the institution of the action under consideration, it acquired title thereto, unless the defendant's grantor moved in the matter within the time allowed by law; the error being that the charge in effect instructs the jury that by simply opening out and clearing up the right of way the railroad company acquired title, whether it immediately or subsequently abandoned the whole or any part of the property or not.

2. SAME—COLOR OF TITLE—EXTENT—RAILROAD RIGHT OF WAY.

But where a railroad company, under the power given it in its charter, lays out a right of way 200 feet wide and maintains that width by keeping it clear of trees and undergrowth, its successor in title acquires color of title to the full width of 200 feet, although the instrument of conveyance merely describes it as the grantor's "right of way."

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 463-465.]

(Syllabus by the Court.)

Error from Superior Court, Ware County; T. A. Parker, Judge.

Action by the Atlantic Coast Line Railroad Company against J. F. Bennett. Judgment for plaintiff, and defendant brings error. Reversed.

Leon A. Wilson, for plaintiff in error. Kay, Bennett & Conyers and J. C. McDonald, for defendant in error.

BECK, J. The Atlantic Coast Line Railroad Company brought an equitable petition seeking to enjoin Bennett from building a fence upon its alleged right of way within about 50 feet from its track, claiming that the width of the right of way, along that portion of the track where the defendant was building the fence, was 200 feet, extending 100 feet on each side of the center

of the track. It was alleged that the plaintiff held this right of way under a prescriptive title, by reason of the continuous adverse possession of itself and its predecessors in title for more than 20 years, and also by possession under color of title for a period longer than the statute requires. Upon the trial evidence was introduced tending to show that the plaintiff, together with its predecessors, had for 30 years prior to the institution of this action kept the full width of 200 feet of the alleged right of way, upon a part of which the defendant was alleged to be trespassing, clear of trees and undergrowth. In the instruments conveying the road to the plaintiff and its grantors, the width of the right of way is not described, nor does it appear in the record by copy of charter; but evidence was introduced tending to show that 100 feet had been cleared and kept clear upon each side of the track by the Brunswick & Albany Railroad Company, the original owners of the road, which had the right under its charter to establish and maintain a right of way of that width. The defendant showed a perfect paper title in himself to the lot he was endeavoring to inclose, as well as to all of the land upon which the railroad was constructed for a distance covered by the proposed fence, but admitted that the plaintiff had a prescriptive title to a right of way 80 feet in width (15 feet on each side of the center of the track), and conceded that at the time the road was built and now 200 feet was the usual and necessary width for a right of way through that portion of the country. The jury found for the plaintiff, and to the overruling of the defendant's motion for a new trial he excepted. Besides the general grounds, the motion contained several special grounds, all of which that merit consideration will be taken up and disposed of seriatim.

1. The first ground of the motion worthy of discussion is the one attacking the following charge: "If the railroad company under its charter selected, opened out, and cleared up 100 feet on each side of its track for its right of way through the land in question, 20 or more years ago, that became the right of way of the company; and if the owner of the soil did not move in the matter, or proceeded against it for the value of the right of way within the time allowed her by law, she would have been barred of any right of recovery from the company for the same, and this bar would operate against any party taking a deed from her." We are constrained to hold that this charge was error. In effect it instructed the jury that by simply "opening out" and "clearing up" 100 feet on each side of the track 20 years ago, or longer, the railroad company acquired title to that tract, unless the defendant's grantor took proper steps against such ownership, whether or not the railroad com-

pany immediately or subsequently abandoned all or the greater part of the tract so "opened out." And this is not the law of prescription. For possession to ripen into prescription it must, among other things, be continuous; and to be continuous in a case like the one at bar the railroad company must have continually kept the 200 feet clear, or exercised other acts of possession. It is true that in a subsequent portion of the charge the court properly instructed the jury in relation to the railroad company's keeping the right of way clear for the full width; yet, as has been repeatedly ruled and adhered to by this court, the jury are not expected to select one part of a charge to the exclusion of another, nor to determine whether one portion cures a previous error, unless their attention is especially called to the fact that the correct instruction is to be taken in lieu of the bad charge. *Morrison v. Dickey*, 119 Ga. 698, 46 S. E. 863.

2. The only other ground of the motion that need be considered is the attack upon the charge of the court on the subject of prescription under color of title, on the ground that there was no evidence of color of title in the case. Here we must differ with counsel for defendant. There was some evidence introduced upon the trial to show that the original company laid out a right of way 200 feet wide and maintained that width during the period of its ownership, and its successors in title, according to evidence introduced by the plaintiff, also kept clear the full 200 feet. It was admitted by the defendant that 100 feet on each side of the center of the track was, at the time the road was built, the necessary and usual width for a right of way; and under the original company's charter it had the right to appropriate any amount of land for right of way purposes that the directors deemed "necessary for the construction, convenience and protection of their railroad." See Acts 1835, p. 191, § 10; Acts 1861, p. 112. So we do not hesitate to hold that there was enough evidence of color of title to warrant the charge complained of; there being evidence to show that the original company had the right to, and did, lay out and maintain a right of way through the premises in question 200 feet wide, and that all of the instruments which conveyed the railroad property, from the initial road down to the present plaintiff, conveyed the grantor's "right of way." In *Tumlin v. Perry*, 108 Ga. 520, 34 S. E. 171, in discussing the writing there relied upon as color of title, the court said: "The description is certainly neither clear nor definite, but the uncertainty is not so great that the description cannot be made certain by extrinsic evidence. Taking together the description in the bond and the extrinsic evidence introduced for the purpose of identifying the lands, we think that the land could be definitely located.

Certainly the bond was admissible as color of title." See, also, the cases of *Gaston v. Railway Company*, 120 Ga. 516, 48 S. E. 188, *Street v. Collier*, 118 Ga. 470, 45 S. E. 294, and *Harriss v. Howard*, 126 Ga. 325, 55 S. E. 59, where the question is fully discussed. Hence we hold that the court properly charged upon the subject of color of title.

The other portions of the charge excepted to, as intimated above, do not appear to be erroneous for the reasons assigned in the exceptions thereto.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

WINN v. STATE.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. CRIMINAL LAW—CERTIORARI—TIME FOR FILING.

In *Roach v. Sulter*, 54 Ga. 458, it was held that when a bill of exceptions was filed to the judgment of the city court of Savannah, on the ground that the verdict was contrary to the evidence, and was dismissed by this court, the party complaining might file a certiorari to the superior court within three months from the dismissal of the case in this court. That decision was rendered by a full bench, and has never been overruled. Nor is there any request to overrule it. It controls this case on the point stated.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2571.]

2. SAME—INSTRUCTIONS.

As to the charge complained of, the case of *Samueals v. State*, 29 S. E. 427, 103 Ga. 3, is controlling.

3. SAME—SUFFICIENCY OF EVIDENCE.

The evidence supported the verdict.
(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Pearl Winn was convicted of crime, and brings error. Affirmed.

Marion W. Harris, for plaintiff in error.
Wm. Brunson, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

ALLRED v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. CRIMINAL LAW—ADMISSIONS BY ACCUSED.

A declaration by the defendant to the officer having him in custody, which was in itself ambiguous, but which, in the light of facts and circumstances proved, the jury would have been authorized to find was in the nature of an incriminating admission, was properly admitted in evidence for consideration by the jury; and it was for them to decide, under proper instructions, whether the prisoner in making such a declaration had reference to the criminal act with the commission of which he was charged. *Bryant v. State*, 25 S. E. 927, 97 Ga. 815; *Cook v. State*, 53 S. E. 104, 124 Ga. 653.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 894-896.]

2. SAME.

Where two persons are indicted jointly for an offense, evidence that a third person merely stated to one of them while under arrest that he had received a telephone message from the other, requesting the person so arrested to go along quietly and make no move, and not to do anything until the sender came, which would be the next morning, and that the person under arrest said nothing, but (in the language of the witness) "after we went on, it seems like he said, 'Well, all right,' something like that, I think. This is the reply he made him"—such evidence was not sufficient to prove either that the message was actually sent or that the accused made any admission.

3. SAME — EVIDENCE OF OTHER OFFENSES — PREJUDICIAL ERROR.

Particular transactions cannot be inquired into to prove the bad character of a witness, except in cross-examination in seeking for the foundation and extent of the witness's knowledge. Pen. Code 1895, § 1027. Hence, it was error for the court to allow a witness to be asked, over objection of counsel, if he "had ever bought any spurious money." And this error was prejudicial to the accused, it appearing that the witness was a material one for the defendant, and that he refused to answer the question, shielding himself under his privilege.

(Syllabus by the Court.)

Error from Superior Court, Dawson County; J. J. Kimsey, Judge.

Elias Allred was convicted of crime, and brings error. Reversed.

F. C. Tate, W. A. Morris, R. R. Arnold, and A. W. Vandiviers, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

GRIGGS v. STATE.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. SUNDAY — RUNNING FREIGHT TRAINS — STATUTES.

Section 420 of the Penal Code of 1895, which prohibits the running of freight trains on the Sabbath, does not apply to a railroad which begins and ends in other states, and which does not run a distance greater than 30 miles in this state. Acts 1897, p. 38; Acts 1899, p. 88.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Sunday, § 8.]

2. CRIMINAL LAW—REVIEW—OBJECTIONS NOT RAISED ON TRIAL—CONSTITUTIONAL QUESTIONS.

The constitutionality of a statute cannot be questioned in this court, when it does not appear that such question was made in the lower court.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2620.]

3. SUNDAY — RUNNING FREIGHT TRAIN — CRIMINAL OFFENSE—EVIDENCE.

It appearing that the defendant was convicted of running a freight train on Sunday on a railroad which begins and ends in other states than Georgia, and that the road is not more than 30 miles long in this state, the verdict was without evidence to support it, and a new trial should have been granted.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Sunday, § 8.]

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

A. Griggs was convicted of running a freight train on the Sabbath, and brings error. Reversed.

J. P. Jacoway, Tye & Bryan, and Chas. A. Read, for plaintiff in error. Saml. P. Maddox, Sol. Gen., for the State.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

OGLETREE v. HUTCHINSON.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. INSURANCE—APPLICATION—BENEFICIARY.

When an application for a policy of life insurance designates a named person as the beneficiary of the policy, and a policy is issued which does not contain the name of any beneficiary, the person named in the application is to be treated as the beneficiary of the contract. Aliter, if the application name one person and the policy name another, and the policy be accepted by the insured.

2. SAME—STIPULATIONS — VALIDITY—PERSONS ENTITLED TO PROCEEDS OF POLICY.

A stipulation in a policy of life insurance that payment of the amount of the policy to any relative of the insured belonging to a designated class will discharge the company from liability is valid, but such a stipulation does not have the effect to make the person actually receiving the money thereunder the beneficiary of the policy. It is merely an appointment, by the parties to the contract, of a person who may collect the amount due under the policy for the benefit of the person ultimately entitled thereto.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Edna F. Hutchinson against the Metropolitan Life Insurance Company and J. P. Ogletree. Judgment for plaintiff, and defendant Ogletree brings error. Affirmed.

Mrs. Edna F. Ogletree, now Hutchinson, brought suit against the Metropolitan Life Insurance Company and J. P. Ogletree, and alleged: About five years ago Q. P. Ogletree made an application and had issued to him a policy of insurance upon his life in the sum of \$500 by the Metropolitan Insurance Company. He died August 29, 1904. Petitioner was his wife, and was the beneficiary of the policy. The policy, copy of which is attached to the petition, names no beneficiary. The application for the policy, which is attached to the petition, names the petitioner as the beneficiary. The policy is in the hands of J. P. Ogletree, father of the deceased, and he is proceeding to collect the amount due thereunder. Petitioner prays for an injunction restraining him from collecting the amount of insurance, and also for a receiver to collect the same and hold it pending the determination of the controversy. The defendant demurred on the ground that the petitioner had no cause of action.

and was not a party to the contract of insurance. This demurrer was overruled, and the defendant excepted.

W. H. Terrell, for plaintiff in error.
Payne, Jones & Jones, for defendant in error.

COBB, P. J. (after stating the foregoing facts). While the case was pending, the insurance company paid the amount of the policy into court, and was dismissed from the case. The only question now to be determined is, who is entitled to this fund which resulted from the contract made by the insured with the company? In the application appears the following: "14. Name, etc., of beneficiary, subject to provisions of policy applied for as to payment. Name: Mrs. Edna F. Ogletree. Relationship: Wife. 15. Is name of beneficiary to be entered in policy? ———" The policy stipulated to pay the amount thereof as an endowment to the insured when he shall have passed the age of 70 years, and, "if the insured shall die prior to the date of the maturity of the endowment, to pay, upon receipt of proofs of death of insured, made in the manner and to the extent and upon the blanks required herein, and upon the surrender of this policy and all receipt books the amount stipulated in said schedule. * * * In case of such prior death of the insured the company may pay the amount due under this policy to either the executor or administrator, husband or wife, or any relative by blood or lawful beneficiary of the insured, and the production of a receipt signed by either of them shall be conclusive evidence that all claims under this policy have been satisfied."

The application for the insurance being the proposal for the contract by the applicant, and the policy being the acceptance of this proposal, the two papers are to be construed together, and any stipulation in the proposal which is not inconsistent with anything in the policy would become a part of the contract between the parties. If there is a variance between the application and the policy, the policy having been accepted presumably with full knowledge as to what it contained, and as to the fact that it did not follow the application it would control as to the terms of the contract between the parties. The application designated the wife as the person to whom the benefits of the policy should accrue. It is to be noted that the question in the application as to whether the name of the beneficiary should appear in the policy is unanswered. If the company had issued the policy and designated therein some other person than the wife as the beneficiary, and such person was one who could have been a lawful beneficiary under the policy, the acceptance by the insured of the policy and payment of premiums thereon would have amounted to an assent to this change in the contract. *Hunter v. Scott*, 108 N. C. 213. 12 S. E. 1027. The policy as issued did not contain the name of any

person as a beneficiary. Hence as to this matter there is no conflict between the application and the policy; and it is to be assumed, as the company issued the policy in this shape and the insured accepted it, that there was a mutual assent that the contract should be construed as one making the wife the beneficiary. The clause in the policy above quoted, as to who may receipt the company and thus discharge it from liability, does not amount to a designation of a class of persons or any one of them as beneficiaries. This was merely an appointment by agreement between the parties as to persons who might receipt the company and discharge it, and thereafter hold the amount received for the benefit of the person ultimately entitled thereto. If the company had, in accordance with the stipulation in the policy, paid the amount thereof to the father and taken his receipt for the same, the company would have been discharged from liability to any other person, and the father, being within the class appointed for this purpose, would hold the money for the benefit of the beneficiary under the contract. See in this connection *Metropolitan Life Ins. Co. v. Schaffer*, 50 N. J. Law, 72, 11 Atl. 154; *Harding v. Littlehale*, 150 Mass. 100, 22 N. E. 703; *Mass. Catholic Order v. Callahan*, 146 Mass. 391, 16 N. E. 14; *Bradley v. Insurance Co. (Mass.)* 72 N. E. 989; *Providence County Saving Bank v. Vadnais (R. I.)* 58 Atl. 454; *Folmer's Appeal*, 87 Pa. 133. When the application and the policy are construed together, it clearly appears that there were two things agreed on by the insured and the insurer as parties to the contract; the one being that the wife was to be the beneficiary of the contract, and that the company should be discharged by a receipt from any one of the class of relatives named in the policy, upon such relative complying with the conditions of the policy at the time of payment. The company has been discharged, and the fund is in court, and should be awarded to the person who was intended as the beneficiary of the contract. The demurrer was properly overruled.

Judgment affirmed. All the Justices concurred, except FISH, C. J., absent.

ANSLEY v. FARLEY.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. JUSTICES OF THE PEACE — REVIEW — CERTIORARI.

Under the decision in *Toole v. Edmondson*, 81 S. E. 25, 104 Ga. 776, 783, if the amount in controversy in a suit in a justice's court exceeds \$50, and only a question of law is involved, and the nature of the ruling complained of is such as not to dismiss the case, the losing party may select one of three remedies: An appeal to a jury in the justice's court, an appeal to the superior court, or a certiorari. If at the trial questions both of law and fact are raised, but the petition for certiorari only complains of the rulings which involve the questions of

law, thus waiving the right to complain of rulings upon disputed questions of fact, certiorari is available as a remedy.

[Ed. Note.—For cases in point, see vol. 81, Cent. Dig. Justices of the Peace, § 759.]

2. SAME—DISMISSAL.

In the present case there was no conflict of evidence upon any material question, there was none at all on the subject of the plea to the jurisdiction, and while, among other assignments of error, it was said that each of the magistrate's rulings was contrary to law and evidence and the weight of evidence, yet, when taken in connection with the above-mentioned fact, and the statement immediately following, that the "evidence as undisputed" demanded a finding in favor of the defendant, and that under the plaintiff's own evidence such a judgment should have resulted, and the other assignments of error, the use of such expression did not authorize a dismissal of the petition for certiorari.

3. SAME.

In *Western & Atlantic R. Co. v. Dyar*, 70 Ga. 723, the case involved less than \$50, and also apparently involved contested questions of fact.

(Syllabus by the Court.)

Error from Superior Court, Fulton County;
I. T. Pendleton, Judge.

Action by A. L. Farley against E. P. Ansley, commenced in justice court. On certiorari by defendant from the superior court, plaintiff recovered judgment, and defendant brings error. Reversed.

Alex. W. Stephens, for plaintiff in error.
R. B. Blackburn, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

WALPERT v. BOHAN.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. INNKEEPERS—CONDUCTING BATHHOUSE—RELATION BETWEEN INNKEEPER AND PATRONS.

If an innkeeper also conducts a bathhouse on the seashore, where the general public, as well as guests at his inn, may obtain the use of bathrooms and accessories to the bath, this is not sufficient to constitute the relation of innkeeper and guest between him and persons using such bathhouse.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Innkeepers, §§ 3, 4.]

2. BAILMENT—BATHHOUSES—PROPERTY OF PATRONS—LOSS—LIABILITY OF PROPRIETOR.

The proprietor of a bathhouse, who for a consideration furnishes bathrooms, bathing suits, and other accessories of the bath to those who desire to bathe in the sea, and also receives their money, jewelry, or other valuables for safekeeping, is a depository for hire in relation thereto, and is liable for any loss occurring from want of ordinary care on his part.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bailment, § 51.]

3. SAME—ACTION—PLEADING.

The allegations of the declaration were sufficient to withstand a general demurrer, and the sustaining of such a demurrer was error.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; P. E. Seabrook, Judge.

Action by Mrs. A. Walpert against William M. Bohan. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Walpert brought suit against William Bohan, alleging in substance as follows: Bohan was a resident of Chatham county, and was during the month of May, 1905, the proprietor and owner of a certain seashore inn called "Bohan's Pavilion," or "Bohan's Hotel," located on the island of Great Tybee, and was "at that time engaged at said place in the business of an innkeeper. In connection with said inn, and as a part of said inn, and as a part of his said business at said place as an innkeeper, said Bohan maintained a certain bathhouse, where he is and was at that time accustomed to furnish for rent or hire to such of his guests and the general public who desired to enjoy the pleasure and benefits of sea bathing, bathrooms, bathing suits, and other bathing accessories." On May 11, 1905, "petitioner, along with several friends, desiring to enjoy the entertainment of said inn, and the pleasure and advantages of sea bathing, paid to the said William M. Bohan the charges or hire therefor, and became and were the guests of said inn, and of the said William M. Bohan as such innkeeper, and as such were guests and were received as such therein and thereat; that in said bathhouse, a part of said inn as aforesaid, is a certain public room or office in charge of a keeper or attendant, as the servant, agent, and direct representative of the said William Bohan, who furnishes to guests for hire such bathing rooms, towels, etc., as is required for sea bathing, and assigns them to bathrooms in said inn or bathhouse, and receives from said guests for safekeeping, while they are bathing in the sea and not occupying their said rooms, such articles, jewelry, money, and other valuables as they may have, so that the same shall not be lost or stolen from their bathrooms while they are absent therefrom, and that posted in a conspicuous place and in full view of the public is a large printed or written sign or notice requiring the guests of said inn and bathhouse to deposit with the keeper or custodian in charge of said office all moneys, jewelry, and other articles of value for safekeeping, and warning them that upon failure to comply with this requirement the said Innkeeper would be relieved of all liability for any losses sustained through theft or otherwise." Petitioner, after having inquired of defendant's agent whether a deposit of her valuables would be safe, and being assured that they would be, and after having shown the same to such attendant and apprised him of their value, deposited with such agent of defendant a handbag containing a small sum of money and a diamond brooch and ring, of the value of \$700, receiving a check therefor. This deposit of valuables was made along with those of one of petitioner's party of friends accompanying her, and a single check issued for the property of both. After returning from

her bath, Robinson, "acting for himself and petitioner," presented the check and received the handbag, when upon examination, it was found that "petitioner's handbag or purse had been entered," and the diamond brooch and ring taken therefrom. It was opened in full view of the attendant in charge, and the loss immediately reported to this agent of defendant. Petitioner demanded of defendant compensation for her loss, and defendant refused to pay the same. Petitioner's loss was not occasioned by any fault or neglect on her part, but occurred through the neglect "of the said William M. Bohan, innkeeper, his servants, agents, employés, and representatives, as aforesaid." The petition prayed for a judgment for \$700 and costs, and for process. The defendant filed a general demurrer, which was sustained, and the plaintiff excepted.

Alexander & Edwards, for plaintiff in error. O'Connor, O'Byrne & Hartridge, for defendant in error.

LUMPKIN, J. (after stating the foregoing facts). 1. If one keeps an inn, and also, separate from the inn, keeps a bathhouse, where persons bathing in the sea change their garments and leave their clothes, he is not chargeable as an innkeeper for property stolen from the bathhouse. *Minor v. Staples*, 71 Me. 316, 36 Am. Rep. 318. In the opinion in this case it is said: "We are not now speaking of bathrooms attached to or kept within hotels, but of separate buildings, erected upon the seashore, and used, not as bathrooms, but as places in which those who bathe in the sea change their garments and leave their clothes and other valuables while so bathing." In Schouler's *Bailments and Carriers* (3d Ed.) § 230, it is said: "One who keeps a public house may, not inconsistently, carry on a restaurant, cater to a select company, serve liquors at a bar, keep a shaving saloon, or permit outside parties to get up a ball on his premises; and, as to strangers who avail themselves of such extraneous service, he is no innkeeper at all." It is true that the declaration alleges in general terms that in connection with the inn, and as a part of it, and as a part of his business at that place, the defendant maintained a certain bathhouse, where he was accustomed, for rent or hire, to furnish, to such of his guests and the general public as desired to enjoy the pleasure and benefits of sea bathing, bathrooms, bathing suits, and other bathing accessories. It does not appear, however, that the bathhouse was physically connected with the inn, or was for the use of the guests as such, or that becoming a guest at the inn entitled one to use the bathhouse, or that conducting it was an actual part of innkeeping; but apparently it was a separate and distinct building on the seashore, where the general public, whether guests of the inn or not, could for hire ob-

tain dressing rooms and other accessories of sea bathing. We do not think this was sufficient to show the relation of innkeeper and guest existed between the proprietor of the bathhouse and those who went there for the purpose of bathing in the sea. Although the proprietor of the bathhouse may have also been an innkeeper, operating the bathhouse, it did not thereby become a part of the innkeeping. When the facts set forth show that the defendant in reference to the transaction under consideration is not an innkeeper, merely to call him by that name in the pleading does not determine his liability as that of an innkeeper. Ancient common-law definitions of an inn are not altogether applicable to modern conditions and methods of travel and of innkeeping. Thus Lord Bacon defines an innkeeper to be "a person who makes it his business to entertain travelers and passengers, and to provide lodgings and necessaries for them and their horses and attendants." *Bac. Abr.* title "Inns and Innkeepers," B. Few now travel with horses and attendants; nor is the entertainment of transient custom confined to actual travelers. A very good definition of an innkeeper at present is "one who regularly keeps open a public house for lodging and entertaining transient comers, on the general expectation of his suitable recompense." *Schouler's Bailments*, §§ 279, 303. If the proprietor of a hotel should also furnish, for hire by his guests and others, boats for rowing and sailing on a river or lake, or should maintain a public race course, or golf links, or a baseball park, where all could enter by paying an admission fee, these things would evidently not be a necessary part of keeping an inn, although they might furnish attractive sports which would give pleasure to guests and others. See *Bonner v. Welborn*, 7 Ga. 296, 304, et seq.; 16 Am. & Eng. Enc. L. (2d Ed.). 509.

2, 3. While this is true, we think the presiding judge erred in dismissing the petition on general demurrer. In *Bird v. Everard*, 4 Misc. Rep. 104, 23 N. Y. Supp. 1008, it was held that the proprietor of a bathing establishment, who receives from his patrons the sum demanded for the privilege of a bath and assumes the custody of their wearing apparel while the latter are enjoying the privileges thereof becomes a voluntary custodian of the patron's apparel for profit and is bound to exercise due care to guard against loss or theft by others having access to his establishment with his permission; and for any loss or theft which could have been prevented by the exercise of such care, such proprietor is answerable in damages. See, also, *Bunnell v. Stern*, 122 N. Y. 539, 25 N. E. 910, 10 L. R. A. 481, 19 Am. St. Rep. 519; *Tombler v. Koelling*, 60 Ark. 62, 28 S. W. 795, 46 Am. St. Rep. 146; *Dilberto v. Harris*, 95 Ga. 571, 23 S. E. 112; 7 Am. & Eng. Enc. L. (2d Ed.) 321, 322, and notes. The proprietor of such

an establishment, who receives the apparel or valuables of a bather for safekeeping while the customer is bathing, and receives a consideration for this and the use of the bathroom or dressing room and accessories to the bath, being a bailee for hire, is bound to use ordinary care, and is liable for a failure to do so. The declaration sufficiently alleged negligence on the part of the defendant or his agent, and was not subject to a general demurrer.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

WELCH v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

LARCENY—WHAT CONSTITUTES.

"If one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him, under the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat."

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, §§ 85, 87.]

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

W. W. Welch was convicted of a crime, and on denial of a motion for new trial, brings error. Reversed.

W. W. Welch was arraigned in a city court upon an accusation for simple larceny, which alleged the fraudulent taking, etc., of \$3.60, the property of the Griffin Manufacturing Company. Upon the trial evidence was introduced by the state tending to establish the following facts: The accused went to the superintendent of the Griffin Manufacturing Company and asked for an advance for the purpose of procuring hands from a distance to work for the company. The advance was refused, and the accused thereupon told the superintendent "he had got into some trouble," and wanted to send some money to a bailiff at Lindale, Ga., to settle the cost. The superintendent thereupon went with the accused to the office of the Western Union Telegraph Company, gave \$5 to the telegraph company's agent, with instructions to send \$3.84, charges prepaid, to the bailiff. The application for the order was made out in the name of the accused. The superintendent and accused left the office together, and shortly thereafter the accused returned and told the agent the superintendent said not to send the money until he heard from him. Later he told the agent the money was his, and he had decided not to send it to the bailiff by telegraph order, but would send him a draft. Thereupon the agent gave the money to the accused. The accused introduced no evidence. The jury returned a verdict of guilty. The accused moved for a new trial on the general grounds, which was denied, and he excepted.

Thos. W. Thurman, for plaintiff in error.
T. E. Patterson, Sol., for the State.

COBB, P. J. (after stating the foregoing facts). The money was delivered to the agent of the telegraph company by the superintendent of the Griffin Manufacturing Company, to be used for the benefit of the accused, and not for the benefit of the superintendent or his company. When the application for the money order was made, and the accused was named therein as the sender, title to the money passed to him, and the delivery of the application to the telegraph company constituted it his agent for the transmission of the money to the sendee. The agency was revocable at will. The demand by the accused for the money was a revocation of the agency. The withdrawal of the money from the possession of the telegraph company, and the appropriation of the same by the accused to a purpose other than that intended by the superintendent, did not constitute larceny. The rule is that "if one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him, under the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat. But if, with the like intent, he fraudulently gets leave to take possession only, and takes and converts the whole to himself, he becomes guilty of larceny, because, while his intent is thus to appropriate the property, the consent which he fraudulently obtained covers no more than the possession." 1 Bishop, Crim. Law, § 583, and authorities there cited. See, also, Foster v. State, 117 Ga. 39, 43 S. E. 421; Finklestein v. State, 105 Ga. 617, 81 S. E. 589; Kerr v. State, 105 Ga. 655, 31 S. E. 739; Harris v. State, 81 Ga. 759, 7 S. E. 689, 12 Am. St. Rep. 355. The evidence did not sustain the verdict, and a new trial should have been granted.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

RANFORD v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 13, 1906.)

MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé, whose duties call him at frequent intervals to a place where fellow servants are at work shoveling coal from railroad cars into a coal bin, is under no legal obligation to give them notice of his presence, if they have reason to apprehend that he may be inside the coal bin at any time, and there is an established custom whereby they give timely warning whenever large lumps of coal are thrown into it.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 743, 747.]

(Syllabus by the Court.)

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by David Ranford against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

H. W. Dent and W. R. Hammond, for plaintiff in error. Dorsey, Brewster, Howell & McDaniel, for defendant in error.

EVANS, J. On March 23, 1904, the plaintiff in error, David Ranford, was employed by the Southern Railway Company as a "helper" in its machine shop in the city of Atlanta. Adjacent to the boiler room was a coal bin in which coal was being almost constantly thrown during the day through a window from cars stationed upon a side-track, and the firemen engaged in the boiler room made frequent visits to the coal bin for the purpose of loading coal into wheelbarrows and carrying it to the furnaces to be used as fuel. It was to be expected that the men employed to unload the cars might at any hour during the day be at work shoveling coal through the window into the coal bin, and that the men engaged to feed the furnaces might at any time be getting coal from the opposite side of the coal pile, which was usually raked down when it became so high that the men on the outside could not see those at work on the inside of the coal bin. Early in the morning of the day just mentioned, the plaintiff was ordered by the company's foreman to take the place of one of the firemen. The plaintiff went to the coal pile and secured a wheelbarrow of coal, with which he fed the furnaces, and shortly returned for more coal. No coal was being unloaded from the cars when he made his first visit to the coal bin, and when he returned he did not know that the men on the outside had resumed work, and could not see them because the coal pile was too high. As he was shoveling coal into the wheelbarrow, a lump of coal as large around as a man's body was hurled through the window and rolled down the pile upon his foot, severely injuring it. No warning of any kind was given him, and it was impossible for him to get out of the way, or for a fellow workman, who saw the lump as it came through the window, to give him timely notice of his peril. The plaintiff had previously performed the duties of a fireman, and was familiar with the surroundings and the manner in which the work was carried on by the fireman and by the men employed to unload the coal cars.

The suit for damages which the plaintiff brought against the railway company resulted in a judgment of nonsuit. Presumably the judgment was based upon the idea that the plaintiff, knowing the danger to which he voluntarily exposed himself by not notifying the men on the cars of his presence, was chargeable with contributory negligence. That these men, who had reason to

apprehend his presence at any time, were guilty of negligence, seems beyond question. The plaintiff, referring to their habit in the past, testified that "when them fellows throwed over lumps of coal, they always notified" the firemen who were at work on the opposite side of the coal pile; that the men unloading the cars "would always tell them"; that they say "Birmingham" before throwing large lumps of coal through the window into the coal bin. The plaintiff added that Perry Davis, who was one of the regularly employed firemen, had stated that "they always say that." What Perry Davis may have stated as to this custom was purely hearsay, and of no probative value. But we construe the testimony of the plaintiff to mean that such had been the custom while he had been at work, and that he had been informed by Davis that the men on the cars had always given warning to the firemen in the same way. If, as we understand the plaintiff to assert as a witness, the men unloading the cars were in the habit of calling out "Birmingham" as a warning before throwing through the window large lumps of coal, he had a right to rely upon their observing this usual and necessary precaution, and was not guilty of negligence in undertaking to perform the duties assigned to him in the customary way without first taking steps to inform himself whether or not the men on the outside of the coal bin were at work, and, if so, notifying them of his presence.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

DOWNING et al. v. ANDERSON.

(Supreme Court of Georgia. Aug. 17, 1906.)
INJUNCTION—TRESPASS—TITLE OF PLAINTIFF—POSSESSION.

Before one claiming ownership of a tract of land can maintain an action to enjoin the cutting of timber thereon, it is incumbent upon him to show that he has title to the land or is in possession thereof; and, if he relies upon possession alone as a basis for the granting of the relief sought, it must be actual possession of that portion of the land upon which the wrong complained of is being committed.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 74.]

Atkinson and Lumpkin, JJ., dissenting.
(Syllabus by the Court.)

Error from Superior Court, Charlton County: T. A. Parker, Judge.

Action by W. J. Downing and another against D. F. Anderson. Judgment for defendant and plaintiffs bring error.

Leon A. Wilson, for plaintiffs in error. J. S. Williams, for defendant in error.

EVANS, J. This was an equitable proceeding to enjoin the cutting and removal of timber by the defendant from lands to which the plaintiffs asserted title. In order to maintain a suit for damages for an injury

to the freehold, it is essential for the plaintiff to show either that he was in possession of the land at the time of the trespass or that he then had title thereto. *Whiddon v. Lumber Co.*, 98 Ga. 701, 25 S. E. 770. It would seem to be axiomatic that, if a plaintiff be not entitled to recover damages for a trespass alleged in his petition to have been already committed, he cannot be permitted to maintain an equitable action to enjoin a continuance of the trespass. *Flannery v. Hightower*, 97 Ga. 602, 25 S. E. 871. The only prayer in the present petition is for injunction to prevent further trespass by the defendant; and we will inquire whether, under the proof submitted on the interlocutory hearing, the plaintiffs established a right to recover damages for the trespass alleged to have been already committed, thus applying the test for determining whether they were entitled to the relief sought. Many cases will be found in our reports to the effect that a plaintiff who has bona fide been in possession of land under claim of ownership may, upon proof of such possession, maintain against a wrongdoer an action to recover the land; or on proof of the insolvency of the defendant, irreparable damage, or other circumstances which in the discretion of the court render the issuance of the writ of injunction necessary, may maintain an action to enjoin interference with his possession. See *Yahoola Mining Co. v. Irby*, 40 Ga. 479; *McLendon v. Horton*, 95 Ga. 54, 22 S. E. 45; *Hadley v. Bean*, 53 Ga. 685; *Parker v. Railroad Co.*, 81 Ga. 392, 8 S. E. 871; *Fletcher v. Fletcher*, 123 Ga. 323, 51 S. E. 416; *McArthur v. Matthewson*, 67 Ga. 134. Indeed, our Code declares that the "bare possession of land authorizes the possessor to recover damages from any person who wrongfully, in any manner, interferes with such possession." Civ. Code 1895, § 3876. This section was construed in *Ault v. Meager*, 112 Ga. 148, 37 S. E. 185, wherein it was held that, where the plaintiff in an action of trespass relies upon possession alone as a basis of recovery, it must be actual possession of that portion of the tract upon which the alleged wrong was committed. On page 150 of 112 Ga., page 186 of 37 S. E., Cobb, J., who prepared the opinion in that case said: "Constructive possession by one who is not the owner, but merely claims ownership, is not sufficient to support the action, unless it is continued for a sufficient length of time to ripen into a complete ownership." This principle has been reaffirmed in *Clower v. Maynard*, 112 Ga. 340, 37 S. E. 870; *McCook v. Crawford*, 114 Ga. 838, 40 S. E. 225; *Jones v. Cllett*, 114 Ga. 676, 40 S. E. 719; and *Fletcher v. Fletcher*, 123 Ga. 323, 51 S. E. 416. The petitioners allege themselves to be the true owners and in possession of lots of land Nos. 4 and 61, in the second land district of Charlton County. But on the interlocutory hearing their only attempt at proof of title was the introduction

of a deed dated November 25, 1904, and recorded March 20, 1905, from Samuel C. Crews to themselves and two others, purporting to convey several lots of land, including the two lots in controversy, and a subsequent conveyance from the other grantees to themselves. They failed to show either complete paper title or title by prescription. Clearly one who merely has a deed to land and is not in possession has no right to complain of trespasses committed on the land by another, however much of a wrongdoer he may be relatively to the true owner. *Parker v. Railroad Co.*, 81 Ga. 388, 8 S. E. 871. Nor did the plaintiffs sustain their contention that they had possession of the lands from which the timber was being cut by the defendant. They joined in an affidavit in which they asserted, upon bare information and belief, that their agent had erected houses on lots Nos. 2, 4, 61, and 124, and that he was in the actual possession of these lots.

The real truth of the matter, however, as disclosed by the evidence of persons acquainted with the facts, was that some time between the date of the plaintiff's purchase in the latter part of 1904 and the filing of their petition in July, 1905, their agent caused to be erected a house on lot No. 124, another on lot No. 2, and a small one-room shanty on lot No. 61. The house on lot No. 124 was occupied some time before the granting of the restraining order; but it affirmatively appears that the shanty on lot No. 61 has never been occupied since its erection. The defendant would not permit the plaintiffs' employes to fence in any parts of the lots in dispute, and no improvements were ever made on lot No. 4. The erection of the shanty on one of the lots in controversy did not have the legal effect of placing the plaintiffs in actual possession of that lot, since a "mere entry, unaccompanied by an actual occupancy, is no possession at all," and the building of the shanty indicated merely a purpose to occupy. *Flannery v. Hightower*, 97 Ga. 604, 25 S. E. 871. So far as the other lot (No. 4) is concerned, there seems never to have been even an actual entry upon it by the plaintiffs or their agent. A plat of the lots to which they assert ownership under the deeds introduced in evidence shows that they are joined together, though neither of the lots on which the alleged trespass occurred immediately adjoins lot No. 124, on which the house actually occupied was erected. At most, the plaintiffs can claim to be only in constructive possession of the lots upon which the timber is being felled. *Johnson v. Simerly*, 90 Ga. 612, 16 S. E. 951. The evidence demanded a finding that the plaintiffs have never been in actual possession of either of these lots. Indeed, the defendant offered evidence tending to show that he had been continuously, under color of title and claim of right, cutting cross-ties on one of the lots for at least 2 years and on the other for 10

or 12 months before the present action was begun, and that during the periods stated other persons claiming under him had been constantly using the timber for turpentine purposes, without interruption on the part of any one. The plaintiffs do not complain that the sub modo right acquired by their entry in and to the use and occupancy of the shanty erected by them on lot No. 61 is being interfered with, but only that they will suffer irreparable damage by the injury being done to the freehold in the felling of the timber and its appropriation by the defendant. He has, apparently, as much right to the timber as have the plaintiffs, who have never had anything more than constructive possession of the land on which it stands, and are therefore not in a position to assert that they are the owners thereof, without disclosing that in fact they have the legal title to it. They were not entitled to the relief for which they prayed, and the judge rightly so held.

Judgment affirmed.

FISH, C. J., absent. COBB, P. J., and BECK, J., concur.

ATKINSON and LUMPKIN, JJ. (dissenting). It has been held that to entitle a complainant in a court of equity to seek relief against trespassers on land, it is not necessary to show a perfect title; but a prima facie title is sufficient, in the absence of a better outstanding title. *McArthur v. Matthewson*, 67 Ga. 134; *Smith v. Smith*, 105 Ga. 108, 31 S. E. 135; *Fletcher v. Fletcher*, 123 Ga. 326, 51 S. E. 418. What will constitute prima facie title? It is conceded that actual possession will suffice, without other proof of title. The Civil Code of 1895, § 3876, declares: "The bare possession of land authorizes the possessor to recover damages from any person who wrongfully, in any manner, interferes with such possession." It is said, however, that this applies to actual possession only, and not to constructive possession. What difference does the law make between the two as to showing a prima facie title? Section 3585 says: "Actual possession of lands is evidenced by enclosure, cultivation, or any use and occupation thereof which is so notorious as to attract the attention of every adverse claimant, and so exclusive as to prevent actual occupation by another." Section 3586 declares: "Constructive possession of lands is where a person having paper title to a tract of land is in actual possession of only a part thereof. In such a case, the law construes the possession to extend to the boundary of the tract." And section 3587 says: "Possession under a duly recorded deed, will be construed to extend to all the contiguous property embraced therein."

It is contended that the doctrine of constructive possession has reference only to prescription; but the Code does not say so. True,

sections 3585, 3586, and 3587 are grouped in the chapter on the subject of prescription; but they define the terms actual possession and constructive possession generally, and state the effect of the latter. When our Brethren speak of actual possession, though not dealing with prescription, they turn to one of these sections for its definition. When we speak of constructive possession, we turn to another one of these sections to show what is the legislative definition and effect of that term as used in this state. It is to be noted that the expression as employed in many jurisdictions is the possession which the law presumes or construes the true owner to have of his property, whether he has actual possession of any part of it or not. But in this state it has a certain meaning and effect by statute. As stated, section 3586 declares that, where a person has paper title to a tract of land and is in actual possession of only a part of it, the law construes the possession to extend to the boundary of the tract. What is the possession which the law construes to extend to the boundary? Clearly the possession which was mentioned in the previous portion of the section; that is, the actual possession. *Roberson v. Downing Co.*, 120 Ga. 883, 887, 48 S. E. 429, 102 Am. St. Rep. 128, and citations. On pages 840, 841, of 120 Ga., page 432 of 48 S. E. (102 Am. St. Rep. 128), occurs the following: "In *Prescott v. Nevers*, 4 Mason, 330, Fed. Cas. No. 11,390, a suit for cutting timber off of lot No. 1, where one of the parties claimed title by virtue of possession of a part, and constructive possession of the balance of the lot, Judge Story said: 'I take the principle of law to be clear that, where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title, and that he is deemed to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described in any other person.' In *Gardner v. Gooch*, 48 Me. 487, it was held that where a grantee is in possession of part under a recorded deed he is presumed to be in possession of the whole. 'The law of constructive possession declares that the deed of the lot to the settler which may be found on record * * * shall, so far as his title is concerned, be a substitute for a substantial and permanent fence around the whole.' *Chandler v. Spear*, 22 Vt. 405. 'If a man enters upon a tract of land under a deed duly registered, * * * and has a visible occupation of part of it only, the true owner is disseised of the whole tract' *Farar v. Eastman*, 10 Me. 195. See, also, *Pomroy v. Stevens*, 11 Metc. (Mass.) 244; *Nye v. Alfter*, 127 Mo. 530, 30 S. W. 186; *Shedd v. Powers*, 28 Vt. 655; *Alexander v. Polk*, 39 Miss. 738; *Forest v. Jackson*, 56 N. H. 357." The fact that two may be in constructive possession of a part of a tract, and that

no prescription runs as to such part, does not militate against this view, for both may also fence in part of the same land, which would destroy the exclusiveness of the possession of either. Few people are in actual physical occupancy of every foot of their yards or gardens; but they would be astonished to know that they did not have such occupancy to their fences or boundaries as to prevent a trespasser from entering and committing a trespass on such parts. See, also, *Tripp v. Fausett*, 94 Ga. 830, 831, 21 S. E. 572; *Johnson v. Simerly*, 90 Ga. 612, 16 S. E. 951; *Weitman v. Thiot*, 64 Ga. 17; *Parker v. Jones*, 57 Ga. 204. In *Clark v. Hulsey*, 54 Ga. 608, 610, in discussing which of two parties had prior possession, the statutory constructive possession of which we are now speaking is directly construed as competing with actual possession.

A recovery may be had in ejectment based on prior possession alone; and this applies as well to constructive possession as to actual possession. *Wilcox v. Moore*, 118 Ga. 351, 45 S. E. 400; *Civ. Code* 1895, § 5008. Mere prior possession, however, if afterward abandoned or terminated, will not suffice as a basis for an action of trespass. *Whiddon v. Williams Lumber Co.*, 98 Ga. 701, 25 S. E. 770. But present possession will suffice. *McDonough v. Carter*, 98 Ga. 703, 706, 25 S. E. 938. We are not unmindful of the case of *Ault v. Meager*, 112 Ga. 148, 37 S. E. 185, and other cases which have followed it and which are cited by the majority of the court. Some of them are decisions of the entire bench, and cannot be reviewed or changed except by the entire bench. We feel it our duty to say that we cannot fully concur with the reasoning in *Ault v. Meager*, and the cases which have merely followed it. We cannot overcome them; but we do not think they should be extended further. Besides, this case can be legitimately differentiated from them. They declared that, where possession was relied on as a basis for recovery for a past trespass, it must be actual possession. The most plausible theory on which they rest is that, where an action is brought for trespass working damage to the freehold, it must be shown that the plaintiff is the true owner, else the defendant might be held liable twice. *Whiddon v. Williams Lumber Co.*, 98 Ga. 701, 25 S. E. 770. This may be quite true; but the question is, what will suffice to make out a prima facie case of ownership in the plaintiff, and thus shift the burden of rebutting it to the defendant? As already stated. It is conceded that actual possession will have that effect, but denied that, constructive possession will do so. We fail to see why the same danger referred to above would not be as applicable where the plaintiff had actual, as where he had constructive, possession. But this is not a proceeding to recover damages for a past trespass, as the cutting of timber alone, but to prevent a threat-

ened entry upon property claimed by the plaintiffs, and the doing of irreparable damage thereon. It involves both a threatened intrusion and a cutting of timber after entry. Damages may be recovered for the wrongful intrusion as well as for the subsequent tort committed. See 4 *Suth. Dam.* (8d Ed.) § 1010. What, then, we repeat, will suffice to show prima facie title in the plaintiffs which will support the proceeding to enjoin such acts on the part of an insolvent defendant? If the defendant had entered and taken possession, clearly, under the decisions above cited, the plaintiffs would have shown sufficient prima facie title to eject him. Ejectment in Georgia is not merely an action to try the right of possession, but a finding for the plaintiff conclusively determines between the parties the title, unless the jury find for the plaintiff less than the fee. *Civ. Code* 1895, § 5005. Is it possible that the plaintiffs have enough prima facie title, unless overcome by rebutting evidence, to conclusively determine the title as against the defendant, to eject him, and to recover mesne profits against him (*Civ. Code* 1895, § 4997; *Cunningham v. Morris*, 19 Ga. 583, 65 Am. Dec. 611), but not enough to furnish a basis for injunction to prevent his wrongful entry and trespass, if he be insolvent? If he seeks to hold possession, there is ample title to put him out and to recover mesne profits against him; but not enough (as our Brethren think) to prevent by injunction the commission of the act, if the defendant is safely insolvent. We cannot concur in the view that an insolvent trespasser, without a vestige of right, may enter and commit irreparable damage upon the property to which the plaintiffs have such a prima facie title, resting upon present possession, as we have shown they have, merely because they have not shown a perfect prescriptive title. In *Flannery v. Hightower*, 97 Ga. 603, 25 S. E. 874, it was said: "A person in possession under color of title, or in actual possession of premises, though he be not the owner of the strict legal title, if his possession be in good faith, might be, under certain circumstances, entitled to maintain a petition for injunction against a bare trespasser, who was himself insolvent, and who could not answer in damages for his wrongful act in interfering with a person holding such possession."

BRINKLEY et al. v. BELL et al.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. EJECTMENT—TITLE OF PLAINTIFF—TITLE FROM COMMON SOURCE.

In the trial of an action for the recovery of land, whether brought in the common-law form or under the Code, whenever it appears either from the pleadings or the evidence that the parties claim under a common grantor, it is not incumbent upon the plaintiff to show title in such person.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, § 59.]

2. SAME—EVIDENCE—SUFFICIENCY.

When, in the trial of such an action, the evidence shows that the plaintiffs claim under a deed in which a life estate is created in their father, with remainder to them, that the defendant claims under a deed from their father, and that the father is dead, a prima facie case is made out.

3. SAME—PRESUMPTIONS.

When, in a case of the character above indicated, the deed from the father is produced by the defendant under notice, the presumption arises that the defendant claims under the deed until the contrary appears. This presumption may be overcome by evidence showing that the defendant claims under another and independent source of title.

(Syllabus by the Court.)

Error from Superior Court, Burke County; H. C. Hammond, Judge.

Action by Henry Q. Bell and others against L. G. Brinkley and others. After verdict for defendants, a new trial was granted, and defendants bring error. Affirmed.

Henry Q. Bell and others brought an action to recover a described parcel of land against John Sherman. The abstract of title attached to the petition was as follows: "(1) Possession and title in Simeon Bell, Sr. (2) Deed dated February 4, 1867, executed by Simeon Bell, Sr., reserving life estate to grantor and conveying life estate to Seaborn J. Bell, with remainder in fee simple to such child or children or child's child as he shall leave surviving him at his death; the land conveyed being 500 acres, adjoining lands of A. Robinson, Simeon Reeves, and others, on the waters of Luke's branch. (3) Death of Simeon Bell, Sr., first life tenant. (4) Death of Seaborn J. Bell, second life tenant. (5) Petitioners are the only surviving children of Seaborn J. Bell at the time of his death; there being no grandchildren whose parents had deceased." A copy of the petition and process was served on Mrs. Brinkley and her children as the true claimants. Sherman answered, alleging that he was merely a tenant of Mrs. Brinkley, and had no further interest in the matter. Mrs. Brinkley filed an answer, in which she denied that the plaintiffs had title to the premises and admitted that Sherman was in possession as her tenant. She alleged that her deceased husband obtained the land by conveyance from Pope, who held a chain of title to the same which originated in a conveyance from James T. Bothwell to Ellet Lockhart, and that each grantor in this chain had warranted the title. The several grantors in the chain of title were vouched in as parties defendant to defend the title of Mrs. Brinkley. It did not appear from the answer from whom Bothwell derived title. At the trial the plaintiff introduced a deed dated February 4, 1867, embracing the premises in dispute, which were referred to as the place where Seaborn J. Bell then lived, in which Simeon Bell was the grantor. The deed recited that the consideration was \$10 and the natural love and affection which the grantor bore to his son,

Seaborn J. Bell. Under the terms of the deed a life estate was reserved to the grantor, and an estate for life was granted to Seaborn J. Bell, and after his death the property was to go in fee simple to such "child or children or children's child" of Seaborn J. Bell as he may leave surviving him. In the event Seaborn J. Bell died leaving "no child or child's child surviving him," the property was to revert to the estate of Simeon Bell. The plaintiff also introduced in evidence a deed which had been produced by defendant under notice, dated August 12, 1873, from Seaborn J. Bell and his wife to James T. Bothwell, embracing the premises in dispute. The deed recited that the land conveyed was a part of the land assigned to Seaborn J. Bell as a homestead. Attached to the deed was a paper, signed by the ordinary, confirming the sale by Bell and his wife to Bothwell, and reciting that the consideration named in the deed consisted of outstanding judgments and mortgages prior to the 1st of January, 1868, to which the land was subject and liable. There was evidence that the plaintiffs were the children of Seaborn J. Bell. It also appeared that the deed under which the plaintiffs claimed was found among the papers of S. J. Bell after his death. It seems from the evidence that the property in dispute was once in the possession of James H. Royal, and about 1857 Royal removed from the place, and Seaborn J. Bell went into possession. He was in possession at the beginning of the Civil War. He went into the army, leaving his family upon the place, and his father, Simeon Bell, exercised a general supervision over the property until S. J. Bell returned from the army. There is nothing in the record to indicate how the property passed from Royal to S. J. Bell; it simply appearing that Royal removed from the premises at the instance of Simeon Bell, who placed his son Seaborn in possession. It is not claimed that Simeon Bell acquired title to the property by prescription, and the evidence hardly establishes that he was ever in possession at all. Such apparent acts of ownership as he exercised from time to time were subject to the possession of Seaborn J. Bell and his family. The defendant introduced no testimony. The jury, under the charge of the court, returned a verdict for the defendant. The plaintiff made a motion for a new trial, which was granted, and the defendant excepted.

Johnston, Fullbright, Lamar & Callaway, and W. R. Callaway, for plaintiffs in error. Brinson & Davis, for defendants in error.

COBB, P. J. (after stating the foregoing facts). The rule of the common law that, where both parties in ejectment derive title from a common source, the plaintiff is not required to show title in such person, has been often recognized by this court as being applicable to an action for the recovery of land brought

under the common-law form, as well as such an action brought under the Code. See cases cited in 4 Michie's Enc. Dig. 77. If the plaintiff claims as a remainderman under a deed creating a life estate in one person and a remainder to them, and the defendant claims under a conveyance from the life tenant, the parties derive whatever title they have from a common grantor; that is, the grantor in the deed creating the life estate and the remainder. *Brundage v. Bivens*, 105 Ga. 905, 32 S. E. 133. If it appears, either from the plaintiffs' petition or from the defendant's answer, that each party claims under a common source, this, of course, is sufficient to make the rule applicable to the case. It is contended that the rule has no application to the present case, for the reason that the fact that the parties claim under a common source does not appear from the pleadings, but only from the evidence. We have found no distinct ruling that, when this fact appears from the evidence only, the rule is applicable; but it has been the almost uniform practice to apply the rule in such case, and we know of no decision holding that the rule is applicable only where the fact of common source of title appears from the pleadings. If the common-law form of ejectment is followed, all that is required in the pleading is a petition showing the usual allegations of lease, entry, and ouster, and an answer denying these allegations. If a suit is brought under the Code, the abstract of title must set forth the title relied on for recovery, and the abstract of each conveyance is to be treated in the nature of a demise laid by the plaintiff. If in the present case the plaintiffs had brought their action, laying the demises in their own names and in the name of Simeon Bell or his legal representatives, this would have been sufficient to authorize evidence of a common source of title in order to make out a prima facie case. As the abstract of title attached to the petition shows that they derive title through Simeon Bell, we see no reason why this would not be sufficient to authorize any evidence to show that the title in Simeon Bell was a sufficient foundation for a recovery by them. The deed from Seaborn J. Bell to Bothwell came from the custody of the defendant, and this would raise an inference that the defendant claimed under that conveyance. This inference would remain until the contrary appeared. As long as it remained, the plaintiffs would stand as having made out a prima facie case for recovery. Of course, we do not mean to hold that the defendant is bound to claim under a deed simply because he has possession of it. He may rely upon two sources of title. But, when a deed comes from his custody and is admitted in evidence against him, the burden is cast to show better title than the deed conveys, if his title under the deed is not sufficient to meet the case made by the plaintiff, unless, as appears to have been held

in one case, the defendant expressly denies that he claims under the deed. In *McConnell v. Cherokee Mining Co.*, 114 Ga. 84, 39 S. E. 941 (the case referred to), the original record shows that the defendant produced the deed, but insisted that he did not claim under it, asserting that he derived title from a source independent of and distinct from that under which the plaintiff claimed. In the present case there was no denial by the defendants that they claimed under the Bothwell deed. On the contrary, the plea distinctly set up that they did, and the heirs of Bothwell were vouched in to defend.

We think the court properly granted a new trial. On another trial the defendant may introduce evidence of any title that she has acquired to the premises, either through S. J. Bell or otherwise. If the land originally belonged to Simeon Bell, the exclusive possession by S. J. Bell for seven years without the payment of rent would create the presumption of a gift, and convey title to him, unless there was evidence of a loan, or a claim of dominion acknowledged by S. J. Bell, or a disclaimer of title by him. Civ. Code 1895, § 3571. If such exclusive possession had been completed before the execution of the deed of 1867, Simeon Bell would have been at that time without title to the property. The evidence in the present case was not sufficient to show title in Simeon Bell, or to raise a presumption of a gift from him. But all these facts may be inquired into on another trial. The extent of our ruling now is, simply, that the deed from S. J. Bell to Bothwell, coming from the custody of the defendant, was sufficient to make out a prima facie case in the plaintiffs, and to put the defendant on proof of her title.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

HART v. LEWIS, SHORE & CO.

(Supreme Court of Georgia. Aug. 9, 1906.)

INJUNCTION—RESTRAINING TRESPASS.

Where, on the interlocutory hearing of an equitable petition to enjoin a trespass, the judge upon conflicting evidence reaches the conclusion that the plaintiff has established a right to an injunction, the same should be granted without qualification, when the evidence shows that the damages he may suffer will be incapable of ready computation and ascertainment; for in such a case a bond given by the defendant to answer for any damages which may be had against him cannot afford adequate protection to the plaintiff.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 16.]

(Syllabus by the Court.)

Error from Superior Court, Brooks County; R. G. Mitchell, Judge.

Action by Mattie Hart against Lewis, Shore & Co. Judgment for defendant, and plaintiff brings error. Reversed.

On March 7, 1906, Mrs. Mattie Hart filed her petition against Lewis, Shore & Co., a partnership, alleging that she was the owner of a described parcel of land, and that the defendants, without authority, were proceeding to cut the timber thereon. She prayed that the trespass about to be committed be enjoined. It was averred that D. W. Hart died in possession of the land, leaving S. E. Hart and T. H. Hart as his only heirs at law; that they agreed that S. E. Hart should have a life estate in the land, and T. H. Hart a remainder in fee; and that on October 26, 1888, they executed a "deed of division" to this effect. On March 22, 1897, T. H. Hart conveyed his interest in remainder to the plaintiff. S. E. Hart was in adverse possession of the land until her death in 190-, when plaintiff went into possession, and is still in possession. The sixth and seventh paragraphs of the petition were in the following language: "(6) That since your petitioner has been in possession of the property she has greatly improved and enlarged the plantation, buildings, and other improvements on said tract of land; that she has at this time inclosed and in a good state of cultivation at least 100 acres of land, besides the buildings hereinabove described, and she alleges that the timber on said lot, which the defendants are threatening to remove, is indispensable in keeping her plantation and buildings in repair, and that she has no other available timber that can be used for that purpose; and that, if she is deprived of the use of the timber for the purpose aforesaid, her farm will of necessity depreciate in value, and the damages arising therefrom will be incapable of exact computation. (7) That the timber upon that part of the tract of land uninclosed constitutes its chief value; and, inasmuch as it varies in size and distribution, it will when cut and carried away be impossible to ascertain the exact quantity of lumber manufactured therefrom, and your petitioner will be without means of arriving at the extent of her loss, and for this reason her injury and damage cannot be accurately and completely measured in money." It was alleged that the defendants were insolvent. The judge granted a restraining order, and set the case down for a hearing. The defendants filed a demurrer setting up that the petition set forth no cause of action, that the facts alleged afforded no basis for the interference of a court of equity, and that it did not appear that plaintiff had a perfect paper title within the meaning of Civ. Code 1895, § 4927. The defendants in an answer denied every averment in the petition, and alleged that S. E. Hart had granted a lease to Fender of all the timber on the land suitable for sawmill and turpentine purposes, and by a

series of transfers defendants had acquired all the rights under this lease; that the lease to Fender had been negotiated by T. H. Hart, who was the agent of both S. E. Hart and plaintiff; that plaintiff was cognizant of all the negotiations; that she aided in inducing Fender to take the lease; and that she is therefore estopped to assert her title to the timber against Fender and those claiming under him. There was a prayer that the defendants be permitted to continue the cutting of the timber upon giving bond to answer any damages the plaintiff might suffer. The judge passed an order that the restraining order be dissolved upon defendants giving a bond in a named amount, to pay whatever judgment the plaintiff recovered against them. To this order the plaintiff excepted.

Wilcox & Patterson, for plaintiff in error.
L. W. Branch and Stanley S. Bennet, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The application was not under the timber cutters' act (Civ. Code 1895, § 4927); nor did the evidence authorize an injunction upon the ground that the defendants were insolvent. The evidence did authorize a finding that the plaintiff was the owner of the land and timber by prescription. It also appeared that both plaintiff and defendants claimed under a common grantor. *Brun- dage v. Bivens*, 105 Ga. 806, 32 S. E. 133. The allegations of the petition and the evidence were sufficient to show that the injury would be irreparable. Damages would not adequately compensate the plaintiff for the threatened wrong. *Massee-Felton Lumber Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92; *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164; *Camp v. Dixon*, 112 Ga. 872, 38 S. E. 71, 52 L. R. A. 755, and citations; *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439. The judge must have reached the conclusion that the plaintiff was entitled to an injunction. Upon no other theory would the requirement of a bond by the defendant be authorized. When this conclusion was reached, it necessarily involved a finding that damages would not compensate for the threatened wrong. It was therefore erroneous to allow the defendants to continue the trespass upon giving a bond, thus remitting the plaintiff to a remedy which was not adequate. The evidence authorized a finding for either party; but, when there was a finding on the facts in favor of the plaintiff, the injunction should have been granted unconditionally. *Stoner v. Patten*, 124 Ga. 754, 52 S. E. 894; *Wethington v. Baxter*, 124 Ga. 1024, 53 S. E. 505.

Judgment reversed. All the Justices con- cur, except FISH, C. J., absent.

HOLLOWAY v. HOLLOWAY.

(Supreme Court of Georgia. Aug. 18, 1906.)

1. DIVORCE—GROUNDS—CONVICTION OF CRIME—OFFENSE INVOLVING MORAL TURPITUDE.

The offense of voluntary manslaughter involves moral turpitude.

2. SAME—EFFECT OF PARDON.

The conviction of a married person of an offense involving moral turpitude, followed by a sentence of imprisonment in the penitentiary for a term of two years or longer, gives to the other party to the marriage a right to a divorce; and this right is not affected by an executive pardon granted after the sentence has been imposed.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 47-50, 159; vol. 37, Cent. Dig. Pardon, § 16.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Libel by Mittie D. Holloway for divorce against Joseph Holloway. A demurrer to the libel was overruled, and respondent brings error. Affirmed.

Mittie D. Holloway brought her libel for divorce against Joseph Holloway on May 18, 1905, and alleged that they were married on December 24, 1893; in 1899 the respondent was convicted of the offense of voluntary manslaughter, and sentenced to serve a term of 20 years in the penitentiary; they have not lived together since the conviction of the respondent; in 1904 the respondent was pardoned by the Governor. A demurrer to the libel was overruled, and the respondent excepted.

O. M. Duke and J. E. & L. F. McClelland, for plaintiff in error. J. D. Kilpatrick, for defendant in error.

COBB, P. J. (after stating the foregoing facts). 1. The Civil Code of 1895 declares among the grounds for divorce "the conviction of either party for an offense involving moral turpitude, and under which he or she is sentenced to imprisonment in the penitentiary for the term of two years or longer." Section 2426, par. 8. The respondent was sentenced to the penitentiary for a term exceeding two years, and the right of the libellant to a divorce depends upon whether the offense of which he was convicted involved moral turpitude. Turpitude in its ordinary sense involves the idea of inherent baseness or villainy; shameful wickedness; depravity. Webster's Inter. Dict. In its legal sense it includes everything done contrary to justice, honesty, modesty, or good morals. Black's Law Dict.; Bouvier's Law Dict. The word "moral," which so often precedes the word "turpitude," does not seem to add anything to the meaning of the term, other than that emphasis which often results from a tautological expression. All crimes embraced within the Roman's conception of the *crimen falsi* involve turpitude;

but it is not safe to declare that such crimes only involve turpitude. Murder involves villainy and depravity; for it is the result of an abandoned and malignant heart. Voluntary manslaughter involves the intentional destruction of human life. It is true that there is no deliberation, no malice, in the act constituting the offense; but the manslayer intends to kill, and carries out the intention in an unlawful manner. It may be the result of passion or temper, and the law in its mercy visits a less penalty than that inflicted for willful killing; but it necessarily involves the intention to unlawfully deprive another of life. Whenever one intentionally and wrongfully takes human life, he does an act which is base, vile, depraved, and contrary to good morals. That the offense of voluntary manslaughter involves moral turpitude cannot admit of serious question. See, in this connection, 5 Words & Phrases, 4580.

2. The right of the libellant to a divorce results from the conviction and sentence. There are three essential ingredients in the ground for divorce: The commission of the offense involving moral turpitude, the conviction for the same, and a sentence for a term of two years or longer in the penitentiary. When this state of affairs is shown to exist, the law declares the libellant is entitled to a divorce. Can this right, given by statute, be destroyed by an executive pardon? The pardon restores the convict, so far as the public is concerned, to the position he occupied before the conviction. He is no longer infamous. He may vote, hold office, and perform other public functions. Rights which have accrued to individuals as a result of the conviction are not affected by the pardon. Mr. Bishop, in his work on Marriage, Divorce, and Separation, §§ 444, 1807, says that, where conviction for a crime is declared to be a ground for a divorce it is a defense to a divorce suit to show that the convict has been pardoned. He cites no authority for this statement. He does refer to the case of *Young v. Young*, 61 Tex. 191, where it was held that the commutation of the sentence of one convicted of a felony was not equivalent to a pardon. The statute of Texas provided that, if a party to a marriage was convicted of a felony and imprisoned in a state prison, this should be a ground for divorce, provided that no suit could be maintained for the conviction of either party until 12 months after final judgment of conviction, nor then if the Governor should have pardoned the convict. In that case the Governor had commuted the sentence of the convict within 12 months after final judgment; and this was held not to amount to a pardon within the meaning of the statute. Mr. Nelson, in his work on Divorce and Separation, says that it would seem that, if before the trial of the suit for divorce the convict is pardoned, the divorce should not be granted. He cites no authority

for this proposition. Reference is made to the case of *Young v. Young*, supra, and also to the case of *State v. Duket* (Wis.) 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. Rep. 928. In that case it was held that the reversal of a sentence of one convicted of a felony did not have the effect of restoring the conjugal rights taken away by virtue of a statute which declared that a sentence of imprisonment for life should dissolve the marriage of the person sentenced. Mr. Keezer, in his recent work on *Marriage and Divorce*, says that no pardon granted after the decree of divorce will restore such party to his or her conjugal rights. To sustain this proposition he cites the case of *Young v. Young*, supra, and *Handy v. Handy*, 124 Mass. 394. In the case last cited the facts were peculiar, and it is impossible to tell from the meager statement in the report exactly what was the extent of the ruling. We have been able to find no decision which is a direct ruling on the question now before us. We think the better view is that the pardon of the convict does not destroy the right to a divorce, declared by statute to arise upon conviction and sentence.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SAVANNAH ELECTRIC CO. v. McELVEY. (Supreme Court of Georgia. Aug. 13, 1906.)

1. TRIAL—INSTRUCTIONS—CONFORMITY TO ISSUES—CARRIERS—INJURY TO PASSENGER.

Where the plaintiff's declaration and the evidence in support of it tended to make a case of a willful tort on the part of a street car conductor, committed on a passenger by

forcibly pushing or kicking her off the car, and the evidence on behalf of the defendant tended to show that after the car had stopped a sufficient length of time and signals had been given, and upon her failure to alight it had moved on, she voluntarily stepped from the car and was injured, it was error to so charge the jury as in effect to authorize them to find in favor of the plaintiff if she was not in fact willfully ejected from the car, but was injured by reason of negligence on the part of the conductor in not allowing sufficient opportunity for a passenger to leave the car.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 593.]

2. CARRIERS—EVIDENCE—ADMISSIBILITY.

There was no error in allowing a witness to testify that on the street where the injury occurred there was a place where street cars stopped at the crossing.

3. SAME—INSTRUCTIONS.

There was no error in charging that the jury might consider whether or not the car ought to have stopped at a given point, in determining questions with reference to the circumstances under which the conductor and plaintiff may have acted, with reference to whether the circumstances would be such as to authorize a finding for punitive damages, and generally in considering the circumstances immediately leading up to and attending the occurrence.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by Sarah McElvey against the Savannah Electric Company. Judgment for plaintiff, and defendant brings error. Reversed.

Osborne & Lawrence, for plaintiff in error. Twigs & Oliver, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

MORISEY v. HILL.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. EXECUTORS AND ADMINISTRATORS—REJECTED CLAIMS—COUNTERCLAIM—LIMITATIONS.

Under Revisal 1905, § 93, requiring a claimant within six months after notice of the rejection of his claim by an executor, to commence an action for the recovery thereof or be barred from maintaining action thereon, a counterclaim founded on a rejected claim presented in an action by the executor more than two years after its rejection is barred.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 1729-1764.]

2. SAME—ALLOWANCE AGAINST UNADMINISTERED ASSETS.

Revisal 1905, § 94, allowing a claimant who has not presented his claim within 12 months after notice duly published, to assert his demand as against unadministered assets of the estate, is not available under section 41, if personal notice to exhibit his claim has been served on the creditor, and he fails to make exhibit within six months.

3. SAME—NOTICE OF ADMINISTRATION.

Revisal 1905, § 39, directing the publication of a general notice in the administration of an estate, being independent of section 93, requiring a claimant to sue within six months after notice of rejection of his claims, the publication of notice under the former is not necessary to the enforcement of the latter.

Appeal from Superior Court, Duplin County; Webb, Judge.

Action by J. K. Morisey, executor of the will of D. G. Morisey, deceased, against W. L. Hill. From a judgment for plaintiff, defendant appeals. Affirmed.

This was a civil action on appeal from a justice's court, tried before his honor J. L. Webb, judge, at the February term, 1906, of the superior court of Duplin county, upon the following facts agreed upon by the plaintiff and defendant: (1) That D. G. Morisey died in June, 1901, and plaintiff qualified upon his estate immediately thereafter; that said executor has not filed his final account; and that said estate is not settled and is solvent. (2) That defendant is indebted to plaintiff in the sum of \$200, with interest thereon at 6 per cent. from March 11, 1901, evidenced by a certain duebill. (3) That on the 12th of November, 1901, the defendant presented to the plaintiff an account for board and services rendered plaintiff's testator, amounting to \$310, which said claim was rejected by the plaintiff on the same day. (4) That said claim was not referred or put in action by the said defendant, but on the 13th day of February, 1904, plaintiff instituted an action against the defendant before J. H. Fonvielle, a justice of the peace, upon the duebill aforesaid, and the defendant offered as a counterclaim upon the said trial the account referred to in the third paragraph hereof. The defendant waived all of said account except \$200, which he claims as an offset to plaintiff's duebill. Plaintiff plead the six-month statute of limitations under section 1427 of the Code. Upon these facts, the judge below

held that the defendant's counterclaim was barred under section 93, Revisal 1905, and gave judgment for the amount of plaintiff's demand and interest due thereon; and from this judgment, defendant excepted and appealed.

H. L. Stevens, for appellant. Grady & Graham, for appellee.

HOKE, J. (after stating the case). Revisal 1905, § 93, provides that when a claim is presented to and rejected by an executor, administrator, or collector, and not referred, as provided by a previous section, the claimant must, within six months after due notice of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred from maintaining an action thereon. According to the facts agreed upon, defendant in person presented the claim, an account for board and services rendered the testator, to the executor on November 12, 1901; and on that day, same was rejected by the executor. More than two years thereafter, defendant endeavors to set up this demand as a counterclaim to an action instituted against him by the executor, and, to this counterclaim, plaintiff pleads the statute. We agree with his honor that the counterclaim is clearly barred by section 93 of the Revisal of 1905, and the judgment in favor of the plaintiff must be affirmed. It is urged by defendant that, as the estate is solvent, and still unadministered, there is no good reason why defendant should be precluded from asserting his claim. But such a position cannot be allowed against the plain and imperative provision of the statute.

Under section 94 of the Revisal of 1905, a claimant who has not presented his claim within 12 months after general notice duly published is allowed to assert his demand as against unadministered assets of the estate, and without cost against the administrator or executor. But even this privilege would seem to be shut off by section 41 of the Revisal of 1905, if personal notice to exhibit his claim has been served on the creditor, and he fails to make such exhibit within six months. And so, when the claim is presented and rejected, action must be commenced within six months or the claim is forever barred. It is the policy of the statute that these estates should be speedily settled, and a plain and express provision of law looking to this end cannot be disregarded or set aside, because, in some exceptional case, it may shut off a righteous claim.

Again, it is insisted that the provisions of this section should not be enforced, because it nowhere appears that the general notice provided for in section 39 of the Revisal of 1905, has been given, and that the publication of this notice is necessary to the operation and enforcement of section 93. We do not so understand or construe the law; nor do we see

any such connection as that suggested between the two sections. Section 39 of the Revisal 1905, directing that a general notice shall be published, was enacted more for the protection of the executor, and is necessary to enable him to go on and administer the estate without regard to claims which are not presented within the year; but it has no necessary connection with section 93 which applies to claims which have been presented and rejected by executor. The language of the statute is positive and explicit, and must be enforced in accordance with the plain meaning of its terms. A like construction has been placed on a statute substantially similar in other jurisdictions. *Benedict v. Hogglin*, 2 Cal. 386.

There is no error, and the judgment below is affirmed.

BRICK v. ATLANTIC COAST LINE R. CO.
(Supreme Court of North Carolina. Oct. 16, 1906.)

JUSTICES OF THE PEACE—JURISDICTION—ACTION FOR TORT—AMOUNT IN CONTROVERSY.

Where a passenger packed into his trunk jewelry intended for sale in his store, together with wearing apparel, in an action for loss of the trunk, his cause of action for the loss of the jewelry was in tort for negligence, and the claim for such loss being in excess of \$50 was not within the jurisdiction of the justice of the peace.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, §§ 130, 151, 159.]

Appeal from Superior Court, Robeson County; Councill, Judge.

Action by A. B. Brick against the Atlantic Coast Line Railroad Company. From the judgment, plaintiff appeals. Affirmed.

McIntyre & Lawrence, for appellant. McLean, McLea & McCormick, for appellee.

CLARK, C. J. Plaintiff sued for value of the contents of a trunk into which he had packed certain of his wearing apparel, and also a quantity of jewelry intended for sale in his store at Chadbourn. He purchased a ticket, and checked the trunk, and then delivered the ticket and check to his brother who was a clerk in his employ in said store, and who rode upon said ticket. The trunk was lost. This action was begun in the court of a justice of the peace. On the trial on appeal to the superior court, the judge charged the jury that, as to the jewelry, the defendant was liable only for gross negligence; that the burden was upon the plaintiff to establish such negligence; that the mere showing delivery to defendant and the nonproduction of the trunk upon demand was no evidence of gross negligence; and that in no view of the evidence could the plaintiff recover the value of the jewelry. The plaintiff excepted. There was a verdict for \$46.75, the value of the wearing apparel only.

We need not consider the charge excepted

to, because the action was begun in the justice's court, which had jurisdiction of the breach of contract of safe carriage of the wearing apparel; but whatever cause of action, if any the plaintiff may have had for the nondelivery of the jewelry, was for negligence; for a tort, and the demand of damages therefor being in excess of \$50, was not within the jurisdiction of a justice's court. *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880. Indeed if the defendant had excepted and appealed, a very interesting question might have been raised, whether a recovery could have been had for the wearing apparel of plaintiff, seeing that the ticket, to the use of which the carriage of baggage was appurtenant, was not used by the plaintiff, but by his brother. The defendant having failed to except and appeal, that question, however, is not before us.

No error.

HOKE, J., concurs in result.

STATE v. RING.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. SEDUCTION—EVIDENCE—SUFFICIENCY.

In a prosecution for seduction under promise of marriage, the prosecution need not show that defendant expressly promised the prosecutrix to marry her, if she would submit to his embraces, but it is sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the promise, giving to defendant the benefit of any reasonable doubt.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seduction, § 82.]

2. SAME.

In a prosecution for seduction under promise of marriage, where the promise of marriage existed before the seduction, the evidence considered and held to show that prosecutrix trusted to defendant's pledge to never forsake her, and to his promise of marriage when she yielded to his embraces, and to sustain a conviction.

Appeal from Superior Court, Columbus County; Justice, Judge.

One Ring was convicted of seduction under promise of marriage, and he appeals. Affirmed.

The defendant was indicted for seduction under promise of marriage. The prosecutrix testified that she first knew the defendant in 1901 when he made love to her, and they became sweethearts; that she went with him two years. He courted her, and she promised to marry him. She did not go with any one else. He made a request of her a year before she yielded, which was in August, 1904, and she became pregnant in November of that year. He said it was his right to do as he wanted to with her under the circumstances, and, to prove her love, she yielded to him. The defendant left the state in April, 1905. The child was born the following August. He said he loved her, and would not believe she loved him unless

she yielded to his wishes. She yielded to his wishes, and she still loved him, and believed everything he said. He said further that he would never forsake her, but would stick to her forever. They had been engaged over a year when she yielded to his approaches the first time, but before that he had promised her that he would never forsake her, that he intended to marry her anyhow, and that it was his right to have his way with her, and that he would not believe that she loved him unless she yielded, and she did so to prove her love for him. There was also evidence tending to support the testimony of the prosecutrix. Letters from the defendant to her were read as evidence. In these he admitted having promised to marry her, and that he had sexual intercourse with her. He requested her not to tell any more than she had to tell and not to have a lawsuit as it would make things worse. In one of the letters, he states that he is deeply sensible of the great wrong he had done. He inquires if either of them was to blame, as one could not help it more than the other, and wants to know if a satisfactory settlement cannot be made. Several times he warns her against being deceived and insists that she should say as little about it as possible. He further says that while it is an unfortunate affair, it is no worse than others have done; that he had been caught, and that is all, but that the affair had not caused him to leave home, but other circumstances forced him to leave. In one letter, is this expression: "You have trusted in my honor in the past. I now trust in yours to do all that you can to prevent so much publicity by having a lawsuit which will not bring to light anything that will be to our credit or in our favor. I cannot see what good it will do you, or any one else, if you convict me." He then threatens that, if the matter is prosecuted, he will disclose something that will not be to her credit or to that of her people, and adds: "I know that you are not the one who is prosecuting (implying that her brother is) but it depends on what you say. I am not uneasy about being convicted, but it is on your account that I want this settled without going to court. I want to see you, first chance." In still another letter, he says: "You have sacrificed your virtue for the gratification of the passion of a man who is worthy of a letter from you. Will you be kind enough to write something, and tell me what you expect of me, and what you hope to accomplish by going to law?" There was evidence to the effect that the prosecutrix had been a chaste, virtuous, and innocent woman before the time of the alleged seduction. The defendant's counsel requested the court to charge the jury, "that under all the evidence in the case, the defendant is not guilty." The court refused so to charge, and the defendant excepted. The jury convicted the

defendant, and from the judgment upon the verdict, he appealed.

D. J. Lewis and J. B. Schulken, for appellant. The Attorney General and Walter Clark, Jr., for the State.

WALKER, J. (after stating the case). The defendant's counsel, in their brief, contend that there was no evidence in the case that the prosecutrix was seduced under a promise of marriage. The gravamen of this offense is seduction induced by the promise which the defendant has failed to keep. There are other essential elements, but this is the principal one, and if there was no evidence of it, the defendant should have been acquitted. We think that there was not only some, but abundant evidence, to warrant the verdict of the jury. It is not necessary to a conviction under this law that the state should show that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces. It is quite sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt. But in this case, the defendant admits in one of his letters to the prosecutrix that she had trusted in his honor, and that he was deeply sensible of the great wrong that he had done her, and that she had sacrificed her virtue at his solicitation when they were engaged to be married. While, under a promise of marriage to her, he told her that he would not believe that she loved him, if she did not comply with his request, and she yielded to prove her love for him. Just before she did so, he promised never to forsake her and boldly and shamelessly asserted that he did not ask her consent as a favor, but as something to which he was of right entitled by reason of their engagement.

Is it possible for evidence to be stronger for the purpose of showing a seduction accomplished by a promise of marriage? The mere fact that the promise existed long before the seduction can make no difference, if he afterwards took advantage of it in order to effect his nefarious purpose. His conduct, in such a case, would be the more reprehensible as showing a studied and deliberate purpose, first to engage her affections, and then, by taking advantage of her weak and confiding nature and the trustfulness he had inspired by his perfidy, to insidiously ensnare her with his wicked and faithless promises of love and constancy. Such base conduct is the legal equivalent of an express promise to marry, if she would submit to his lecherous solicitations, provided the jury found, as they did, that it had the effect of alluring her from the path of virtue. If he made his promise to her in good faith, why did he not keep it when he found that he had ruined her, and when

she most needed the protection of his name? It being admitted that he made the promise, his gross betrayal of her was surely a fact to be considered by the jury in determining his guilt. It is against the wily arts of the seducer that the law would protect the innocent woman, and he can effect his purpose just as well by first gaining the confidence and affection of his intended victim, and then inducing her to surrender her chastity, and finally debauching her by means of persistent appeals to her supposed sense of duty and obligation to him as her lover. The evidence in the case forces the conviction upon us that this unfortunate woman trusted to his pledge that he would never forsake her and to his promise of marriage when, in an evil moment, she permitted him to accomplish her ruin.

The defendant's counsel relied on *State v. Ferguson*, 107 N. C. 841, 12 S. E. 574, and quotes this passage from the opinion of the court by Justice Davis: "If she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that produced by a promise of marriage, she is in pari delicto, and there is no crime committed under the statute." That is very true. But the principle there stated does not fit the facts of this case. If the evidence is trustworthy, there is hardly anything in it to indicate that she sacrificed her chastity in order to gratify her own lascivious desires. At least, the jury could well have found that she did not do so, but, on the contrary, that in trustful and abiding belief that the defendant would not betray her but fulfill his promise of marriage, she yielded at last to his urgent appeals. The case is rather to be governed by another principle stated in that case: "The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage" in return. The case of *State v. Horton*, 100 N. C. 443, 6 S. E. 238, 6 Am. St. Rep. 613, is authority for the position that the state is not required to show that the defendant, in so many words, promised to marry the woman if she would agree to submit to carnal intercourse with him or, in other words, to show the causal relation between the promise of marriage and the seduction by any set form of words, but it is sufficient if the evidence is such as to convince the jury to the exclusion of all reasonable doubt, that the woman was influenced by the promise and the man intended that she should be, or so purposely acted as to produce the impression on her mind that he would keep his promise if she would comply with his request. The jury are to draw their own deduction from the testimony, provided there is even inferentially any evidence of a purpose to violate the statute. Besides all this, what the defendant said in his letters is, of course, evidence

against him as to what his purpose or intention was and as to what he actually said and did. "I am deeply sensible of the great wrong that I have done. Don't be deceived and be sure that you know your friends. Have as little to say about it as possible. You have trusted to my honor in the past. While this is a very unfortunate affair it is no worse than others have done." These expressions taken from the evidence are much stronger in their tendency to establish the guilt of the defendant, or his vicious purpose throughout his intimate association with the prosecutrix, than were the words used by the defendant in his conversation with the woman's father, which were held to be sufficient to sustain the verdict in the *Horton Case*.

We can see no error in the ruling of the court.

No error.

SLOCUMB v. PHILADELPHIA CONST. CO. et al.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. APPEAL — RECORD — CORRECTION — CERTIORARI.

Where the papers constituting the record proper have been misplaced without any laches of an appellant, the proper practice is to file the case on appeal settled by the trial judge, and ask for certiorari for the record proper.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2834-2838.]

2. SAME.

The Supreme Court will not, by certiorari, direct the trial court to make changes in the case on appeal where the letter of the trial judge states his opinion that the record is fair and correct; the relief being granted only when the judge by letter indicates that he is willing to make the corrections desired.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2834-2838.]

3. SAME—POWER OF TRIAL JUDGE.

After the trial judge has settled the case on appeal, he has no power to change it except by consent of the parties or of the Supreme Court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2803-2806.]

4. SAME — REVIEW — DISCRETION OF LOWER COURT—SETTING ASIDE VERDICT.

The discretion of the trial judge in setting aside a verdict is not reviewable.

5. CONTINUANCE—DISCRETION OF COURT.

Under Revisal 1905, § 531, providing that the judge at any term at which an action is triable may postpone the trial on the application of either party and on such terms as shall be just, on certain grounds named, an order granting a continuance for plaintiff on payment of the costs of the term was within the discretion of the trial judge.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 17, 18.]

Walker, J., dissenting in part.

Appeal from Superior Court, Robeson County; O. H. Allen, Judge.

Action by A. H. Slocumb, receiver, against the Philadelphia Construction Company and

others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Iredell Meares and R. E. Lee, for appellant. McIntyre & Lawrence, and McLean, McLean & McCormick, for appellees.

CLARK, C. J. The plaintiff docketed the case on appeal "settled" by the judge, and asks for a certiorari for the record proper, upon an affidavit that the papers have been misplaced, without any laches of his, so that they could not be copied. This is the proper course. *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782, and cases cited; *Parker v. R. R.*, 121 N. C. 504, 28 S. E. 347; *McMillan v. McMillan*, 122 N. C. 410, 29 S. E. 361. Ordinarily it is the record proper that is docketed, and the certiorari is for the "case on appeal," but the principle is the same; all of the transcript that can be obtained must be docketed at the first term and certiorari asked to complete the transcript. *Pitman v. Kimberly*, 92 N. C. 502. The plaintiff is entitled to a certiorari to bring up a transcript of the record proper. But the plaintiff further asks that the certiorari include an order to the judge to make sundry changes in the case on appeal. This would be a mandamus which this court has no power to issue to a judge, who has settled a case. *State v. Blackburn*, 80 N. C. 474. All this court has ever done is to issue a certiorari to give the judge an opportunity to correct the "case" already settled by him, and such certiorari never issues (except to incorporate exceptions to the charge filed within 10 days after adjournment [*Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76]), unless it is first made clear to the court, usually by letter from the judge, that he will make the correction if given the opportunity. *Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205, and cases cited in *Cameron v. Power Co.*, 137 N. C. at page 105, 49 S. E. at page 78. In this case, the judge's letter, filed by petitioner, declines to make the amendments asked, and for reasons says: "I do not think I have any right to do so except by consent of the parties or of the Supreme Court, and for the further reason that the statement, in my opinion, is fair and correct in all the material parts." The judge was correct in holding that he did not have the power. Having "settled" the case, at the time and place, of which counsel had notice, he is *functus officio* unless by agreement of parties, or by certiorari from this court upon proof of his readiness to make correction, opportunity is given him of correcting such errors as have occurred by inadvertence, mistake, misapprehension, and the like. *Boyer v. Teague*, 106 N. C. 571, 11 S. E. 330. As was said in *Cameron v. Power Co.*, 137 N. C. 104, 49 S. E. 78: "As to all matters transpiring during the trial, if counsel cannot agree upon a statement, the judge settles the case, and the case thus settled is conclusive. This court has no power to examine

witnesses and find the facts differently, nor can we command the judge to state the facts differently, for he acts under the obligations of his duty and oath of office."

This ruling has never been based upon any idea of courtesy to the judge, but upon the principle of Magna Charta that we "will not delay justice." If the appellant has shown any diligence whatever he has always ample time—for the case must be docketed and printed at least a week before it is called for argument—in which to make application to the judge, and learn whether or not he will make the correction if given the opportunity. Certainly if the appellant will not take the trouble to write a letter to the judge he ought not to get a delay of six months upon a suggestion of error in the judge's case on appeal when he was, or could have been, present when the case was settled, and his averment of inadvertent omission is denied by counter affidavit. To give such delays to an appellant upon a vague statement that he believes the judge will make a correction, when if there is the slightest diligence shown he can lay the judge's reply to his letter before us, would lead to the gravest abuse and a delay of several months in almost any case in which delay was desired by a party. This ruling has been uniform. *Smith, C. J. Porter v. Railroad*, 97 N. C. 65, 2 S. E. 581, 2 Am. St. Rep. 272, and cases there cited; *McRae, J. Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205, and cases cited; *Broadwell v. Ray*, 111 N. C. 457, 16 S. E. 408; *Lowe v. Elliot*, 107 N. C. 718, 12 S. E. 383; *Bank v. Bridgers*, 114 N. C. 107, 19 S. E. 276, and very many other cases, before and since *Clark's Code* (3d Ed.) p. 936. The ruling in this court has been uniform (but there is no "rule of court" on the subject), and it seems to be the uniform practice in all other jurisdictions—and for the same reason. A contrary practice would be unjust to the appellant and fruitful of unnecessary delays and expense. By the slightest diligence the appellant can always ascertain whether the judge would probably make the correction and lay that fact before us in making his application; in which case it is always allowed.

The petitioner contends, however, that, upon examining the appellant's and appellee's statements of case on appeal, the judge, in some instances was more unfavorable to the plaintiff than the appellee's statement of case. If counsel agree, the judge has nothing to do with making up the "case on appeal," but when they differ, he sets a time and place for settling the case, after notice that counsel of both parties may appear before him. He then "settles" the case. *Revisal 1905, § 591*. In so doing "he does not merely adjust the differences between the two cases," but may disregard both cases, and should do so, if he finds that the facts of the trial were different. *State v. Gooch*, 94 N. C., at page 985.

The certiorari must be denied so far as it seeks to direct the judge to change a case on appeal which he certified at the time, by the very act of signing it (and has since reiterated by his letter), to be "fair and correct." The chief exception set out in the case on appeal is that the judge "set aside the verdict in his discretion." This is not reviewable. *Edwards v. Phifer*, 120 N. C. 406, 27 S. E. 79, and cases there cited. As to the alleged impropriety on the part of the judge, we are bound by the facts as found by his honor; and they present no ground for a review of the discretion exercised in setting aside the verdict. The exception that the court did not sign judgment upon the verdict is merely a repetition of that already discussed. The only other exception stated in the "case on appeal" is that, at a previous term, the court continued the cause for plaintiff upon payment of the costs of the term. This was a matter in the discretion of the trial judge. Revisal 1905, § 531. These exceptions should properly have been discussed after the coming in of the record proper, upon return of the certiorari, but, having been fully presented, we have deemed it best to decide them, as, unless there are errors upon the face of the record proper, it will be useless to bring it up by certiorari, and there will only remain the duty of executing the order of reference (which had been previously asked by plaintiff) which was ordered by the judge, after setting aside the verdict.

No error.

WALKER, J. (concurring in result). The conclusion of the court in this case has my full concurrence; but I take occasion to repeat here what was said by me in *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76. I do not think this court, in exercising its constitutional and remedial power of supervision over the lower courts (Const. Art. 4, § 8) should require a letter from the judge before issuing the writ of certiorari to correct errors of statement in cases on appeal. This procedure is so contrary to the usual course of practice in the courts, and is fraught with so much danger that, in my judgment, it should no longer prevail. The capital objection to it is that it is ex parte when it is the right of every litigant to be heard upon any matter and everywhere, if his interests may be put in jeopardy. The consent of the judge to an amendment of the case on appeal, upon application of one of the parties without notice to the other, may often effect a change in a respect vital to the latter, and reverse what would otherwise have been the decision of this court. Such a proceeding is so much out of the ordinary and so opposed to good practice, that I must withhold my assent to its continuance as one which is sanctioned by this court, and indispensable to the amendment of a case on appeal. The judge should either correct the case upon a formal petition presented to him, after no-

tice to the other side, in which case his order of amendment could be certified to this court when filed in the clerk's office, or we should issue the writ in the first instance, and let him proceed in the matter as in other like cases. In my opinion, if there is error in the case suggested by petition to this court, the complaining party is entitled to be heard by the judge of the superior court as matter of right as much so as he is so entitled when there is any other mistake in the record. In my practice I have always found the judges ready to correct inadvertencies, and I am persuaded to believe that they are always anxious to present the case just as it was tried below. But there should be regularity in our procedure, instead of loose and careless practice which, in many instances, may lead to injustice.

The views entertained by me upon this subject are so well expressed by Mr. Justice Douglas, in his concurring opinion in *Cameron v. Power Co.*, that I take the liberty of referring to it. An order for a certiorari in such a case is no imputation upon the judge who tried the case; on the contrary, the learned, able, and upright judges who preside in our superior courts will always welcome the opportunity thus afforded by regular procedure to correct any error or mistake which has inadvertently been committed.

THOMASON et ux. v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. RAILROADS—CONSTRUCTION AND MAINTENANCE—NUISANCE—ACTIONS.

In an action for injuries to adjoining owners from the construction and maintenance of a spur track, the question to be determined was whether the railroad committed and maintained a nuisance on a lot adjoining plaintiffs' land, not on the right of way, but outside the right of way.

2. SAME—CONSTRUCTION AND USE OF TRACK OUTSIDE RIGHT OF WAY.

Where a railroad erected, on a lot occupied by it outside its right of way, a spur track on a trestle 10 feet high, extending within 5½ feet of the line fence of the adjoining owners, who had acquired their property before the erection of the line, and extending to within 27½ feet of their dwelling and sleeping apartments, and its cars were several times wrecked and dropped over toward the adjoining owners' dwelling, so that they had reasonable grounds to believe and did believe that they were in danger of being hurt, the operation of the track constituted a nuisance, for which the railroad was liable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 720-724.]

3. SAME—NEGLIGENT OPERATION.

Where a railroad company negligently permitted its cars to run off a spur track and knock down the fence of adjoining owners, the railroad was liable for the injuries to the fence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 720-724.]

4. SAME.

Where a railroad negligently operated its trains over a spur on land outside its right of

way, and kept adjoining owners in constant dread, and because of the proximity of the track to the house of adjoining owners, and because of the soot, cinders, and smoke, their house was rendered less valuable as a residence and was made uncomfortable and disagreeable to the owners, such facts constituted a nuisance, for which the defendant was liable.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 720-724; vol. 37, Cent. Dig. Nuisance, §§ 23, 24.]

5. SAME—DAMAGES.

Where a jury found that the maintenance of a spur track by a railroad company and the operation of its trains thereon was negligent, it was proper, in determining the amount of the damages, to consider the injury to the household and kitchen furniture of adjoining owners, caused by the smoke and cinders which were caused to pass through the house by reason of such use.

6. SAME.

In determining the damages to adjoining owners, owing to the negligent construction and operation of a spur track, it is proper to take into consideration the depreciation in the value of the property and the inconvenience, discomfort, and unpleasantness sustained.

7. PLEADING — DEMURRER — EFFECT OF DECISION.

Where a demurrer to a complainant is sustained, and an amended complaint is filed, the effect of the ruling on the demurrer as res judicata cannot be considered, where it is not presented by the pleading.

Appeal from Superior Court, Nance County; E. B. Jones, Judge.

Action by Henry Thomason and wife against the Seaboard Air Line Railway. From the judgment, defendant appeals. Affirmed.

This action is prosecuted for the purpose of recovering damage alleged to have been sustained by plaintiffs by reason of a nuisance maintained by defendant. It appears from the record that at the institution of the suit plaintiffs filed a complaint setting forth several causes of action, to which defendant demurred. The demurrer to each cause of action was sustained at October term, 1905, and leave given plaintiffs to file amended complaint. A complaint was accordingly filed December 1, 1905. It does not clearly appear in what respect this complaint differs from the first one, to which a demurrer was sustained. In the last complaint plaintiffs alleged that, 20 years prior to the institution of this action, they purchased a lot in the town of Henderson, and have used and occupied it as a dwelling place and residence until the beginning of this action; that said lot was bounded partly by the right of way of the Raleigh & Gaston Railroad, upon which it had, and maintained, tracks over which its engines and cars passed, etc.; that by consolidation and merger the defendant has succeeded to all of the rights, duties, etc., of the said railroad company. Among many other matters and things, not necessary to be noted in this appeal, plaintiffs alleged: That defendant had, since the purchase by plaintiffs of said lot and its occupation as a residence, purchased a lot in excess of its right of way adjoining plaintiffs' lot, upon which

it permitted and maintained a coal yard, and it had "negligently and with wanton indifference to plaintiffs' rights and safety maintained through and over said coal yard a trestle, with a spur railway track thereon, some 10 feet above the ground, pointing directly to plaintiffs' sleeping room, extending within about 5 feet of plaintiffs' yard fence and within about 20 feet of their sleeping room, and ran cars and locomotives thereon. On two occasions coal cars have been negligently forced over the end of this spur track, and the trucks, with a large portion of the car, suspended in and over plaintiffs' said yard, and within less than half a car's length of their sleeping room, so near that, if the cars had lost their balance or had been run into by other cars and thrown over endwise, they would have crushed into plaintiffs' sleeping room, to the great danger of their lives and property. That on one occasion the car was negligently permitted to remain in such position by the defendant a week or more. The plaintiffs were driven and kept from their usual bedroom by the imminence of the danger which thus threatened them. That they requested the defendant, through its agent, to remove the car and abate the nuisance, which it wantonly and contemptuously refused to do until they engaged counsel, etc. Defendants continued to use the said spur track until some time in March, 1904, when a fast night passenger train, coming into and through the town at a great speed, negligently ran through an open switch upon this track, wrecked their locomotives and a number of coaches, together with the trestle upon which said track was laid, and threw a coal car from said track over the intervening space between such track and plaintiffs' yard, partly into said yard, and within a few feet of their sleeping room, crushing their fence, nearly throwing them from their bed by the violence of the concussion, etc." They alleged that such spur track, together with the negligent manner of its use, was a nuisance, injuring their property, depreciating its value, and otherwise damaging them. Defendant made a specific denial of the matters alleged, and for further answer said: "That the alleged damages charged in the complaint, if any, were the result only of the usual and ordinary incidents of operating railroads, which no care, caution, or foresight of the defendant could have prevented, and the defendant alleges that it was guilty of no negligence or want of due care in the construction and maintenance of its said railroad spur tracks, etc.; and for further defense this defendant says that, more than 20 years before the commencement of this action, it and its predecessor, the Raleigh & Gaston Railroad Company, erected its said railroad and spur tracks, and have been in the peaceable and undisturbed possession and maintenance thereof since then up to the bringing of this action, and by said 20 years of quiet, peaceable, and undisturbed use of said

railroad spur tracks, rights of way, coal and wood yards it has acquired a prescriptive right to operate and use the same, and this defendant pleads said 20 years' use and prescriptive right in bar of any recovery herein."

Defendant, when the cause was called for trial, demurred ore tenus to the several causes of action set forth in the complaint. The court sustained the demurrer as to all of the causes of action, except the fourth, to wit: "The defendant demurs to so much of the plaintiff's complaint as alleges damage by the construction of side tracks into and for the benefit of said coal and wood yard, for failure to state a cause of action, because the Seaboard Air Line Railway is authorized by law to engage in the business of a common carrier, and in order to properly carry on said business it is its duty to construct side tracks for the accommodation of the authorized enterprises constructed and operated along its right of way, and it is not liable for damage resulting from the lawful performance of such duty." The judgment of his honor, upon the demurrer concludes: "That is to say, that all the grounds of demurrer as to the different causes of action in said complaint are sustained, except the cause of action for damages to plaintiff's fence and whatever damages the defendant may have caused the plaintiffs by reason of the construction and operation of the spur track on the lot of land used for a coal and wood yard, other than injuries to fence and plaintiffs' health." To this judgment defendant excepted. Defendant thereupon asked leave to amend its answer by setting up the judgment of October term, 1905, sustaining the demurrer to the original complaint, as res judicata of the plaintiffs' cause of action. Motion denied. Defendant raised the same question by an exception. The cause went to trial upon the following issues, resulting in a verdict, as set forth: "(2) Did the defendant commit and maintain the nuisance complained of? Ans. Yes. (3) What damage, if any, has plaintiff sustained by reason of the nuisance complained of? Ans. \$450. (4) What damage, if any, has plaintiff sustained by reason of damage to his household and kitchen furniture? Ans. \$50. (5) What damage, if any, has plaintiff sustained by reason of the destruction of his fence? Ans. \$10." Defendant pleaded the statute of limitations, but no exceptions appear in the record in regard to his honor's rulings thereon. There was judgment upon the verdict, and defendant appealed.

Day & Bell, Murray Allen, and J. H. Bridgers, for appellant. H. M. Shaw and T. M. Pittman, for appellees.

CONNOR, J. (after stating the case). It will be convenient to first dispose of defendant's exception to his honor's refusal to sustain the fourth cause of demurrer. This calls

into question the right of plaintiffs, upon the allegation in the complaint, to proceed with their proof. If this contention be correct, it becomes unnecessary to examine the other exceptions. The question presented by the demurrer is both interesting and important. It has been so frequently and so thoroughly considered and discussed by courts of the highest authority that but little is left to be done save to apply well-settled principles applicable to it. The judgment upon the other causes of demurrer eliminates, for the purpose of this appeal, a number of questions, and presents the single proposition advanced by the plaintiffs that, conceding to the defendant its right "to do a lawful thing in a lawful way," they are entitled to recover on the cause of action stated in the complaint. Freed from all formal or technical verbiage, the case developed by the complaint is simply this: Plaintiffs own a lot, upon which is located their dwelling, in the town of Henderson. Defendant owns and operates, pursuant to its charter, a railroad, the right of way of which abuts upon plaintiffs' property. Defendant, for the better conducting its business of common carrier, purchased a lot adjoining plaintiffs', which it permits to be used as a coal yard. For the delivery of coal and other purposes defendant has constructed over said lot a spur track, a portion of which is a trestle or coal chute, some 10 feet above the ground, pointing directly to plaintiffs' dwelling, extending within about 5 feet of plaintiffs' fence and 20 feet of their sleeping apartment. Plaintiffs allege that the location of this track and its construction and proximity to their dwelling is per se a nuisance, menacing the safety of their persons and property when used in the ordinary way, and causing noises, dust, smoke, and other disagreeable and injurious nuisances. They further say that the defendant has negligently used the track, specifying several instances in which they were threatened with injury, and one in which their property sustained physical injury and they were compelled to abandon their bedroom by the violent concussion caused by the collision of defendant's trains. Adopting Blackstone's definition, there can be no doubt that the facts set forth in the complaint constitute a private nuisance. "Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 16 Am. & Eng. Enc. 682. "An act or use of property, to constitute a nuisance, must violate some legal right, either public or private, and must work some material annoyance, inconvenience, or injury, either actual or implied from the invasion of the right." Id. 686. The defendant says that, conceding the damage done plaintiffs, they have no cause of action, or that the damage done is not an actionable nuisance, for that defendant was acting within its chartered rights, or, as expressed in many of the authorities cited, "doing a lawful act in a lawful way." This contention is based upon

the elementary proposition: "That no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner." Pollock on Torts (7th Ed.) 128. The principle applied to railroad companies, as quasi public agencies assimilating them, in this respect, to municipal corporations, has been well stated in an exceedingly able opinion by Beasley, C. J., in *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164: "They are not responsible for those incidental damages that result from the proper exercise of their functions."

The principle applied to municipal corporations is recognized by this court in *Meares v. Wilmington*, 81 N. C. 73, 49 Am. Dec. 412. In that case the municipal authorities, in grading a street, removed the earth to the depth of several feet, causing the plaintiffs' lot adjoining the street to fall, bearing with it a brick wall, to plaintiffs' damage, etc. Defendant contended that by its charter, and ordinance passed pursuant thereto, it was empowered to grade the street, and that by reason thereof it was not liable to plaintiff, whether due caution was used or not. His honor instructed the jury that the act of defendant was lawful, provided it was done with due caution, etc. From a judgment for plaintiff, defendant appealed. Pearson, J., said: "If the defendants had caused the grading to be done with ordinary skill and caution, and, by the erection of a substantial wall as the excavation proceeded, had so managed as to prevent any caving in of the plaintiffs' lot, so that the damage, if any, would have resulted, not from a want of ordinary skill and caution, but merely from the fact that, by reason of the grading, the lot was left higher above the level of the street, and so was more difficult of access and therefore less valuable, the case would have presented a very grave question; and we are strongly inclined to think, with his honor, that the plaintiffs would have been without remedy, for, as it was lawful for the defendants to do the work, if it was done in a proper manner, although the plaintiffs were damaged thereby, it would be *damnum absque injuria* and give no cause of action." The principle announced in this case was approved with much caution in *Wright v. Wilmington*, 92 N. C. 156. This may be regarded as the settled doctrine in this state. *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264. In *Salisbury v. Railroad*, 91 N. C. 490, Smith, C. J., says that the question whether the same principle applies to railroads is not presented, and therefore is not "passed upon." He further says: "We do not understand the counsel for the defendant to deny that if the power conferred in the charter was exercised negligently and without a due regard to the interest of others, and an injury was suffered in consequence, the company would be exposed to an action for redress in some form," citing *Meares v. Wilmington*, *supra*.

While in the very well-considered and exhaustive brief of defendant many cases are cited in which railroad companies are given the same immunity from actions for consequential injury to property sustained by the lawful exercise of power as municipal corporations, this court, in *Staton v. Railroad*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838, in an opinion by Shepherd, C. J., denies such immunity. It is there held that the authority granted to a corporation by its charter to construct a railroad does not thereby confer upon it an immunity from liability for damages to others in respect to their adjacent lands, when, under the same circumstances, a private individual would be liable. That case involved the question of the right of an adjacent landowner to recover damages for flooding his land by the construction of ditches on defendant's right of way. It may be noted that such flooding of the lands amounted to a "taking" and comes within the elementary principle that in such cases compensation must be made. For the purpose of disposing of this appeal it is not necessary to further discuss the question presented in *Staton v. Railroad*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838. From either viewpoint the limitation is always annexed that the right be exercised "in a lawful way"; that is, in respect to those who suffer damage with due care for their rights. When done negligently, and without due regard for such rights, there is *damnum et injuria*—that is, in contemplation of the law, *injuria*—which is always actionable. We find the same limitation imposed upon the doctrine in all of the cases from other jurisdictions cited in defendant's brief. In a well-sustained opinion by Judge Keith in *Flaher v. Railroad*, 102 Va. 363, 46 S. E. 381, he concludes the discussion with this language: "But, in order to secure this immunity, the power given by the Legislature must be exercised without negligence and with judgment and caution. For damage which could not have been avoided by any reasonable, practicable care on the part of those authorized to exercise the power, there is no right of action; but they must not do needless harm, and, if they do, it is a wrong against which the ordinary remedies are available." Pollock on Torts, 129.

In a case strikingly similar to ours (*Balt. & Pot. Railroad v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739) it appeared that, under the powers conferred upon the defendant to erect such works as it might deem necessary and expedient for the completion and maintenance of its road, it erected in the city of Washington, in close proximity to the defendant Baptist Church, an engine house, machine shop, etc., and used them in such a way as to disturb the congregation assembled in the church, interfere with religious exercises therein, break up the Sunday schools, and destroy the value of the building as a place of worship. For the pur-

pose of recovering damages the church instituted an action. The same defense was relied upon as in this case. Field, J., said: "Plainly the engine house and repair shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises; * * * that is, a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. * * * It is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress to bring its track within the limits of the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they are skillfully constructed. * * * In the first place, the authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city, without reference to the property and right of others. As well might it be contended that the act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the corporation does assert a right to place its works upon property it may acquire anywhere in the city. Whatever the extent of the authority conferred, it was accompanied with this implied qualification: That the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. Undoubtedly a railway over the public highways of the district, including the streets of the city of Washington, may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But the case at bar is not of

that nature. It is a case of the use by the railroad company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship." This case is cited with approval in *Bates v. Holbrook*, 171 N. Y. 460, 64 N. E. 181; *Ridge v. Penna. Railroad Co.*, 58 N. J. Eq. 172, 43 Atl. 275, in which the Chancellor says: "Therefore the right of this company to use the strip of land upon which the three tracks are placed * * * for terminal purposes does not include the right to use them for all purposes to which a terminal yard may be devoted. The company is bound to take into consideration the environments, and adjust its operation so as to produce the least annoyance to persons and property, in placing the instrument necessary to its business." In *Willis v. K. & L. Bridge Co. (Ky.)* 46 S. W. 488, citing the *Church Case*, it is said: "Whenever a railroad company has been granted authority to use a street, it is accompanied with an implied qualification that its use shall not unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Such a grant does not license the railroad company to use the street in disregard of the private rights of others and with immunity for their invasion." In *Chicago G. W. Railway Co. v. First Methodist Church*, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, in which it appeared that the company erected a hydrant in a street opposite the church and built tracks to it, in the use of which the engines made noises, emitted smoke, cinders, etc., a right of an action was sustained by the Court of Appeals.

Defendant insists that this appeal is to be distinguished from the *Baptist Church Case* because "(1) it did not appear that the railroad had the proper legislative authority to construct and use the building complained of in the place at which it was located, and it appeared affirmatively that it was at an unreasonable place." It appeared that the road was, by its charter, empowered to make and construct all works whatever which might be necessary and expedient in order to the proper completion and maintenance of its road. The defendant's charter is in substantially the same language. The location of the road was expressly permitted and approved by Congress. Conceding that the location of the spur track upon the lot purchased by defendant for that purpose was authorized by the charter, the complaint is that by the construction of it, the trestle pointing directly to plaintiffs' dwelling and extending to within a few feet of his fence and 27 feet of his dwelling, it would seem that, considering the purpose for which it was built and was to be used, it was at least a menace to plaintiffs' property. In *Romer v. Railway Co.*, 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455, it is said by the court that no negligence was imputed to defendant. In *Dolan v. Railroad*

(Wis.) 95 N. W. 385, a recovery was denied for a nuisance in maintaining a stockyard, because it was not shown that the location was not a reasonably proper one, or that the company did not use reasonable diligence in preventing unhealthy conditions. The distinction is apparent. This contention is, we think, met by the language of Judge Field above quoted. Conferring the power to erect all structures, buildings, etc., necessary and convenient for its business cannot be construed to empower it to locate and use them as it might think proper without reference to the rights of others. *Terminal Co. v. Jacobs*, 100 Tenn. 727, 72 S. W. 954; *Ridge v. Railroad*, 58 N. J. Eq. 172, 43 Atl. 275. To give it such a construction would impute to the Legislature a disregard of private rights, trenching closely upon, if not in violation of, constitutional limitations. In *Railroad v. Meth. Epis. Church*, supra, it is said: "If two private citizens own adjacent lots, one of them cannot establish and maintain on his own lot a nuisance which has the effect of depriving his neighbor of any beneficial use of his lot without making compensation for the injury, and no more can a private corporation erect and maintain a nuisance on its own premises, or in a public street, which has the effect to deprive an adjacent or abutting owner of the beneficial use of his property, without making compensation for the injury." Defendant says that the cases are distinguished, in that "the engine house was a part of the defendant's private works, used exclusively for its private business, and bearing no relation to the public." We do not find that the court so regarded the engine house; on the contrary, the entire discussion proceeds upon the theory that defendant was acting within its chartered powers, but in violation of the duty imposed to use them in a reasonable manner and with due regard to the rights of others. However this may be, the plaintiffs aver that in the use of the trestle defendant was negligent, specifying several instances in which it is alleged there was gross negligence. In *Dargan v. Waddill*, 31 N. C. 244, 49 Am. Dec. 421, holding that a stable in a town was not per se a nuisance, *Ruffin, C. J.*, says: "But, on the contrary, if they be so built, so kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises and impair their value as places of habitation, stables do thereby become nuisances." We do not discuss the question whether the rights of the plaintiffs are affected by the fact that the spur track and trestle were on a lot purchased by defendant for use as a coal yard, as distinguished from a like use of land covered by the right of way. Without entering further in this domain, wherein frequent attempts to restate the doctrine has sometimes led to obscurity, we conclude that his honor correctly overruled the demurrer. The allegation is specifically made that defendant wantonly and negligently created, maintained,

etc., the nuisance, specifying each negligent act. These terms are repeated in respect to each act complained of, and permeate the entire complaint in respect to this cause of action.

Postponing the consideration of several exceptions to rulings upon the admissibility of testimony, we proceed to examine such as relate to his honor's instructions. After stating the contentions of the parties his honor said: "So, then, gentlemen, the question is for you to find as to whether the defendant in this case committed and maintained, caused, and continued a nuisance on the lot adjoining plaintiffs', not on the right of way, but outside of the right of way and next to and adjoining the plaintiffs' lot." To this defendant excepted. We find no error in this. His honor clearly stated to the jury the limits within which, by the judgment upon the demurrer, he had restricted plaintiffs. His honor proceeded to instruct the jury: "So, if you find by the greater weight of evidence that the lot occupied and used by the defendant is off its right of way and adjoining the plaintiffs' lot; that plaintiffs acquired their lot and erected a dwelling on same before the defendants built the spur on its lot, and commenced to use the same as a dwelling; that the end of the spur track was insecurely built, or not safely constructed; that it extended to within 5½ feet of the plaintiffs' line fence, and to within 27½ feet of plaintiffs' dwelling and sleeping apartments; that defendant's cars were several times wrecked and dropped over towards the plaintiffs' dwelling; and that by reason of this fact the plaintiffs had reasonable grounds to believe and did believe that they were by reason of the proximity of the track in danger of being hurt—then if you find these facts to be true from the evidence, and by the greater weight of the evidence, the court charges you the operation of the spur or track by the defendant under these circumstances would create a nuisance on the part of the defendant; and plaintiffs would be entitled to recover if you find this condition existed within three years prior to the bringing of this action." "And if you shall find from the greater weight of the evidence that the defendant negligently and carelessly permitted its cars to run off of the spur track and knock down plaintiffs' fence, then the plaintiffs would be entitled to recover of the defendant the damage to the fence, caused by reason of the negligence of the defendant in throwing its cars on the fence, if you find that it was negligence." "If the jury shall find by the greater weight of the evidence that the defendant operated its engines and cars over the spur in a reckless and careless manner, and because of the proximity of the defendant's track to the residence of the plaintiffs it kept the plaintiffs in constant dread

and fear; and you shall further find that because of this proximity of defendant's track to plaintiffs' house, and because of the soot, cinders, and smoke, the plaintiffs' house was rendered less valuable as a residence, and made the house uncomfortable and disagreeable to its occupants, the plaintiffs—then these facts and circumstances if proven by the greater weight of evidence, would make the acts of defendant a nuisance." These instructions, we think, are sustained by the authorities which we have cited in regard to the ruling upon the demurrer. They fairly present to the jury the averments contained in the complaint, upon which there was testimony; in fact, there was no contradictory testimony in respect to the damage sustained by plaintiffs. Several of defendant's witnesses corroborated the plaintiffs' evidence.

His honor further instructed the jury: "Or if you shall find from the evidence, and by the greater weight of evidence, that the defendant in operating its engines and cars upon the spur track on the lot adjoining the plaintiffs' lot, and in so doing you find that its engines emitted such smoke, cinders, and threw out such smoke and cinders through the windows and doors of the plaintiffs' house, and injured the plaintiffs' property, his household and kitchen furniture, the plaintiffs would be entitled to recover for damages thus sustained." Defendant insists that in this instruction his honor eliminated the question of negligence and permitted the plaintiffs to recover damage to their furniture for smoke, cinders, etc., emitted from the engines. The charge must be so read that each portion shall be construed in the light of the whole. While it is true that for smoke, cinders, etc., emitted by engines in the ordinary operation of the business of defendant, no action lies, yet when, as in this appeal, there is evidence that the engines were used upon a structure and under conditions which the jury have found to be negligent, it would seem that the damage inflicted by them is proper to be considered by the jury. The instruction is in accordance with the opinion in the case of *Railroad v. Baptist Church*, supra. The testimony in regard to the damage sustained from this annoyance was clear, and, taken in connection with all the facts in the case, we think it was competent for the jury to consider it in fixing the damage. In regard to the measure of damages, his honor instructed the jury that they should consider all the circumstances, the depreciation in value of the plaintiffs' home as a dwelling during the three years next preceding the bringing of the action, the inconvenience, discomfiture, and unpleas-

antness sustained. The instruction in this respect is fully sustained by the authorities. It seems to have been drawn with reference to the language of Judge Field in the *Church Case*. We find in all that is said in that case authority for the ruling of his honor. While we have carefully examined a number of cases cited in defendant's brief, we have found no other so nearly analogous to this appeal. While recognizing the general principles governing the liability for railroads to actions for nuisances, it is founded upon sound reason and principles of manifest justice.

The exceptions in regard to the admission and rejection of testimony were not pressed in this court, and we do not find in them any reversible error. The case was tried upon the theory of a negligent and unreasonable use of the powers conferred upon defendant by its charter, and, as we have seen, the very great weight of authority recognizes this limitation upon the maxim that no action lies for "doing a lawful thing in a lawful way." It is difficult to conceive how the law could be otherwise, or how it can be said that to do any act, however lawful, without a due regard to the rights of others to be affected thereby, is doing such act in a "lawful way." While large powers are of necessity granted to railway companies in the construction and operation of the business in which they are engaged, and by which, when properly restrained, the public welfare is promoted, it would be contrary to fundamental principles of law and conceptions of natural justice to say that the Legislature will, or can, confer upon any person, either natural or corporate, absolute and uncontrolled power to injure or destroy the property of the citizen without making compensation. No matter how extensive the power conferred, it must not be exercised in an unreasonable or negligent way so as to injure others in their enjoyment of their property. Within this limitation the principle of immunity from liability for "doing a lawful thing in a lawful way" is sound and salutary. Without the limitation it confers arbitrary power to be exercised in an arbitrary manner.

The effect of the judgment upon the demurrer to the first complaint, as an estoppel, is not presented by any pleadings. The defendant answered the amended complaint, and did not set up the judgment upon the demurrer. The request to amend was denied. The exception to his honor's refusal to hold with defendant in that respect cannot be sustained.

We find, upon an examination of the entire record, no error.

**THOMASON et ux. v. SEABOARD AIR
LINE RY.**

(Supreme Court of North Carolina. Aug. Term, 1906.)

**1. RAILROADS—INJURIES FROM OPERATION—
LIABILITIES ON CONSOLIDATION OF COM-
PANIES—RIGHTS OF ABUTTING OWNER.**

That a railroad company owning a short line has consolidated with other companies so as to form a through line, whereby the use of the right of way at a particular station is greatly increased, to the increased annoyance of an abutting owner, does not affect such owner's rights as against the railroad.

2. SAME—ACTION—PLEADING.

Where a complaint alleges that a railroad has wantonly and negligently created and maintained on its premises adjoining plaintiff's land a nuisance, consisting of the use of certain side tracks in such manner as to cause injury to the plaintiff from the noise, smoke, and vibration incident to such use, the legal effect of the allegations is that the use of the tracks for the purposes named constitutes, as a matter of law, a wanton and negligent nuisance.

3. SAME—NUISANCE.

The use by a railroad company of side tracks on its right of way for its regular traffic and for the storing of engines used on the branch line, in a reasonable manner, is not a nuisance for which it is liable to an adjoining owner, though causing annoyance and injury to his property by reason of the noise, smoke, cinders, and vibration incident to such use.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 720-724; vol. 37, Cent. Dig. Nuisance, §§ 23, 24.]

Appeal from Superior Court, Nance County; E. B. Jones, Judge.

Action by Henry Thomason and wife against the Seaboard Air Line Railway. From the judgment, plaintiffs appeal. Affirmed.

Plaintiffs alleged that they were, and had been for many years, the owners of a lot, upon which was situate a dwelling occupied by them as a residence, in the town of Henderson; that prior to 1887 the Raleigh & Gaston Railroad, being about 96 miles in length, ran near to, and its right of way abutted upon, plaintiffs' lot; that in 1889 the Durham & Northern Railroad was constructed, Henderson being one of its termini; that the original corporations, in 1901, were merged into and with other roads formed the defendant corporation; that by such merger a great through line of railroad was established, more than 1,000 miles in length, which has since been greatly increased, and the traffic has been such as to greatly increase the burdens upon lands lying along its lines far beyond the damages paid or contemplated in the creation of the Raleigh & Gaston Railroad, for which no compensation has been made; that since plaintiffs' purchase of said lot the defendant and its predecessor, the Raleigh & Gaston Railroad Company, have wantonly and negligently created and maintained and permitted on their premises, adjoining and contiguous to plaintiffs' land, such nuisances as to greatly endanger plaintiffs in their comfort, persons, and property, by rendering their said dwelling house and

premises unfit and dangerous for occupancy as a place of residence, and interrupt their quiet and peaceable occupation thereof, which said nuisances consist in the use of certain side track or tracks immediately in rear of plaintiffs' said premises and within a few feet thereof as a hostelry for storing, standing, and keeping the locomotives of the Durham & Northern Division of the defendant's railways, when not in use, the yard engine of the defendant at Henderson and such other engines of the defendant as may for any cause be in Henderson, and not in immediate use (Henderson being a terminal of said Durham & Northern Division). Here such locomotives were kept at night and on Sundays and at other times when not in actual service, and cleaned, fired, steamed, and kept in order, without any roundhouse or other structure inclosing or covering the same, and without chimneys or smokestacks of sufficient height to carry the smoke, steam, dust, cinders, and odors above the surrounding property. From the engines so placed, tended, and handled there were daily and many times during the day and night the noise of escaping steam, the ringing of bells, and the blowing of whistles. In summer, when the doors and windows of plaintiffs' said dwelling house were open for light and air, smoke and cinders, ashes and dust, were discharged and blown from such locomotives in and through the doors and windows, settling upon the occupants of the house and upon the furniture and furnishings, and soiling clothes, bedding, curtains, and other articles therein, and accompanied by foul and offensive odors, which tainted and corrupted the atmosphere and rendered the dwelling house and premises of plaintiffs unfit for habitation, whereby plaintiffs were greatly annoyed, inconvenienced, discomforted, and damaged, both in their persons and their property. Further, the defendant, as plaintiffs are advised and believe, without authority in their charter to engage in such business, held a lot of land in excess of its right of way, adjoining plaintiffs on the northeast, and let the same as a coal and wood yard, and suffered the lessee or occupant thereof to set up thereon, and to maintain and operate, a steam boiler without spark arrester, engine, and circular saw, near the line of plaintiffs' lot, near their front door, and within 30 or 40 feet of their sleeping room, and plaintiffs were greatly and continuously annoyed and disturbed by the noise therefrom, and their fences, outhouses, and dwelling were greatly in danger from fire.

To the foregoing cause or causes of action the defendant demurred ore tenus. The demurrer sets forth: "(1) The defendant demurs to so much of the plaintiffs' complaint as alleges 'from smoke, noise, odors, and vibrations resulting from the operations of the defendant's railroad,' because such allegation does not state a cause of action, inasmuch as the Seaboard Air Line Railway is author-

ized by law to operate a steam railroad, and the smoke, noise, odors, and vibrations complained of are the results of the proper operation of such road, and the damage therefrom is *damnum absque injuria*. (2) The defendant demurs to so much of the plaintiffs' complaint as alleges damage from fright or nervous trouble resulting therefrom, for failure to state a cause of action, because fright, unaccompanied by physical injury, is not an element of damage. (3) The defendant demurs to so much of the plaintiffs' complaint as alleges injury from the operation of a steam boiler and engine and circular saw on the defendant's property adjoining the plaintiffs' lot, for failure to state a cause of action, because, as is alleged, the said lot was leased for the purpose of establishing thereon a coal and wood yard, which is a lawful business when properly operated, and the defendant is not liable for any damage resulting from a nuisance created by the tenant in the operation thereof. (4) The defendant demurs to so much of the plaintiffs' complaint as alleges damage by the construction of side tracks into and for the benefit of said coal and wood yard, for failure to state a cause of action, because the Seaboard Air Line Railway is authorized by law to engage in the business of a common carrier, and in order to properly carry on said business it is its duty to construct side tracks for the accommodation of the authorized enterprise constructed and operated along its right of way, and it is not liable for damage resulting from the lawful performance of such duty." The defendant demurs to the sixth allegation of said complaint, because the same fails to state a cause of action.

His honor sustained the demurrer, rendering judgment as follows: "After due consideration, it is ordered and adjudged that the first, so far as it applies to the main line, and second, third, and fifth causes of demurrer be, and the same are, hereby sustained. Judgment accordingly." Plaintiffs excepted and appealed.

H. M. Shaw and T. M. Pittman, for appellants. Day & Bell, Murray Allen, and J. H. Bridgers, for appellee.

CONNOR, J. (after stating the case). Before proceeding to discuss the principal question presented upon plaintiffs' appeal, it will be well to notice the suggestion made in the complaint that defendant's right to use its right of way is limited by conditions existing at the time of the organization of the Raleigh & Gaston Railroad Company and the length of its track when completed. Whatever may be the extent of the rights acquired by the corporation against the owners of the land condemned, when a new corporation is formed by consolidation and merger with other corporations, pursuant to authority conferred by the Legislature, we cannot perceive how the plaintiffs, whose land, so

far as appears, was never condemned and no right of way acquired over it, can complain of the enlargement of the business of the company. The right of defendant to operate a railway, carrying on the business of a common carrier, with all of its incidental powers and duties, is derived from the statute authorizing the consolidation and the merger effected pursuant thereto. *Priv. Laws 1901*, p. 463, c. 168; *Spencer v. Railroad*, 137 N. C. 107, 49 S. E. 98, 1 L. R. A. (N. S.) 604. Defendant succeeded to the rights of the Raleigh & Gaston Railroad Company, and took them unimpaired. *Dargan v. Railroad*, 113 N. C. 603, 18 S. E. 653. It would seem that, upon the reason of the thing and from the nature of and the purpose for which the powers are granted, when the company acquired the right of way, in the absence of any restrictions either in the charter or the grant, if one was made, it became invested with the power to use it, not only to the extent necessary to meet the then present demands, but such further demands as arose from the increase of its business and the proper discharge of its duty to the public. Any other construction of its charter, in this respect, would defeat the very purpose for which it was created—the growth and development of the resources of the country through which it was constructed. It would seriously interfere with railroads in the discharge of their duty to the public, in a country the population and business of which are rapidly increasing, if, because to meet and encourage these conditions, they doubled their tracks, erected larger depots, made connections with branch lines, etc., new rights of action accrued against them in regard to the use of their right of way. It is immaterial, for the purpose of deciding this appeal, that the Raleigh & Gaston Railroad, originally only 96 miles in length, has become a part of a great trunk line of 1,000 miles, with branch lines connecting at Henderson and other points. It may, if necessary to meet the demands of its enlarged growth, cover its right of way with tracks, and, in the absence of negligence, operate trains upon them, without incurring, in that respect, additional liability either to the owner of the land condemned or others. We therefore attach no weight to the fact that the Raleigh & Gaston Railroad Company has become a part of the defendant's system of roads, or that the Durham & Northern has formed a physical connection with it as a part thereof.

Plaintiffs say that his honor was in error in sustaining the demurrer, because they have alleged that the nuisances complained of were wantonly and negligently created and maintained. As we have seen in the discussion of defendant's appeal, if this is true, the defendant cannot maintain the position that it is "doing a lawful thing in a lawful way"; for it can never be lawful to use or exercise any power or right in a wan-

ton and negligent way, and for any damage inflicted thereby a right of action accrues to the injured party. It becomes, therefore, necessary to ascertain whether the conduct complained of is so characterized by plaintiffs. It is undoubtedly true that plaintiffs allege that defendant has "wantonly and negligently created, maintained, and permitted on their premises, adjoining and contiguous to plaintiffs' said land, such nuisances," etc. If the allegation had ended there, it is clear that the defendant could have successfully interposed a demurrer, or at least demanded that the plaintiffs specify the matters and things which they claimed constituted a nuisance. A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done or omitted to be done, by which the court can see that there has been a breach of duty, is defective and open to demurrer. *Hagins v. Railroad*, 106 N. C. 537, 11 S. E. 590; *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927. The learned counsel well knew this elementary rule of pleading, and he therefore, after making the general averment, proceeds to say, "which said nuisances consist in the use of certain side tracks," etc. It will be observed that it is not alleged that the said side tracks were negligently constructed or used. The evident purpose of the plaintiffs was to allege that, by using said side tracks in the manner and for the purposes set forth, the defendant wantonly and negligently created and maintained a nuisance. This theory runs through the complaint in the statement of the cause of action to which his honor sustained the demurrer. It is manifest that, in stating their cause of action in respect to the use of the coal yard, the construction and use of the spur track, trestle, etc., a different theory is advanced. They allege "that, without authority in the charter to engage in such business, defendant held a lot in excess of its right of way, etc., and let the same as a coal and wood yard. They next allege that upon said lot defendant negligently maintained a trestle; that upon two occasions coal cars were negligently forced over the end of said trestle; that they were negligently permitted to remain in such position; that on another occasion the fast mail train negligently ran into said spur track and collided with locomotives. It will be noted that, in respect to each and every act specified as constituting the nuisance connected with the erection and use of the spur track, negligence is specifically alleged. We are brought to the conclusion that, by a proper construction of the complaint in respect to the first cause of action, the plaintiffs have alleged and intended to allege that, by using the side tracks in the manner and for the purposes set forth, the defendant wantonly and negligently created and maintained a nuisance, or, to express the thought in different form, that the use of tracks for the purpose set out constitutes

as a matter of law a wanton and negligent nuisance. While pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability. The cases bearing upon the subject are collected in *Clark's Code*, p. 194, § 283.

Considered from this point of view, the appeal presents a question the solution of which is of great importance to the citizens and railroads of this state. It is not of first impression, having been frequently discussed and decided in other jurisdictions. Chief Justice Beasley, in *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164, says: "If a railroad, by the necessary concomitants of its use, is an actionable nuisance with respect to plaintiffs' property, so it must be as to all property in its vicinity. It is not only those who are greatly damaged by the illegal act of another to whom the law gives redress, but its vindication extends to every person who is damaged at all. * * * The noises and other disturbances necessarily attendant on the operation of these vast instruments of commerce are wide-spreading, impairing in a sensible degree some of the usual conditions upon which depend the enjoyment of property in their neighborhood; and consequently, if these companies are to be regarded purely as private corporations, it inevitably results that they must be responsible to each person whose possessions are thus molested." He proceeds to show that if such actions may be maintained, it would be impracticable to operate railroads. In the case of *B. & P. R. R. v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, upon the authority of which we held defendant liable on its appeal, Field, J., drawing the distinction, says: "Undoubtedly a railway over the public highways * * * may be authorized, * * * and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience, in such case, must be suffered for the public accommodation." The principle is well stated by Pollock in his work on Torts (page 128): "A person dwelling near a railway constructed under the authority of Parliament for the purpose of being worked by locomotive engines cannot complain of the noise and vibration caused by trains passing and repassing in the ordinary course of traffic, however unpleasant he may find it; nor of damage caused by the escape of sparks from the engines, if the company has used due caution to prevent such escape as far as practicable. * * * If an authorized railway comes near my house, and disturbs me by

the noise and vibration of the trains, it may be a hardship to me; but it is no wrong. For the railway was authorized and made in order that trains might be run upon it, and without noise and vibration trains cannot be run at all." The principle is illustrated by the maxim that "no action can be maintained for loss or inconvenience of an authorized thing done in an authorized way."

The question involved in this appeal is very clearly stated and discussed in *Atchison & R. Railroad v. Armstrong* (Kan.) 80 Pac. 978, and the conclusion reached "that, the company having been specifically authorized to make the alleged improvement in its roadbed, in the absence of any charge that it was unnecessary or unskillfully done or made at a place not authorized, it is not liable for damages as for the maintenance of a nuisance." The court thus states the reason upon which the law is founded: "The damages alleged to have been sustained in this case are purely incidental, and arise from a proper operation of the defendant's locomotive engines. Railroad companies are public corporations, organized and maintained for public purposes. Railroads cannot be operated without causing more or less inconvenience to the public, and discomfort and possible damage to persons living adjacent to their lines. All such inconveniences and incidental damages must be endured by the individual for the public good." In *Carroll v. Wisconsin Cent. R. R.*, 40 Minn. 168, 41 N. W. 661, the same conclusion is reached; the court saying: "Railroads are a public necessity. They are always constructed under authority of law. They bring to the public great benefits. Operating them in the most skillful and careful manner causes to the public necessary incidental inconveniences, such as noise, smoke, cinders, vibrations of the ground, interference with travel at the crossings of roads, streets, and the like. One person may suffer more from these than another. * * * But the difference is only in degree and not in kind. * * * If each person had a right of action because of such inconveniences, it would go far to render the operating of railroads practically impossible." *Parrot v. Cin. H. & D. R. R.*, 10 Ohio St. 627. The question underwent a thorough investigation in *Fisher v. Railroad*, 102 Va. 363, 46 S. E. 381, and the conclusion reached, with the authorities upon which it is sustained, are cited and discussed by Keith, P. In *Jones v. Railroad Co.*, 151 Pa. 30 (47), 25 Atl. 134, 17 L. R. A. 758, 31 Am. St. Rep. 722, Williams, J., says: "The business authorized by the charter of a railroad corporation is the carriage of persons and goods. The work of construction is provided for as an indispensable preliminary, * * * but in the operation of its road a company is liable only for negligence or malice. Smoke, dust, and noise are the usual, and, in the present state of knowledge on the subject, the necessary, consequence of the use of

steam and the movement of trains, just as noise and dust are the consequences of the movement of drays and carts over an ordinary highway. The resulting inconvenience and discomfort are, in both cases, *damnum absque injuria*." *Romer v. St. Paul City Ry. Co.*, 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455. In *Bates v. Holbrook*, 171 N. Y. 400, 64 N. E. 181, Bartlett, J., says: "Damages which are inflicted upon abutting property owners in the performance of public works, reasonably and properly conducted, are regarded as *damnum absque injuria*. This exemption rests upon the necessity of the situation and commends itself to all reasonable minds." For an able and exhaustive discussion of the question see *Austin v. Augusta Term. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; *Transportation Co. v. Chicago*, 99 U. S. 635, 25 L. Ed. 336. To the same conclusion the authors of the text-books have arrived. Baldwin, *Am. R. R. Law*, 28. Judge Elliott says: "A railroad company, authorized by the Legislature to construct and operate a road for the public use, is thereby relieved from many of the consequences attending the construction and operation of a road by an individual without such authority, and it may, perhaps, be stated as a general rule that, so long as it keeps within the scope of the powers and authority granted, a railroad company is not liable, either civilly or criminally, for a nuisance, which is the necessary result of the construction and operation of its road in accordance with its charter." Elliott on Railroads, § 718; 21 Am. & Eng. Enc. 737; *Railway Co. v. Truman*, L. R. 11 App. Cases (1886) 49; *Adams v. Railroad*, 110 N. C. 325, 14 S. E. 857.

While not directly in point, the principle upon which defendant claims immunity from liability is recognized by this court in several cases. In *Morgan v. Railroad*, 98 N. C. 247, 3 S. E. 506, the action was for frightening plaintiff's horse. Merrimon, J., said: "The defendant certainly had the right on its roadway to move its locomotives, with or without cars attached to them, in the orderly course of such work, to and fro in making up its trains, etc. The noises ordinarily—naturally—incident to this work, when done, when it may be lawfully done, do not constitute negligence or nuisance. * * * Harm thus sustained is *damnum absque injuria*." *Harrell v. Railroad*, 110 N. C. 215, 14 S. E. 637. In *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27, the same principle is announced. It will be observed that plaintiffs do not allege that defendant has exceeded its right of way. The complaint is that it has used its side track as a hostelry for the engines of the Durham & Northern Division of defendant. We may take notice of the fact that the Durham & Northern is a short branch line, and but few engines can be used on it. We cannot see that the use by defendant of its side tracks for the purpose stated is unreasonable. It is said they

are kept there at night and on Sundays, and cleaned, fired, and steamed, without any roundhouse inclosing or covering the same. We cannot see anything unreasonable or negligent in so using and handling the engines. There is no suggestion that by carelessness, or want of due care and caution, any other or different noises are made than is usual or necessary in caring for the engines and preparing them for use. It is said that no smokestack is provided of sufficient size to carry off the smoke, dust, etc., above the surrounding property. There is no suggestion that the smokestacks attached to the engines are not such as are generally in use. It would hardly be insisted that a railroad company is required to erect and maintain a roundhouse at every station where a short branch or feeder makes connection with it. There is no allegation that it is usual to do so. We are not able to say, as a matter of law, that defendant should have a roundhouse or smokestack sufficient to carry the smoke beyond the adjoining property. It may be that if, to protect plaintiffs' property from dust, smoke, and cinders, a way was provided to cast them upon the premises of others, not so near the track, a liability to them would be incurred. Plaintiffs say that from the engines so placed, tended, and handled they were annoyed by the ringing of bells, blowing of whistles, smoke, cinders, etc. These are all, as we know from observation and experience, the usual, ordinary, and to a certain extent necessary, concomitants of using and operating locomotive engines. To subject the company to actions for damages for them would be to practically render them useless. While the law will afford a remedy for damage sustained by the negligent or unreasonable use of these powerful agencies of industrial life and progress, to impose unreasonable restrictions would be unwise. In this day, when almost unlimited legislative control over these public agencies is being asserted and sustained by the courts, by the requirement of larger facilities and greater security for travel and transportation by double tracks, union depots, block systems, and many other modern devices, it would seriously interfere with such control to put new and unreasonable restrictions upon their mode of operation. Again, this and all other courts have imposed upon railroads very stringent rules requiring them to give warning of the movement of their engines by ringing bells, sounding whistles, etc. Failure in this respect, followed by injury to persons upon the track, results in large verdicts for damages. The law must be reasonable and just. It would be neither if, for meeting its demands on the one hand, it subjected the corporation to actions for nuisances on the other. The slightest reflection will show the wisdom of the law in this respect.

We have treated the plaintiffs' complaint as in an action for a nuisance, and not for compensation demanded by reason of a

constructive "taking" of his property. We would not be understood as abating in any degree the fundamental principle of law that, no matter how urgent the demands of the public may be or how necessary to the progress of its country, no man's property may be taken without compensation. In those cases wherein the right is asserted to flood lands, or otherwise appropriate or subject them to an additional burden, the question of negligence is not involved. Courts uniformly hold that where the action is for damages, by way of compensation which, when paid, secures an easement, the owner of the property is entitled to recover. In *Staton v. Railroad*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838, the injury for which compensation was sought was, as said by Shepherd, C. J., equivalent to a "taking" and an appropriation; hence the question of negligence was not presented. This theory was adopted in *Ridley v. Railroad*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, and *Parker v. Railroad*, 119 N. C. 677, 25 S. E. 722. *Douglas, J.*, in *Beach v. Railroad*, 120 N. C. 498, 26 S. E. 703, *Lassiter v. Railroad*, 126 N. C. 509, 36 S. E. 48, and *Geer v. Water Co.*, 127 N. C. 349, 37 S. E. 474, says that in such cases permanent damages should be assessed, and, when paid, the defendant acquires an easement to so use the lands. This must in the nature of the case be so. There is no statutory mode prescribed for a railroad to acquire an easement by condemnation to flow water over adjoining lands. The necessity to do so, to protect and render safe its roadbed, is apparent; hence the courts will not enjoin the company. *Railway Co. v. Mining Co.*, 112 N. C. 661, 17 S. E. 77; *Merrick v. Railroad*, 118 N. C. 1082, 24 S. E. 667. As said by Judge Douglas, the defendant cannot, by law, acquire a right to continue a legal trespass, by paying damages; hence the law permits the acquisition of the easement, in such cases, by the payment of permanent damages, the judgment having that effect. *Brown v. Power Co.*, 140 N. C. 333, 52 S. E. 954. It is manifest that no easement can be acquired to emit smoke, cinders, make noises, causing vibrations, etc. *Beasley, C. J.*, says: "The laws, in providing for the acquisition and condemnation of lands, authorize the taking of such lands only as are requisite for the necessary structures of the road and the accommodation of its business, and require the payment of damages only to that class of landowners. These corporations are not permitted to sequester any other property, nor to compensate for other damages. The central idea of the system is that for incidental damages these companies are not responsible." When it is said that in contemplation of the law there is no wrong without a remedy, it must be noted that the term "wrong" has a legal significance distinct from "damage," and is synonymous with "injury," signifying a legal injury; hence the maxim "damnum absque injuria," which "is used to designate damage

which is not occasioned by anything which the law esteems an injury." Am. & Eng. Enc. 694.

The same argument which is made to sustain this action may, with equal force, be made in every case wherein this maxim is invoked. It is an illustration of the truth that the law is not a system of logical or of ethical perfection, but a practical science, and that almost all of its general principles, however wide their application may seem to be, have on all sides their reasonable limitations. The value of property is constantly being affected by the conduct of adjoining owners. Changes in the value of property in towns and cities are constantly being made by the demands of trade, manufacturing, channels of travel, and many other causes. So long as they are done within legal rights and without negligence, there is "damage," but no injury, therefore no action. Of course, if the business engaged in is per se wrongful, hurtful to health, or otherwise destructive of legal rights, another maxim of the law, "*Sic utere tuo ut alienum non lædas*" applies. Without further pursuing the interesting question involved, we find, upon principle and in the light of the authorities, no error in his honor's ruling sustaining demurrer.

The judgment must be affirmed.

STATE v. WELLS.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. EMINENT DOMAIN — CONDEMNATION PROCEEDINGS — FILING MAPS AND PROFILES — AMENDMENT.

Where a map and profile is not served with the summons in condemnation proceedings, as required by Revisal 1905, § 2599, the omission may be supplied by amendment.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 503.]

2. SAME—RAILROAD AND LOGGING COMPANY—RIGHTS ACQUIRED.

Priv. Acts 1901, p. 88, c. 42, confers on a railroad and logging company the right to condemn land according to the provisions of the general law. Revisal 1905, § 2575, gives the right to enter on land for the purpose of laying out a road and on contiguous land along the route necessary for depots, warehouses, and other buildings, and requires the payment to the owners of an amount agreed on. *Held* that, in the absence of an agreement between the parties, this right of entry is only for the purpose of laying out the line and designating the sites required for the construction of the road.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 202, 505-507.]

3. SAME—NECESSITY OF PAYMENT.

Under Revisal 1905, § 2575, authorizing a railroad company to enter on land for the purpose of laying out its road and requiring the payment by the company of an amount agreed on with the owner, and section 2587, providing that in case of appraisal by commissioners the company may, on payment into court of the amount appraised, enter and hold the land, notwithstanding an appraisal is pending, a company does not, in the absence of an agreement

with the owner, acquire the right to enter land for the purpose of building its road until the amount appraised has been paid into court.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, §§ 202, 505-507.]

4. TRESPASS — CRIMINAL RESPONSIBILITY — DEFENSES.

An indictment for willful trespass will lie against an employé of a railroad and logging company for an entry on land which the company is seeking to acquire for its road, though an injunction to restrain the trespass would have been denied.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespass, § 172.]

5. SAME—EVIDENCE.

Where, in a prosecution for willful trespass under Revisal 1905, § 3688, making it a misdemeanor to enter on the lands of another without license, etc., there is evidence tending to show that defendant believed on reasonable grounds that he had the right to enter, a conviction cannot be had without a consideration of defendant's bona fide claim of right to enter.

Appeal from Superior Court, Duplin County; E. B. Jones, Judge.

D. Wells was convicted for willful trespass before a justice of the peace. On appeal to the superior court the conviction was sustained, and defendant prosecutes a further appeal. Reversed, and new trial granted.

Defendant, having been convicted before a justice of the peace for a willful trespass, under section 3688, Revisal 1905, appealed to the superior court, where it was agreed that the judge might find the facts and enter judgment accordingly. The court found the facts, and thereon adjudged defendant guilty, and imposed a fine of \$1. Defendant excepted and appealed, assigning for error that the court adjudged defendant guilty on the facts as found. From the findings of facts it appears that the charter of the Hilton Railroad & Logging Company (chapter 42, p. 88, Priv. Acts 1901) confers upon it the right to condemn lands according to the regulations and procedure established by the general law (Revisal 1905, c. 61, § 2575 et seq.). Pursuant to the power so conferred, condemnation proceedings were instituted by the company against one F. H. Carter. A demurrer was filed to the petition made in the cause, which was heard May 28, 1906, when the demurrer was sustained by the clerk, and an appeal was taken to the judge holding the courts of the district, who ordered an amended petition, map, and profile to be served on defendant, F. H. Carter, on May 29th. Pending the proceedings before any appraisement made, and without any money having been paid into court by the petitioner, the defendant, an employé of the road, after being forbidden by the owner, entered on the lands for the purpose of constructing the road; and for this entry said defendant was adjudged guilty of criminal trespass, and excepted and appealed as heretofore noted.

Walter Clark, Jr., H. L. Stevens, and the Attorney General for the State. Rountree & Carr, for defendant.

HOKE, J. (after stating the case). The question intended to be presented in this appeal is whether, under the statute referred to, conferring power to condemn land, and on the facts as found by the court, the railroad corporation, by its agent and employes, had the right to enter on the lands of F. H. Carter, the prosecutor, for the purpose of constructing their road, before an appraisal made, and before paying into court the sum appraised by the commissioners appointed for the purpose. The statute (chapter 61, Revisal 1905) provides that the company may enter on land for the "purpose of laying out the road"; and the same section says that "they may also enter on any contiguous lands along the route which may be necessary for depots, warehouses and other buildings required, and shall pay to the proprietors such sum as may be agreed upon." This right of entry is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price. Another reason for granting the company a right of entry at this stage and for this purpose is that section 2599 requires that, in case condemnation proceedings become necessary, the company is required to file with their petition, or rather to have served with their summons, a map showing how the line is located through the land, and a profile showing the depths of the cuts and length of embankments, etc. Under section 2575 no right of property passes unless by agreement of the parties, and no right or interest in or upon the land is given as against the owner except to lay out the line and designate the sites required for the necessary and proper construction of the road as proposed. In case the parties cannot agree, then the company may proceed to condemn the land as directed in other sections of the act. As stated, a map and profile must be served with the summons, though a failure to do this may be cured by amendment, as was done here (*Railroad v. Newton*, 133 N. C. 137, 45 S. E. 549, 98 Am. St. Rep. 701); and on petition filed, if no sufficient cause is shown contra, commissioners are to be appointed, who shall view the premises, determine the amount of compensation, and duly report their proceedings, etc. When the appraisal is made by the commissioners, the statute (section 2587) provides "that if said company, at the time of appraisal shall pay into court the sum assessed by the commissioners, then, and in that event, the said company may enter, take possession of, and hold said land, notwithstanding the proceedings on appeal." Revisal 1905, § 2587. While it is the generally accepted construction of the section that the payment of the amount assessed by the commissioners, when this assessment has been made in compliance with the statute, is prima facie sufficient protection to the landowner, and will authorize the company to enter on the land for the purpose of building their road according to

the plans and specifications considered and passed upon, it is also true that prepayment of the amount into court is a condition precedent, and until such payment no right of entry exists for such purpose. The right given by section 2575 is for laying out and marking a map and profile of the route, and to enable the parties to agree as to proper compensation. When this agreement cannot be made, and condemnation proceedings are instituted, the right given under section 2587 is to enter when the amount of the appraisal has been paid into court, and not before.

Considering the two sections together, the meaning is too plain for misconstruction. We are clearly of opinion, therefore that the defendant, as employe of the company, had no right to enter on the land of the prosecutor. We are referred by counsel to several decisions where a restraining order against entries of this character have been refused by the courts; and it is argued that, because a restraining order would be refused, no indictment would lie. This position is not well considered. It is neither an ordinary nor usual exercise of the equitable powers of the court to grant injunctive relief for the prevention or punishment of crime. This process, as a rule, is only issued in such cases when the acts complained of involve an invasion of property rights which causes or threatens irreparable damage and the remedies at law are inadequate to afford protection or redress. High on Injunctions (4th Ed.) § 20, 20a; *McHenry v. Jewett*, 90 N. Y. 58; *Moore et al. v. Railroad*, 108 N. Y. 98, 15 N. E. 191. It does not follow, therefore, that because, in certain cases, the courts have refused an injunction, an indictment will not be upheld. In one of the cases cited by counsel (*Railroad v. Lumber Co.* 116 N. C. 924, 20 S. E. 964) the decision proceeds on the supposition that defendant was a trespasser, and injunction was denied because a bond had been filed sufficient to cover all damages which might ensue by reason of the entry. And in another (*Railroad v. Newton*, 133 N. C. 132, 45 S. E. 549) it is expressly stated for law "that formerly payment of the compensation was not required before entry; citing *Railroad v. Davis*, 19 N. C. 452; *Railroad v. Parker*, 105 N. C. 246, 11 S. E. 328; *State v. Lyle*, 100 N. C. 501, 6 S. E. 379. Code, § 1946 (Revisal 1905, § 2587), changed this as to railroads by requiring the company to pay into court the sum assessed before entry on the right of way."

While we are of opinion, and so hold, that the defendant had no right to enter on the prosecutor's lands for the purpose of constructing the road, we do not at all hold that, on the facts as found by the court, the judgment of guilt entered against him is valid or can be allowed to stand. Defendant is prosecuted under section 3688, Revisal 1905, which makes it a misdemeanor for one to enter on the lands of another after being forbidden, without license, etc. The uniform construction put upon this statute has been that a

defendant who enters, after having been forbidden, cannot be convicted if he enters having right or under a bona fide claim of right. *State v. Crossett*, 81 N. C. 579; *State v. Whitener*, 93 N. C. 590; *State v. Winslow*, 95 N. C. 649. True, we have held in several well-considered decisions that when the state proves there has been an entry on another's land, after being forbidden, the burden is on the defendant to show that he entered under a license from the owner, or under a bona fide claim of right. And on the question of the bona fides of such claim the defendant must show that he not only believed he had a right to enter, but that he had reasonable grounds for such belief. *State v. Glenn*, 118 N. C. 1194, 23 S. E. 1004; *State v. Durham*, 121 N. C. 546, 28 S. E. 22. But where there is evidence tending to show that the defendant believed and had reasonable ground to believe in his right to enter, then in addition to his right the question of his bona fide claim of right must be in some proper way considered and passed upon before he can be convicted. The judge finds, and we agree with him, that the defendant entered without right; but the question of whether he entered under a bona fide claim of right does not appear in the facts, and has never been determined. The defendant's guilt, therefore, has not been established, and the judgment against him must be set aside.

While we have expressed our opinion on the main question, the right of the defendant to enter on the land, because the parties desired to present it, and in the hopes that this opinion will end the controversy, we must not be understood as approving the method of procedure by which the guilt of the defendant was determined upon in the court below—a trial by a judge without the aid of a jury. Two decisions of this court (*State v. Stewart*, 89 N. C. 564; *State v. Holt*, 90 N. C. 749, 47 Am. Rep. 544) have held that, in the superior court, on indictment originating therein, trials by jury in a criminal action could not be waived by the accused. We do not decide whether this principle applies in the present case, but for the error pointed out we direct that a new trial be granted, to the end that the facts found by the judge be set aside as insufficient to present the question of defendant's guilt or innocence, and defendant be tried in accordance with the law.

New trial.

WALKER and CONNOR, JJ., concur in result.

HOLLINGSWORTH v. SKELDING.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. CARRIERS—INJURIES TO PASSENGERS—CARE REQUIRED OF CARRIER.

The rule that a carrier is an insurer against injuries other than those caused by the act of

God or the public enemy, or to which the negligence of the passenger contributed, does not apply to injuries to passengers, and the carrier is liable in such case only for injuries caused by its negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1085.]

2. SAME—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a passenger, evidence held insufficient to sustain his theory that the injury was caused by the collision of the street car with an ice wagon, causing it to turn completely around, so that its rear end struck him, where he was situated near the rear of the car.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1312.]

3. APPEAL—DISPOSITION OF CAUSE—REMAND TO LOWER COURT—DIRECTION TO DISMISS.

Under Revisal 1905, § 539, providing that, if the defendant moves to nonsuit at the close of all the evidence and it is ruled against him, he shall have the benefit of his exception in the Supreme Court, on reversal of a judgment entered for plaintiff after refusing a nonsuit, the lower court will be directed to dismiss the action and enter a nonsuit, and a new trial will not be granted.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4588-4596.]

Clark, C. J., and Hoke, J., dissenting in part.

Appeal from Superior Court, Duplin County; W. R. Allen, Judge.

Action by C. C. Hollingsworth against A. B. Skelding, receiver, etc. From a judgment in favor of plaintiff, defendant appeals. Reversed, with instructions to dismiss the action.

Action to recover damages for a personal injury received by the plaintiff while a passenger on the cars of the Wilmington Street Railway Company. There was evidence tending to prove that plaintiff had one foot on the running board and the other on the floor, and was injured by an ice wagon coming in contact with him. The court submitted the following issues: "(1) Was the plaintiff injured by the negligence of the defendant? Answer: Yes. (2) Was the plaintiff guilty of negligence which contributed to his injuries? Answer: No. (3) What damage, if any, is plaintiff entitled to recover? Answer: \$600." At the conclusion of the plaintiff's evidence the defendant moved to dismiss the action and for judgment of nonsuit. Motion overruled, and defendant excepted, and appealed from the judgment.

Davis & Davis, for appellant. Stevens, Beasley & Weeks, for appellee.

BROWN, J. His honor charged the jury that "carriers of passengers are insurers as to their passengers, subject to a few reasonable exceptions. They are held to exercise the greatest practicable care, the highest degree of prudence, and the utmost human skill and foresight which has been demonstrated by experience to be practicable. They are so held upon the ground of public policy, reason, and safety to their patrons. The exceptions are the act of God and the public enemy. If these—that is, the act of

God, or of the public enemy—be the proximate cause of the injury, and without any neglect on the part of the carrier, the carrier is not liable. He is, against all perils, bound to do his utmost to protect and prevent injury to his passengers." It is due to the learned judge who tried this case to state that this instruction appears to have been given verbatim from the opinion of Faircloth, C. J., in *Daniel v. Railroad*, 117 N. C. 602, 23 S. E. 327. An examination of the case discloses that it is a mere dictum, a generalization, not necessary at all to the decision of the case. As a proposition of law it is not supported by authority, but, on the contrary, is against the teachings of the text-writers as well as the judgments of the courts. It does not, therefore, meet with our approval. The rule laid down by the late Chief Justice applies to the transportation of freight and all classes of inanimate objects only. The reasons given for this rule by Lord Holt were "to prevent the clandestine combinations with thieves and robbers to the undoing of all persons who had dealings with them." Hutchinson says this rule was never applied to carriers of passengers. Hutchinson on Carriers, § 4497. The Supreme Court of the United States in an elaborate opinion by Chief Justice Marshall refuse to apply the rule to slaves. He says: "In the nature of things and in his character he resembles a passenger, not a package of goods. It would, therefore, seem reasonable that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than by that which is applicable to the carriage of common goods." *Boyce v. Anderson*, 2 Pet. (U. S.) 150, 7 L. Ed. 379. When the attempt is made to hold the carrier responsible for injuries received by living human beings, negligence is the essential element in the case, and without it the injured person cannot recover. This is universally true where the common law is administered. *Grote v. Railroad*, 2 Exch. 251; *Hale on Bailments and Carriers*, 517; *Fetter on Carriers*, 5-8; *Thompson on Carriers*, § 497; 2 Wood, *Railway Law*, 1054-1059, and notes; 2 A. & E. Ency. (1st Ed.) 746, 747, where numerous authorities are collected. The degree required of the passenger of carriers has been the subject of much discussion by text-writers and judges. The weightiest authorities agree that this standard does not extend beyond the highest degree of a practicable care. *Fetter, Carriers*, § 11. We doubt if any better definition of the duty a carrier owes the passenger can be found than that of Lord Mansfield in *Christie v. Griggs*, 2 Camp. 79: "As far as human care and foresight could go he must provide for their safe conveyance." In commenting upon this case Mr. Barrow says: "It must not be supposed, however, that the law requires the carrier to exercise every device that the ingenuity of man can conceive.

Such an interpretation would act as an effectual bar to the business of transporting people for hire." In view of these authorities and many others we could quote, the judge erred in the instructions given, although, in doing so, he followed the language of the late Chief Justice in the *Daniel Case*.

2. The defendant offered no evidence, and in apt time moved to dismiss the action and to nonsuit the plaintiff upon the ground that there was no evidence of negligence. The only theory of negligence upon which the plaintiff's counsel rested his case in this court is that the ice wagon was in the act of crossing the car track in front of the car, when it was struck by the car and knocked completely around, so that its rear end struck the plaintiff, and that the motorman was guilty of negligence. The plaintiff was the only witness who testified concerning the accident, and an examination of his testimony shows that this theory is purely conjectural and has no foundation in fact to support it. The plaintiff was near the rear end of a car, about 25 feet long. Running the length of this car is a running board, about 18 inches from the ground, used by passengers in getting on and off. The plaintiff testified: "The conductor called on me for my fare, and I said, 'All right,' and I got up out of my seat, and put one foot on the running board and one on the floor of the car, so I could put my hand in my pocket, and got a nickel and paid him, and when I put my hand back in my pocket the wagon of Worth & Co. came up and struck me. It knocked me senseless for a minute or two, and when I came to my senses some one had hold of me. I did not see the ice wagon before the collision. At the time of the collision the street car was running at a pretty good speed." The wagon belonged to Worth & Co., and it is in evidence that at the time that the plaintiff was injured it was moving in an opposite direction from that in which the car was going, and was drawn by a horse guided by a driver. On cross-examination the plaintiff says: "I think it was the rear end of the wagon, and it struck me on the right side." The collision which the plaintiff refers to is evidently the collision of the wagon with himself; for there is no evidence that the wagon struck the car itself anywhere. Had the front of the car crashed into the wagon, while crossing the track, with sufficient force to knock it entirely around, the plaintiff must have felt the jar before he was hurt, and could have testified to this. According to his version there must have been no previous jar and crash. The horse, driver, and wagon had passed the motorman in safety before the plaintiff was hit. It is hardly within the domain of possibility that the car could have hit the wagon on the track and knocked it so entirely around that its rear end struck the plaintiff. Had such been the case, the

horse could not have been pulling the wagon in an opposite direction from that in which the car was moving at the time the rear end of the wagon hit the plaintiff. Such a blow must have turned the horse around, as well as the wagon, and demolished the latter. Again, the plaintiff says that when the rear end of the wagon struck him, the car was running at "a pretty good speed." This could not have been true, had there been a collision immediately before on the track by the car running into the wagon. The force of such an impact would not only have been plainly felt by the passengers, but must have stopped the car, or have greatly reduced its speed before the rear end of the wagon could hit the plaintiff at the rear end of the car.

We conclude that, taking the account of the accident given by the plaintiff in the light most favorable to him, no reasonable deductions can be drawn from it tending to sustain the only theory of negligence advanced by counsel. The motion to dismiss the action and nonsuit the plaintiff should have been granted. The cause is remanded to the superior court of Duplin county, with instructions to so order.

It is suggested that a new trial should be ordered in this case. We do not think so. If the plaintiff can "mend his lick," and produce new evidence, this court has declared that he has a right to bring a new action within 12 months. *Meekins v. Railroad*, 131 N. C. 1, 42 S. E. 333. If we ordered a new trial and the plaintiff should gather additional evidence, which possibly he should have had on the first trial, and thereby recover against the defendant, the latter would be taxed with the entire costs, including the first trial, in which plaintiff failed on his own showing. *Williams v. Hughes*, 139 N. C. 17, 51 S. E. 790. For this "false clamor" the plaintiff should pay the costs. To order a new trial in this and similar cases works injustice to defendants and is against the meaning and spirit of the statute. Revisal 1905, § 539. As the plaintiff is not cut off from bringing a new suit, the justice of the matter is with the defendant, who should not be subjected ultimately to the possibility of paying the costs of a trial where plaintiff failed to "make out a case." The statute expressly declares that if defendant moves to nonsuit at the close of all the evidence, and it is ruled against him, he shall have the "benefit of his exception" in this court. If we order a new trial, we do only what we would have done had the matter been determined on the refusal to instruct the jury "that, upon the whole evidence, plaintiff cannot recover." If a new trial is the only result, there is nothing whatever to be gained by excepting to a refusal to nonsuit. The defendant might just as well resort to a prayer for instruction. The statute was evidently intended to preserve the defendant's rights, to the end that, if the court

below erred, this court should correct that error by directing the court below to render the judgment which should have been rendered. There is no other way to give the defendant the full and just "benefit of his exception." It is admitted that cases can be found in our Reports, such as *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800, where the motion to nonsuit was refused below and allowed here, when a new trial was ordered. So there are cases contra, where "Error," or "Reversed," was written at the close of the opinion, and a new trial was not ordered, which indicate plainly that the practice has not been uniform. We think the practice was best settled by Mr. Justice Hoke, speaking for a unanimous court as at present constituted, in a most recent case, *Dunn v. Railroad*, 141 N. C. 522, 54 S. E. 416. In that case the motion to nonsuit was denied below, verdict and judgment for plaintiff, and defendant appealed. The court says: "There was error in overruling the motion to nonsuit, and upon the testimony the action should have been dismissed. This will be certified to the court below, that judgment may be entered dismissing the action. Reversed." This is the most recent precedent in our Reports.

A new trial should be ordered in cases where there has been a verdict and error is shown in the rulings of the court upon questions of evidence and in instructing the jury and the like, errors such as is said in *Bernhardt v. Brown*, 118 N. C. 711, 24 S. E. 527, 36 L. R. A. 402, which "enter into and bring about an erroneous verdict." A motion to nonsuit or demur to the evidence does not enter into the trial so far as it affects a verdict. When it is interposed, the facts in evidence are to be taken as true and interpreted in the light most favorable to the plaintiff. The matter is then one of law as upon a "case agreed," and calls for a judgment upon those facts, and only those. This is what is said by this court in *Neal v. Railroad*, 126 N. C. 641, 36 S. E. 117, 49 L. R. A. 684. If the judgment of the court below upon such "case agreed" is erroneous, it is our duty to direct that the proper judgment be rendered. It is different where the plaintiff makes out his case, but the court errs in the charge or rulings upon the evidence. Then a new trial is the only method of correcting the error. If this court reverses or affirms a judgment, it may, at its discretion, enter judgment here or direct it to be done below. *Bernhardt v. Brown*, supra. Revisal 1905, § 1542, says: "In every case the court may render such sentence, judgment, and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon." In order that the practice might be settled, we have considered this matter anew, and again hold that where a motion to nonsuit is made, and the requirements of the statute are followed, and such motion denied below and sustained in this court, upon the coming

down of the judgment and opinion it is the duty of the superior court to dismiss the action.

Upon an inspection of this record it appears to us that at the close of all the evidence the superior court should have entered judgment dismissing the action. As it failed to do so, it is mandatory upon us to correct the error by directing such court to enter such judgment.

Reversed.

CLARK, C. J., concurs in the opinion and in the conclusion, but submits that it is erroneous to insert the order that the court below shall enter a judgment of nonsuit. The uniform practice and decisions of this court, as well as justice, forbid it. Where there is a nonsuit below, and that is affirmed on appeal, such entry is proper. But when a case is tried by a jury below, and on appeal any error is found in the proceedings, error is declared, and the case goes back for a new trial. If a demurrer to the complaint is overruled, and on appeal it is held that it should have been sustained, this court does not direct judgment below. So, if a demurrer to the evidence is erroneously overruled, final judgment below should not be directed. The reason is the same in both cases. Non constat but, if the judge had ruled correctly, the plaintiff might then and there have asked and obtained leave to amend his complaint or amend the evidence. The plaintiff ought not to be put in a worse plight because, the judge being with him, he did not ask leave to offer more evidence. If, when the case goes back, the plaintiff cannot "mend his lick," nonsuit will be voluntarily taken or will be ordered by the court; but, if the plaintiff can offer further evidence, what benefit will it be to the defendant to drive the plaintiff to a new action? The practice is settled. In *Bernhardt v. Brown*, 118 N. C., at page 711, 24 S. E. 527, 36 L. R. A. 402, it is said, refusing a motion to correct an entry of "new trial": "The errors affected the proceedings and went into and brought about an erroneous verdict. The mover, however, insists that the error is so vital that this court can see that on its correction the verdict on the next trial must be for the opposite party. It may be so. It may also be true that on the next trial there may be amendments to the pleadings or new evidence brought forward. The court cannot consider argument as to the possibility or probability of such changes. If the error declared by the court is vital and irremediable, then on the new trial below the appellee will simply, in deference to our ruling, submit to a final judgment. This court cannot enter or direct "judgment reversed" upon the assumption that the appellee will be compelled to take that course. When, on an appeal, error is found as to the proceedings anterior to and including the verdict, we can only declare error and order a new trial. In *Prevatt v. Harrelson*, 132 N.

C. 252, 43 S. E. 801, the very proposition now before us is expressly decided; the court saying: "In refusing the motion to nonsuit there was error, for which, under the uniform practice of this court, there must be a new trial. On such new trial, if the plaintiff can 'mend his lick' by additional and sufficient evidence, well and good. He has not lost the land. If he cannot offer additional evidence, this, though a new trial in form, will be virtually a finality against him." In the same case it is further said to be "the settled practice that, when a motion to nonsuit (or a demurrer to the evidence) is erroneously refused, a new trial has always been ordered. *State v. Adams*, 115 N. C., at page 784, 20 S. E. 722; *State v. Rhodes*, 112 N. C., at page 858, 17 S. E. 164, are exactly in point, besides numerous cases in which it is taken as settled practice. The verdict and judgment being set aside, a trial de novo is necessary." In *State v. Adams*, 115 N. C., at page 784, 20 S. E. 723, it is said: "In failing to sustain the demurrer to the evidence, and also for refusing to instruct the jury that there was no evidence to go to them, there was error. But this does not necessarily dispose of the case. Non constat that the state may not, in some cases, produce more evidence on the next trial. *State v. Rhodes*, 112 N. C. 857, 17 S. E. 164." Not only is this the settled and uniform practice, even in criminal cases, as above shown, but it is a just practice, both to save the unnecessary cost of a new trial, when, if the plaintiff has additional evidence, it is to the interest of both parties that the matter shall be determined in this action, and because, as said in *Prevatt v. Harrelson*, 132 N. C., at page 253, 43 S. E. 801, "the verdict and judgment being set aside, a trial de novo is necessary." Indeed, it is then a constitutional right, if the plaintiff can offer evidence sufficient to go to a jury. The practice is settled thus, if uniform precedents can settle anything. There is no reason shown for overruling them, and no benefit to any one.

HOKE, J. (concurring). I agree with the Chief Justice, and am of opinion that the weight of authority, where the subject has been considered by the court, sustains the position that, on the facts in the present case, a new trial should be awarded. In the case of *Dunn v. Railroad*, 141 N. C. 522, 54 S. E. 416, cited in the opinion of the court, the debated question was as to the liability of defendants on facts about which there was no substantial difference between the parties, and the mind of the writer was not especially attentive to the form of the order made in the cause; nor was this question raised or discussed before us.

WALKER, J. (concurring). In the complex situation which has resulted from the unsettled course of decision upon the question involved in this appeal as to the proper

judgment to be entered where there is a reversal of the judge's refusal to grant a nonsuit or to dismiss the action upon the evidence, I find myself in sympathy with what is said by Mr. Justice BROWN on that point. If I have unwittingly contributed to bringing about the confusion, the sooner I assist in extricating the court from the unfortunate dilemma the better. I suppose that now I am remitted to the right of expressing my opinion in accordance with the original view I have always taken of the statute—that it means what we now decide it to mean or it means nothing, and was therefore a vain and useless enactment. To my mind, at least, it is clear that, if the defendant has the right to dismiss at the close of the testimony in the lower court, he must needs have the same right here, or we do not enforce the will of the Legislature according to the intent and spirit of its enactment, and we refuse to reverse an error in law which by the Constitution, which is the law of our creation (article 4, § 8), and the statute (Revisal 1905, §§ 1543, 1542), we are commanded to do. I concur in the opinion, as written by Mr. Justice BROWN for the court, in all respects, except as to the effect of a judgment of nonsuit upon the right of the plaintiff to bring a new action and prosecute the same successfully. Whether the former judgment of nonsuit is a bar to a new action, I prefer not to consider in this appeal, as the question is not presented. I confine my concurrence to what is actually decided by us in this case.

CONNOR, J., concurs in the concurring opinion of WALKER, J.

MCGILL BROS. v. SEABOARD AIR LINE RY. CONNER v. SAME (two cases).

(Supreme Court of South Carolina. Sept. 17, 1903.)

NEW TRIAL—MISCONDUCT OF JURY.

In actions for burning over lands by a railroad company, the verdict for defendants will be set aside where the foreman of the jury accepted entertainment from the claim agent of the railroad company one night during the trial, and several of the jurors after the verdict were treated by such agent to liquor, and thanked for what they had done.

[Ed. Note.—For cases in point, see vol. 37, Cent. Dig. New Trial, § 93.]

Appeal from Common Pleas Circuit Court of Lexington County; D. E. Hyrick, Judge.

Actions by McGill Bros. against the Seaboard Air Line Railway, by James W. Conner against the same, and by H. Willmot Conner against the same. From an order setting aside verdicts in favor of defendant, it appeals. Affirmed.

Lyles & McMahan and Eiford & Dreher, for appellant. Jno. T. Seibels, Melton & Belser, and T. C. Sturkie, for respondents.

WOODS, J. These three separate actions were brought to recover damages caused by a fire which burnt over the lands of the plaintiffs, alleged to have been set out by a locomotive of the defendant railroad company. James W. Conner claimed \$400 damages for burning over 200 acres, H. W. Conner, by his guardian ad litem, \$1,400 for burning over 700 acres, and McGill Bros., \$580 for the burning of timber, crude turpentine, etc., on 825 acres. The causes were tried together, and it was agreed by counsel that the same jury should also try the next case, Danville Lumber & Manufacturing Company and Rudolph Rorer against the same defendant, in which \$4,800 damages were claimed for the same fire. This arrangement was made because it was deemed important for the decision of each case that the jury charged with it should inspect the premises, and all the cases being before one jury, one inspection would suffice for all. The sheriff was placed in charge of the jury while they were making the inspection, and by consent of all parties, Rorer, who was interested in the next case to be tried by the same jury, furnished dinner to the jurors and those who were allowed to accompany them. The only issues were as to the origin of the fire and the amount of the damages. The jury found for James W. Conner, \$75, for N. W. Conner, \$100, and for McGill Bros., \$50. Thereupon, when the case of Danville Lumber & Manufacturing Company and Rudolph Rorer was called, though, under agreement, it was to be tried by the same jury, plaintiff's counsel, without explanation, moved for and obtained from the presiding judge an order discontinuing that cause on payment of costs. Plaintiff's counsel, having immediately thereafter commenced his argument for a new trial in these causes on the ground of gross insufficiency of the verdicts, the presiding judge told him he did not care to hear argument, either as to the law or the facts on the motion; but if he cared to make a motion for a new trial, on the ground that the verdict of the jury was not above suspicion, or was improperly influenced, he would entertain that motion and give him time to make necessary investigation to present the facts to the court. Counsel for the defendant joining in the desire for an investigation, the court forthwith had each juror called and examined him as to his conduct concerning the trial. As a result of the examination, the circuit judge set aside the verdicts on the ground "that some of the jurors had accepted the hospitality of W. C. Johnson, the claim agent of the defendant railway, so that the verdicts rendered may be open to the suspicion of having been improperly influenced," and by a separate order the claim agent, Johnson, was required to show cause why he should not be attached for contempt. The order discontinuing the case of Danville Lumber & Manufacturing Company and Rorer v. Seaboard

Railway, on payment of costs, was vacated and the case continued. The appeal is from the order granting a new trial. We have not the least doubt the order of the circuit judge setting aside the verdicts should be sustained.

In the first place, the reasons for refusing to interfere with the discretion of a circuit judge in matters involving the purity of the jury box and the integrity of verdicts are peculiarly strong. He is in the atmosphere of the trial, and has opportunity to estimate the character and intelligence of the jurors, as well as of the person charged with improper conversation or corrupt dealings with them. He has opportunity also to consider the verdict in the light of the evidence and the sources from which the evidence comes, and determine whether the verdict has so little support as to indicate corrupt or improper influence. These and perhaps other things afford the trial judge such superior means of coming to a just conclusion, that before disturbing his order on such a subject, an appellate court should require very clear evidence of abuse of discretion.

In the second place, the admissions of the foreman and several other jurors so clearly showed improper intercourse between them and Johnson, the defendant's claim agent, that if the circuit judge had refused to set aside the verdicts, this court would have regarded the refusal a clear abuse of discretion, and reversed his judgment.

Johnson, the claim agent of the defendant, was known by the jurors to be present as a representative of the defendant, and interesting himself in the trial on defendant's behalf. With this knowledge, the foreman of the jury, while the trial was in progress, accepted his invitation to spend the night with him in his room at the hotel at Johnson's expense. Immediately after the verdicts were rendered, a number of the jurors, on the claim agent's invitation, repaired to his room, and received thanks for the verdicts, and accepted from him treats to liquor. Besides all this, after the trial, another juror spent the night with Johnson at the hotel at his expense. The treating and this last entertainment of a juror at the hotel, it is true, took place after the trial of the causes, but it was well known to Johnson and the jurors that the trial of another case in which Johnson was interested as agent for the defendant was to be immediately entered upon, and these transactions throw a very strong reflex light on the entertainment of the foreman and the payment of his expenses at the hotel while the trial was in progress. Free entertainment for the night at a hotel is rarely tendered and still more rarely accepted even among intimate friends. Certainly no sane man could suppose for an instant that Johnson's attentions to these jurors and his expense on their account were prompted by personal attachment or benevolent impulse. His motive obviously was to influence them by these means to a favorable view of the side

of the case in which he was interested. It is hardly less certain that the jurors who accepted these favors did so with the full consciousness that they were extended in the expectation of reciprocation on their part in making up their verdicts. If they did not know this, they were too little versed in human affairs to be capable of discharging any of the duties of jurors. Every case of this kind must be decided on its own facts, and we think this case is too clear to require the aid of authority. The test is, has the fountain of justice been kept pure? Is the verdict the result solely of the honest deliberation of the jury on the cause as publicly developed at the trial, or is there reason to suppose that outside influences have entered into it as a factor. In the one case, the parties have had a fair trial, according to the law of the land, in the other, they have not. In this case, the evidence is clear that the jury box was not free from improper influence, and there was not a free trial.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

BURTON v. ANDERSON PHOSPHATE & OIL CO.

(Supreme Court of South Carolina. Sept. 17, 1906.)

MASTER AND SERVANT—INJURY TO SERVANT—ACTION—COMPLAINT.

A complaint alleging the death of plaintiff's intestate by the negligence of his employer because of defective appliances, without specifying any particular machine or appliance, or any particular place, but alleging that the proximate cause of the injury was the negligence of the defendant in failing to provide safe machinery and to keep it in a safe condition, states a cause of action, and, if defendant desires more definite allegations, his remedy is by motion to make more definite, and not by demurrer.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 825.]

Appeal from Common Pleas Circuit Court of Anderson County; Dantzler, Judge.

Action by Bertha Burton, administratrix of Larkin Burton, against the Anderson Phosphate & Oil Company. From an order overruling demurrer to complaint, defendant appeals. Affirmed.

Smythe, Lee & Frost and J. M. Paget, for appellant. B. F. Martin and G. B. Greene, for respondent.

WOODS, J. By the complaint above set out in full, Bertha Burton, as administratrix, seeks to recover of the Anderson Phosphate & Oil Company damages for the death of her husband. The defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant appeals.

The complaint is very defective, but it does not altogether fail to state a cause of

action. Briefly stated, the allegations as to the accident which caused the death of Burton are that he was in the engine room, where he was frequently sent to do hard work and difficult and dangerous jobs, though employed to do different work not in the engine room; that, while endeavoring to connect two large boilers by means of a pipe, "the pipe broke and a large, intense volume of steam was suddenly released, with almost cannon-like force and velocity; the small room was flooded with a dense hot cloud of pent-up steam, and the occupants put in peril of their lives; in his quick agitated attempt to save his life and make for safety, the said Burton fell from, or was hurled from, the said brick structure by the exploding steam, and received violent injuries from which next day he died." Without specifying any particular machine or appliance, or any particular place, it is then alleged: "That the proximate cause of the injuries and death of the said Larkin Burton was the negligence of the defendant in failing to provide safe and proper machinery and appliances with which, and about which, said Burton should work, and to put and keep same in proper and safe position and condition, in failing to provide and maintain a safe place in which he should do his work, and in other particulars." The complaint therefore does not fall under the principle laid down by this court in a number of cases, from *Gentry v. Railway Co.*, 66 S. C. 256, 44 S. E. 728, to *Green v. Railway Co.*, 72 S. C. 401, 52 S. E. 45, for the plaintiff does not rely on any presumption that the machinery or appliance was defective or the place unsafe, from the mere fact that the accident happened at that place or was due to the breaking of the appliance; but, on the contrary, she affirmatively charges negligence as the proximate cause of the accident, in the failure to provide safe machinery and appliances and a safe place to work. Construing the complaint, as we must do, most favorably to the pleader, the remedy of the defendant was a motion to require the complaint to be made more definite and certain, and not demurrer. *Garrett v. Weinberg*, 50 S. C. 316, 27 S. E. 770; 14 Ency. P. & P. 341.

There is no force in the point that the complaint shows the deceased was injured by his own act in attempting to escape from the engine room. The allegation is distinctly made that the hot steam put the deceased in peril of his life, and if, having a reasonable apprehension of great danger, he was injured in an effort to escape from a condition due to defendant's wrong, the defendant would be liable. *Stokes v. Salstonstall*, 13 Pet. 193, 10 L. Ed. 115; *Wade v. Electric Co.*, 51 S. C. 302, 29 S. E. 283, 64 Am. St. Rep. 676.

The complaint was indefinite, also, as to the time of the accident, and as to Burton's

employment by the defendant when the accident occurred; but this indefiniteness affords no support for a demurrer.

It is the judgment of this court that the judgment of the circuit court be affirmed.

REED v. SOUTHERN RY.—CAROLINA DIVISION.

(Supreme Court of South Carolina. Sept. 12, 1906.)

1. RAILROADS—LEASED LINES—NEGLIGENCE OF LESSEE—LIABILITY OF LESSOR.

Where a railroad company leased its road, it was liable for an injury to an employé of its lessee in operating the road, under Acts 1902, p. 1152, providing that a consolidated railroad company shall be subject to any action that may arise out of the operation of its lines of road, notwithstanding its lease of the same, and shall be subject to suit for causes of action arising out of such operation as formerly.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 803, 813.]

2. MASTER AND SERVANT—INJURY TO RAILROAD EMPLOYÉ—RIGHT OF ACTION.

Const. art. 9, § 15, provides that every employé of a railroad company shall have the same right of action against an employer for an injury suffered by the negligence of a railroad corporation or its employé as is allowed other persons not employé, when the injury results from the negligence of a superior officer or a person having a right to control the party injured. Held that, where an injury to an employé of a railroad was the result of negligence on the part of the conductor, the legal representative of the person injured was entitled to the same remedies as are allowed to other persons not employé.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 354-358.]

3. SAME—NEW TRIAL—EVIDENCE.

In an action for injuries to an employé, a motion for a new trial, on the ground that there was an entire absence of evidence to support the verdict, was properly overruled, where there was evidence tending to show negligence.

4. APPEAL—REVIEW.

Where a new trial has been refused, on appeal therefrom it must be shown that the rulings to which exception was taken were erroneous, and that the appellant has suffered prejudice by such erroneous rulings.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3670, 4047.]

Appeal from Common Pleas Circuit Court of Dorchester County; D. E. Hyrick, Special Judge.

Action by Leize W. Reed, administrator of Arthur T. Reed, against the Southern Railway—Carolina Division. Judgment for plaintiff, and defendant appeals. Affirmed.

The following are the exceptions:

First. To the charge:

"(1) Because it is respectfully submitted that his honor, the circuit judge, erred in charging the jury as follows: 'I charge you that the defendant, Southern Railway—Carolina Division, is liable for all causes of action arising out of the operation of its railroad by the Southern Railway Company, just as liable as the Southern Railway Company itself would be. It is made so by the express terms of the statute law of this state. Of

course, if the Southern Railway Company would not itself be liable, the defendant company would not be. To make the defendant liable, a case of legal liability must be made out; whereas, it is submitted that the defendant, Southern Railway Company—Carolina Division, being only the lessor company, is not responsible for the injury causing the death of plaintiff's intestate, Arthur T. Reed, an employé of the Southern Railway Company, the lessee of the defendant company, for the negligence of the Southern Railway Company, its servants, agents, and employes.

"(2) Because it is respectfully submitted that his honor, the circuit judge, erred in refusing to charge the defendant's fourteenth request, which was as follows: 'That if the jury find from the evidence that the defendant, Southern Railway—Carolina Division, was not the employer of the plaintiff's intestate, Arthur T. Reed, but that he was employed by the Southern Railway Company, and that the officers and employes of the train upon which said Arthur T. Reed was, and of the train with which it came in collision, were officers and employes, not of the defendant company, but of the Southern Railway Company, the lessee of the defendant company, and that the trains above mentioned belonged to and were operated by the Southern Railway Company, and did not belong to and were not operated by the defendant company, Southern Railway—Carolina Division, then the plaintiff cannot recover anything in this suit against the defendant.'

"(3) Because it is respectfully submitted that his honor, the circuit judge, erred in refusing to charge the jury the fifteenth request of the defendant, as follows: 'That the act of the Legislature permitting the consolidation of certain railroad companies mentioned in the complaint, and the lessee of such consolidated companies to the Southern Railway Company, did not render the consolidated company liable for injuries to the employes of the Southern Railway Company arising out of the negligence of the Southern Railway Company or its agents and employes.'

Second. To the order granting a new trial conditionally:

"(4) Because it is respectfully submitted that his honor committed an error of law in holding that it was negligence for a railroad company to allow an engineer, even if willing to do so, to run his engine over the road for 42 hours consecutively, without rest, and in refusing to set aside the verdict absolutely, and in refusing to direct a new trial without condition on that account; whereas, it is submitted that, under the law of South Carolina, in a suit by the administratrix of the engineer for causing his death, even if it was negligence on the part of the railroad company to allow the engineer to run his engine for such a time consecutively,

without rest, yet, if the engineer was willing to do so, then, under the law of South Carolina, he was himself guilty of negligence as a matter of law, and there was no cause of action proved against the defendant company, and there was no evidence to sustain the verdict.

"(5) Because it is respectfully submitted that his honor committed an error of law in holding that the measure of the liability of the defendant company to the plaintiff, as administratrix of Arthur T. Reed, the engineer and employé of the defendant company, for an injury to him caused by his exhaustion from overwork, was the responsibility of the railroad company to another employé or passenger upon the train injured through such exhaustion and overwork of said engineer, and in refusing to set aside the verdict absolutely and directing a new trial without condition on that account; whereas, it is submitted that the liability to such passenger or employé would not be affected by the voluntary act of plaintiff's intestate in working until exhausted, and therefore the liability to such passenger or employé is not a measure of the liability to the plaintiff for the death of her intestate.

"(6) Because it is respectfully submitted that his honor committed an error of law in holding that the verdict of the jury eliminated the question of contributory negligence on the part of plaintiff's intestate, the engineer, so far as it affected the doctrine of *volenti non fit injuria*, and in refusing to set aside the verdict absolutely on that account, inasmuch as the question of contributory negligence had been submitted to the jury; whereas, it is submitted that his honor should have considered the question of contributory negligence upon the motion for a new trial, whether the jury had found a verdict on the subject or not, and it was not eliminated by the verdict.

"(7) Because it is respectfully submitted that his honor committed an error of law in holding that the maxim, '*volenti non fit injuria*,' had been changed in its application through a true construction of section 13 of article 9 of the Constitution, and in refusing to set aside the verdict absolutely on that account; whereas, it is submitted that the section referred to has no application whatever to the voluntary act of an employé in undertaking, as in the present case, to work beyond a reasonable time.

"(8) Because it is respectfully submitted that his honor committed an error of law in holding that if the negligence of a superior officer or agent, or of a person having a right to control or direct the services of the party injured, be such as to give another employé or passenger a right of action then, by the express language of section 15 of article 9 of the Constitution, the same right of action is given to the injured employé, when such employé is injured through his own voluntary act, and in refusing to set

aside the verdict absolutely on that account; whereas, it is submitted that the said section has no application whatever to a case where an employé is injured through his own voluntary act in working longer than a reasonable time, and disobeying the rules of the company on that account.

"(9) Because it is respectfully submitted that his honor erred, as a matter of law, in holding that the words of section 15, art. 9, of the Constitution, that 'knowledge of any employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby,' affected the act of the plaintiff's intestate in voluntarily undertaking to work beyond a reasonable time; whereas, it is submitted that said section in the words quoted herein was only intended to apply to the defense of 'knowledge of defective or unsafe character or condition of any machinery, ways or appliances,' and not to the voluntary act of an employé, an engineer, in working beyond a reasonable time."

B. L. Abney, Joseph W. Barnwell, and John A. Hiers, for appellant. Legare & Holman and Dennis & Mann, for respondent.

GARY, A. J. This is an action for damages alleged to have been sustained by the plaintiff through the negligence of the defendant in causing the death of her husband, of whose estate she is the administratrix. The allegations of the complaint, material to the questions involved, are substantially as follows: (1) That the Southern Railway—Carolina Division is a corporation chartered under the laws of South Carolina, having been organized under an agreement of consolidation of the rights and franchises of the Abbeville & Spartanburg Railroad Company, South Carolina & Georgia Railroad Company, South Carolina & Georgia Railroad Extension Company, and the Carolina Midland Railway Company. (2) That the Southern Railway Company is chartered under the laws of Virginia, and is now operating the Southern Railway—Carolina Division, by virtue of a lease thereof, sanctioned by an act of the General Assembly of South Carolina. (3) That on the 2d of April, 1905, Arthur T. Reed was in the employment of the Southern Railway Company as an engineer, and was operating a locomotive drawing an extra freight train over the line of defendant's road, known as the South Carolina & Georgia Railroad, in the direction of Charleston; that the same came into collision head-end, on the main line of said road, with another locomotive and cars of a passenger train, proceeding in the direction of Branchville; that in the collision Arthur T. Reed sustained injuries from which he died on the 6th of April, 1905. (4) That he came to his death through the negligent, wanton, and reckless acts of the defendant, in causing the two locomotives to come into collision.

(5) That under the terms of the act of the General Assembly, authorizing the consolidation of the railroad companies hereinbefore mentioned, and empowering the consolidated company to make a lease of its property to the Southern Railway Company, both companies are made jointly liable for all causes of action arising out of the operation of said road, and that each of said companies is liable for the death of Reed. The defendant denied generally the allegations of the complaint, except in certain immaterial particulars, and set up as a defense contributory negligence on the part of Reed "in permitting the engine and train, on which he was engineer, to run upon the time of the passenger train, with which it came into collision, when he might have prevented the same by observing the rules of the company." The action was originally instituted, not only against the defendant, but also against the Southern Railway Company. The case was removed into the Circuit Court of the United States, whereupon the plaintiff discontinued as to the Southern Railway Company, and the action was remanded to the state court. The plaintiff withdrew the allegations of wantonness and recklessness. The jury rendered a verdict in favor of the plaintiff for \$40,000, but upon a motion for a new trial his honor, the presiding judge, granted an order setting aside the verdict, unless the plaintiff would remit upon the record \$20,000 thereof, which was done. The defendant appealed upon exceptions, which will be set out in the report of the case.

1. The first question presented by the exception is whether there was error in charging the jury that the plaintiff had a right of action against the defendant, if the testimony showed there was negligence on the part of the Southern Railway Company resulting in the death of her intestate husband, while employed as an engineer, and operating an engine and cars of the latter company, to whom the defendant had leased its road. The act authorizing the consolidation of the railroad companies, mentioned in paragraph 1 of the complaint (Acts 1902, p. 1152) contains this proviso: "That from and after such consolidation and merger, the consolidated company shall possess and exercise all the rights, privileges and franchises, and be subject to all liabilities of the said several constituent companies, and of a railroad corporation, organized and existing under the laws of the state of South Carolina, and shall be and remain subject to suit in the courts of this state for all causes of action that may arise out of the operation of said lines of railroad, notwithstanding any lease of the same that may be herein authorized, and shall keep up and continue to operate in a safe and proper manner all portions of the line of railroad of the said several constituent companies." The second section of that act empowers the consolidated company to make a lease of its

property to the Southern Railway Company, and contains this proviso: "That after such lease, the said Southern Railroad Company shall be and remain subject to suit in the courts of this state, for all causes of action that may hereafter arise out of the operation of said lines of railroad, as fully and effectually as the roads in said consolidation and lease were subject to suit in such court." The running of an engine attached to cars by an engineer in the discharge of his duties pertains to the operation of the road, and an action for damages sustained by such employé may be properly said to arise out of the operation of the road. Furthermore, the proviso in the second section of said act evidently contemplated actions for injuries suffered by employés in the operation of the road. Similar words are used in the proviso first set out, and, as they must receive the same construction as those in the second proviso, it must be held that they include actions for damages by employés.

There are other reasons why the plaintiff should be allowed to bring this action against the defendant. In the case of *Harmon v. Railway*, 28 S. C. 401, 404, 5 S. E. 835, 13 Am. St. Rep. 686, the principle is thus stated: "When a railroad company accepts a charter, it assumes the performance of all the duties to the public which are imposed upon it by the charter or the general laws of the state, and it cannot be permitted to escape from the obligations thus imposed upon it by transferring its chartered rights and privileges either to an individual or to another corporation. A corporation must of necessity always act through individuals, and whether such individuals are called its officers, or agents, or its lessee, cannot affect the question of its liability to perform the obligations which it has incurred, in consideration of its chartered rights and privileges. It cannot be permitted to enjoy the benefits conferred by its charter, without incurring the responsibilities incident thereto." This doctrine is affirmed in the cases of *Bank v. Railway*, 25 S. C. 216; *Bouknight v. Railroad*, 41 S. C. 415, 19 S. E. 915; *Parr v. Railway*, 43 S. C. 197, 20 S. E. 1009, 49 Am. St. Rep. 826; *Davis v. Railway*, 63 S. C. 370, 41 S. E. 408; *Smalley v. Railroad*, 73 S. C. 572, 53 S. E. 1000; and *Franklin v. Railroad*, 74 S. C. 332, 54 S. E. 578. The appellant's attorney, while recognizing the general principle, contends that it has no application to actions by employés, based upon the negligence of the lessee; and that, in the cases just cited, the actions were for damages based upon a liability for a breach of duty imposed by law, affecting the public, while in the case under consideration the action arose entirely out of contract; that the traveling public and shippers of freight are brought into relation with the carrier operating the trains, without their consent; and that the employé of the lessee is in a different category. The

theory of the law is that a railroad company chartered by the state, and afterwards making a lease of its franchises, is still regarded as operating the road through the lessee as its agent, whenever the lessee commits an act resulting in damages, against which the law, for reasons of public policy, will not allow the lessor to contract. A railroad company has the power to enter into a great many special agreements, but it cannot make a valid contract whereby it will be exempt from liability for negligence. *Wallingford & Russell v. Railroad*, 26 S. C. 258, 2 S. E. 19; *Johnstone v. Railroad*, 39 S. C. 55, 17 S. E. 512. This principle is applied, even when the action is by an employé based on negligence. *Johnson v. Railroad*, 55 S. C. 152, 32 S. E. 2, 33 S. E. 174, 44 L. R. A. 645; 20 Enc. of Law, 154, 155. The reason for the rule is that such contracts are against public policy. The defendant could not, therefore, escape liability by leasing its road. This principle is specially applicable to railroads, as it very frequently happens that acts of negligence, committed by them against their employés, jeopardize the rights of shippers and of the traveling public.

Again, section 15, art. 9, of the Constitution, provides that: "Every employé of any railroad company shall have the same rights and remedies for any injury suffered by him, from the acts or omissions of said corporations or its employés, as are allowed by law to other persons not employés, when the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of a party injured. * * * When death ensues from any injury to employés, the legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons." The cases of *Boatwright v. Railroad*, 25 S. C. 123, *Hicks v. Railroad*, 63 S. C. 559, 41 S. E. 753, and *Rhodes v. Railway*, 68 S. C. 494, 47 S. E. 689, recognize the principle that the conductor of a train is the representative of the railroad company. There was testimony tending to show that the injury was the result of negligence on the part of the conductor. Therefore the legal representative of the deceased was entitled to the same rights and remedies as are allowed by law to other persons not employés. The exceptions raising this question are overruled.

2. The next question for consideration is whether his honor, the presiding judge, erred in refusing the motion for a new trial, on the ground, as contended by the appellant, that the reasons assigned by him were erroneous. In the case of *Sims v. Jones*, 43 S. C. 91, 98, 20 S. E. 905, 907, the court says: "When the rulings of the circuit judge are brought in review before this court, two things must appear: (1) That the ruling to which exception was taken is erroneous;

(2) that the appellant has suffered prejudice by such erroneous ruling." The effect of erroneous reasons assigned, in refusing motions for new trials, may be divided into three classes: (1) When the motion is refused on the ground that the court is without power to entertain it. [That principle is inapplicable to this case.] (2) When the motion is based upon a question of law, in which case this court will look to the ground upon which the motion was made, for the purpose of determining whether it was erroneously overruled. And (3) when the motion involves a question of fact, in which case it must appear that the presiding judge would have ordered a new trial but for the erroneous reasons, otherwise it will be presumed that other reasons would have been assigned, if those had not been deemed sufficient. *State v. David*, 14 S. C. 428; *Wood v. Railroad*, 19 S. C. 579; *Montgomery v. Insurance Co.*, 55 S. C. 1, 32 S. E. 723; *Mason v. Railroad*, 58 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826; *Glover v. Gasque*, 67 S. C. 18, 45 S. E. 113; *Peterman v. Pope*, 74 S. C. 296, 54 S. E. 569.

In the case under consideration the motion was made on three grounds: (1) That there was an entire absence of testimony to sustain the verdict; (2) that the verdict was against the preponderance of the evidence and (3) that the verdict was excessive. The first ground presents a question of law. The testimony tended to show that Reed had mistaken the time, by reason of the fact that his watch had run down, but it likewise tended to show that this was caused by the defendant, through its conductor, in requiring or permitting Reed to operate his engine, after he had been in the discharge of his duties for 42 consecutive hours immediately preceding the collision, without rest, and for about 27 or 28 hours without anything to eat. This was evidence of negligence, and the first ground of the motion was properly overruled. The second ground involved a question of fact, and it does not appear that the presiding judge would have granted the motion except for the alleged erroneous reasons; but, on the contrary, it affirmatively appears that he would have refused it on additional grounds, if he had considered those assigned to be insufficient. He says: "Aside from the point discussed, I think there was testimony from which the jury might have drawn the conclusion that the defendant was negligent in another respect. But, as there may be a new trial of this case, I must refrain from a discussion of the facts in detail." Therefore there was no error in overruling this ground. The third ground was sustained by the presiding judge, and therefore is not before this court for consideration.

These views render unnecessary the consideration of the question whether the rea-

sons given by the presiding judge in refusing the motion for a new trial were erroneous.

It is the judgment of this court that the judgment of the circuit court be affirmed.

MITCHINER v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Sept. 17, 1906.)

1. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—MENTAL ANGUISH.

Plaintiff sued to recover for failure to deliver a telegram to his wife: "Do not come tomorrow. Smallpox at L. Will write." *Held*, that evidence that the baby of the addressee was fed on artificial food, and the supply which she had was only enough for one day, is inadmissible to show mental anguish of the wife, who was quarantined at L.

2. SAME—CONTRACT TO DELIVER.

That a telegram agent stated to the sender that he would do all he could to get the message through in a certain time is not evidence of a special contract to deliver at a specified time, but implies only an attempt to deliver with reasonable diligence.

[Ed. Note.—For cases in point, see vol. 45. Cent. Dig. Telegraphs and Telephones, § 18.]

3. SAME—EVIDENCE OF WILLFULNESS.

In an action for delay in delivery of telegram, there was evidence that a message was filed at R. between 6:30 and 7 p. m. Central time, to be delivered at A., that the office at A. closed at 8:30 p. m. Eastern time; that it was delivered the next day at 10:20 a. m. *Held*, insufficient to show willfulness in the delay of the telegram.

[Ed. Note.—For cases in point, see vol. 45. Cent. Dig. Telegraphs and Telephones, § 33.]

4. SAME—NONSUIT.

Refusal of nonsuit in action for delay in delivery of telegram *held* proper under the evidence.

[Ed. Note.—For cases in point, see vol. 45. Cent. Dig. Telegraphs and Telephones, § 76.]

5. SAME—EVIDENCE OF DAMAGES.

In an action for damages for delay in telegram whereby plaintiff's wife was for several weeks quarantined in a town subject to smallpox, evidence *held* insufficient to show that such exposure was the proximate result of a failure to deliver the telegram.

6. SAME—MENTAL ANGUISH.

In an action to recover for delay in delivery of a telegram whereby plaintiff's wife was exposed to smallpox, the greatest length of time for which plaintiff could recover for mental anguish is from the time of the receipt of the message to the time when with reasonable diligence he could have removed his wife from such danger.

Appeal from Common Pleas Circuit Court of Abbeville County; Memminger, Judge.

Action by D. R. Mitchiner against the Western Union Telegraph Company. Judgment for plaintiff, defendant appeals. Reversed.

Geo. H. Ferrons, Evans & Finley, and Frank B. Gary, for appellant. Wm. N. Graydon, for respondent.

JONES, J. This is the second appeal in this case; the former appeal being reported in 70 S. C. 522, 50 S. E. 190. The plaintiff

seeks to recover damages for mental anguish alleged to have resulted from defendant's negligence and willfulness in failing to promptly deliver a message filed on April 2, 1903, for S. E. Bell, with defendant's agent at Richland, Ga., for transmission to plaintiff at Abbeville, S. C., in these words: "Do not come to-morrow. Smallpox at Lumpkin. Will write." Plaintiff's wife with baby was about to visit Lumpkin, Ga., expected to take the 3:15 a. m. train, April 3d, and the object of the message was to prevent her leaving Abbeville on that train. The complaint alleges a special contract by which the defendant agreed to deliver the message at Abbeville, S. C., on the night of April 2d, in time to prevent Mrs. Mitchiner from leaving Abbeville. The complaint further alleges that, owing to the failure to promptly deliver said telegram, "plaintiff's wife and baby went to Lumpkin, Ga., were quarantined on account of smallpox, were kept there four or five weeks, were constantly exposed to the danger of smallpox, and plaintiff was subjected to great mental anguish and distress on account of the danger of his wife and baby." The jury rendered a verdict for \$547.50 in favor of plaintiff.

1. The first exception alleges error in permitting plaintiff to testify as to mental suffering arising from the fact that his baby, which accompanied his wife to Lumpkin, was fed on artificial food, and that the supply of prepared milk which she took with her was only sufficient to last until 4 o'clock p. m., April 3d. The objection urged against the admission of the testimony was that it was not relevant to the allegations of the complaint. We think the testimony was improperly admitted for the purpose for which it was introduced, to show plaintiff's mental anguish. The allegations of the complaint will not warrant a recovery for mental suffering on account of the situation of the baby. Such mental suffering was not reasonably within the contemplation of the defendant company, for there was nothing on the face of the message or in the information alleged to have been given the defendant to connect the baby with the message. *Jones v. Tel. Co.*, 70 S. C. 540, 50 S. E. 198. The complaint alleged merely that the defendant was informed that the object of the message was to prevent Mrs. Mitchiner leaving Abbeville that night, and the testimony was only to that effect. There is a view, however, under which the testimony was not wholly irrelevant. The defendant had interrogated plaintiff as to whether he made any effort to prevent Mrs. Mitchiner from stopping at Lumpkin, and it may be that the testimony as to the necessities of the baby would afford some explanation why the plaintiff allowed his wife to stop at Lumpkin, at least for such length of time as the needs of the child would require. We would therefore not hold the ruling to be reversible error.

2. The defendant requested the court to

charge the jury that there was no evidence of the special contract alleged, and the fifth and seventh exceptions assign error in refusing to so charge, and in submitting it to the jury to determine whether any such contract had been made. This, we think, was error. The only testimony relied on to support said special contract was that the telegraph operator at Richland, Ga., when advised that the sender wanted the message to be delivered at Abbeville before Mrs. Mitchiner left, promised "to do all he could to get it through." We are now called upon to decide whether a mere telegraph operator has power to bind the telegraph company by a special contract to deliver a message at a specified time. It is sufficient in this case to say that there was no evidence of any such agreement, as a promise by the transmitting agent to do all he could to get the message through cannot be construed as a guaranty that the message would be delivered in time. The promise imported nothing more than is involved in the ordinary contract of a telegraph company on receiving a message for transmission and delivery, which is to transmit and deliver with all reasonable diligence. Under such ordinary contract a telegraph company is not an insurer, and is only liable for negligence or willful default in the transmission and delivery of messages. The defendant was very probably prejudiced by submitting this question to the jury. The jury, under the charge, may have found that there was such a special contract and held the defendant liable for failure to deliver in time, although believing that the message was not filed at Richland until after the close of the Abbeville office, for the court instructed the jury not to consider whether the office hours were reasonable or not, in case they found there was an express contract to deliver before plaintiff's wife left Abbeville.

3. Under the second, sixth, and ninth exceptions, the question is presented whether there was any evidence of willfulness on the part of the defendant in failing to deliver the message promptly. This question was raised on circuit by motion to nonsuit the cause of action based upon willfulness, by request to charge that there was no evidence of willfulness, and by motion for new trial on that ground. There is a conflict in the testimony as to the exact time when the message was filed with the Richland agent. The testimony for plaintiff was that the message was filed between 6:30 and 7 o'clock p. m., while the testimony of defendant's agent at Richland was that it was filed at 7:35, and that he noted the time on the telegram when filed, and such is the time indorsed on the original telegram introduced in evidence. Between Richland, Ga., and Abbeville, S. C., are two relay stations, one Americus, Ga., the other Atlanta, Ga. The message was transmitted to Americus, Ga., at 7:40 p. m., but did not reach the Abbeville office until 9:30 a. m., April 3d, and was delivered to plaintiff at

10.20 a. m., as testified by plaintiff, or at 9.35 a. m., as testified to by defendant's agent at Abbeville. The standard of time prevailing at Richland, Ga., was one hour earlier than the standard prevailing at Abbeville, S. C., and the closing hour of the Abbeville office was 8.30 p. m., so that, if the message was filed at Richland before 7.00 p. m., there was something over 30 minutes in which to transmit to the Abbeville office; whereas, if the message was filed at 7.35, it was even then too late for transmission to the Abbeville office that evening. There was testimony to the effect that, in view of the usual business, one hour would be a reasonable time in which to get a message from Richland, Ga., to Abbeville, S. C., through the relay stations of Americus and Atlanta; but that, if the wires were open and operator ready to receive the message, it could be transmitted in a few minutes. When the message reached Americus at 7.40, it was then too late to transmit to the Abbeville office before its close at 8.30 p. m., which, according to the testimony, was a reasonable closing hour, and, when the Abbeville office made the "good night" call to Atlanta office, it received no information that there was a message for Abbeville. When the message was received at the Abbeville office at 9.30 next morning, information of it was phoned to plaintiff and the message delivered some minutes later. It was held in *Young v. Tel. Co.*, 65 S. C. 93, 43 S. E. 443, *Machen v. Tel. Co.*, 72 S. C. 256, 51 S. E. 697, and *Willis v. Tel. Co.*, 73 S. C. 379, 53 S. E. 639, that long delay and absence of effort to deliver promptly are some evidence to go to the jury on the question of willfulness. The present case, however, shows some effort to deliver, and, in view of the time necessarily required to transmit a message between the places named through two relays and the right to observe reasonable office hours, there was no long unexplained delay. We think, therefore, that defendant's contention that there was no evidence of willfulness should have been sustained.

4. The third exception assigns error in refusing the motion for nonsuit of the cause of action based upon negligence, on the ground that there was no evidence of negligence. We cannot say there was not a scintilla of evidence of negligence. If the message was not received at the Richland office until 7.35, as claimed by defendant, then, as shown on the former appeal, there was no evidence of actionable negligence, as it was then clearly too late to transmit to Abbeville that night before its reasonable closing hour. But if the message was filed between 6.30 and 7.00 o'clock, as testified by plaintiff's witness, and it was not transmitted until 7.40, it was for the jury to say whether due diligence was exercised under the circumstances. There was no evidence that the Richland operator during that time was busy with prior messages or could not get the Americus office, except as to five

minutes of time after the receipt of the message. As there was no evidence that the relay stations at Americus and Atlanta were so occupied on that particular occasion as not to be able immediately to receive and transmit the message, it may be that the defendant failed to exercise the diligence due under the circumstances, if the message was filed before 7.00 p. m. Hence, there was no error in refusing the nonsuit on that ground.

5. Under the eighth exception, appellant contends that the circuit court erred in refusing a new trial because there was a total failure of evidence to show that plaintiff's wife and child were quarantined in Lumpkin, and thereby exposed to the smallpox, as alleged in the complaint. While there was some evidence that the towns of Richland and Preston quarantined against Lumpkin on account of smallpox in April, 1903, the evidence was undisputed that Mrs. Mitchiner was free to leave Lumpkin by other routes than through Richland, and that all residents of Lumpkin were free to pass through Richland on the Seaboard Air Line to Americus, through which place plaintiff's wife traveled both in going to and returning from Lumpkin. There was therefore a complete failure of proof, in so far as plaintiff's cause of action depended upon the alleged quarantine. The evidence showed that plaintiff made no effort to recall his wife after learning of the existence of smallpox at Lumpkin, and that Mrs. Mitchiner made no effort to leave. Hence, any mental anxiety which plaintiff may have suffered because his wife remained for several weeks in Lumpkin was not the natural and proximate result of the failure to deliver the telegram, but was the result of his and her choice to remain there after knowledge of the conditions. It appears that there was smallpox in Abbeville at the same time, and this may have had an influence in the decision to remain. There was no evidence that plaintiff's wife was exposed to smallpox at Lumpkin, except the fact that it existed in the town, and there was a case about 75 yards from where she resided with her brother. But the plaintiff's cause of action is not wholly dependent upon the existence of the quarantine. If the defendant was negligent in failing to deliver the message in time, and if as a natural result of that failure the plaintiff's wife (not wife and child) was exposed to the danger of smallpox for any length of time, and if plaintiff, judged by the standard applied to men of average firmness, intelligence, and sensibility, suffered mental anguish because of such exposure, the complaint is broad enough to sustain a recovery for such damages as the jury may conclude are just compensation therefor. The greatest length of time for which plaintiff could possibly have suffered mental anguish as the result of the failure to deliver the message, if the jury should conclude there was a negligent failure to deliver promptly, is from the time of the receipt of the message to the time

when with reasonable diligence he could have kept or removed her from such danger, since the law requires one affected by the negligence of another to use ordinary care to avert or minimize the harmful consequences. *Willis v. Tel. Co.*, 69 S. C. 539, 48 S. E. 538, 104 Am. St. Rep. 828. As the circuit court may have refused the new trial because the plaintiff's cause of action was not wholly dependent upon the existence of the alleged quarantine, we cannot say that there was error of law; but, as there must be a new trial upon other grounds already stated, the remarks we have made in this connection may be useful in reaching a just conclusion in this protracted litigation.

The remaining exceptions, not practically covered by what has been said, relate to the charge to the jury as to punitive damages; but they were not argued by appellant, and we do not deem it important to consider them.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

YOUNG v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Sept. 17, 1906.)

1. APPEAL—HARMLESS ERROR.

Admission of evidence, as to a fact not in dispute, is not prejudicial error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4163.]

2. EVIDENCE—RES GESTÆ.

In an action by a servant for injuries caused by defects in an appliance of which the foreman had notice, a statement of the foreman as soon after the accident as the employé got quiet, that if a new appliance, for which requisition had been made, had been sent, the accident would not have happened, is part of the *res gestæ*.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 351-368.]

3. MASTER AND SERVANT—INJURY TO SERVANT—EVIDENCE.

In an action for injuries to a railroad employé, evidence that defendant forced plaintiff to leave its employment because he would not sign a release of his claim for injury was admissible, where the court ruled that the jury had no right to consider this fact as an element of damage unless plaintiff was discharged because of the injury.

Woods, J., dissenting in part.

Appeal from Common Pleas Circuit Court of Union County; Klugh, Judge.

Action by M. V. Young against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Defendant appealed on following exceptions:

"(1) Because his honor erred in permitting the witness, Moore Young, to testify that he and several others had complained to the section master about the condition of the cleaver or cleavers. This was erroneous, because it permitted a witness to testify, in so far as it referred to his own complaints, to

transactions or conversations between himself and the section master, in which neither the plaintiff nor defendant were in any way interested or involved at the time, and which transactions or conversations were not relevant to the issues made in this case. It was not the proper and competent way to prove the condition of the cleavers; it being evident that there might have been complaints, no matter what the condition of the cleavers was. The condition of the cleavers could not be lawfully ascertained by proving complaints from the section hands. It was further incompetent because, in so far as the witness testified as to the declarations and complaints of others, he was permitted to testify as to declarations and statements made by others, the fellow servants of the plaintiff, and himself; which statements could be nothing more nor less than hearsay. The complaints of the witness and his fellow servants to the section master were really nothing more than declarations giving their opinions as to what was needed by them for their work.

"(2) Because his honor permitted the plaintiff's counsel to ask the witness, Moore Young, the question, whether or not the section master had made requisition for new cleavers. The error consisted in allowing the witness to state a fact which he could not possibly know, and did not claim to know of his own knowledge, but must have known, if at all, from the statement of the section master, which would be, of course, nothing more than hearsay. Even if requisition had been made for new cleavers, it was not proper to permit the witness to testify as to this in order to show the condition of the cleavers at the time of the accident.

"(3) Because his honor erred in ruling that the witness, Jeff Shelton, could answer the question asked by plaintiff's counsel, whether or not he, or any of the section hands, had made complaint to the section master about the condition of the cleavers. This was erroneous, because it permitted the witness to state a transaction or conversation between himself and the other section hands with the section master, which was certainly not relevant to the matters in issue, and was not the proper way to prove the condition of the cleavers. If this testimony was not competent to prove the condition of the cleavers, it was not otherwise relevant to the issues raised by the pleadings.

"(4) Because his honor erred in permitting the witness, Walter Jeter, to answer the question asked by plaintiff's counsel, as follows: 'Q. Did you make any complaint about the condition of these cleavers? A. Yes, sir.' It was error to permit the witness to testify as to the fact that he had made complaint about the condition of the cleavers, the time as to the complaint not being stated, and the fact that this witness had made complaints about the condition of the cleavers not being relevant to the issues involved in the case, this testimony at best could only tend to prove

the section master's knowledge of the condition of the cleavers, which fact, from the testimony, was well known to him without information from the section hands.

"(5) Because his honor erred in permitting the witness, Jeff Shelton, to testify that the section master said, after the accident, 'If they had sent me the new cleaver I had made reposition [requisition] for, that it would not have happened.' From all of the testimony of all the witnesses, considered together, it was clearly shown that the section master was not present when the accident occurred, but was some 30 or 40 yards away at the river bridge, did not see the accident, and evidently did not know how it happened, except from hearsay, and did not return until some minutes after the accident, and could not have made this remark until after Mr. Young had gotten somewhat easy, which, according to the testimony of the witnesses, was 20 or 25 minutes after the accident. These declarations of the section master could not possibly be a part of the *res gestæ*, could not be competent as an admission to bind the company, and from all of the circumstances was nothing but an expression of opinion as to the cause of the injuries, and this opinion, based upon the statements of the eyewitnesses as to how it occurred. By permitting this witness to thus testify, the court, in effect, permitted a witness to testify as to what another party had said not under oath, and which, under all the facts, was clearly nothing but hearsay and an expression of opinion.

"(6) Because his honor erred in permitting the plaintiff to testify that the section master told him, after the accident, and after plaintiff had gotten easy and quiet, that, 'If they had sent me the cleaver I had sent in requisition for, there would not have been anything of this matter'; that is, of plaintiff's eye getting hurt. It was error to permit this witness to testify as to this statement or declaration of the section master, which happened too long after the accident to be a part of the *res gestæ*, being 20 or 25 minutes afterwards, and which was in no way an explanatory exclamation. It was not a part of the *res gestæ*, and was not an admission against interest, but was merely an expression of opinion based upon statements made to the section master by those who were present.

"(7) Because his honor erred in permitting plaintiff to testify, over the objection of the defendant, that after he returned to work for the defendant, he was fired [discharged] by the company because he would not sign a release paper; that is, a release for any claim he might have for damages to his eye. The error consisted in permitting the witness to testify as to a transaction between him and the employes or agents of the defendant several weeks or months after his injury; which transaction had nothing to do with explaining to the jury how the accident occur-

red, or in fixing the liability for the same. This testimony of the plaintiff as to his discharge by the company because he would not sign a release was irrelevant to the issue, and was very prejudicial to the defendant, in that it was used to inflame the mind of the jury against the defendant. It was error to permit this testimony, there being no charge of vindictive, willful or wanton conduct on the part of the defendant, in that it did not intend to throw any light upon the question whether or not the plaintiff was injured by the negligence of the defendant, that being the only issue submitted to the jury. Such evidence could be used, and was only used, for the purpose of improperly influencing the jury against the defendant, was not responsive to any issue properly raised by the pleadings, there being no charge of willfulness, wantonness, recklessness, or general misconduct towards the plaintiff by the defendant.

"(8) Because his honor erred in permitting plaintiff to testify that he suffered mental anguish, in that he was apprehensive that he might lose the sight of his eye; his honor holding that plaintiff could recover for such apprehensions on the part of the plaintiff. It was error on the part of his honor to hold that apprehensions on the part of the plaintiff as to what might happen was a proper ground for recovery in an action of this kind. The plaintiff, in an action of this kind, can only recover his actual damages for lost time, expenses, and actual physical pain and mental anguish suffered on account of existing circumstances, but he cannot recover on account of apprehensions which he might have had as to what might possibly happen on account of existing conditions.

"(9) Because his honor erred in overruling the motion of the defendant upon the minutes of the court for a new trial. (1) In overruling this motion for a new trial, his honor erroneously held that it was competent for plaintiff to prove that he had been discharged by some employé of the company some weeks or months after the accident, when he had returned to work, because he, the plaintiff, would not sign a release for any claim he might have against the company on account of his injuries. His honor held that this was not strictly in the case, but that it might come in to show the general relation between the parties. This was erroneous, for the only question to be decided in the case was, whether or not the plaintiff was injured by the negligence of the defendant in not furnishing him with safe tools with which to work. The fact that he was afterwards discharged, could not throw any light upon that question. This testimony could only be used, and was only used, to excite sympathy for the plaintiff, to inflame the mind of the jury against the defendant by arguing to them that the defendant had injured the plaintiff by its negligence, and had then discharged him when he returned to his work because he

would not sign the release. The defendant had no notice that any such testimony would be introduced, and could not have anticipated that such would be admitted or permitted, and therefore, could not be in position to contradict the same. His honor should have held that a grave injustice had thus been done the defendant upon the trial of the case, under all of the circumstances, and should, upon this ground, have granted the defendant's motion for a new trial. There was no allegation in the complaint that the defendant had in any way mistreated or damaged the plaintiff after the accident in which the plaintiff's eye was injured. (2) His honor erred in concluding and stating in his order overruling the motion for a new trial, that the section master made more than one statement as to how, in his opinion, this accident occurred. One of the witnesses was asked the question, what the section master said immediately after the accident; but the section master, by all of the testimony, was not present, and could not have made any statement immediately after the accident occurred. The witness, in his reply, did not say that the statement was made immediately after. From the testimony of all the witnesses, it was evident that the section master made only one statement as to this matter, which, as his honor himself says, in his order, was erroneously admitted in evidence. His honor erred in holding that one of the statements of the section master, he erroneously finding that there were two, was part of the *res gestæ*; for it was not possible for this declaration to have been made so shortly after the accident as to be a part of the *res gestæ*, and it was not an exclamatory explanation on the part of one taking part in the transaction. His honor erred in holding that his erroneously permitting this testimony to go to the jury was harmless error. The former testimony showed complaints by the section hands, but this declaration or statement of the section master, after the accident, is the only testimony tending to show that the section master thought the cleavers were not in good condition. The section master not being present at the trial of the case, it was error to permit witnesses to testify as to these declarations by the section master. His honor should have, in view of these facts, granted the motion for a new trial."

J. L. Glenn, for appellant. Wallace & Barron, for respondent.

GARY, A. J. This is an action for damages, alleged to have been sustained by the plaintiff through the wrongful act of the defendant, in failing to furnish safe appliances. The allegations of the complaint (except the formal portions thereof) are substantially as follows: That on the 17th of June, 1903, the plaintiff was employed by the defendant as a laborer, in repairing a section of its track; that in discharging the duties of his employ-

ment, under the direction of the section master, it became necessary for him to take hold of a spike bar, for the purpose of bracing a steel rail, that was being cut; that while holding the spike bar, another employé was holding the cleaver, with which the rail was being cut, by a third employé striking the same with a sledge hammer; that when the cleaver was being struck by the driving sledge a piece of said cleaver flew off, and struck the plaintiff in the eye, causing him permanent injury; that the injury resulted from the negligence of the defendant, in not supplying a safe and suitable cleaver, for use by its employés in cutting said rail; that the cleaver furnished for cutting that particular rail was utterly unfit and unsafe for that purpose, within the full knowledge of the defendant and its representative, or the defendant could and should have known the fact, and that the plaintiff did not have knowledge of such fact, nor was he warned of the danger. The jury rendered a verdict in favor of the plaintiff for \$2,500.

1. The defendant made a motion for a new trial, which was refused, whereupon it appealed upon exceptions, which will be set out in the report of the case. The first four exceptions raise the question, whether his honor, the presiding judge, erred in permitting the witnesses to testify as to conversations which they had with the section master, prior to the injury, in reference to the unsuitable condition of the cleavers, including a statement made to them by the section master, that he had made a requisition for new cleavers. The only object of this testimony was to show that the defendant had notice of the unsafe condition of the cleavers. This fact was not in dispute, as will appear by the following statement set out in the fourth exception, to wit: "This testimony at best, could only tend to prove the section master's knowledge of the condition of the cleavers, which fact from the testimony was well known to him, without information from the section hand." The testimony was admissible, for the purpose of showing knowledge of the unsafe condition of the cleavers on the part of the defendant. But even if there was error in admitting such testimony, it was not prejudicial, as the fact was not in dispute.

2. The fifth and sixth exceptions present the question whether the statement of the section master: "If they had sent me the cleaver I had sent in requisition for, there would not have been anything of this matter," was admissible as part of the *res gestæ*. The witnesses testified that the section master was about 50 steps, 30 or 40 or 100 yards distant from plaintiff, when he was injured. The record discloses the following, while the witness Jeter was on the stand: "You started to say something that Mr. Reynolds said, when the accident happened—when Mr. Young was hurt. What was it that he said

at the time Mr. Young was hurt? Mr. Glenn: Witness didn't say anything. I object to his going on and stating what Mr. Reynolds said. Mr. Barron: I think we can prove it was an admission, and I think it is clearly competent under the doctrine of *res gestæ*. (Objection overruled.) Q. State whether or not Mr. Reynolds made any admission immediately after this accident? Mr. Glenn: Your honor understands that I am still objecting to this. Court: Yes, sir. Witness: Well, he said, 'If they had sent me the new cleaver I made requisition for, that would not have happened.'" The plaintiff also testified as follows: "Q. State whether or not, after the piece struck you in the eye, Mr. Reynolds made any admission as to the condition of the cleaver? Mr. Glenn: We object. Court: Same ruling. Q. Did he make any admission? A. He told me after I got quiet and was easy. He said: 'If they had sent me the cleaver I had sent in requisition for, we would not have had anything of this matter.'" As said by his honor, the presiding judge, the object of this testimony was to show the bad condition of the cleaver, and the knowledge of that fact by the defendant, through its agent, which fact was not in dispute. Therefore, the testimony was not prejudicial to the appellant. But in any event it was a part of the *res gestæ*. *Gosa v. Ry.*, 67 S. C. 347, 45 S. E. 810; *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384, 102 Am. St. Rep. 661; *Nelson v. Ry.*, 68 S. C. 462, 47 S. E. 722.

3. The seventh exception assigns error on the part of the presiding judge in ruling that testimony to the effect that the defendant forced the plaintiff to leave its employment, because he would not sign a release of his claim for said injury was admissible. The reasons assigned by the presiding judge for said ruling were as follows: "The fact of their having discharged him would have no bearing on the question of damages, unless they had discharged him because of this injury. I think it is proper to the railroad as well as to the plaintiff, that he state that he lost the position on the road, and show that it was not as a result of this injury rendering him inefficient, but for some other reason. I don't know that it is strictly in place in the case, but it has come in and I will allow the question." Under the ruling of the presiding judge, the jury did not have the right to consider this fact as an element of damages, unless the plaintiff was discharged because of the injury, and it is not contended that the jury disregarded said instruction. We therefore fail to discover any prejudicial error.

The eighth exception was abandoned.

The ninth exception relates to a motion for a new trial upon grounds which have already been considered. One of the grounds for a new trial was based upon the ruling that the introduction in evidence of the declarations, set out in the fifth and sixth exceptions, was erroneous. In disposing of this ground the presiding judge said: "Even if both declarations were incompetent, still those facts are amply established by the testimony of the witnesses, Moore Young, Jeff Shelton, and Walter Jeter, as to the condition of the cleaver and the knowledge of the section master, and notice to him and to the defendant through him, by the complaints of those witnesses, and also by the fact that the section master had made requisition for new cleaver, all of which was fully testified to by these witnesses in chief. *Garrick v. R. R.*, 53 S. C. 451, 31 S. E. 334, 60 Am. St. Rep. 874." These reasons and those already assigned, show that the motion for a new trial was properly refused.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

WOODS, J. I concur in the view that a new trial should not be granted for any error in the admission of evidence of statements made to others by the section master as to defects in the cleaver, for the reason that the defects and the probability that the injury to the plaintiff was due to them were abundantly proved by other evidence which was competent, and no evidence to the contrary was offered by the defendant.

The other objection to testimony is much more serious. The plaintiff was allowed to prove that after the accident he was again employed by the defendant railroad company, and then discharged because he refused to give the defendant a release from liability on account of this accident. The complaint contained no allegation on this subject, and hence the defendant had no notice it would be required to meet such a charge. Discharge for this cause standing before the jury as an unchallenged fact brought into the case an element of damage which the defendant was not sued for, and which it will hardly be denied would be regarded by any jury as an important factor in making up the estimate of damages suffered by the plaintiff at the hands of the defendant. New trials should rarely be granted for error in the admission of testimony, but I cannot bring myself to doubt that this clearly incompetent evidence was not highly prejudicial to the defendant.

HUGHES v. GEORGIA RY. & ELECTRIC CO.

(Supreme Court of Georgia. Aug. 18, 1906.)

TRIAL—QUESTIONS OF LAW OR FACT—DISMISSAL—NONSUIT.

The evidence in this case did not sustain the allegations of the declaration and amended declaration, and the plaintiff was not entitled to have the case submitted to the jury. The proper judgment, however, should have been one of nonsuit, rather than a dismissal on the pleadings and evidence. The judgment is affirmed, with direction that it be so altered as to be one of nonsuit.

[Ed. Note.—For cases in point, see vol. 46. Cent. Dig. Trial, §§ 360, 361.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. E. Hughes against the Georgia Railway & Electric Company. The case was dismissed on the pleadings and evidence, and plaintiff brings error. Judgment affirmed, with direction that it be so altered as to be one of nonsuit.

Jno. Clay Smith and Lewis W. Thomas, for plaintiff in error. Rosser & Brandon, N. T. Colquitt, and B. J. Conyers, for defendant in error.

LUMPKIN, J. Judgment affirmed, with direction. All the Justices concur, except FISH, C. J., absent.

PALMER et al. v. INMAN et al.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. JUDGMENT—DORMANCY—ENFORCEMENT.

Under the decisions in *Nowell v. Haire*, 42 S. E. 719, 116 Ga. 386, and *Smith v. Bearden*, 45 S. E. 59, 117 Ga. 822, an entry made by a proper officer upon an execution issued from a judgment unless recorded upon the proper execution docket, will not, even as between the parties to the judgment, arrest the running of the dormancy statute.

2. SAME—NECESSITY OF REVIVAL.

An equitable petition, which sought to subject property to the payment of a dormant judgment, without any revival of such judgment and without suing upon it, was properly dismissed on demurrer.

(Syllabus by the Court.)

Error from Superior Court, Bulloch County; B. T. Rawlings, Judge.

Action by Annie Palmer and others against W. L. Inman and others. A demurrer to the petition was dismissed, and plaintiffs bring error. Affirmed.

On November 2, 1893, a judgment was rendered in Bulloch superior court in favor of Cumming, administratrix of Palmer, deceased, against J. E. Hogan and J. R. Slaton, for the sum of \$250 principal, besides interest and attorney's fees. The execution issued on November 24, 1903. On it were the following entries: "Levied this *fi. fa.* on one iron gray horse named 'Mike,' about 8 yrs. old, and one bay horse mule named

'Rock,' about 8 yrs. old. This 9th Feby., 1894. W. H. Waters, Sheriff B. C." "March 3rd. Sale under levy Feby. 9, 1894, suspended until further notice." "March 3rd. Credit this *fi. fa.* with fifty dollars, paid by J. R. Slaton." "I have this day made a search for property to levy this *fi. fa.* on, and none could be found. This Jan'y. 23, 1901. W. H. De Loach, Deputy Sheriff, B. C. Entered on docket, Jan'y. 23, 1901. S. C. Groover, Clerk." There was also what appeared to be a memorandum of the distribution of \$50, showing payment of certain costs and expenses and the fees of attorneys. This was not signed by any officer, or dated or recorded. On April 7, 1901, the execution was transferred and assigned by the plaintiff to Annie Palmer and others. On September 30, 1903, the assignees filed their equitable petition against J. E. Hogan and Willie Lee Inman, seeking to subject certain property which Hogan had transferred to Willie Lee Inman in December, 1891, and which it was claimed, for certain reasons set out in the petition, was subject. It was alleged by amendment that all the defendants in *fi. fa.* were insolvent. On demurrer the petition was dismissed, and the plaintiffs excepted.

Fred T. Lockhart, J. A. Brannen, and G. S. Johnston, for plaintiffs in error. Osbourne & Lawrence and R. L. Moore, for defendants in error.

LUMPKIN, J. (after stating the facts). 1. The judgment to which it was sought to subject certain property by means of an equitable petition was dormant. Under the decisions in *Nowell v. Haire*, 116 Ga. 386, 42 S. E. 719, and *Smith v. Bearden*, 117 Ga. 822, 45 S. E. 59, an entry made by a proper officer upon an execution from a judgment rendered, unless recorded on the proper execution docket, will not, even as between the parties to judgment, arrest the running of the dormancy statute. Personally the writer inclines to the equitable construction placed upon the act touching the dormancy of judgments, stated by Turner, J., in his dissenting opinion in *Columbus Fertilizer Co. v. Hanks*, 119 Ga. 955, 47 S. E. 222, as will be seen from the dissenting opinion in *Roundtree v. Jones*, 124 Ga. 398, 52 S. E. 325. But the two decisions cited above are directly in point on the subject now before us, and one of them, having been concurred in by the entire bench of six justices, is binding, unless reviewed and modified or overruled by the entire bench of six justices. If the entry of levy in February, 1894, was not sufficient to prevent the judgment from becoming dormant, certainly a mere memorandum, unsigned and unrecorded, to the effect that a sale was suspended until further notice, and the statement, "Credit this *fi. fa.* with fifty dollars, paid by J. R. Slaton," also unsigned and unrecorded, would not have that effect. No entry at all appears to have been made on the docket until January 23, 1901, and the

judgment was dormant when the entry of nulla bona of that date was made. There was neither proper prayer nor were there proper parties for the purpose of reviving this dormant judgment, or obtaining judgment on it by suit, and the petition cannot be considered as one having that object in view. Its sole purpose was by equitable proceedings to subject property to this execution. The judgment, in order to subject property either at law or in equity, must be awake. As long as it is dormant, it is both legally and equitably asleep. It may be aroused into activity by scire facias, or suit may be brought upon it.

2. It is true that under our practice, where legal and equitable remedies may be had in the same action, a suit on a dormant judgment and an equitable proceeding to subject property to it may be united. *Kruger v. Walker*, 111 Ga. 383, 36 S. E. 794. But here the judgment is left to slumber, while equity labors to subject property to it. If the maxim, "*Vigilantibus et non dormientibus jura subveniunt*," applies to litigants who sleep over their rights, it would seem to apply in principle with even greater force to dormant judgments, to which it is sought by equitable proceedings to subject property without even awakening them from their lethargy.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

BELL v. MAYOR, ETC., OF FORSYTH.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCE—LIMITATIONS—ADMISSIBILITY OF EVIDENCE.

Where one is prosecuted upon appeal before the mayor and aldermen of a municipal corporation for the violation of a municipal ordinance, it is not erroneous to admit testimony as to the violation of the ordinance by the defendant on one or more days different from those alleged in the accusation.

(a) In the absence of an ordinance fixing a period of limitations to operate as a bar to prosecution for violation of an ordinance, there is no bar to such prosecution on account of the lapse of time.

(b) In such prosecution, the testimony as to a violation of the ordinance must be restricted to the time after which the ordinance alleged to be violated goes into effect.

(c) But, after conviction, in order to make the point on certiorari that the ordinance was not in effect when the offensive conduct was committed, it is essential that the plaintiff allege the date of the ordinance, or other facts fixing the date of conduct anterior to the date of the ordinance. If he fails to do so, it is the duty of the judge, in so far as relates to that point, to refuse to sanction the petition.

2. SAME—APPEAL—POWER OF MAYOR AND ALDERMEN.

Under the charter of the city of Forsyth, the mayor and aldermen have no power, in reviewing the judgment of the mayor upon appeal, to increase or diminish the sentence imposed by the mayor.

3. SAME—SUFFICIENCY OF EVIDENCE.

The evidence supports the finding of the mayor and aldermen, and the judge of the su-

perior court did not commit error by refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Jordan Bell was convicted of keeping intoxicating liquors for sale. A petition for certiorari was refused by the superior court, and defendant brings error. Affirmed.

The defendant was tried and convicted by the mayor of Forsyth, upon accusation, dated November 17, 1905, of the offense of keeping on hand intoxicating liquors for sale in his store within the limits of the city of Forsyth. It was claimed that the conduct of the defendant as stated was violative of the ordinances of said city, and occurred on or about November 4, 1905. After conviction the defendant was fined \$100, and, being dissatisfied, appealed the case to the mayor and aldermen of said city. Upon the trial of the appeal evidence was introduced to the effect that at different times whisky had been bought from the defendant at his store in the city of Forsyth. The mayor and aldermen affirmed the judgment of the mayor, and fixed the fine at \$100, and in default of payment ordered that the defendant work 60 days on the chain gang of the city. The defendant, in his petition for certiorari, complained of the judgment of the mayor and aldermen upon the general grounds that the finding was contrary to law and to evidence, and that the evidence was not sufficient to establish the guilt of the defendant beyond a reasonable doubt. Further special grounds were urged as follows: (1) The admission in evidence, over the objections of counsel for the defendant, of the testimony of Thomas Edge to the effect that he had bought whisky from the defendant on the 15th or 16th day of September, 1905. The objections were: (a) That inasmuch as the accusation alleged that the defendant kept liquors on hand for an illegal purpose on or about the 4th of November, 1905, such offense was one where-in time was a necessary element, and for that reason the council should be confined to the exact dates alleged in the accusation; (b) that testimony as to a sale on "either the 15th or the 16th of September" was too uncertain and vague as to the day, and in no wise put the defendant upon notice, and that the witness should have been required to specify on which of the two days the sale occurred. (2) The council erred in admitting the testimony of Edge to the effect that he had bought whisky from the defendant several times two years prior to the 4th day of November, 1905. The objection was that the testimony was too indefinite as to time and that the testimony "does not bring the purchase within the statute of limitations." (3) The council had the right to reduce the fine, even if they should affirm the judgment of the mayor; and the council erred in holding that they only had power to affirm or reverse

the judgment of the mayor. The judge of the superior court refused to sanction the petition for certiorari, and the defendant excepted.

Robt. L. Berner, for plaintiff in error. Cabaniss & Willingham and O. H. B. Bloodworth, Sol. Gen., for defendants in error.

ATKINSON, J. The record does not disclose evidence of any ordinance of the city of Forsyth providing that proof of the offense should be restricted to the exact date alleged in the accusation, or that a prosecution must be commenced within a specified time. If there be such ordinance, this court could not take judicial cognizance thereof. *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354. In the absence of a municipal ordinance, there is no reason why the general rule should not apply which governs criminal prosecutions for the sale of whisky under state laws. In such cases it is sufficient that the proof show a violation of the statute at any time within the period of limitations. *Watts v. State*, 120 Ga. 496, 48 S. E. 142. (4). If the prosecution be for the violation of a municipal ordinance, and there be no ordinance of limitation, under the ruling in the case of *Battle v. Marietta*, 118 Ga. 242, 44 S. E. 994, the sale may be shown to have occurred at any time after the passage of the ordinance alleged to be violated. The law of bar by statute of limitation would not be involved. The only standpoint from which time appears to be important in this case is with reference to the date of the ordinance alleged to be violated, as compared with the dates upon which it is testified that it was violated. It must, of course, appear that at the time of the alleged sale the ordinance alleged to be violated was of force. If there was no such ordinance, there could be no violation. But when it affirmatively appears from the allegations of the petition that there was such an ordinance as the defendant was charged with having violated, in order to review the judgment of the municipal court on the ground that the evidence as to the time when the offense was committed was so indefinite as not to show that it was committed after the enactment of the ordinance, it is essential for the plaintiff in certiorari to set forth in his petition the date of the ordinance. Unless he sets forth in his petition the date of the ordinance, the judge of the superior court would have no means of knowing whether the time of commission of the offense as fixed by the testimony of the witnesses was before or after the passage of the ordinance, and it would be impossible for him to pass upon the question. In such case it is the duty of the judge, in so far as that point is concerned, to refuse to sanction the petition for certiorari. *Hill v. Atlanta*, supra. The superior court cannot take judicial cognizance of the date of the ordinance, nor can this court; but

the municipal court could, and, as its jurisdiction is unchallenged, presumptions will be indulged in favor of its judgment. It will therefore be presumed that the municipal court, taking judicial cognizance of the date of the ordinance, correctly ascertained that the ordinance was in effect at the time of the offensive conduct. In order to overcome this presumption, the burden is upon the plaintiff to affirmatively allege, in his petition for certiorari, that the date of the enactment of the ordinance was subsequent to the dates upon which the testimony objected to showed the offense to have been committed.

2. The charter of the city of Forsyth (Acts 1902, p. 431), in providing for appeal from the decision of the mayor, expressly provides: "In the event any such person or persons shall be dissatisfied with the judgment of the mayor or the mayor pro tem., he or they shall have the right to appeal to the mayor and aldermen at their next regular meeting, upon giving bond and good security for their appearance before said mayor and aldermen to abide the final decision in said case; and the mayor and aldermen, after hearing the evidence submitted, shall only have power to affirm or reverse the decision of the mayor or mayor pro tem." This is an express restriction upon the part of the mayor and aldermen, and allows them only to "affirm or reverse" the decision of the mayor or mayor pro tem. They have nothing whatever to do with imposing the penalty. They can neither increase nor reduce it.

3. The evidence supported the judgment of the mayor and aldermen finding the defendant guilty, and the court did not commit error by refusing to sanction the petition for certiorari for any of the reasons assigned in the bill of exceptions. We are well aware of the apparent anomaly which this decision brings to light. But it results from an omission on the part of the legislative department in failing to declare any period of limitations as applicable to infractions of municipal ordinances; and it is hardly probable that the municipalities themselves will supply the omission. The result is that, even in capital cases, except prosecutions for murder, indictments must be filed within seven years from the commission of the offense; in other felonies, within four years; in misdemeanors, within two years. Pen. Code 1895, § 30. Of all offenses against either the state or its subordinate divisions, none, save murder and the breach of a municipal ordinance, can be prosecuted at any unlimited time after its commission. The assassin and the man who may thoughtlessly create some slight disorder, or perhaps spit upon the sidewalk in cities where this is prohibited, are never protected by lapse of time, however long. Surely this is one of the curiosities of the law. Most certainly legislation is needed.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

BRAGG et al. v. STATE.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. INTOXICATING LIQUORS—ILLEGAL SALE.

All the questions of law involved in this case are controlled by the decision in the case of *Sowell v. State*, 54 S. E. 916, 126 Ga. —.

2. SAME—EVIDENCE.

While there was sufficient evidence in the case to support a finding that the defendants were guilty of an illegal sale within the statute of limitations, the evidence did not sufficiently show whether the date of the sale was prior to the finding of the indictment, or subsequent thereto, and a new trial must be granted.

(Syllabus by the Court.)

Error from City Court of Sylvania; J. W. Overstrut, Judge.

W. H. Bragg and another were convicted of an illegal sale of intoxicating liquors, and bring error. Reversed.

W. H. Bragg and Lawson Bragg, for plaintiffs in error. H. A. Boykin, for the State.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

COX v. MACON RY. & LIGHT CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

WRIT OF ERROR—REVIEW—MOTION FOR NEW TRIAL—EXCEPTIONS—INSTRUCTIONS.

In this case there was no motion for a new trial, nor was the verdict or any final judgment excepted to; and, as it does not appear that those portions of the charge excepted to necessarily control the verdict against the plaintiff in error, they would not, even if for any reason inapplicable or erroneous, authorize this court under this procedure to adjudge that the verdict be set aside and a new trial granted. *Newberry v. Tenant*, 49 S. E. 621, 121 Ga. 561; *Anderson v. Wyche* (Ga.) 55 S. E. 19.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by A. S. Cox against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Dismissed.

Cox sued the Macon Railway & Light Company on account of personal injuries alleged to have been received, while alighting from a trolley car, because of the negligence of the defendant's employes. The jury found for the defendant, and Cox excepted, not to the final judgment of the court, but to various portions of its charge to the jury, and brought the case here by direct bill of exceptions, which contains 15 grounds. The first, second, third, fourth, fifth, and eleventh grounds relate generally to portions of the charge with respect to the duty of the plaintiff to exercise ordinary care and diligence. The first ground assigns error upon this charge: "If the plaintiff in this case by the exercise of ordinary care and diligence could have avoided the consequences to himself caused by the negligence of the defendant company, its servants, agents, or employes,

then I charge you that the plaintiff is not in any event entitled to recover." The second ground complains of the following charge: "Before the plaintiff in this case is entitled to recover, it must appear from a consideration of the evidence in the case that at the time he contends he was injured that he was in the exercise of ordinary care and diligence; that is to say, that he was exercising at that time that care which every prudent man takes under the same or similar circumstances and conditions. It is an essential element to the plaintiff's right to a verdict in the case that he must have been at the time in the exercise of ordinary care and diligence; that is to say, that his own negligence did not cause the alleged injury and damage of which he complains." These two excerpts from the charge were attacked upon the ground that they do not limit the time when, under the law, the plaintiff was required to exercise ordinary care and diligence to the time when the defendant's negligence had commenced or was known to the plaintiff. And for similar reasons the following portions of the charge were attacked in the third, fourth, fifth, and eleventh grounds of the bill of exceptions: "If you find from a consideration of the evidence in this case, under the rules of law as given you in charge by the court, that the plaintiff was not in the exercise of ordinary care and diligence—that is to say, that he was negligent—then I charge you that he would in no event be entitled to a verdict against the defendant company." "If, however, from a consideration of the evidence in the case you find that at the time of the alleged injury that the plaintiff was in the exercise of ordinary care and diligence—that is to say, that he was not negligent; that he did not bring about by his own negligence the injury and damage of which he complains—then I charge you that you will proceed further in the case and see whether or not, under the evidence, measured by the rules of law which I give you in charge, the defendant company, its officers, servants, agents, and employes, brought about the alleged injury and damage of which the plaintiff complains by reason of their negligence, or the negligence of any of the servants, employes, agents, or officers." "If, however, you believe from a consideration of the evidence in the case that the plaintiff was in the exercise of ordinary care and diligence, and that at the time of the injury he did nothing to bring about the injury and damage to himself, that the defendant company, through its servants, agents, officers, and employes, was not negligent—that is to say, that it exercised toward him the degree of care known as extraordinary care and diligence; that he was not at fault, and the company was not at fault—then I charge you that he would not be entitled to recover in the case." "The jury will inquire what the evidence is touching this question, inquire whether the

defendant has produced to the jury the agents and employes engaged in the particular business out of which the injury grew, consider whether their testimony shows any negligence on their part, and, if so, what negligence, and how that negligence affected the plaintiff. The jury will inquire whether the car was operated as usual, and, if there was any jar to the car upon which the plaintiff was standing, whether that jar was brought [about] in the usual and ordinary operation of the car, or whether there was any negligence in the same, and, if so, what negligence, and whether such negligence caused the injury to the plaintiff, or, if there was such negligence on the part of the defendant, whether plaintiff could have avoided the result by the exercise of ordinary care and diligence on his part." These excerpts were also attacked because they did not state accurately the law applicable to ordinary care and diligence, and that some of them contain expressions of opinion on the part of the court as to what constitutes negligence.

The charge excepted to in the sixth ground is as follows: "If the jury believe from the evidence that the plaintiff was in the act of alighting from the car, or was preparing to alight, and the plaintiff's foot slipped, and that in consequence of his foot slipping the plaintiff was thrown from the car, and that this was not caused by any negligent moving or jerking or knocking of said car by the employes of the defendant in charge of the same, the plaintiff is not entitled to recover, and the jury will find for the defendant." The error assigned upon this language is that it is an expression of opinion of the court, or "a summing up by the court of what facts in the case would authorize the jury to find that the injury resulted from an accident."

In the seventh and eighth grounds these portions of the charge are attacked: "The presumption of negligence which arises when a plaintiff shows that he has been injured by the running of the cars of a railroad company applies only to the acts of negligence alleged in the plaintiff's petition, and no presumption would arise as to any matters not alleged in the petition, and the defendant would not be under any duty to show that it was not negligent as to anything not alleged in the petition; but the presumption may be fully rebutted by the defendant by showing by a preponderance of evidence that it was not negligent in regard to the specific facts alleged in the declaration." "I charge you that, if you believe that any presumption has arisen against the defendant under the rules of law I have given you in charge, then it is not incumbent upon the defendant to show the cause of the plaintiff's injury, in order to rebut the presumption; but it may rebut the presumption by showing by a preponderance of the evidence that its employes were not negligent in respect to

the acts alleged in the petition." The error assigned is that the excerpts do not state correct principles of law, "In that the burden is upon the defendant to show that it is not guilty of any act contributing to or causing the plaintiff's injury."

The twelfth ground alleged error upon this portion of the court's instructions: "If you believe from a consideration of the evidence in this case that at the time of the injury complained of the car was not suddenly, violently, negligently, and without any warning whatever moved or jerked or knocked, in the manner set forth in the declaration, then I charge you that the plaintiff is not entitled to recover in the case, and you will so find." And the criticism is that it "limited the jury in the consideration of the evidence in the acts of negligence set forth in the declaration."

The instructions attacked in the thirteenth and fourteenth exceptions are as follows: "Now, in determining whether there was any sudden, violent, and negligent movement, jerk, or knock of the car, as contended for by the plaintiff in this case, you are authorized to take into consideration all the circumstances connected with the case, connected with the movement of the car and operation of the same at the time and place at which the plaintiff claims to have been injured; and you are authorized, further, to consider whether the car was moving at an unusual rate of speed or an ordinary rate of speed, whether the car was crowded; and you are also authorized to consider the conduct of the motorman and conductor in the effort to obey the instructions of the alleged passenger and the motorman in the effort to obey the signal of his conductor, if any signals were given, and whether there was anything done by the motorman in charge of the car which would cause any sudden, violent, and negligent movement, jerk, and knock; and you are authorized to consider in this connection whether there were any other persons on the car, and, if there were any, see if any other person experienced or felt any such violent, negligent, or sudden movement of the car. You may consider all these matters, and determine what the true facts and circumstances with reference to the allegations of negligence in this petition are." "I charge you that unless you believe from the evidence in the case that the car upon which the plaintiff was riding was suddenly, violently, negligently, and without any warning whatever, moved or jerked or knocked by reason of the negligence of the employes in charge of that car, the plaintiff is not entitled to recover in this action." The error assigned in these grounds is that the instructions "limited the jury in the consideration of the evidence to the conduct of the motorman and conductor in charge of the car on which plaintiff was riding, and excluded from their

consideration any evidence of negligence on the part of the agent of the company in charge of the trailer. The plaintiff contends that the evidence shows that the negligence of the employé on the trailer car caused the jolt or sudden movement of the car on which plaintiff was riding."

The fifteenth exception is as follows: "Be it further remembered that during the progress of said case the court charged the jury as follows: 'If you believe from a consideration of the evidence in this case that the plaintiff asked the conductor to stop the car at Poe street to enable him to alight, and if the conductor began to obey the instructions and to bring the car to a stop, and that simultaneously the plaintiff began to descend from the platform, and that each intended a proper object, the plaintiff to alight and the conductor to stop the car, and that in stopping the car the trailer bumped against the motor car unexpectedly to both the plaintiff and the conductor, and no negligence on the part of the conductor is shown from a consideration of the evidence in the case, then I charge you that the calamity was a pure accident, and the plaintiff cannot recover for any injury growing out of the same, and you should find for the defendant in the case.' To this charge the plaintiff, by his counsel, then and there excepted, * * * and says that this charge was error: (1) Because the court expressed to the jury an opinion as to what facts would show the injury was the result of an accident. (2) This charge is error for the further reason that the court in it put the burden on the plaintiff to show negligence on the part of the defendant, instead of upon the defendant to show that it was not negligent, in that he charged the jury, if 'no negligence on the part of the company is shown from a consideration of the evidence, the plaintiff cannot recover.'"

J. H. Hall and R. S. Wimberly, for plaintiff in error. Roland Ellis, for defendant in error.

BECK, J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent, and ATKINSON, J., not presiding.

COBB, P. J. I concur in the judgment for the reasons stated in my concurring opinion in *Anderson v. Wyche* (Ga.) 55 S. E. 19.

EVANS and LUMPKIN, JJ. We concur specially, under the decision in *Newberry v. Tenant*, 121 Ga. 561, 49 S. E. 621 (a decision of the entire bench). But we do not concur in the idea expressed in the headnote that in no case can there be an exception to a final judgment without making a motion for a new trial, except upon necessarily controlling rulings. Neither the decision in *Henderson v. State*, 123 Ga. 739, 51 S. E. 764, nor *Anderson v. Wyche* (Ga.) 55 S. E.

19, in our opinion goes to that extent. Each of those decisions includes the absence of the evidence. In *Henderson's Case* it was said: "There are two ways by which a case may reach this court. One is by the usual and ordinary methods of procedure. The other, for convenience, may be called the 'short form.' * * * It is not every error, but only necessarily controlling rulings, which may be segregated from the case, stripped from their surroundings, and brought to this court alone as successful grounds for a reversal." This refers to an effort to segregate and bring up necessarily controlling rulings (Acts 1898, p. 92), not to an exception bringing up the case generally, with brief of evidence and proper assignments of error (Civ. Code 1895, §§ 5528 [1], 5530). If the rulings fell within the act of 1898, as necessarily controlling the verdict or judgment, under that act an exception to the verdict or judgment would seem to be provided for.

CITY COUNCIL OF AUGUSTA v. DOZIER.
(Supreme Court of Georgia. Aug. 17, 1906.)

MUNICIPAL CORPORATIONS — DEFECTIVE STREETS—INJURY TO PEDESTRIAN—ACTION—PETITION.

The petition set forth a cause of action, and the demurrer to the same was properly overruled.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1638.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by E. F. Dozier against the city council of Augusta. Judgment for plaintiff, and defendant brings error. Plaintiff by cross-bill brings up her exceptions pendente lite. Judgment on main bill affirmed, and cross-bill dismissed.

Mrs. Emma F. Dozier brought suit against the city council of Augusta, and alleged: That the defendant was the owner of the franchises and properties of the Augusta Canal Company, and had assumed the obligations and liabilities thereof. In the operation of the canal the company had converted a ravine into a reservoir known as "Lake Olmstead," and a road had been laid out along the brink of said lake. At a certain portion of said road there was no fence or guard rail, and the bank sloped from the edge of the road to the edge of the water, a distance of about 45 feet and a depth of about 16 feet. On January 23, 1903, the husband of petitioner, while traveling said road, was, "without fault on his part, precipitated" from the unprotected portion of said road into the lake and was drowned. Damages were laid in the sum of \$10,000. The petitioner had previously brought suit for the same cause of action to the city court of Richmond county.

to which suit the defendant interposed a general demurrer, which was overruled, and to this ruling defendant did not except. At the January term, 1905, of the city court, the case came on to be heard, and a nonsuit was granted, and the case dismissed. A complete copy of the proceedings in the city court was attached to the petition. The defendant demurred generally on the ground that the petition set forth no cause of action. The plaintiff moved to strike the demurrer, on the ground that a general demurrer to the petition setting out the same cause of action between the same parties had been overruled in the city court of Richmond county, and that as to all questions raised therein the defendant was estopped by the doctrine of *res adjudicata*. The motion to strike the demurrer was overruled, and the plaintiff excepted *pendente lite*. The demurrer to the petition was heard and overruled, and the defendant excepted. The plaintiff by cross-bill brings up her exceptions *pendente lite*.

C. Henry Cohen, for plaintiff in error.
Salem Dutcher, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The city of Augusta is the owner of the canal and the land upon which the body of water known as "Lake Olmstead" is situated. This land adjoins a public highway. The city, therefore, owes to travelers upon the highway the same duty that any owner of land adjoining a highway owes to travelers thereon. What is the duty of such an owner to travelers on an adjacent highway? An owner of land abutting upon a highway is liable to travelers for injuries resulting from the maintenance of those things upon his property which are likely to render travel upon the highway unsafe. Many of the cases in which the rule is announced involved excavations on the land adjoining the highway; but the rule is, of course, not limited to cases where the injury resulted from an excavation. If the public lay out a highway so near a natural water course on the land of an adjacent proprietor that travel along the highway is rendered unsafe on account of the proximity of the stream, it may be that the owner of the stream would be under no obligation to erect rails or guards along the course of the stream; but when the owner creates and maintains upon his land an artificial lake or body of water, so near the highway and so located relatively to the same that travel thereon is rendered unsafe, a duty to so guard the same that travelers in the exercise of due diligence will not fall or be precipitated therein devolves upon the owner. *Hutson v. King*, 95 Ga. 271, 22 S. E. 615 (3); 15 Am. & Eng. Enc. Law (2d Ed.) p. 437, and cases cited. The distance from the highway to that which caused the injury will in many cases determine whether there was a duty to guard the highway. When the adjacent land is level, or practically so, and that which caused the injury so far removed

that a traveler in the exercise of due care would not have been injured thereby, no duty to the traveler would arise. Where the land is precipitous, a duty to the traveler arises in cases where under other conditions no duty would arise. The edge of the lake was 16 feet below the highway and 45 feet therefrom. The slope began at the edge of the highway, and about two-thirds of the distance is a very sharp incline of 45 to 50 degrees, and thence to the water's edge about half that extent. The edge of the highway is protected at one place by a substantial fence, and at another place by large iron pipes; but between the points where the fence ends and the pipes begin there is a gap of 30 feet which is entirely unprotected, and is at the very crest of a steep declivity extending to the water's edge. This gap was at one time protected by a fence, which had disappeared and had never been replaced. The husband of the plaintiff was walking along the highway at night, walked into the gap, was precipitated down the declivity into the lake, and was drowned therein. The averments of the petition were sufficient to raise a duty on the part of the city to guard the highway at the point where the deceased departed therefrom, and also to show that he was in the exercise of due care. Such being the case, a cause of action was set forth.

Judgment on main bill affirmed. Cross-bill dismissed. All the Justices concur, except FISH, C. J., absent.

McDONALD v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. CRIMINAL LAW—VOID INDICTMENT—REMEDIES—MOTION TO SET ASIDE JUDGMENT—MOTION IN ARREST.

A motion to set aside the judgment is not the appropriate remedy in a criminal case, if the indictment is void. The judgment may be arrested upon motion made during the term at which the verdict is rendered, or the prisoner may be discharged upon writ of habeas corpus at any time thereafter, if no question as to the validity of the indictment was adjudicated at the trial. *Griffin v. Eaves*, 39 S. E. 913, 114 Ga. 65. See, also, *Moore v. Wheeler*, 35 S. E. 116, 109 Ga. 62; *Duren v. Stephens*, 54 S. E. 1045.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2549.]

2. SAME.

In the case of *Regopoulos v. State*, 42 S. E. 1014, 116 Ga. 596, no question was made as to the remedy by motion to set aside being appropriate.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

C. D. McDonald was convicted of a crime, and brings error. Affirmed.

Geo. W. Bryan, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and W. P. Bloodworth, for the State.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SUSONG v. McKENNA.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. SALES—WHEN TITLE PASSES—PAYMENT OF PRICE.

Where goods were sold for cash, to be paid for on delivery, the prepayment of the price being a condition precedent of the sale, the mere fact that the buyer obtained possession did not operate to pass the title to him, and notwithstanding such possession the title remained in the seller; the purchase price not having been paid.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Sales, §§ 517, 542, 544.]

2. PRINCIPAL AND AGENT — AUTHORITY OF AGENT.

When the buyer knew that the seller intended to sell for cash only, and possession was obtained for this reason alone, the buyer cannot refuse to pay the price and retain the goods upon the ground that he is entitled thereto upon a prior agreement with the agent of the seller, when such agreement was not disclosed to the seller at the time possession was obtained, and in no way assented to by him.

3. TRIAL—INSTRUCTIONS—THEORY OF DEFENSE—DUTY OF JUDGE.

The charge of the judge failed to give the defendant the benefit of a theory of the defense which was sustained by the evidence introduced in his behalf, and a new trial should have been granted.

(Syllabus by the Court.)

Error from City Court of Savannah; T. M. Norwood, Judge.

Action by J. H. McKenna against W. A. Susong. Judgment for plaintiff, and defendant brings error. Reversed.

D. H. Clark and Adams & Adams, for plaintiff in error. Osborne & Lawrence and Edmund H. Abrahams, for defendant in error.

COBB, P. J. Susong was a horse trader and proprietor of a sales stable. Barrett was a blacksmith and horseshoer, having a place of business adjoining the stable of Susong. McKenna was a plumber. Susong went to Kentucky to buy stock, and requested Barrett to take a general supervision of his stable and business in his absence. While Susong was absent, McKenna went to Susong's stable for the purpose of purchasing a mule. A negro in charge of the stable directed McKenna to Barrett. Barrett, upon being asked if he was in charge of the stable, replied that he was. McKenna said that his purpose was to buy a mule. Barrett told him there was only one mule in the pen, but there were horses. McKenna went with Barrett to look at the mule. As to what transpired subsequently there is a disagreement between Barrett and McKenna. McKenna contended that he said that the mule was too small for his purposes, and that he entered into an agreement with Barrett that he would take the mule at \$140, and, when Susong returned with a car load of mules, McKenna was to have the privilege of selecting any mule from the lot, and returning the small mule paying whatever difference there was

in the price between \$140, the value placed upon the small mule, and the price of the mule to be thereafter selected. Barrett claims that he had no authority, except to sell the mule for cash, the price placed upon the mule by Susong before he left being \$150; that he assumed the authority to sell it at \$140; and that he made a sale for this sum, and delivered the mule and collected the money from McKenna several days thereafter. When Susong returned, McKenna sent Magrath, his bookkeeper, to Susong's stable to select a mule. Neither Magrath nor McKenna communicated to Susong the agreement that had been made with Barrett. A large mule was selected, which Susong priced at \$165. This mule was sent to McKenna's place of business. McKenna then sent the small mule and \$25 to Susong in payment for the large mule. Susong refused to accept these terms, insisting that the contract was for a cash sale, and repudiated the agreement made by Barrett, denying that Barrett had any authority to make such a contract. Susong took out a possessory warrant against McKenna and recovered possession of the large mule. Subsequently the small mule was returned to McKenna and died in his possession. Susong demanded that McKenna pay for the feed of the small mule while he remained at his stable, and McKenna paid the amount demanded. Before the small mule died, and while the same was still in possession of McKenna, he brought an action of trover against Susong to recover the large mule. Upon the trial of this case the jury found a verdict for the plaintiff. The defendant made a motion for a new trial, which was overruled, and he excepted.

The instructions of the judge related mainly to the law of agency. He charged the jury, in substance, that, if Barrett was authorized by Susong to make the trade with McKenna, Susong would be bound; but that if Barrett was not authorized to make this trade, and in doing so exceeded whatever authority Susong had conferred upon him, Susong could not repudiate the trade unless he tendered back to McKenna the \$140 which McKenna had paid to Susong. When the large mule was sent to McKenna and the price of \$165 agreed upon, McKenna did not disclose to Susong the arrangement he claimed to have made with Barrett, and his testimony would bear the interpretation that he intended to get possession of the mule before the disclosure of his claim as to the trade he had made with Barrett. Even if it be conceded that McKenna had made the arrangement with Barrett which he claimed, this would not operate to pass the title to the large mule, if at the time it was delivered to McKenna Susong intended that the delivery would be upon a cash sale at the price of \$165, and McKenna knew that such was the intention of Susong. There is nothing in the evidence which would author-

ize a finding that Susong intended to deliver the mule in accordance with the arrangement claimed to have been made with Barrett. The evidence authorized, even if it did not demand, a finding that, when the mule was delivered to Barrett, it was delivered upon a cash sale. Such being the case, if McKenna refused to pay the cash, the sale was incomplete, and Susong had the right to recover his property. *Wilson v. Comer*, 125 Ga. 500, 54 S. E. 355. The judge was requested to instruct the jury in reference to this theory of the case. The instruction was not given, and there is nothing in the charge of the court which gives to the defendant the benefit of this theory.

It is claimed that the failure of McKenna to certiorari the possessory warrant case, and his taking possession of the small mule and payment of the feed bill, operated as an estoppel to prevent him from thereafter claiming title to the large mule. We are not prepared to hold that these facts would operate as an estoppel, as it does not appear that Susong has done any act on the faith of McKenna's conduct, or that his position is at all changed as a result of such conduct. These are circumstances to be considered in determining the question as to whether there was in fact a sale of the large mule as a result of the arrangement with Barrett. As the charge of the judge did not give the defendant the benefit of the theory of his defense above referred to, a new trial should have been granted.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

ATLANTA ICE & COAL CO. v. MIXON. (Supreme Court of Georgia. Aug. 13, 1906.)

1. EVIDENCE—OPINION EVIDENCE — MATTERS OF FACT OR OPINION.

It is the province of the jury, not of a nonexpert witness, to draw conclusions from the facts to which he testifies.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2150.]

2. SAME—SIMILAR FACTS—RELEVANCY.

The inquiry being what was proper to be done under given circumstances at a particular point, proof of what was usually done at a point near by under different circumstances cannot illustrate the question.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 388-390, 399.]

3. DAMAGES—INJURIES TO MULE—AMOUNT—EVIDENCE—SUFFICIENCY.

A finding against the defendant was warranted by the evidence, but the verdict returned in favor of the plaintiff exceeded in amount the highest proved value of the animal for injury to which the suit was brought, less the sum for which the animal was afterwards sold by the plaintiff, and which diminished the damages sustained by him.

[Ed. Note.—For cases in point see vol. 15, Cent. Dig. Damages, § 400.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by E. P. Mixon against the Atlanta Ice & Coal Company, commenced in justice's court. On certiorari to the superior court, judgment was rendered for plaintiff, and defendant brings error. Affirmed, on condition.

Payne, Jones & Jones, for plaintiff in error. Jos. W. & Jno. D. Humphries, for defendant in error.

EVANS, J. A suit for damages was brought in a justice's court by E. P. Mixon against the Atlanta Ice & Coal Company; the plaintiff claiming that a heavily loaded wagon belonging to the company had been negligently driven over the left front foot of his mule while standing at the platform of the company's factory. The driver of the plaintiff's team testified that he had loaded his wagon with ice and was about to put on the wagon seat and drive out of the yard, when a large two-horse wagon belonging to the company approached from the rear of the yard; that the roadway at the point where his team was standing was very narrow, and he called upon the driver of the company's wagon to stop, as there was not room to pass, but the company's "starter" turned the mule's head aside, pushing the mule back, and ordered the company's driver to come ahead; and that the mule jumped as the wagon passed, one of its wheels having run over the mule's foot. The defendant introduced testimony which tended to support its contention that there was ample room to pass, and the injury to the mule was due solely to the fact that, after the front wheels of the wagon had passed, the mule suddenly threw out one of its fore feet directly in front of the rear wheel on that side of the wagon.

1. A witness who had testified in behalf of the defendant was asked the following question: "In view of the circumstances you have stated, that the plaintiff's mule turned its foot in front of the wheels of the company's wagon after the driver had passed, was it, or not, possible, in your opinion, for the driver of the company's wagon to have prevented the wagon wheels from running over the mule's foot? Objection was made by counsel for the plaintiff on the ground that the question called for the mere opinion of the witness, and this objection was sustained. The ruling was eminently proper, it being within the exclusive province of the jury to say whether or not, under the circumstances detailed by the witness, the driver of the wagon could have prevented the injury after the mule had thrust its foot in front of the rear wheel, which ran over and bruised it.

2. The defendant sought to prove that the plaintiff's driver had knowledge of a custom prevailing at the factory, in accordance with which wagons to be loaded with ice were driven up in turn to the platform, and, after being loaded, passed out by other wag-

ons, awaiting their turn, which were backed up against the platform near where the plaintiff's wagon was standing, and, further, that his driver knew it was customary for the driver of each team to look after his mule while other wagons were being driven on by. The evidence offered in this connection was rejected. It appears that the yard was of considerable width at one end of the platform, but became narrower towards the point where the plaintiff's wagon was stationed, and the question at issue was whether, at that particular point, there was sufficient room to safely drive a team in front of his mule. What was the common practice near that point, but further down the yard, could not illustrate this question. Nor was it pertinent to show that the plaintiff's servant knew that the driver of each team was expected to look after his mule while wagons were passing in front on their way out of the yard. The plaintiff's driver did undertake to look after his mule, and called upon the company's driver to stop, saying there was not room to pass; but the company's "starter" interposed, pushed the mule back, and turned its head, at the same time ordering the driver of the two-horse wagon to come ahead. The plaintiff's servant was on hand, ready and willing to look after the safety of his team; but the company's servant assumed control of the plaintiff's mule, and ordered the company's driver to pass, over the protest of the servant of the plaintiff, and with the result heretofore stated. It is clear, therefore, that the company could have taken no comfort out of proof of what the usual custom was when teams were driven in front of wagons backed up against the platform near the point where the plaintiff's team was standing.

3. The evidence well warranted a finding that the injury to the plaintiff's mule was caused by negligence on the part of the company's servants. The jury took this view of the case and returned a verdict for \$75 in favor of the plaintiff. On certiorari to the superior court, the judge of that court declined to set aside the verdict, either because of the rejection of the testimony above mentioned or on the ground that the verdict was excessive and unsupported by the evidence. The highest proved value of the mule was \$100. Some time after its injury the plaintiff sold the mule, on credit, for the sum of \$35. There was no claim for damages on account of the loss of hire or for expenses incurred in caring for the mule after the injury, nor any evidence along this line. It is clear that the jury did not allow the amount for which the mule was sold after the injury as a deduction from its highest proved value. It follows that the verdict should have been set aside, unless the plaintiff should voluntarily write off from his recovery the sum of \$35, the price for which the animal was sold. In the event he shall

do so, a new trial will be unnecessary, under the direction which we have given in the case; otherwise, the verdict must be set aside.

Judgment affirmed, on condition. All the Justices concur, except FISH, C. J., absent.

BOARD OF EDUCATION OF TENNILLE v. KELLEY.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. COSTS—DISMISSAL OF ACTION—PAYMENT OF COSTS AS CONDITION OF BRINGING NEW ACTION.

Where a suit has been dismissed by the plaintiff, in order to bring a second suit for the same cause of action, the plaintiff must pay the costs, or file a pauper affidavit stating his inability to do so. A failure in this regard furnished ground for a plea in abatement. Civ. Code 1895, § 5043; *Langston v. Marks*, 68 Ga. 435; *Sweeney v. Malloy*, 32 S. E. 858, 107 Ga. 83; *Johnson v. Central Ry. Co.*, 45 S. E. 983, 119 Ga. 185; *Wright v. Jett*, 48 S. E. 345, 120 Ga. 995.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, §§ 1048, 1049.]

2. SAME—PAYMENT—RELEASE—AUTHORITY OF CLERK OF COURT.

That the clerk of the superior court, on request of counsel for the plaintiff, charged the cost to such counsel, and released the plaintiff, stating that he also "had authority to collect for the sheriff as well as himself," would not suffice. This was not an actual payment of the cost, at least as to the sheriff; nor did it appear that the clerk in fact had authority, as to the cost due the sheriff, to release the plaintiff and charge it to the attorney. Authority to collect for the sheriff did not include authority to release the plaintiff and charge the cost to another.

(Syllabus by the Court.)

Error from Superior Court, Washington County; L. A. Parker, Judge.

Action between the board of education of Tennille and Lawson Kelley. Judgment for Kelley, and the board of education brings error. Reversed.

G. H. Howard and E. W. Jordan, for plaintiff in error. Evans & Evans, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent, and EVANS, J., disqualified.

HOHENSTEIN v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

JUSTICES OF THE PEACE—CRIMINAL RESPONSIBILITY—MALPRACTICE—INDICTMENT.

An indictment against a notary public and ex officio justice of the peace for the offense of malpractice in office, which charged that the defendant did issue a warrant for the arrest of A. B., "said warrant having been willfully and knowingly issued as aforesaid, not in good faith and for the purpose of inaugurating a criminal prosecution, but corruptly and for the sole purpose of affording the [defendant], as magistrate as aforesaid, the opportunity for pecuniary consideration of drawing up the bond of said person so arrested as aforesaid, and

thus extorting money out of said person, contrary to the laws of said state," was open to attack by general demurrer; there being a local act, in the county in which the accused held office and committed the alleged criminal acts, allowing justices of the peace a fee for "drawing up a bond and approving the same," and there being no averments in the indictment that the warrant was not found upon a proper affidavit, or that the defendant colluded with the party making the affidavit, or that bond was improperly required. And the court erred in overruling the demurrer to the indictment. See, Pen. Code 1895, §§ 202, 208; *Hawkins v. State*, 54 Ga. 653; *State v. Zachary*, 44 N. C. 432.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Charles V. Hohenstein was convicted of a crime, and brings error. Reversed.

Garrard & Meldrim and C. V. Hohenstein, for plaintiff in error. W. W. Osborne, Sol. Gen., and Dan'l. J. Charlton, for the State.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

HOWARD v. STATE.

(Supreme Court of Georgia. Aug. 17, 1906.)

MASTER AND SERVANT—FRAUDULENT BREACH OF CONTRACT—CRIMINAL RESPONSIBILITY OF SERVANT—EVIDENCE.

When, in the trial of one charged with the violation of the act of 1903 (Acts 1903, p. 90) providing for the punishment of those who with fraudulent intent procure advances on the faith of contracts of labor, it appears from uncontradicted evidence that the accused was a minor and that the failure on his part to perform the services required under the contract was due to the fact that his father had directed him to leave the service and return home, in order that he might perform labor under a contract which the father had made, the presumption of fraudulent intent, arising from the fact that money was procured on the faith of the contract and the service not rendered or the money returned, is rebutted, and a conviction of the accused is contrary to law.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Willie Howard was convicted of crime, and brings error. Reversed.

Williford & Middlebrooks, for plaintiff in error. R. W. Moore and R. H. Lewis, Sol. Gen., for the State.

BECK, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

BERRY v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Aug. 9, 1906.)

RAILROADS—KILLING ANIMALS—ACTION—EVIDENCE—SUFFICIENCY—NEW TRIAL.

Where three successive verdicts in favor of the plaintiff were set aside, the last order stating that it was granted with great reluctance, inasmuch as the presiding judge had set aside two former verdicts, but that he felt compelled to set aside the verdict in the plaintiff's favor

and grant a new trial, because in his opinion the defendant's testimony overcame the presumption of negligence against the defendant, that plaintiff's testimony was not in sufficient conflict with that of the defendant to authorize the verdict, and that he would not have set aside the third verdict except for that reason, the evidence being in fact sufficient for that purpose, such third grant of a new trial was erroneous.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action by Fred Berry against the Southern Railway Company. A verdict for plaintiff was set aside, and he brings error. Reversed.

Jos. W. & Jno. W. Humphries and W. T. Kimsey, for plaintiff in error. Jno. B. Hutcheson and Lamar Rucker, for defendant in error.

LUMPKIN, J. Berry brought suit against the Southern Railway Company for killing a cow. Thrice the presiding judge set aside a verdict for the plaintiff. The last order granted by him was in the following terms: "After considering the motion for a new trial in the above-stated case, I feel compelled to set aside the verdict in plaintiff's favor and grant a new trial, because, in my opinion, defendant's testimony overcomes the presumption of negligence against the defendant, and plaintiff's testimony is not in sufficient conflict with that of defendant to authorize the verdict. It is with reluctance that I set aside this verdict, because I have already set aside two previous verdicts in plaintiff's favor, and would not set aside this third verdict in plaintiff's favor except for the reasons above stated." It is apparent from this order that the presiding judge, as matter of law, did not think that there was sufficient evidence on behalf of the plaintiff, in conflict with that of the defendant, when taken in connection with the presumption arising against the defendant from proof of the killing of the cow, to sustain a verdict for the plaintiff. He acted with reluctance, and only because he felt compelled, under the view thus stated, to again set aside the verdict.

The defendant admitted killing the cow, and its value, and assumed the burden of proof. The engineer testified that when he first saw the cow the engine was running at the rate of about 35 miles an hour, a customary speed; that she was about 300 yards distant, and was grazing about 15 feet from the track; that when he was within about 75 yards of her she started towards the track, and he at once applied the brakes and blew the stock alarm, "and just as she got to the track the engine and cow met at the same time. She stepped on the track just immediately in front of the engine. I had gotten down to a slow rate of speed at that time, but it was impossible for me to stop before striking the cow." He also stated that, after he saw the cow was moving towards the track, he did all that he could to stop the engine; that when the cow was struck the en-

gine was moving about 5 to 8 miles an hour; that he could see down the track at that point for about three-quarters of a mile, and that he could have stopped the train within something over 100 yards when running at the usual speed; that there was one fence around there, but not immediately beside where the cow was struck; that she was north of the fence; that it did not "seem to him like there are very much ditches there." The fireman corroborated the testimony of the engineer as to having first seen the cow at a distance of from 275 to 300 yards away, and testified that she was 15 or 20 feet from the track; that the engine was within from 50 to 75 yards of her when she started towards the track; that the engineer applied the brakes and the fireman rang the bell; that the brakes were in good order, and that the engine was running at the rate of about 6 or 8 miles an hour when the cow was struck, and it was impossible to stop the train and avoid the collision when she started towards the track. On cross-examination he testified that "below where we struck the cow is a wire fence. I reckon it runs in 25 or 30 feet of the track. I didn't examine to see how close it was. * * * There was no trouble about stopping the train before you reached her from the time you first saw her. I suppose I could have stopped or slackened it, so I could have had it under control, even by that time." A witness for the plaintiff testified that "at this particular time, when the train hit the cow, I didn't know how fast it was running, but about as fast as it usually ran. It didn't seem to check speed, from the way I seen it hit the cow. When it hit the cow, it didn't stop. They blowed and kept on." On cross-examination he admitted that he had never run an engine, and did not know how fast they ran at any time; that he did not know anything about the time, and did not know whether the train was running 10, 50, or 75 miles an hour. Other evidence for the plaintiff tended to show that there were ditches extending alongside of the railroad, made to complete the embankment, which were 4 or 5 feet wide and $2\frac{1}{2}$ or 3 feet deep, containing mud and water, and extending to within 6 or 7 feet of the cross-ties; that on one side there was a pasture of 4 or 5 acres fenced in with barbed wire; that the fence was not over about 14 feet from the railroad, and about a foot from the ditch. The plaintiff testified that his cows did not return home, and he went to look for them; that he found where they had gone out of his pasture, and followed their tracks part of the way towards the bottom; that, when he arrived at a point where he could see the railroad, he saw the cows upon it; that at that point he could not go straight to the track without crossing the ditch, and went some distance down the railroad in order to get upon the track; that he had discovered by their tracks where the cows had gone upon the railroad at the upper end of the ditches.

"I tracked them on down the track. There was the tracks where they had grazed around. They went down the railroad track." He stated that another cow belonging to one Berry, which was also hurt, was standing very close to the track, and his cow was "down below her a piece"; that Berry's cow was right opposite the 10-acre field, and was about opposite the middle of the pasture, which was inclosed by the barbed wire fence. He drove the cows below the 10-acre field in order to get them away from the track. "They came on the railroad, just as I told you, on Mr. Terrell's land. It would be from Aunt Mensey's pasture fence there between 100 and 150 yards."

It is unnecessary to quote further from the testimony to show that there was a conflict both as to whether the speed of the train was slackened and whether the cow in fact came on the track as stated by the engineer and fireman. There was evidence in regard to the tracks of the cows, the location of the accident, relatively to a wire fence and ditches, tending to show that it was improbable, if not impossible, for them to have been standing at a distance of about 15 feet from the track, and to have gone straight to it, so as to arrive at the point of collision just as the engine did so, and that in fact they went upon the track at a point some distance above the place of collision, and were grazing down the track when struck. Coupling this evidence with that as to the straightness of the track, the distance at which a cow could have been seen, the distance within which the engine could have been stopped, the admission that the defendant killed the cow, and that she was of the value claimed, we cannot agree with our learned brother of the trial court that he was constrained to set aside a third verdict. There was sufficient evidence to support such a verdict, and his ruling to the contrary was erroneous. See *Darien R. Co. v. Thomas*, 125 Ga. 801, 54 S. E. 692.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

MARTIN v. PATILLO.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. BOUNDARIES—SURVEYS—JUDGMENT—CONSENSIVENESS.

Where, after processioners have duly made out and certified a plat as required by law, a protest to their action is filed by an adjoining landowner, and the same is returned to the superior court, where a verdict is rendered sustaining the return of the processioners, and such return is made the judgment of the court, the judgment unappealed from is conclusive as against the protestant and his privies in title. *Howland v. Brown*, 92 Ga. 513, 17 S. E. 803.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 263.]

2. TRESPASS—ACTS CONSTITUTING.

After such judgment, the true line between the coterminous proprietors is that marked by the processioners, and any invasion thereafter

across the line thus established upon the land of the adjacent owner by the protestant in the processioning proceeding would amount to a trespass.

8. INJUNCTION—GROUNDS—CONTINUING TRESPASS.

If repeated acts of wrong are done or threatened, so as to make the trespass a continuous one, they may be repressed in equity by injunction.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 101.]

4. SAME—EVIDENCE.

There was no error in the allowance and rejection of the evidence, and the court did not abuse its discretion in granting the injunction.

(Syllabus by the Court.)

Error from Superior Court, Henry County; E. J. Reagan, Judge.

Action between M. F. Martin and J. W. Patillo. Patillo recovered judgment, and Martin brings error. Affirmed.

E. M. Smith and Brown & Brown, for plaintiff in error. Geo. W. Bryan, for defendant in error.

EVANS, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

BRANDON v. PRITCHETT.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. FRAUDS, STATUTE OF—AUTHORITY TO MAKE MEMORANDUM.

There is no statute in this state requiring the authority to make the memorandum required by the statute of frauds to be in writing, and such authority may be conferred by parol.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 187, 254, 255.]

2. SAME—SALE OF LAND—PAROL RATIFICATION.

A parol ratification of a contract for the sale of land, made by one without authority assuming to act for the owner, is valid and binding upon the owner, provided the person assuming to act as agent in behalf of such owner signed a memorandum which, in its terms, complied with the provisions of the statute of frauds, which showed upon its face that it was executed in behalf of the owner.

(Syllabus by the Court.)

3. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—REVOCATION.

An agency for the sale of land, not created upon a valuable consideration, nor coupled with an interest in the land may be revoked upon the mere volition of the principal at any time before the sale is effected. If the agent, by another, submits the property to a proposed purchaser, who agrees to buy upon the terms offered, but, before any written contract is made or any part of the purchase money is paid, the principal revokes the authority to sell and notifies the agent, who in turn notifies the proposed purchaser, no subsequent negotiations between the agent and the purchaser would bind the principal. (Per Atkinson, J., dissenting.)

4. SAME.

Such power of sale as just described, though expressed in writing, may be revoked by parol. (Per Atkinson, J., dissenting.)

5. FRAUDS, STATUTE OF—EXECUTORY CONTRACT TO SELL LANDS.

An executory contract for the sale of land is within the statute of frauds as adopted in this state, and, to be binding, must be in writing.

(a) An agency to execute such a contract is required by the Civ. Code 1895, § 3002, to be in writing.

(b) Express ratification of such an act must be of equal solemnity with that required for the delegation of the original authority necessary to authorize the act in advance of its execution.

(c) An executory written contract for the sale of land by an assumed agent did not become ratified by the mere verbal statement of the owner to the pretended purchaser, after knowledge of the writing by the assumed agent, to the effect that he had decided to make the deed, and would, on the following day, execute the same.

(d) There was no evidence sufficient to require the defendant to execute a deed to the plaintiff, and the court did not commit error in directing a verdict for the defendant. (Per Atkinson, J., dissenting.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Action by D. S. Brandon against T. J. Pritchett. Judgment for defendant. Plaintiff brings error. Reversed.

Daley & Bussey and Peyton L. Wade, for plaintiff in error. Sanders & Davis, for defendant in error.

COBB, P. J. Brandon brought an action against Pritchett, praying for the specific performance of a contract for the sale of a described parcel of land. The judge directed a verdict for the defendant, and Brandon excepted. The case of the prevailing party, taken in its most favorable light, may be thus stated: Pritchett in a writing signed by him authorized Grier to sell a parcel of land at a stated sum, the authority to sell to continue for three days only. Before any contract of sale was made by Grier, Pritchett revoked the authority. The revocation was by parol. After the revocation but within the three days, Grier made a contract with Brandon for the sale of the land, and signed in his individual name a memorandum reciting that he had sold the land to Brandon as the agent of Pritchett, which memorandum, so far as its contents were concerned, would be a sufficient compliance with the statute of frauds. Within the three days, and after the signing of this memorandum by Grier, Pritchett was approached by an attorney representing Brandon, and informed of the contract which Grier had made, and presented with a deed with the request that he sign it. At the time the deed was presented, there was an offer to make a tender of the amount of the money specified in the memorandum signed by Grier, which was the same amount specified in the original paper conferring authority upon Grier to make the sale. Pritchett waived the tender of the money, and agreed that the matter should stand as if a tender which was legally complete had been made. Pritchett declined to sign the deed at that time. On the next day, or the next day but one, the attorney for Brandon approached Pritchett and told him he had a check for the amount of the pur-

chase money, and was ready to pay it over if he would sign the deed, and Pritchett said: "I have concluded that I will sign the deed. I will go to your office in the morning." This statement by Pritchett that he would sign the deed on the following day was within the three-day limit fixed in the writing which conferred the authority to sell upon Grier. Pritchett thereafter refused to sign the deed, and has never signed it.

The general rule of the common law was that an agent might be appointed by parol. Judge Story said, in 1839, that it was absolutely indispensable to the exigencies of commercial business that the rule should be as stated, for, otherwise, the most ordinary transactions would be greatly embarrassed, if not obstructed. Story on Agency (9th Ed.) § 47. If this was true at that day, how much more true is it at the present time? If no one could sign for another a check or promissory note, or bill of exchange, or accept the same or indorse such papers, or sell or buy goods, or write a letter, or procure a policy of insurance, unless authorized by a writing, the operations of the business world would be retarded at every step. There were a few exceptions to this general rule. One was that where the act required a writing under seal, the authority to do the act must generally be conferred by an instrument under seal. But there were even exceptions to this exception. There was also another exception to the general rule, founded upon the strict notions of the old common law; and that was that an agent of a corporation must ordinarily receive his appointment to do any act for the corporation by an instrument under the common seal of the corporation. But this exception has been greatly relaxed in modern times. The statute of frauds requires certain contracts to be in writing, but there is no provision in that statute requiring the authority of an agent to make the contract to be also in writing. The general rule in England as well as in America was and is, that, although a contract for the sale of land must be in writing, an agent may be appointed by parol to make the contract, the general rule being that unless the statute expressly require the authority to be in writing an agent may be authorized by parol to make a contract for the sale of land. Mechem on Agency, § 89; Browne on Statute of Frauds (5th Ed.) § 370; Wood on Statute of Frauds, 778-786; 1 Reed on Statute of Frauds, § 377.

In some states statutes have been passed which require the authority of an agent to make a sale of land, or other contracts within the purview of the statute of frauds, to be in writing. In the absence of such a statute, the common law prevails; and while the contract for the sale of land, to be enforceable, must be in writing signed by the party to be charged, or by some one duly authorized by him, the authority of the agent to sign the writing may be created by parol.

If one assumes to represent another when he has no authority, or, having a limited authority, exceeds its limits, when the person in whose behalf the act is done repudiates the act he is not bound. But if, with full knowledge of all the circumstances he approves the act, he is bound just as if authority had originally been given to the person assuming to act as agent. It is, however, the general rule that the act of ratification must be of the same nature as that which would be required for conferring the authority in the first instance. If sealed authority was indispensable, sealed ratification must be shown. If written authority was required, written ratification must appear. Mechem on Agency, § 136. If there is any law requiring the creation of the agency to be in writing, a parol ratification of the agency would not be sufficient. Mechem on Agency, § 144. In the present case, the evidence authorized a finding that Pritchett had ratified in parol the unauthorized writing made by Grier to sell his land. Grier assumed to act as the agent for Pritchett, after his agency had been revoked. The writing, therefore, goes for nothing, unless there was a ratification. Whether Pritchett would be bound by the parol ratification depends upon whether there is any statute in this state requiring the authority of an agent to make the memorandum required by the statute of frauds to be conferred in writing. If there is no such statute, the rule of the common law, which allowed the agent to be appointed by parol, is still the law of this state. There is no statute in this state changing the common-law rule. *Smith v. Insurance Ass'n*, 111 Ga. 737, 36 S. E. 957. *Watson v. Brightwell*, 60 Ga. 212. The Code declares: "The act creating the agency must be executed with the same formality (and need have no more) as the law prescribes for the execution of the act for which the agency is created. A corporation may create an agent in its usual mode of transacting business, and without its corporate seal." Civ. Code 1895, § 3002. This section did not have its origin in a statute of this state. It appears for the first time in the Code of 1863. It is to be construed as a codification of the existing law, unless there are words in the section which imperatively demand a construction which would change the rule in force at the time the Code was adopted. *Mitchell v. Ga. & Ala. Ry.*, 111 Ga. 760, 36 S. E. 971, 51 L. R. A. 622. There is no language in the section which can be properly construed to change the existing rule of law, except that contained in the last sentence in regard to the appointment of agents by corporations. The language of this sentence is so clear and unequivocal that there can be no doubt that it was intended that the common-law rule before mentioned, in reference to the appointment of agents by corporations, should no longer be of force in this state. The first paragraph of the section is a sim-

ple and concise statement of the rule of the common law in reference to the creation of agents; that is, that if the law requires an instrument to be under seal, the authority to execute the instrument must be by an instrument under seal. If the law requires, in the performance of an act, a writing attested by a witness or witnesses, then the authority to do the act must be conferred by a writing executed with the same formality. The words in parentheses, which in effect declare that the creation of an agency need be executed with no more formality than the act itself requires, clearly indicate that the framer of this section had in mind the common law when the section was penned. For there were writers upon the common law who had laid down the rule that an agent or attorney to do any act, no matter what it might be, must be authorized by an instrument under seal; that is, that the authority to act for another must be by an instrument under seal without reference to the formality required for the act itself. Judge Story calls attention to the utterances of these writers, and pronounces the rule thus stated to be manifestly incorrect. Story on Agency, § 46. The framer of this section of the Code clearly intended, by the use of the words in the parenthesis, to indicate that it was his purpose to codify the true common-law rule, and to repudiate in express terms the rule which Judge Story refers to as having been laid down by common-law writers, and which he pronounces incorrect. If the section of the Code be taken in its literalism, without reference to its history, it may be that a construction could be placed upon it which requires an agency to do a written act to be in writing. But the sections of the Code not having their origin in the statutes of this state, but simply coming into the law as part of a codification, can never be safely construed except in the light of their origin. We do not think that the section in question, properly construed, changes the common-law rule in reference to the creation of an agency to make a memorandum required by the statute of frauds. Such being the case, the ratification of an unauthorized writing which itself complies with the terms of the statute, is binding, although the ratification be by parol. The court erred in directing a verdict for the defendant.

Judgment reversed.

FISH, C. J., absent. EVANS, J., concurs. LUMPKIN and BECK, JJ., concur dubitante.

ATKINSON, J. (dissenting). In a suit for the specific performance of an alleged contract for the sale of land, the evidence showed the following: The defendant, the owner of the land in question, gave written authority, good for three days from date, to one Grier, a member of the firm of Hightower, Grier & Co., engaged in the real estate business, to sell the lot of land at a

stipulated price. There was no consideration for the writing, and no interest in the land claimed by the agent, Grier. On the evening of the same day on which the paper was given, the defendant sent a messenger to Grier, requesting that the paper be returned, and stating that he, the defendant, did not wish to sell the land. Grier replied that he had delivered the paper to his partner, Hightower, who, he suspected, had already negotiated the trade. It appeared that Hightower had in fact found a purchaser, the plaintiff in the case, who had agreed to the terms of the sale as contained in the writing given Grier by the defendant, and also to pay a certain sum to Hightower, Grier & Co. as commission. A short while after this agreement, which was oral, Grier appeared and informed Hightower and the plaintiff of the message which the defendant had sent, withdrawing his consent to sell the land, and requesting a return of the paper. The plaintiff, however, contended that the matter had been concluded, and insisted upon the execution of the agreement as made; and to this end, an attorney at law was secured and a paper drawn up which in substance declared that Grier, acting under the authority conferred upon him by the defendant, had completed a contract for the sale to the plaintiff of the land in question, and that the defendant, upon the timely payment of the purchase money, would make the plaintiff good and sufficient warranty titles to the land. This paper was signed by Grier and witnessed, and is the basis of the present action. At the time such "contract," was drafted, the plaintiff gave as a "partial payment on the trade" his check for \$100, payable to Hightower, Grier & Co., the same being intrusted to the attorney at law. On the following day (which was within the limit of time specified in the original authority to sell) the plaintiff in person made a tender of the purchase money to the defendant; but the latter at that time refused to accept the money or sign the deed, giving, however, no final answer as to what he would do about it. There was testimony, which was not unquestioned, to the effect that, shortly after the refusal of the defendant to sign the deed, he stated to the attorney that he had decided that he would sign it; but this he never did. When the evidence was all submitted, the court directed a verdict for the defendant, and the plaintiff excepted.

1. This is where the plaintiff seeks to compel the defendant to specifically perform a contract which he alleges was executed in behalf of the defendant by an agent having authority to bind the defendant. Under the evidence, it is shown that the defendant by a letter authorized Grier at a named price to sell certain land within a specified time. Grier, through another, within that time had offered the land to the plaintiff, who had agreed to buy. Before the

payment of any part of the purchase money, or reducing the contract to writing, defendant sent a verbal message to Grier, notifying him that he did not wish to sell, and demanding the return of the letter. After this notice, Grier informed the plaintiff thereof, but the plaintiff insisted that the trade was made; and thereupon counsel was called upon to prepare a contract which Grier, the agent, signed and delivered to the plaintiff, who then, at the request of Grier, delivered a check for part of the purchase price into the hands of the attorney at law to await the execution of a deed by defendant. The suit now is to compel the defendant to execute a deed in accordance with the contract which Grier signed. Under these facts, it will be seen that the question is not as to any right which Grier may have, but is solely as to what right has the plaintiff. If the defendant had power and did revoke the authority of Grier to sell before the plaintiff acquired legal rights against the defendant, then it follows that the subsequent dealings between Grier and the plaintiff were nugatory so far as the defendant is concerned. We may then consider whether the defendant had the right to terminate the agency. In considering this question, we will bear in mind that the agency was not one coupled with an interest in the property, nor was it created upon any valuable consideration, or as a part of any security. It was a mere voluntary proposition to allow Grier to sell within a specified time at a fixed price. Such an agency could have been terminated by expiration of the time, or by accomplishment of the purpose, or by subsequent agreement between the parties, or, among other methods, by revocation by the principal without the consent of the agent. In the latter case there could be circumstances under which the agent personally might be wronged, and for which he would have his individual redress against the defendant, but that would not affect a third party dealing with the agent after notice that the authority had been withdrawn, and consequently need not be considered in this case. "As the authority of an agent to act for his principal depends entirely upon the will of the latter, and as it is only for the principal's benefit and in his behalf that the agent should exercise such authority, the agent should not be permitted to exercise it any longer than the principal so wills, in the absence of special circumstances giving the agent such a right * * * Where an authority is given to an agent to sell property of any kind, and the power is not coupled with an interest, as we shall presently see, or is not given for a valuable consideration, such authority may be revoked at any time before the completion of the sale." 1 Clark & Skyles on the Law of Agency, § 157. See, also, section 169c, which is as follows: "A fortiori an authority conferred by a writing not under seal may be dissolved

by parol. Where, under an agreement by a creditor to accept from his debtor, in payment of the debt, property at an appraised value, appraisers are appointed, their authority may be revoked as in the case of a submission to arbitration, and such revocation may be made orally, though the appointment was in writing but not under seal. The demand by the principal for the return of a written power under which an attorney in fact was acting, and its surrender without any further instructions, is a revocation of the power." See, also, in this connection, Civ. Code, 1895, § 3003; *Wilkins v. McGehee*, 86 Ga. 766, 13 S. E. 84; *Ray v. Hemphill*, 97 Ga. 566, 25 S. E. 485. In this court it has been held: "Where money is paid by A. into the hands of B. to remain at the disposal of C. the right to that money continues in A. until B. gives and C. takes credit for it, or B. actually pays it to C.; up to this period, B. is the agent of A. only, and A. may countermand the authority to make the payment; in the same manner as a person who sends another to pay money may stop him before he arrives at the place where it is to be paid, and require him to deliver it back." *Trustees of Howard College v. Pace*, 15 Ga. 486. See, also, the following other cases where the bailee was intrusted with funds to pay to another, and the authority to pay was revoked before executed. *Phillips v. Howell*, 60 Ga. 411; *Cox v. Reeves*, 78 Ga. 543, 3 S. E. 620; *Burke v. Steel*, 40 Ga. 217; *Smith v. Peacock*, 114 Ga. 691, 40 S. E. 757, 88 Am. St. Rep. 53, and cases cited. "To constitute a power coupled with an interest, * * * there must be an interest in the subject of the agency itself, and not a mere interest in the result of the execution of the authority. So, an interest arising from commissions or proceeds of a transaction is not an interest which will prevent revocation." 1 Am. & Eng. Enc. L. 1217, 1218. See, also to this effect, *Wilkins v. McGehee*, supra. Under the facts in this case, there is no reason why the defendant, if he desired, should not have revoked the authority to sell.

2. Having the power to revoke the authority to sell, the evidence shows that the defendant did so. It is stated in 1 Am. & E. Enc. L. 1219, that "revocation may be effected in any manner showing the intention of the principal to withdraw his authority either expressly or by implication; even though the authority be in writing or under seal, it is held that it may be revoked by parol." The evidence in this case discloses a revocation, and also the fact that after notice thereof from defendant, and before any part of the purchase money was tendered by the plaintiff, or any written contract was entered into between the plaintiff and Grier, the latter told the former of the revocation. This should have resulted in an abandonment of further efforts between Grier and the plaintiff, and did render of no effect all their

subsequent actions. See *McEwen v. Kerfoot*, 37 Ill. 530. In that case, it was said: "A party was employed as an agent to sell certain real estate belonging to his principal. The agent negotiated a sale as directed, by a verbal agreement, which the principal afterwards repudiated. Subsequently, the agent executed a written instrument to the purchaser, as evidence of the sale, upon the terms stipulated in the prior verbal agreement. Held, that when the agent found his principal had repudiated the sale, although the repudiation may have been improper, his functions as an agent, so far as regarded that sale, were at an end, and he had no right afterwards, under pretense of protecting the purchaser, or to embarrass his principal, to give the purchaser the written contract." Parol revocation of an agency created in writing is authorized by common law (*Clark & Skyles on the Law of Ag. § 169b et seq.*), and we have no statute changing the rule.

3. As we have seen, the agency was revoked before anything was done thereon to obligate Pritchett to Brandon. When Pritchett revoked the agency, Grier's powers were completely at an end. He could neither execute a contract in the name of Pritchett for the sale of the property, nor accept for him any part of the purchase price. Therefore, unless Pritchett afterwards ratified what Grier, without authority, had done for him, he did not become bound to execute the deed. It becomes material, therefore, to consider whether there was a ratification by Pritchett of the sale as made and reduced to writing by Grier. It is not, and could not under the evidence, be contended that there was any ratification by implication. The sole ground relied on is express ratification by the verbal statement of Pritchett after notice of the written contract which he was called upon to ratify. The verbal statement was to Brandon's attorney, and was to the effect that he (Pritchett) had determined to make the deed, and on the following day would call upon counsel for Brandon and sign the same. It was a mere parol declaration unattended by any consideration or other act tending to the injury or advantage of either party. The question then presented is: Will this parol declaration accomplish a ratification of the written contract, thereby taking the transaction out of the operation of the statute of frauds, and render the agreement enforceable by suit for specific performance? To determine this question, we may only inquire whether the power to make such contract as Grier entered into with Brandon could have been delegated by parol. For it stands to reason that, if the original power would not have been binding unless in writing, the express ratification relied on in this instance would fail for the same reason. The solemnity of the one should be commensurate with that of the other. Both are employed to accomplish the same result. There is no dif-

ference between them except that the one precedes the act to be done, and the other follows the act after it has been accomplished. Both are aimed at fixing the liability upon the principal. There is no sound reason to support the proposition that one should be in writing, and that the other may rest in parol; no reason why the one should be required to be supported by the higher, and the other by the lower character of proof. The law would be nugatory in effect if it provided that the original power should be delegated in writing, yet allowed a mere express parol declaration, unattended by acts amounting to an estoppel, to dispense with the previous written authority. In the case of *Long v. Poth* (Sup.) 37 N. Y. Supp. 672, the following proposition is laid down: "Ratification is equivalent to original authority, and nothing more; and where the statute requires the original authority to be in writing, it would, on principle, require the ratification to be made with equal ceremony"—citing *Haydock v. Stow*, 40 N. Y. 370, 371; *Whitlock v. Washburn*, 62 Hun. 374, 17 N. Y. Supp. 60; *Stetson v. Patten*, 2 Me. 360, 11 Am. Dec. 111; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Parrish v. Koons*, 1 Pars. Eq. Cas. (Pa.) 95; *Videau v. Griffin*, 21 Cal. 389. In *Judd v. Arnold*, 31 Minn. 432, 18 N. W. 151, the court said: "A ratification by the principal of the not properly authorized act of the agent must be by an act of the character required for the original authority. Where that must be in writing, the ratification must also be in writing. *Browne on Statute of Frauds*, § 17; *Fitch, Real Est. Ag.* 57; *McDowell v. Simpson*, 3 Watts (Pa.) 129, 27 Am. Dec. 338; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107, 113; *Ingraham v. Edwards*, 64 Ill. 526; *Holland v. Hoyt*, 14 Mich. 238. To permit an oral ratification would, in many cases, let in the very evils which the statute aims to exclude." In *McDowell v. Simpson*, supra, under a statute declaring that "all leases * * * created by parol * * * shall have the form and effect of leases * * * at will only," the court, in construing a lease made by parol, said: "Notwithstanding, however, this lease for seven years was made without authority, it was still in the power of the plaintiff to ratify and confirm it: and this brings us to the second question, has he done so? It is not pretended that he ever did so by writing; and although he may have done it by parol without writing, yet it is obvious that such confirmation could give to the lease no greater force or effect than if he had made it himself originally by parol without writing; which would, according to the express terms of the act, have given it the force and effect of a lease at will, and nothing more." In the case of *Ragan v. Chenault*, 78 Ky. 545, it is held that "an agent cannot bind his principal as surety for another, unless his authority so to do be in writing (*Gen. St. p. 252*), and a subsequent parol

ratification by the principal of such act of his agent cannot make the original signing effective." For other authorities to the same effect, see *Mechem on Ag.* § 136; *Clark & Skyles on Ag.* § 133; *Huffcut on Ag.* (2d Ed.) § 40 (2); *Hawkins v. McGroarty*, 110 Mo. 546, 19 S. W. 830; *Despatch Line v. Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203; *McCracken v. San Francisco*, 16 Cal. 623; *Palmer v. Williams*, 24 Mich. 329; *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 Am. St. Rep. 416.

We may then put the case at bar upon the proposition as to whether Pritchett could be bound by an authority to Grier to sell the land delegated only by parol, for, if not, then, by force of the reasoning in the authorities cited, he could not be bound by mere parol ratification. It is well settled that at common law such power could have been delegated by parol authorizing Grier to negotiate a sale of land, and to execute with the purchaser a contract, not under seal, binding the vendor to execute a deed conveying the property. *Clinan v. Cooke*, 1 Sch. & Lef. 22; 9 Rev. Rep. 3; *Coles v. Trecothick*, 9 Vesey, Jr. (Sumner's Ed.) 234; *Mortlock v. Buller*, 10 Id. 292; 2 Kent's Com. (14th Ed.) 613; *Story on Ag.* (9th Ed.) § 50; *Brown on Statute of Frauds* (5th Ed.) § 370; *Long v. Hartwell*, 34 N. J. Law, 116; *Clark & Skyles on Ag.* § 169 (b, c). It is also equally well recognized that at common law the contrary is held to be true where the thing to be done is executed under seal, such as the conveyance of land by deed. *Hawkins v. McGroarty*, 110 Mo. 550, 19 S. W. 830, and citations. So, if we only had the common law to deal with, the proposition would not be open to debate; for, unquestionably, the contract which Pritchett executed, being one not, in fact, executed under seal nor required by law to be so executed, authority could have been delegated by Pritchett in parol authorizing the same, or, after the execution of the contract, it could have been ratified by parol. But, by our statute, we have amendments to the common law. If we look to the English statute on the subject of frauds (St. 29 Charles II, c. 3 [Cobb's Dig. 1127]), we will see that there is no reference therein made to the manner of the creation of agencies. Those statutes, being of force in England prior to 1779, were brought to this country, and, being consistent with our institutions, were adopted as a part of our laws, and have found way into our Code and have become binding as statutory law in Georgia. The common law of England of force at the time above indicated, so far as consistent with our institutions, has also become binding upon us by adoption, except as changed by express statute. For the reason suggested, it will be seen that, unless the common-law rule has been changed by statute, this case will be controlled by the common law. It is well recognized that the common law relating to the manner of creating agencies has been

changed by statutes in various states, and the text-writers, while recognizing the common law to be as already stated, deal particularly with the subject as modified by statute. See, in this connection, *Clark & Skyles on the law of Agency*, § 133, where it is said: "In some of the states it is expressly provided by statute that where a contract is required to be 'in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized,' such authority by an agent must also be in writing. From this it follows that where an agent has, without authority, executed such a contract, a ratification thereof must also be in writing, in the absence of some element of equitable estoppel. Thus, where the statute requires that authority to make a lease of lands for a longer period than a certain number of years shall be in writing, such a lease by an unauthorized agent can only be ratified by the owner in writing. A parol ratification of such a lease would give it no greater force or effect than if the owner had himself leased it by parol, which would be to create an estate at will." See, also, *Story on Ag.* (9th Ed.) § 50, where it is said: "Even where a statute, such as the statute of frauds, requires an instrument to be in writing in order to bind the party, he may, without writing, authorize an agent to sign it in his behalf, unless the statute positively requires that the authority should also be in writing." Authorities to the same point may be multiplied, but it is unnecessary to cite others.

This brings us to the question of what changes, if any, have been made in Georgia. Section 3002 of the Civil Code of 1895, which by the adoption of the Code of 1895, has all the force of a statute (see *Cent. R. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518) provides: "The act creating the agency must be executed with the same formality (and need have no more) as the law prescribed for the execution of the act for which the agency is created." Section 2693, par. 4, is as follows: "To make the following obligations binding on the promisor, the terms must be in writing, signed by the party to be charged therewith, or some person by him lawfully authorized: Any contract for the sale of lands, or any interest in or concerning land." Are these statutes applicable to the case at bar? The answer must depend upon the thing to be done. It was to execute an executory contract for the sale of land. If Pritchett in propria persona had attempted to execute the contract so as to make it binding upon himself, by the express language and requirement of section 2693 it must have been in writing and signed by himself; for the contract is one for the sale of land and the contract concerns land. Are not the terms of the statute broad enough to comprehend an executory contract for the sale of land? The answer to the question is that the plain meaning of the words

will admit of no other construction. The contract, although executory, being a promise to do something in the future, is, nevertheless, a contract between parties able to contract, based upon a sufficient consideration, and binding the respective parties to do a particular thing. It is for the sale of something, and relates to something. The thing sold and the thing to which it relates is land. By no ingenuity could the conclusion be escaped that the contract is contemplated by the statute. The greater reason would be that a contract of this kind is exactly what was contemplated in the section of the Code referred to; for it is provided in other sections of the Code that deeds and mortgages and deeds to secure debt must be in writing, and if contracts of that character were the only kinds of contracts which it was intended by the Legislature should be reduced to writing in order to make them binding, it would have been altogether unnecessary to have enacted the statute embodied in section 2698 of the Code. So, we may regard it as not controvertible that executory contracts for the sale of land are contemplated by the plain and unambiguous language of the statute already quoted. We therefore see what Pritchett should have done if he had attempted in person to bind himself to make a conveyance of this land. But suppose, he had desired to execute the executory contract for the sale of land by the agency of another. How should he have authorized the other to act for him? To answer this question we look to section 3002 of the Code of 1895, which deals directly with the proposition. This statute differs from the common law as to the manner of creating agencies. It is not the scheme of the act to specify by name the various agencies contemplated therein, or to specify what may or may not be done under the powers severally authorized, because it does not specifically name any particular one. But that it is intended to apply to all agencies for all purposes is manifest from the broad language of the act. To have undertaken to deal more specifically would have brought confusion, and possibly by omission to provide for certain cases, would have failed to accomplish the object of the law. But to deal generally, and apply the rule to all agencies, by reference to the formality required by law in the execution of the contract to be made, reduces the legislation to greatest simplicity. The authority intended to be delegated was to execute a contract in writing, not under seal, for the sale of land.

Inasmuch as the contract for the sale of land, as we have already seen, must be in writing, it must necessarily follow that the agency created for the purpose of making such contract must also be in writing. In other words, writing is one of the formalities required by the statute to be observed in the creation of an agency for making con-

tracts for the sale of land. The statute (section 3002) is so plain in its terms that it is hardly pardonable to offer to construe it. If it should not be applicable to the creation of agencies like the one at bar, it could never be applied with reason to any other kind. It would be a mere matter of judicial speculation or arbitrary rule to hold that the act was intended to be applied to any particular kind of agency, and not to another. Such ruling would be contrary to the language, the spirit, and the scheme of the act; for, by its terms, it applies to all agencies and requires that each be created in a particular way, to wit, with the same formality as the law requires for the act intended to be accomplished. It is difficult to say how a statute could be better framed to meet all the conditions that could arise in the creation of agencies. That writing is one of the formalities contemplated by the statute is directly ruled in the case of *Duke v. Culpepper*, 72 Ga. 545. In that case the question was upon the execution of a mortgage. The court said: "This mortgage had necessarily to be in writing, and to be duly executed by the party to be bound thereby, or some one lawfully authorized"—citing Code 1882, § 1955, which is section 2724 of the Code of 1895. And further: "A verbal mortgage would not be valid." And further: "The act creating the agency must be executed with the same formality as the law prescribes for the execution of the act for which the agency is created"—citing Code 1882, § 2182, which is the same as section 3002 of the Code of 1895. The court then says: "If a party is to execute a mortgage by an agent, it follows from this that the agent's authority must be in writing." We may safely say that writing is as much one of the formalities to be observed in the execution of a contract for the sale of land, or in the execution of an agency delegating to another authority to make an executory contract for the sale of land, as the act of signing, or as any of the descriptive averments tending to make the contract certain. They are all directed against the dangers of leaving any of the things agreed to be done resting in parol. In the case of *Watkins v. Harris*, 83 Ga. 683, 10 S. E. 447, where the authority of one to enter a credit on a promissory note for the maker so as to create a new promise from which the statute of limitations should run, was involved, the court said: "But the whole matter as to a new promise might as well be left to the testimony of witnesses, as the agent's authority to make an unsigned entry." This expression was used by Judge Bleckley in construing and applying section 2182 of the Code of 1882, which is section 3002 of the Code of 1895, which we now have under consideration. That this section of the Code as a statute has all of the binding effect of an original act of the Legislature was settled in the case of *Central Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 41 L. R. A.

518. In that case it was directly ruled that "the intention of the act of December 16, 1895, adopting the present Code, and making the same of force as the Code of Georgia, is to enact into one statute all the provisions embraced in that Code." It is unnecessary to quote further from that case, but it may be important to call attention to the fact that Acts 1893, p. 119, conferred power upon commissioners "to codify and arrange in systematic and condensed form the laws now in force in Georgia, from whatever source derived." In pursuance of the authority delegated by that act, the commissioners compiled the present Code. After this was done, the result of the labors of the commissioners was reported to the Legislature, whereupon that body passed another bill, which was approved December 16, 1895, adopting the Code. In construing the adopting act, this court made the ruling above quoted. So, we may take it that whatever may have been the common law, and that whatever may have been the rulings of this court before the adoption of the Code of 1895, the law which now binds us on the subject under consideration is the statute law quoted from the Code. All reason demands the interpretation which we have placed upon the two statutes, sections 3002 and 2693, and no other application can be made without violence to the law. The judiciary cannot take them physically from the books; and so long as they remain, their provisions are too lucid and mandatory to be disregarded by the courts. It may be said, therefore, under section 3002, if the thing to be done is required by law to be executed under seal, the agency to do the thing must be executed under seal; where the thing to be done is required by law to be executed in writing, though not under seal, the agency must be executed in writing, though not necessarily under seal; where the thing to be done is not required by law to be done under seal or in writing, the agency may be created by parol.

In view of the manner in which the Code of 1895 was adopted, it is not material to a discussion of this case to consider the older rulings of this court upon the questions which formerly involved the manner of creating agencies; for, in those cases, the rulings were put, not upon the statute of Georgia, but upon the common law. The language of section 3002 first appears in the Code of 1863, and has appeared, without alteration, in each of the subsequent Codes down to the present. In a few instances the language which now appears in section 3002 of the Code was interpreted by the court, and in each case where it was interpreted the court adopted the view that writing was one of the formalities contemplated by the language. The instances referred to are the cases of *Duke v. Culpepper*, supra, *Watkins v. Harris*, supra, and *Moore v. Moore*, 103 Ga. 523, 30 S. E. 535. In this connection, it may be noted that the case of *Foster v. Cochran*, 89 Ga. 466, 15 S. E.

551, is one where an agent made an entry of credit on a promissory note in the name of the maker of the note; and it was held that "inasmuch as an agent's authority to execute a promissory note in the name of his principal need not be in writing, the authority to renew or extend such note, by a new promise need not be in writing, but may be created verbally and proved by parol evidence." This case seems to recognize that writing was one of the formalities essential in the creation of an agency, if the thing to be done was required by law to be in writing. The case was decided on demurrer, and it was alleged in the petition that the credit was entered "under the (parol) direction and by the authority" of the maker, and that the agent signing the name of the maker "was duly authorized." For all that appears, the principal may have stood by and personally directed the signing of his name. That such could be done, unless the provisions of the statute positively forbade, see *Moore v. Moore*, supra. The law of principal and agent would not really be involved. It would be the act of the principal himself. But the ruling is not placed upon an interpretation of the statute as embodied in Civ. Code 1895, § 3002. On the contrary, it is expressly stated in the head-note that the ruling is put upon "the general tenor of judicial opinion inferable from several cases in the Georgia Reports." By reference to all previous cases from which it was possible to make any such inference, it will be seen that the decisions of the court in each instance were ruled in contemplation of the common law, and that there was no thought of applying the statute. The case of *Black v. Holland*, 102 Ga. 523, 27 S. E. 671, was reviewed by this court in *Moore v. Moore*, supra, and reaffirmed, the court placing its ruling upon application of a statute similar in character to the provisions of the statute now under consideration, and declaring that "the statute is not one of limitation. It is a law of evidence having for its object the avoidance of the uncertainties to which parol evidence is exposed." The court further says: "By the language of the statute, the entry of credit must be either in the handwriting of the debtor himself, or, if not in his handwriting, subscribed by himself, or some one lawfully authorized by him to do so. This statute is imperative, admits of no exception, and the court has no power or wish to go beyond its plain letter."

There is a long line of decisions, not herebefore mentioned, which hold to the effect that an agency to execute a contract under seal must be created under seal. See *Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549; *Drumright v. Philpot*, 16 Ga. 428, 60 Am. Dec. 738; *Rowe v. Ware*, 30 Ga. 278; *Pollard v. Gibbs*, 55 Ga. 45; *McCalla v. American Freehold Co.*, 90 Ga. 113, 15 S. E. 687; *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. 758. While these cases, upon that ruling, are in harmony with the statute as now embodied in section

3002 of the Code, they need not be referred to further than to say that they were all adjudicated before the adoption of the Code, and the court placed its decision upon the common law without reference to the statutes now before us. The facts in the case of *Smith v. Farmers' Mutual Ins. Ass'n*, 111 Ga. 737, 36 S. E. 957, which has been adjudicated since the Code was adopted, were such as to authorize the application of section 3002, and the court ruled in principle contrary to the doctrine here maintained; but it will be seen from the opinion in that case that the court placed its ruling, not upon the statute, but squarely upon the common law, quoting *Greenleaf on Evidence* and *Abbott on Evidence* as authority for the right to empower by parol an agent to fill out blanks in a writing already signed by the maker. The opinion in that case, beyond controversy, shows that the court did not consider sections 3002 and 2893 (4) as statutory law and apply them to the questions involved, and the case is not to be taken as a construction of those statutes; nor was the case one involving a contract for the sale of land. We are not bound by its rulings, and cannot ignore the statutes.

In support of the contention that the authority to execute an executory written contract for the sale of land need not be in writing, the majority have cited in their opinion the case of *Watson v. Brightwell*, 60 Ga. 219, where it is said: "The employment of an agent by the principal to sell land need not be in writing, but the agent may recover for services rendered in effecting the sale by virtue of a verbal contract." This citation is no support for the proposition, because it is seen at a glance that the case was not one where it was contended that the agency created was one to execute an executory contract for the sale of land. It was merely an employment of an agent by a principal to do a particular service for him, and the question was one as to payment for the services after they had been rendered. The ruling there made bears no relation to the case under consideration. While in the field of obiter dicta, an expression more in point would have been that of Justice Bleckley in *Dobson v. Dickson*, 62 Ga. 639, where it is said: "The creditor is not the agent of the debtor in entering a credit upon the evidence of debt, certainly, not without express authority in writing."

In 1852 and before there was any statute in Illinois on the subject, the Supreme Court of that state, under the common law, ruled that while a deed to land was required to be in writing, yet an executory contract for the sale of land was not required to be in writing, and accordingly that an agent could in parol be empowered to execute such contract. *Johnson v. Dodge*, 17 Ill. 483. But, after-

wards, in 1869 (*Pub. Acts 1869*, p. 363; 2 *Rev. St. of Ill.* by *Starr & C. Ann. St. 1896*, pp. 1997, 1998, c. 59, par. 2), it was enacted that "no action shall be brought to charge any person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized in writing, signed by such party. * * * After the adoption of this act, it was ruled in *Bissell v. Terry*, 69 Ill. 184, that the act applied to an executory sale of land by an agent, and that the agent's power under the writing would be strictly construed, and it was recognized that such an authority could be created by letter not under seal. In a still later case, *Kozel v. Dearlove*, 144 Ill. 23, 32 N. E. 542, 36 *Am. St. Rep.* 416, it was ruled: (1) "If an agent having written authority to sell lands of his principal, sells the same at a less price, or on different terms than he is authorized, he must have a new and further authority, which must also be in writing under the statute of frauds. A verbal consent of the principal for him to sell on other terms is invalid under the statute." (2) "The owner of lots, in writing, authorized his agent to sell the same at certain prices and upon certain terms. The agent made a sale at a less price and on more favorable terms, and communicated that fact to the principal, who assented to the sale, and verbally directed the agent to execute the contract, which he did. Held, that as the agent's authority to make such a contract was not in writing, the same was void and not enforceable." The Illinois statute quoted above substantially contains with approximate precision the substance of sections 3002 and 2893 (4) of our Code, and the application made by the Supreme Court of that state is in accord with the view herein expressed. In other words, they note the same change by statute from the common law which we have observed.

Finally, from all that has been said, it follows that the verbal statement by Pritchett to counsel for Brandon did not amount to a ratification of the written contract, which Grier had executed without authority; and there being neither authority to Grier nor ratification of his act, Pritchett was not bound to execute the deed, and the court did not err in directing a verdict for the defendant. A majority of the court having reached a contrary conclusion and finding myself unable to agree with the doctrine announced by it, I am constrained, in dissenting, to present the principles which, in my judgment, should have controlled its decision.

BAGGETT v. EDWARDS et al.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. PLEADING—CONSTRUCTION—DEMURRER.

Where pleadings do not make distinct and positive allegations, but are ambiguous or couched in alternative expressions, on demurrer they will be given that construction which is most unfavorable to the pleader.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, §§ 66, 67.]

2. POWERS—POWER COUPLED WITH INTEREST—REVOCATION.

Where the title to land is conveyed to secure a debt, and the instrument is not merely a mortgage, a power of sale for failure to make payment is a power coupled with an interest, and is not revoked by the death of the debtor. *Roland v. Coleman*, 76 Ga. 652; *Willingham v. Rushing*, 31 S. E. 130, 105 Ga. 72, 78; *Orient Ins. Co. v. Williamson*, 25 S. E. 560, 98 Ga. 464, 468; *Brice v. Lane*, 15 S. E. 823, 90 Ga. 294, 295.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Powers, §§ 27, 78.]

3. ADMINISTRATORS—EXECUTION OF POWER OF SALE—TIME.

The execution of the power to sell is not a suit against the administrator of the deceased debtor, so as to require a delay of 12 months before action can be taken. *Roland v. Coleman*, supra.

4. WRIT OF ERROR—QUESTIONS CONSIDERED—EXCEPTIONS.

The presiding judge held that the advertisement which had been made under the power of sale contained in the security deed was not legal, and, there being no exception to this ruling, no decision on that subject is necessary.

5. EQUITY—DISMISSAL OF PETITION.

Where, under a power of sale contained in a deed made to secure a debt, a creditor was proceeding to advertise the property for sale on a certain date, but the advertisement was not good because not made a sufficient length of time before the date of sale, and where, upon an equitable petition, the sale was temporarily restrained until after the date set for the sale, and the petition was without equity except for the purpose of preventing the sale under the insufficient advertisement at the time fixed in it, which had passed, there was no error in dismissing the petition on demurrer at a later date, there being no purpose to subvert by retaining the case in court after it had accomplished all it could, and when there remained nothing further which would authorize a court of equity to act.

6. COSTS—AWARD.

The judgment rendered does not award costs, but, inasmuch as the presiding judge held that there was sufficient ground for the filing of the petition to prevent the sale under an insufficient advertisement on the day named in it, in adjudging which party shall be required to pay the costs he will doubtless take this fact into consideration. In affirming the judgment, the question as to awarding costs is left open for future determination by the judge.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. C. Baggett, administrator, against J. L. Edwards and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Baggett, as the administrator of Scogin, deceased, filed his equitable petition against Edwards, a nonresident, and McDaniel, his

resident attorney, alleging in brief as follows: Edwards claims that the intestate is indebted to him in the sum of \$349 as principal, and interest, upon a promissory note dated January 12, 1901, and due January 12, 1904, and also in the sum of \$6.55 for certain taxes; that to secure the payment of these sums the intestate in his lifetime, on January 12, 1901, made to him "a mortgage or security deed" to two described parcels of land; that there is in the conveyance a power of sale authorizing him, his agent or attorney, if the debt should not be paid when due, to sell the lands at public outcry to the highest bidder for cash, for the purpose of paying such debt, "after first advertising the time and place and terms of said sale in some paper published in Fulton county, once a week for four weeks previous to the time appointed for said sale;" and that the conveyance contains a power of attorney constituting the defendant attorney in fact for the deceased to make title to the purchaser of the lands if sold under the power of sale. The intestate died January 12, 1904, "and said defendant, as petitioner is informed and believes, does not claim there was anything due on said debt at the time of his death." Edwards threatens and intends to sell the lands under the power of sale, claiming that the amounts above stated are past due and unpaid, and has through his agent and attorney advertised in the "Atlanta Constitution" to sell the lands on the first Tuesday in August, 1905. This advertisement appeared first in the newspaper on July 7, 1905, and the time fixed for the sale as stated therein is the 1st day of August, 1905, being only 25 days from the date of the first insertion. The plaintiff avers that the sale will be illegal, and will cast a cloud upon the title; that the power of sale in said "mortgage or security deed" is revoked by the death of the maker; that the appointment of the creditor attorney in fact to execute a deed to the land when sold was revoked by the death of the maker; that as administrator has 12 months from the date of his appointment within which to look into the affairs of the estate and pay the debts due by the intestate, during which time he is exempt from suit and protected from any proceeding to sell the property of said estate save by a judgment of the court; that if the lands are sold they will bring but little; that he is informed and believes that they are worth \$1,500. He avers, on information and belief, "that the amount claimed to be due by said defendants upon said debt is more than is really due and owing by said estate." The prayers are that defendants be enjoined from selling the lands on the first Tuesday in August, 1905, or at any other time under the power of sale; that the defendants be enjoined from interfering with the plaintiff's right to administer the interest, equity, and property right of the intestate; that Edwards be required to come

into court and prove what amount, if any, is due by the estate of the intestate upon said debt; for general relief, and for process. By amendment it was alleged that petitioner as administrator has been in possession of the lands since August 10, 1905, and has received the rents therefrom for the estate; that the lands are a part of the assets of the estate; that there are debts due by note and open account by the estate, and there is not sufficient personal property to pay them; and that it is necessary to administer the lands for that purpose. A temporary restraining order was granted on July 31, 1905. A demurrer was filed which came on to be heard November 20th thereafter. The presiding judge sustained the demurrer and dismissed the petition. In his order he stated that the advertisement as set out in the petition was illegal, but that, the date on which the sale was to have been made having passed, no benefit could result from retaining the petition. The plaintiff excepted.

Lavender R. Ray and J. S. James, for plaintiff in error. Dorsey, Brewster, Howell & McDaniel, for defendants in error.

LUMPKIN, J. (after stating the facts). The plaintiff sought to prevent a sale under a power contained in an instrument made by his intestate for the purpose of securing a debt. He did not set out in the petition the instrument itself or the power. He merely alleged that the defendant Edwards claimed that Scogin, plaintiff's intestate, made to him "a mortgage or security deed" to the lands involved; and that in the conveyance a power of sale was claimed to be included. He refrained from informing the court exactly what the instrument was, and referred to it in the alternative as a mortgage or deed. There is a difference between the two in respect to a power of sale. In a deed to secure a debt, which passes title, the power is coupled with an interest and is not revoked by the death of the maker. *Roland v. Coleman*, 76 Ga. 652. In a mere mortgage it is otherwise. *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84. The allegation, being in this ambiguous or alternative form, must be taken most strongly against the pleader; and this being done, the instrument in question may be considered as a deed conveying title, and the power as coupled with an interest. The case above cited is also controlling on another point raised, namely, that a proceeding to sell under a power contained in a deed made to secure a debt is not a suit or in the nature of a suit, and the creditor is not compelled to wait until 12 months after the administrator has qualified, in order to sell under the power. In *Greenfield v. Stout*, 122 Ga. 306, 50 S. E. 111, it was said: "Where the grantor in a security deed dies after the execution of the deed, in exercising the power of sale the property should be sold as that of his estate." This disposes of the contention that

after his death it could not be sold as his property.

There was no equity whatever in the petition except as to one point. The sale was advertised to take place on a specified date. The trial court ruled that the advertisement was not such as to authorize a sale at that time under the terms of the instrument. But as the sale was restrained and the time so advertised had passed, he considered that it would be a vain thing to retain the petition merely to declare that it would have been illegal if a sale had taken place. He therefore dismissed the petition on demurrer. This ruling was right. But, inasmuch as the court held that there was an error in the advertisement, and there was a proper ground for filing the petition to enjoin the sale at the time it was advertised to take place, the presiding judge will doubtless award costs in view of this situation. He did not include in his judgment any statement as to costs, and therefore there is no ruling on that point for us to review.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

ALBRIGHT-PRIOR CO. v. PACIFIC SELLING CO.

(Supreme Court of Georgia. Aug. 17, 1906.)

1. PROCESS—RETURN—NECESSITY—JURISDICTION.

"In order for the court to obtain jurisdiction of the defendant, he must not only have been served in the manner pointed out by law, but there must be a legal return of such service."

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, §§ 155-163.]

2. JUDGMENT—PROCESS TO SUSTAIN—MODE OF ACQUIRING JURISDICTION—LEVY OF ATTACHMENT.

In cases of attachment, where no personal judgment is sought, the levy takes the place of service.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 33.]

3. SAME—ENTRY OF LEVY—DESCRIPTION OF PROPERTY—SUFFICIENCY.

When an attachment is issued against two defendants and is levied upon property, and the entry of levy simply described the property as the property of the defendant, such an entry is insufficient as a basis for a judgment on the attachment against either of the defendants.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 33.]

4. SAME—GARNISHMENT.

When an attachment has been issued against a nonresident and executed by service of summons of garnishment, the court is without jurisdiction to render a judgment on the attachment, until it appears from the answer of the garnishee that the property or effects of or a debt due the defendant, within the jurisdiction, have been seized under the garnishment.

5. SAME—ATTACHMENT—AMENDMENT OF ENTRY OF LEVY.

The entry of a levy of an attachment upon personal property is amendable, but the amendment will not relate back to make valid a judgment rendered on the attachment, entered at a time when no legal levy appeared to have been made.

6. ATTACHMENT—MODE OF OBTAINING JURISDICTION.

In attachment cases the jurisdiction of the court depends upon the proceedings prior to the return term. If no property of the defendant has been seized nor a levy made or summons of garnishment issued prior to that time, all subsequent proceedings are invalid.

7. JUDGMENT—MOTION TO SET ASIDE—AMENDMENT.

A motion to set aside a judgment is amendable by the addition of grounds other than those taken in the original motion.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the Albright-Prior Company against the Pacific Selling Company. Judgment for defendant, and plaintiff brings error. Affirmed.

On October 28, 1904, Albright-Prior Company sued out an attachment against the Pacific Selling Company, a nonresident corporation, and Thos. Roberts & Co., a nonresident partnership, claiming an indebtedness of \$1,000. This attachment was levied by serving summons of garnishment upon three railroad companies, and "also by levying on the following property as the property of the defendant: 50 cases of canned salmon, contained in southern car No. 24,425," etc. The attachment was returnable to the January term of the city court of Atlanta, which begins the first Monday in January. At that time none of the railroad companies answered the summons of garnishment. On January 25, 1905, the attachment was further levied by serving summons of garnishment upon the Atlanta National Bank. On February 24, 1905, the plaintiff filed its declaration in attachment. At the March term, which was the trial term, the Atlanta National Bank answered, admitting possession of \$1,538.60 belonging to the Pacific Selling Company; and as the latter company failed to answer the suit, a judgment was rendered against it on April 14, 1905. On May 29, 1905, the Pacific Selling Company filed a motion to vacate the judgment against it, upon the ground that no jurisdiction had been obtained against the movant by levy upon any of its property. It was alleged in the motion, that the salmon levied upon was not the property of movant, but was the property of Roberts & Co; that no property of movant was seized by the garnishment upon the railroad companies; and that on the first Monday in January, 1905, the date on which the attachment was returnable, no property of movant had been seized. It was also alleged that while the attachment was sued out for \$1,000, the petition showed an indebtedness of only \$900, and the judgment should be vacated upon this ground. It was further alleged, by amendment, that the entry of the constable, wherein it appeared that he levied upon the canned salmon "as the property of the defendant," was void for uncertainty, there being two defendants. To the motion and amendment the plaintiff filed general

and special demurrers, which were overruled. An answer was also filed, denying the material allegations of the motion. The levying officer, who had been made a party, offered to amend his entry so that it would appear that the canned salmon had been levied as the property of the Pacific Selling Company. This amendment was disallowed. After a hearing, the judgment was vacated as prayed. Albright-Prior Company excepted each of the rulings stated.

Moore & Pomeroy, for plaintiff in error. J. W. Moore, and Geo. Gordon, for defendant in error.

COBB, P. J. (after stating the foregoing facts). 1. To authorize a judgment against a person who has not appeared and answered or otherwise submitted himself to the jurisdiction of the court, there must be not only a service upon such person, but also a legal return of such service. Until service has been made, and a legal return entered, the court is without jurisdiction to enter a judgment against a defendant who has not appeared. *Wood v. Callaway*, 119 Ga. 803, 47 S. E. 178, and cases cited.

2. In attachment cases the levy takes the place of service. When no steps have been taken in an attachment case to acquire jurisdiction of the defendant's person, and he has not appeared and answered, or otherwise submitted himself to the jurisdiction of the court, the court is without jurisdiction to render a judgment until there has been a lawful seizure of property owned by him within the jurisdiction of the court, and then only after a lawful return of such seizure has been duly entered. *Tuells v. Torras*, 113 Ga. 691, 39 S. E. 455, (4).

3. It is essential to the validity of the levy of an attachment issued against a nonresident that the entry of levy should show that the property was levied on as the property of the defendant in attachment; and this is so whether the property be realty or personalty. *Drake on Attachments* (7th Ed.) § 449. In the absence of such a return the court has no jurisdiction to render a judgment in the case. *Tuells v. Torras*, supra. When an execution against several defendants is levied, it is essential to the validity of the levy that the entry should disclose to which of the defendants the property seized belonged. A mere general levy upon the property without describing it as the property of the defendant is invalid, and a sale thereunder will not divest the title of the real owner of the land. *Cooper v. Yearwood*, 119 Ga. 44, 45 S. E. 716. It necessarily follows from what was laid down in the decision cited, that when an attachment against two defendants is levied, and the entry of levy simply shows that certain property was seized as the "property of the defendant," not disclosing which defendant was referred to, the levy fails to disclose a valid

seizure of the property of either defendant, and is insufficient as the basis of a judgment on the attachment. There being, at the time that the judgment on the attachment in the present case was rendered, no entry of levy other than the one above described, the judgment was void, it not appearing from the entry of levy that any property of the defendant against whom the judgment on the attachment was rendered had been seized, and the court was therefore without jurisdiction.

4. It is said that the judgment is authorized, because there was an entry of service of garnishment upon three railroad companies, and the garnishees had not answered, and that the judgment was valid, and would be operative upon any property that would thereafter be disclosed by the answer of such garnishees. The garnishees not having answered, it was impossible at the time the judgment was rendered to determine whether any property of either of the defendants had been seized, and until this fact appears the court is without jurisdiction to render the judgment. *Henry v. Lennox-Haldeman Co.*, 116 Ga. 9, 42 S. E. 383.

5. The levy having been made upon personal property and the entry therefore being mere evidence of seizure and not the seizure itself, it is amendable. The jurisdiction of the court depending upon both the seizure and the entry, the amendment would not relate back so as to render the judgment valid. The case of *Jones v. Bibb Brick Co.*, 120 Ga. 321, 48 S. E. 25, was not an attachment case, and in addition to this the motion to set aside the judgment showed affirmatively that the garnishee had been properly served.

6. But it is said that the summons of garnishment issued against the bank resulted in an answer disclosing assets in the hands of the bank belonging to the defendant against whom the judgment in attachment was rendered, and therefore the court had jurisdiction to render the judgment. The Code declares that when affidavit and bond to obtain garnishment have been given, summons of garnishment may issue from time to time before trial, without giving any additional bond. Civil Code, 1895, § 4709. In *Alston v. Dunning*, 35 Ga. 229, it was held that summons of garnishment founded on an attachment may issue after the return term of the attachment without additional affidavit and bond. In that case the attachment was levied upon certain personal property of the defendant, and was also executed by service of summons of garnishment, all of this being done before the return term. The garnishments were subsequently dismissed, and after the return term new summons issued directed to the same garnishees. The jurisdiction of the court depends upon the proceedings had prior to the return term. *Waples on Attachment* (2d Ed.), § 295; *Drake on Attachments* (7th Ed.), § 451 (6); 1 *Wade on Attachment*, § 128; 2 *Wade on*

Attachment, § 336. *Nance v. Barber*, 26 S. W. (Tex. Civ. App.) 151. If there was no seizure of the property of the defendant before the return term, the court is without jurisdiction in the matter, and all subsequent proceedings are invalid. Hence, when the court had failed to acquire jurisdiction at the return term, summons of garnishment issued after that time would be invalid. It would be otherwise, however, if the court had acquired jurisdiction. In the case above cited, in 35 Ga., the validity of the attachment was not brought into question, and therefore the decision cannot be treated as authority for the proposition that a seizure of personal property before the return term which is claimed by a third person and the claim subsequently sustained, would give the court jurisdiction to render a judgment on the attachment. If there has been a levy upon tangible personal property under the attachment and before the return term, the court would have jurisdiction to render a judgment on the attachment, provided the legal return of such levy was made before the return term, or thereafter entered nunc pro tunc before the judgment. If the attachment has been executed by serving summons of garnishment, it is, of course, not essential to jurisdiction that the fact that effects of the defendant have been seized under the garnishment should appear before the return term. But the jurisdiction of the court is in abeyance until the fact that there are effects in the hands of the garnishee appears by answer, or by judgment on a traverse to the answer. If the court acquires jurisdiction before the return term as a result of a seizure under levy of tangible personal property, judgment may be so entered that it will operate upon funds thereafter brought in under answers of garnishees. *Steers v. Morgan*, 66 Ga. 552. The seizure of the personalty would give the court jurisdiction to render an absolute judgment as to the property so seized, and a provisional judgment as to that which might thereafter be brought in under proceedings against the garnishees. However, if the attachment is executed by service of summons of garnishment only, then no judgment can be rendered until it is made to appear to the court that the effects of the defendant have been seized under garnishment proceedings. In the present case the court did not acquire jurisdiction as to the property levied on, for the reason that there had been no legal entry of the levy prior to the judgment. At the time the judgment was rendered it did not appear from the answer of the garnishees who had been summoned to answer at the return term that any of the effects of the defendant were in their hands. The validity of the garnishment sued out after the return term depending upon the jurisdiction of the court having been acquired before the return term, the court was without authority to enter judgment on the answer of such garnishee, until

it appeared from the answer of the other garnishees whether such jurisdiction had been acquired.

7. An amendment was offered to the motion to set aside the judgment, in which other grounds were added to the motion. Objection was made to this amendment, on the ground that it added a new cause of action. We do not think the law prohibiting the addition of new causes of action by amendment has application to a proceeding of this character, and the court did not err in allowing the amendment.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

SOUTHERN EXPRESS CO. v. B. R. ELECTRIC CO.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. CARRIERS—CARRIAGE OF GOODS—FAILURE TO DELIVER—ACTION—VENUE—APPEARANCE—EFFECT.

Under the general law embodied in Civ. Code 1895, § 2004, every express company doing business in this state is subject to suit for a failure to perform its public duties as a common carrier, either in the county where goods are received for shipment or in the county where delivery of the goods are directed to be made. This is true, notwithstanding provision be made in a special charter granted to a particular company that it shall be liable to suit in any county wherein it may tortiously injure the person or property of another or where any contract to which it is a party may be made or is to be performed; and, were this otherwise, it would be too late, after verdict, to question the jurisdiction of a court which was competent to deal with the subject-matter of a suit against a company which voluntarily appeared and made defense.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 148.]

2. MUNICIPAL CORPORATIONS—AUTHORITY OF OFFICERS.

The superintendent of a municipal electric lighting plant has, in the absence of authority to deal with the public in behalf of the municipality, no implied power to accept for it a shipment of electric apparatus not consigned to him or the municipality.

3. EVIDENCE — PRESUMPTIONS — EVIDENCE WITHHELD.

It is not incumbent on a plaintiff, after the defendant has failed to make out a prima facie defense, to offer any counter evidence to that upon which he relies; and therefore the rule that an unfavorable inference may be drawn against a party who fails to produce available proof has no application.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the B. R. Electric Company against the Southern Express Company. Defendant's motion for a new trial was overruled, and it brings error. Affirmed.

According to the allegations of the petition filed in this case, the B. R. Electric Company, on November 25, 1903, delivered to the Southern Express Company a certain shipment of the value of \$214, addressed to the Elberton City Electric Light Company,

Elberton, Ga.; but the express company did not make delivery of the shipment to the consignee, and upon subsequent demand of plaintiff, made in Atlanta, Ga., failed and refused to return the property to the plaintiff or to pay the value of the same. The defendant filed an answer in which it made general denial of the allegations upon which the plaintiff relied for a recovery. At the trial a salesman of the plaintiff company testified that the shipment consisted of several "transformers" and some other electrical apparatus, which he had sold to a man who, according to his recollection, gave his name as Pearson, and represented himself as being connected with the Elberton City Electric Company. This man, the witness stated, mentioned that a carnival was to take place in Elberton—said the electric light plant at that place was being overhauled, and the goods ordered were to be used in furnishing light for the carnival. The fact was developed by another witness that the only electric lighting plant in Elberton was owned by the city and was under the supervision of G. W. Hubbard, the city's electrician, and his assistant, J. P. Cleveland, neither of whom authorized any one to purchase the apparatus. There was, in point of fact, no corporation or association known as the Elberton City Electric Light Company, and the city did not conduct its lighting plant under that name. The Robinson Carnival Company, of which Pierce was the representative, was engaged by the Daughters of the Confederacy to give a carnival in that city, and the apparatus ordered from the plaintiff was used in furnishing light for that occasion; but this was not done under the direction or with the sanction of the municipal authorities, who had merely agreed with the promoters of the enterprise to furnish the power for the lights, and were under no obligation to secure any additional apparatus which might be needed. The shipment arrived in Elberton during the night of November 25th. The local agent at that point testified that on the following morning he inquired of Hubbard, the city electrician, where he wished the apparatus to be placed; that he replied he had other business to look after, but that Mr. Cleveland would be on hand to show the agent where to put it; that the apparatus was hauled on an express wagon to the public square, where Cleveland was found, who pointed out the place where he wished the apparatus delivered, and who assisted in unloading it; that the express charges had previously been paid by the treasurer of the carnival company, who, on being asked where he wished the shipment delivered, had replied that Mr. Hubbard would show where it was wanted; that nothing was said about the ownership of the apparatus, and it was left with Cleveland upon the public square, neither he nor any one else receipting for the shipment. The city electrician, on the other hand, denied that he had told

the local express agent that Cleveland would point out the place where the apparatus was needed, and further testified that he, upon being informed by the agent that the transformers had arrived, told him they had not been ordered by the city and he was not expecting any such shipment. The apparatus was used by the carnival company for several nights, and was shipped away by that company when it took its departure from the city. Some time afterwards, but before suit, demand for a return of the shipment was made by a representative of the plaintiff upon the superintendent of the express company at his office in the city of Atlanta. In submitting the case to the jury, the trial judge left them to determine the question whether or not it was within the scope of the authority of Hubbard, as superintendent of the electric power plant, to receive the shipment, and instructed them that should they conclude as matter of fact that he had such authority, and that delivery was made to him or some one else for him, upon his order, the delivery of the shipment so made would discharge the defendant company from liability, but that this would be otherwise if he had no authority to receive the shipment, or it was not in fact delivered to him or upon his order. The only direct evidence touching the extent of his authority with respect to this particular shipment was his own testimony, during the course of which he stated most positively that he had no power or authority from the city of Elberton to direct the agent of the Southern Express Company to deliver any part of the shipment to any one, and had no right to give any one else authority to receive the shipment. What were his precise duties, or what powers he exercised as city electrician and superintendent of the municipal lighting plant, does not appear. The jury returned a verdict in favor of the plaintiff, and the case comes to this court upon exceptions taken to the overruling of a motion for a new trial made by the defendant.

De Bignon & Alston, for plaintiff in error.
Walter T. Colquitt, for defendant in error.

EVANS, J. (after stating the facts). 1. The plaintiff's petition was framed under a general law which provides that "the court sitting in the county where goods are received for shipment, or where goods are to be delivered, shall have jurisdiction over all express companies, which now do or may hereafter do business in this state, and the judgment shall bind all the property of said companies." Civ. Code 1895, § 2004. This general law was of force when, in 1886, the Southern Express Company was granted a charter which provided that suits against it might be commenced and served in the same manner as suits against railroad companies could then be instituted. Acts 1886, p. 209. After the defendant company had taken its chances for a favorable verdict, it for the first time

sought, by its motion for a new trial, to raise the point that it could not be sued in Fulton county for a conversion which took place in Elbert county. By accepting its special charter the express company subjected itself to suit, in common with railroad companies, in any county wherein it might tortiously injure the person or property of another, or where any contract to which it was a party was made or was to be performed. Code 1882, § 3406. But the company was not relieved of its liability, under the existing general law, to be sued for a failure to perform its public duties as a public carrier, either in the county where goods might be received by it for shipment or in the county where the goods were to be delivered to the consignee. Furthermore, the defendant should have raised the question as to jurisdiction before verdict, as it had full opportunity to do by a motion to dismiss the action after it appeared from the evidence that the plaintiff relied for a recovery upon a conversion occurring in the county where delivery of the shipment was to have been made. *Mitchell v. Andrews*, 94 Ga. 612, 20 S. E. 130; *East Tenn. Ry. Co. v. Suddeth*, 86 Ga. 388, 12 S. E. 682; *McGahee v. Lumber Co.*, 112 Ga. 513, 37 S. E. 708; *Campbell v. Mercer*, 106 Ga. 106, 33 S. E. 871. The court certainly had jurisdiction of the subject-matter of the suit, and it was competent for the express company to waive jurisdiction of the person, as it effectually did. The provisions of the act of 1892, now embodied in Civ. Code 1895, § 2334, to the effect that a judgment against a railroad company "shall be utterly void," if rendered in any county other than that in which the cause of action originated, have not, of course, any application to the present case, since the charter of the Southern Express Company referred to the law of force at the time it was granted.

2. It is inferable from the testimony adduced on the trial that the person who ordered the goods from the plaintiff was Pierce (or Pearson), the agent of the carnival company, who fraudulently represented that he was connected with the "Elberton City Electric Company." The municipal authorities of Elberton authorized no one to purchase any apparatus to be used during the proposed fete. The shipment was directed to the "Elberton City Electric Light Company." There was no company of that name in Elberton, and the local agent at that place was not warranted in assuming that the apparatus had been ordered by the municipal authorities and was intended to be used by them in connection with the city's electric light plant. He nevertheless undertook to make delivery to the assistant of Hubbard, the city's electrician, who was the superintendent of its power plant. That the superintendent had no actual authority to receive the shipment, or direct its delivery to any one else, was shown by his positive and uncontradicted testimony.

Counsel for the plaintiff in error insists, however, that it was within the apparent scope of the authority of this superintendent to receive the shipment in person or to direct to whom it should be delivered. He was a public official, and the company's agent knew him as such. "In dealing with public agents, every person must take notice of the extent of their power at his peril." *Laing v. Americus*, 86 Ga. 758, 18 S. E. 107. The general rule that a private corporation will be bound by the acts of an agent within the apparent scope of his authority does not apply to the acts of a public agent of a municipal corporation, whose authority is fixed by law. 1 Dill. Mun. Corp. (4th Ed.) § 455; 1 Smith, Mun. Corp. § 250. The act of the General Assembly authorizing the city of Elberton to construct and maintain an electric light plant provided that, after its construction, the council should "employ some competent person or persons to operate the same." 2 Acts 1890-91, p. 531. Upon the council itself was conferred the power to purchase all necessary machinery, dynamos, wires, and all other implements and appliances for the construction and operation of its system of electric lights, and merely the physical operation of the plant was to be confined to some official or officials competent to take charge of and manage the machinery and appliances to be furnished in the first instance and afterwards from time to time supplied by council. It was clearly not within legislative contemplation that the person or persons selected to "operate" the plant should supplant the council in attending to the financial affairs of the enterprise, or have any power to contract in behalf of the city, or have any dealings with third persons concerning the project. Only the council had the power to purchase any needed electrical apparatus or to direct to whom shipments intended for the use of the municipality should be delivered. So far as appears, the council had never held out the superintendent or his assistant as an agent authorized to deal with the public in any way, nor in any manner led the representatives of the Southern Express Company into the belief that either had power to bind the city by accepting and receipting for goods consigned to the municipality upon order of its governing officials or otherwise. To hold that Hubbard, the city electrician, had implied authority to bind the city by accepting delivery of goods intended for its use, would be to declare that the municipality became liable to pay the B. R. Electric Company for the shipment in question, notwithstanding the municipal authorities did not order the shipment, did not know the circumstances un-

der which the apparatus had been purchased, and had no opportunity of declining to accept the shipment or to explain that it was not intended for use by the city in connection with its lighting plant. Clearly the city could not be sued in assumption for the value of the apparatus, upon the idea that any official having authority to bind it by his acts had taken possession of the property and had devoted it to the use and benefit of the city. The record shows that the carnival company assumed control over the apparatus, used it during its engagement in the city, and fraudulently shipped the property away before it could be reclaimed by the plaintiff company. Even had the shipment been sent to the city as consignee, directed to it in its appropriate corporate name, the local express agent would have been unwarranted in making delivery to any city officer who had not been by council expressly authorized to accept the shipment in behalf of the municipality, or who had previously been held out to the public as its duly accredited agent to attend to such matters. The charge of the court touching the apparent authority of Hubbard to accept the shipment or direct to whom it should be delivered was more favorable to the defendant company than it had a right to expect.

3. The assistant superintendent, Cleveland, who directed the local express agent where to unload the apparatus, was not called as a witness by either side, nor shown to be inaccessible. Upon this circumstance the defendant based a request to charge the jury as follows: "In arriving at the verdict in this case, you must take into consideration facts proved, and you must consider the absence of counter evidence, if there be any such, for the purpose of inferring the existence or nonexistence of other facts reasonably and logically consequent on those proved." The rule of evidence which the defendant thus sought to invoke is stated somewhat more mildly in Civ. Code 1895, § 5157. Obviously it had no application to the facts of the present case, since the defendant did not make out a prima facie defense which the plaintiff was under any necessity of attempting to meet, either by introducing Cleveland as a witness to disprove the statements of the express agent and others as to the circumstances attending the attempted delivery of the shipment, or by producing any other available counter evidence. In fact, under the evidence submitted, a verdict in favor of the plaintiff was practically demanded, and there was no occasion for confusing the jury by giving the charge requested.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

WILSON v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Oct. 16, 1900.)

1. RAILROADS—KICKING CARS OVER CROSSING—NEGLIGENCE.

To kick cars over a much-used crossing is negligence.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 884.]

2. TRIAL—INSTRUCTIONS AS A WHOLE.

As a charge must be considered, not by sections, but as a whole, an instruction that, if the jury found certain things, they should answer in the affirmative the first issue, which was, "Was plaintiff injured by the negligence of defendant?" is not objectionable as ignoring the necessity of determining the proximate cause of the injury, because making no reference to it, the jury having just before been told in unmistakable terms that they must find that such negligence produced the injury complained of, and that such negligence was the proximate cause of the injury, before they could answer "Yes" to the first issue.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, §§ 703-706, 709.]

3. SAME.

The jury will not be considered to have inferred that the court was stating it to be its opinion that defendant had treated plaintiff as an outlaw, because of the statement, in an instruction given at the request of plaintiff in an action for injury by a car at a crossing, that "the fact that plaintiff was deaf does not make him an outlaw, neither does it lessen the responsibility of defendant to warn him of approaching danger," the charge immediately preceding being clear, fair, and impartial in its general tenor.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Trial, §§ 703-705.]

4. RAILROADS—CROSSING ACCIDENT—NEGLIGENCE—INSTRUCTION.

An instruction, in an action for injury from being struck by a car kicked over a crossing, that, if the jury find that defendant was operating the train which injured plaintiff in violation of an ordinance, and did not have a man on the end of the car approaching the crossing, as required by the ordinance, this alone was a sufficient circumstance from which the jury might infer negligence, is correct; the ordinance being but an affirmation of the general law of the state, and the jury not being told that such violation was per se negligence, but that negligence might be inferred from no man being on the end of the car.

5. DAMAGES—INSTRUCTION—CONSTRUCTION—AUTHORIZING PUNITIVE DAMAGES.

An instruction that, in considering the question of damages and the amount to be awarded, if the jury are satisfied that plaintiff is entitled to any damage, they may consider whether the injury was due to such negligence as amounts to little more than an accident, or such negligence as shows wanton disregard of plaintiff's rights, and, if they find that defendant's conduct was such as to indicate a reckless disregard of its duty to plaintiff, they may, if they feel disposed, increase the allowance of damages for that reason, authorizes the allowance of punitive damages.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Damages, § 543.]

6. TRIAL—INSTRUCTIONS—APPLICABILITY TO PLEADINGS AND EVIDENCE—GROUNDS FOR PUNITIVE DAMAGES.

Authorizing the jury to find punitive damages, in an action for being struck by a car at a crossing, is error, where there is no allegation in the complaint and no evidence that

the injury was willfully, wantonly, and recklessly inflicted in utter disregard of plaintiff's rights.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 584-612.]

7. TRIAL—INSTRUCTION AS CURING ERROR IN CHARGE.

Error of a charge in authorizing the jury to find punitive damages, without using the term, is not cured by the court, on being requested by plaintiff at the end of the charge to charge that plaintiff could recover punitive damages, saying that it would charge that punitive damages must not be allowed; the jury's attention not having been called to this as a correction of the charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 705.]

Appeal from Superior Court, New Hanover County; Webb, Judge.

Action by C. D. Wilson against the Atlantic Coast Line Railroad Company, for an injury received by plaintiff at the crossing of defendant's tracks over Nutt street in the city of Wilmington. The issues of negligence, contributory negligence, and damages, the form of the first being, "was the plaintiff injured by the negligence of the defendant?" were submitted to the jury, who found in plaintiff's favor, and assessed his damages. From the judgment thereon for plaintiff, defendant appeals. Partial new trial.

Davis & Davis, for appellant. Rountree & Carr, W. J. Bellamy, and W. Kellum, for appellee.

BROWN, J. The plaintiff was walking on Nutt street in the city of Wilmington, at a locality where many of defendant's tracks cross it leading to the wharves on the Cape Fear river, when he was run into by a car and knocked down and injured. There are no exceptions to the introduction of evidence, and the errors we are asked to review are confined to the charge of the court.

The evidence is very conflicting as to how the injury was occasioned, as to speed of the moving car, as to whether it was an attempt to make a running switch, and as to the vigilance of the flagman and the other servants of the company. There was evidence introduced by plaintiff tending to prove the crossing is a dangerous one; that there are some 15 tracks crossing Nutt street there; that trains and engines are constantly going in different directions at the same time on some of these tracks; that the street leads across these tracks to the Seaboard Air Line depot, and that there is much traffic and passing along it; that there are no gates to close when engines and trains are passing, and only one flagman whose duty it is to warn passers of the approach of trains. Plaintiff testifies that on January 16, 1905, he had crossed 13 tracks and was looking out for the cars; that he saw some up towards the bridge standing still; that he then looked toward the compress for cars on that track; that he continued to walk on, looking for cars, when he was hit by one un-

awares and badly injured; that the car was a flat car with no one on it; that Mr. Hankins, the crossing flagman, was in a little house 125 feet away and if he saw him he did not come to his rescue. Plaintiff also offered some evidence tending to prove that the flat car which struck him was a loose car which had been "kicked," in railroad parlance, from the train for the purpose of making a "running switch"; that the car was moving fast across Nutt street when it hit plaintiff and that "there was no one on it or near it and one witness said that there was no flagman at all." There was strong contradiction of this evidence by defendant's witnesses, but it is unnecessary to set out the tenor of their evidence. The defendant offered also evidence tending to prove contributory negligence upon the part of the plaintiff. It is not to be doubted that upon plaintiff's showing the defendant was guilty of negligence, and, in the absence of contributory negligence, the plaintiff is entitled to recover damages. The attempt to make a running switch across a much-frequented street is not only a negligent, but a most dangerous and unwarranted, operation, and has been so held by a number of courts. *Bradley v. Railroad*, 126 N. C. 735, 36 S. E. 181; *Brown v. Railroad*, 32 N. Y. 597, 88 Am. Dec. 353; *Fulmer v. Railroad*, 68 Miss. 355, 8 South. 517; *Railway Co. v. Summers*, 68 Miss. 566, 10 South. 63; *French v. Railroad*, 116 Mass. 537; *Railroad v. Garvey*, 58 Ill. 83; *Railroad Co. v. Baches*, 55 Ill. 379. It matters not whether the purpose was to "shunt" the car off on a switch or to give it force enough to roll along on the same track; it is negligence to permit a car to be "cut loose" and roll on uncontrolled by any one across a much-used crossing. The jury having taken plaintiff's version as the true one, there is sufficient evidence to uphold their finding on the first issue. Upon the issue of contributory negligence the evidence is conflicting. The evidence of the plaintiff, carefully examined, tends to prove that he was exercising all the care a man in his condition and circumstances could well exercise. There are a great many tracks along there, and the most prudent of men may get confused, but the plaintiff states how he looked, and where he looked, and it is evident from his statement he was doing all he could to safeguard himself. The plaintiff's evidence, if believed, abundantly justified the verdict of the jury. It is therefore our opinion that his honor properly overruled the motion to nonsuit.

It is not necessary that we should set out his honor's charge. It is very clear and comprehensive, stating with fullness and fairness the contentions of plaintiff and defendant, and then instructing the jury clearly as to the law upon the different phases of the evidence. At the close of the evidence the court gave certain instructions at request of plaintiff, and in the words of the prayer, which are excepted to. Among others he

gave the following: "If the jury find from the evidence that the crossing along Nutt street, having 15 or more tracks upon which engines and cars were constantly shifting, was used by a very large number of people in the conduct of their business, then it was the duty of the defendant to furnish to persons desiring to cross the railroad at Nutt street, in the city of Wilmington, either on foot or with vehicles, a reasonably safe method of crossing, either by way of bridges, gates, an adequate number of flagmen or watchmen, or in some other way. That, even if the jury should find from the evidence that the plaintiff was negligent in not using ordinary care in looking and listening for approaching trains, still the jury should answer the first issue, 'Yes,' if they further find from the evidence that the defendant could have prevented the injury by the use of means at hand, or that it could have had at hand, by the use of reasonable care and diligence; and the fact that the plaintiff was deaf does not make him an outlaw, neither does it lessen the responsibility of the defendant company to warn him of approaching danger." The first objection made to this instruction is that it ignores the necessity for determining the proximate cause of the injury. Taken alone the criticism may be well founded. But the charge must not be taken in sections but as a whole. The jury had just been told in unmistakable terms that they must find "that such negligence produced the injury complained of," and again, "that such negligence was the proximate cause of the injury," before they could answer the first issue, "Yes." We think his honor fully explained the doctrine of proximate cause, so as to leave no misapprehension in the minds of the jury. The other objection is by no means trivial. It relates to the words, "That the plaintiff was deaf does not make him an outlaw." We think the use of such language in the prayer for instructions unfortunate, to say the least; but we cannot think, when repeated from the bench, that the jury inferred that his honor was stating it to be his opinion that defendant had treated plaintiff as an outlaw. We do not place any such construction upon it, and we do not believe the jury did. The charge which preceded this particular instruction was so clear, fair, and impartial in its general tenor that we are sure the jury did not receive the impression that the judge was so hostile to defendant as to intimate an opinion that it was treating plaintiff as an outlaw. While it was not well advised in the court to have adopted such language, under all the circumstances, we do not think it necessitates a new trial on that ground.

Another prayer of plaintiff given and excepted to is as follows: "That, if the jury find from the evidence that the defendant company was operating the train which injured the plaintiff in violation of an ordinance of the city of Wilmington, and that it

did not have a man on the end of the car approaching the crossing, as required by said ordinance, then this alone is sufficient circumstance from which the jury may infer negligence on the part of the defendant, and to justify them in answering the first issue, 'Yes.' It is insisted that this instruction contravenes the rule laid down in *Smith's Case*, 132 N. C. 824, 44 S. E. 663, and *Duval v. Atlantic Coast Line R. Co.*, 134 N. C. 331, 46 S. E. 750, 85 L. R. A. 722, 101 Am. St. Rep. 830, where it is held that running trains through cities and towns at a greater speed than is allowed by the municipal ordinances is some evidence of negligence to be submitted to the jury. The ordinance of the city of Wilmington, requiring that the railroad company shall have a man on the end of a car approaching this crossing, is an affirmation of the general law of the state. It did not declare anything to be law which was not already in force. In giving this instruction the court did not tell the jury that a violation of a city ordinance was per se negligence, but that the jury might infer negligence from the circumstance that no man was on the end of the car. This was substantially what the court had already charged, and the giving of this further instruction was unnecessary and harmless. It is true, in this portion of the charge there is no reference to proximate cause, but we repeat that the charge must be taken in its entirety and not in "broken pieces." It is unnecessary to lengthen this opinion by considering in detail the prayers of defendant upon the issue of contributory negligence. Most of them are substantially given in the charge of the court, and many of them were given verbatim. In instructing upon this issue his honor was eminently just to defendant, and applied the law applicable to the differing phrases of the evidence with clearness and accuracy. We discover on error in any instruction he gave, or omitted to give, as to contributory negligence.

After charging the jury fully and correctly as to actual or compensatory damages, the court, at request of plaintiff, gave the following special instruction: "In considering the question of damages, and in the attempt to reach the amount which the jury will award, if they are satisfied by the evidence that the plaintiff is entitled to any damage, they may take into consideration the question whether the injury was due to such negligence, which amounts to a little more than an accident, or such negligence that shows wanton disregard of the rights of the plaintiff, and, if they should find in this case that the conduct of the defendant has been such as to indicate a reckless disregard of its duty to the plaintiff, they may, if they feel disposed, increase the allowance of damages for that reason." This is an instruction that plaintiff is entitled to recover punitive damages in some phases of the evidence, and is erroneous. There is no allegation in the complaint, and no evidence that the injury

was willfully, wantonly, and recklessly inflicted in utter disregard of plaintiff's rights. There is nothing in the facts of this case to bring it within the principles laid down in *Holmes v. Railroad*, 94 N. C. 318, cited by plaintiff. Neither is *Purcell's Case* any authority for awarding punitive damages to plaintiff. That case was overruled in *Hansley's Case*, 115 N. C. 603, 20 S. E. 528, 32 L. Ed. 543, 44 Am. St. Rep. 474, and reinstated upon a rehearing of same case, 117 N. C. 570, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600, upon another ground than that given in the original opinion, viz., that *Purcell* was treated with indignity and contempt in rushing by the station when there was room for passengers on the train. In actions ex delicto the motive of the defendant becomes material. If a tort is committed through mistake, ignorance, or mere negligence, the damages are limited to such as are called compensatory or actual. 1 *Sutherland on Damages*, § 373; 5 Am. and Eng. Enc. (1st Ed.) p. 21, where the authorities are collected. *Railroad Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374, and the elaborate opinion of Mr. Justice *Avery* in *Hansley's Case*, 115 N. C. 605, 20 S. E. 528, 32 L. Ed. 543, 44 Am. St. Rep. 474.

It is contended that the court finally instructed the jury that punitive damages should not be allowed in this case, in that the record disclosed that, "at the conclusion of the whole charge, counsel for plaintiff asked if the court would not charge that the plaintiff could recover punitive damages, and the court said it would charge the jury that they must not allow punitive damages." As we have held, his honor instructed the jury in the previous part of his charge practically that punitive damages might be allowed. If he intended this as a correction of the former part of his charge, it was his duty to have called the attention of the jury to it as a correction. It would seem from this colloquy between judge and counsel that both thought that the court had not already instructed practically that the jury could award exemplary or punitive damages. The court ought to have defined what is meant by punitive damages, for, as it is a technical legal term, the jury might not have considered that his honor had already charged in effect that they could award them. So we think that, notwithstanding what the court stated at the conclusion of the charge, the jury might have felt at liberty to go beyond compensatory damages under the authority of what had been previously said. They had a right to suppose that, if his honor intended to correct his charge, he would have called their attention to it as a correction. The jury were therefore left at sea, between contradictory instructions upon the issue of damages, which, under numerous decisions of this court, entitles the defendant to a partial new trial. In *Edwards v. Railroad*, 132 N. C. 101, 43 S. E. 585, it is said: "It is well settled that,

when there are conflicting instructions upon a material point, a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly, and when incorrectly." *Edwards v. Railroad*, 129 N. C. 78, 39 S. E. 730; *Williams v. Hald*, 118 N. C. 481, 24 S. E. 217; *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 480.

Let one-half the costs of the appeal be taxed against the plaintiff, and one-half against the defendant. It appears that unnecessary portions of the record were sent up at the plaintiff's request. It is ordered that one-third of the costs of printing the record, and one-third of the costs of making out the transcript in the superior court, be taxed against the plaintiff individually.

It is ordered that there be a new trial on the third issue.

Partial new trial.

WALKER, J. (concurring in part). I think it clear that an error was committed as to the issue of damages, in the respect stated in the opinion of the court, and therefore concur in that opinion, and in the conclusion reached, as to that issue. When the court charged as to compensatory damages and then gave the instruction as to an increase in the allowance of damages by reason of a reckless or wanton disregard of plaintiff's rights, it plainly referred to an enlargement of compensatory or actual damages, and the jury were well warranted in so construing the charge. Especially is this so in view of the fact that counsel afterwards inquired if the court would hold that the plaintiff was entitled to punitive damages and was told that it would not, and it so instructed the jury. This last instruction was not corrective or explanatory of the first, but was either in direct conflict with it, which would make it a reversible error under *Tillett v. Railroad*, 115 N. C. 662, 20 S. E. 480; *Williams v. Hald*, 118 N. C. 481, 24 S. E. 217; *Edwards v. Railroad*, 132 N. C. 99, 43 S. E. 595, or, if consistent with it, more surely evinced the court's reference to actual or compensatory damages when, in the former instruction, it told the jury that they might increase the amount of damages if the defendant's conduct was more than merely negligent. The degree of negligence, if there are any degrees, could not, of course, enhance the actual damages.

I am fully convinced there was error in the charge relating to the first issue, and consequently that the new trial should be general. It must be remembered that the expression in the charge, namely, "the fact that the defendant was deaf does not make him an outlaw," was used, not by counsel in argument, but by the court in direct response to plaintiff's request for instructions. In *State v. Horner*, 139 N. C. 603, 52 S. E. 136, a similar remark was made by the solicitor in his address to the jury,

when referring to the lawless acts of the defendant. This court clearly intimated that, if the word "outlaw" had been used in its ordinary or legal sense, and the effect upon the jury of such an abusive epithet had not been counteracted by the court, a new trial would have followed. But the solicitor explained that he merely meant to describe the defendant as one who had put himself beyond the reach of the law's process by avoiding arrest, and the word was not used in the sense that he had put himself beyond the pale of the law and forfeited its protection, as in the case of a fugitive from justice for whom proclamation has been made and who may be slain, if he refuses to surrender, by any citizen without accusation or impeachment of crime. *Revisal 1906, § 8183*. This court, in view of the solicitor's explanation, and of the charge of the court that the evidence in its most favorable light made the defendant guilty of manslaughter, of which offense he was convicted, held the remark to be harmless, or at least not "gross or manifestly prejudicial," but it is also said in that connection that the use of any term of reproach, especially in regard to a party to the cause, is not commended, and the clear implication is that, but for the explanation of the solicitor and the charge of the court, the use of the term "outlaw" would have been good ground for a new trial, the defendant having duly objected to its use. Here the objectionable language is employed by the court, and the fact that it was done at the instance of one of the parties does not neutralize its effect but rather intensifies it. The logical, if I may not say the inevitable, implication from its use is that the defendant had treated the plaintiff as one who had been deprived of the benefit of the law or excluded from its protection, which is the ordinary and accepted meaning of the word "outlaw." The fair deduction from the remark of the court, is that, though he was deaf, the plaintiff had certain rights which the defendant had ignored, and that, instead of recognizing them, it had treated him as an outlaw. It was also the intimation of an opinion that the defendant had acted towards the plaintiff as if he were an outlaw. It was not a direct charge that it had done so, but there is no escape, I think, from such a construction of it, and it is just as harmful as if the accusation had been made in so many words. It conveys but the one meaning. I do not say merely that I think his honor did not intend so to use the word, but that I know he did not, and I know that counsel did not appreciate, at the time, the force and effect of the language employed in the instruction. Neither judge nor counsel would advisedly use the expression. It was an inadvertence—a mere slip. But, nevertheless, it had the baneful effect, or may have had it, all the same, and we must

look, not at the motive in giving the instruction, but at the probable prejudice actually resulting from it or that may have resulted from it. We should be careful in the trial of causes to see, not only that parties receive a fair and impartial hearing, but we should give them no reasonable ground to complain that justice has been denied them. There is nothing so calculated to make the "wavering balance shake," as when a remark falls from the court, though casual or accidental, and unintentional, which even constructively imputes wrong to either side. The slightest intimation from the court is sufficient to turn the scales against either litigant, and hence our statute which forbids even a suggestion from the court upon the facts. We must consider the instruction as it is, and not as it was intended to be. If the objection to this part of the charge is "by no means trivial" and "the language is unfortunate," how can we say that it may not have influenced the jury and turned the scales against the defendant.

My opinion also is that there was error in giving the third of the plaintiff's prayers, it being the one fully set out in the opinion of the court and which refers to the violation of the city ordinance. The court thereby instructed the jury that a violation of the ordinance alone was sufficient to justify them (1) in inferring negligence, and (2) in answering the first issue, "Yes." In other words, that the violation of the ordinance was a circumstance which, standing by itself, justified them in giving an affirmative answer to the first issue. This goes beyond all of our precedents on this subject and is, I think, plainly in conflict with them. It has always been held that the violation of an ordinance was merely evidence of negligence and not negligence per se. The effect of this instruction is to make it negligence per se or negligence, without reference to any inquiry as to whether it proximately caused the injury or not, or as to whether there was any causal connection between the violation of the ordinance and the injury. If there was a violation, the jury need go no further, but may stop there and answer the first issue, "Yes." This instruction eliminated the element of proximate cause, and the error thus committed was not corrected by anything the court charged generally upon the subject afterwards, for the use of the word "alone" necessarily so restricted their inquiry, as to render the other instructions wholly inapplicable. There is another objection to the instruction. It excludes from their consideration the evidence in regard to the flagman, who, it is alleged, was walking in front of the moving car. No case requires absolutely that a watchman should be on the end of the car. If there is one walking in front of it, so much the better for the safety of pedestrians and others crossing the track,

and this is in law an equivalent for the presence of a lookout on the top, or on a footboard in front, of the car. I say it excludes this evidence from the case because the jury are told that the violation of the ordinance alone, and, if alone, necessarily without reference to other testimony making in defendant's favor, will warrant a verdict for the plaintiff upon the question of negligence. Therefore, I concur in the opinion so far as it awards a new trial on the issues as to damages, but dissent from the view of my Brethren, that the defendant is not entitled to a new trial without restriction and for the reasons I have stated.

As regards the crossing in questions, it is a very dangerous one if the evidence is credible, and the vigilance of the defendant should be proportioned to the danger. From the situation as now presented, it may well be argued that the defendant is bound to use extraordinary care in the protection of the public while crossing its tracks at that place, but whether it has used the care in this particular instance which was required of it is a mixed question of law and fact, its liability depending upon the application of well-established principles in the law of negligence.

CLARK, C. J. (concurring). In *State v. Horner*, 139 N. C. 603, 52 S. E. 186, counsel for the state referred to the defendant as an "outlaw." This was held not to be ground for a new trial. Here the judge charged, at request of plaintiff, that the plaintiff was not an outlaw. Certainly the defendant cannot be hurt thereby. He does not contend that the plaintiff was outlawed.

If there was an incorrect intimation in the charge that the plaintiff could recover punitive damages, this was corrected after the charge was concluded by the judge refusing such prayer when asked by the plaintiff, and the express charge given that the plaintiff could not recover punitive damages. This is not the case of contradictory instructions in the same charge. No intelligent jury could fail to understand that this was the final instruction of the court. The jury are presumed to be competent and intelligent men—as competent in the discharge of their office of triors of fact as the judge is taken to be in instructing them upon the law. If so, this last instruction of the court, made after the charge had been concluded and in refusing a special instruction asked by the plaintiff, could not have failed to impress the jury that punitive damages could not be given by them. But it is entirely clear that the negligence of the defendant was not so gross as to amount to willful and wanton neglect of duty? Was there not indeed criminal negligence on its part? The use of the public street by defendant in that mode had been so long persisted in, and was so

glaringly dangerous, that it might well be that punitive damages would be required to prevent a continuance of the danger. The street had been laid out as such by authority of law. Its primary use, therefore, was for citizens on foot or in carriages. The defendant had a right to use it only subject to the primary right of the public. The defendant had 15 to 21 tracks laid across this public street, most of which it used for shifting purposes as it had five shifting engines there. One or two tracks, perhaps, were used for carrying freight to the warehouse, or to vessels at the wharf. The defendant could, and should, have elevated the tracks it used for that purpose above the street, as it has done with the adjacent track used by it for passengers. And the other tracks used for shifting purposes should have been moved farther out, to a shifting yard that would not be crossed by a public street, which, by a decree of court, has been laid out, as this street had been, for the use of the public. The defendant added to its great negligence in maintaining at that point 15 to 21 tracks crossing a public street on the same grade, not only by having no gates, but by having only one flagman for so many tracks, who could have been of no protection to the plaintiff at the crossing of a distant track. Besides, the flagman who was stationed midway between these 20 tracks signaled the plaintiff to go ahead, and he was struck by a flying switch, the cars running backward, without a lookout, and in violation of a town ordinance requiring a watchman on the car standing 12 inches from the ground. Such conduct by the defendant practically compels the citizens needing to use that street to take their lives in their own hands and to "run amuck." It is a practical denial and reversal by the defendant of the decree of court which dedicated that street primarily to the use of the public. The street thus crossed by so many tracks leads to the depot of the Seaboard Air Line Railroad, and was greatly used by the public, both for passengers and in hauling freight, and for the ordinary passing to and fro of the public.

When the defendant's track was laid out, some 70 years ago, population and business were small and the revenues of the company were light. It was not dangerous at that time to lay the defendant's track on a level with the public street, and the defendant did not then have 15 to 21 tracks at this point. The railroad companies must take notice that, with the great increase of population and of their traffic, it has become criminally negligent to continue to cross on a grade at points where the number of those crossing and their own numerous trains

make the use of the street or crossing dangerous to the public. Wilmington now has over 30,000 people, and in the near future will doubtless have 100,000 or more. The use of one of its public streets cannot be interfered with by 15 or 21 railroad tracks with constantly moving cars and engines. The people of the city have a right to use their streets with safety. The defendant has no right there except in subordination to the prior right of the citizens to the use of the streets. The defendant should remove its shifting tracks, and place its other tracks above the street. This must necessarily be done sooner or later, and it is questionable whether it is not criminal negligence for railroads to fail to change their tracks and run above or below the roadway at such places as this. Last year the railways in this country killed, according to the published official reports of the United States government, nearly 10,000 people, and wounded or crippled nearly 90,000 more—a total of nearly 100,000 killed and wounded in one year. So far as this vast amount of suffering and misery can be reduced by proper care—and the relative number killed and wounded in foreign countries is very far less—it is the duty of courts and juries to see that a neglect to do so is properly punished. Throughout Europe railroads are very rarely permitted to cross a public road even in remote country districts, and never in or near a town. In Connecticut, Massachusetts, and to some extent in New York, railroads have been compelled by statute to change their tracks so as to pass always above or beneath roads and streets used by the public, and to make the change of course entirely at their own expense. Such statutes have been held constitutional, not only by the courts of those states, but by the Supreme Court of the Union. *Railroad v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *Railroad v. Kentucky*, 161 U. S. 696, 16 Sup. Ct. 714, 40 L. Ed. 849; *Railroad v. Defiance*, 167 U. S. 99, 17 Sup. Ct. 748, 42 L. Ed. 87; *Wheeler v. Railroad*, 178 U. S. 324, 20 Sup. Ct. 949, 44 L. Ed. 1085; *Railroad v. McKeon*, 189 U. S. 509, 23 Sup. Ct. 853, 47 L. Ed. 922. See state cases cited in *Cooper v. Railroad Co.*, 140 N. C., at page 227, 52 S. E., at page 938, 3 L. R. A. (N. S.) 391.

Now that their attention has been called to it, doubtless these great corporations, with their great and abundant revenues, derived from the public, and their constantly increasing number of trains, will feel moved by considerations of humanity, as well as by their own interest, to abolish grade crossings at such places as this, and at all others where their longer retention will be inconvenient or dangerous to the public.

SEABOARD AIR LINE R. CO. v. OLIVE
et al.(Supreme Court of North Carolina. Oct. 16,
1906.)

1. INJUNCTION—EASEMENTS—DISTURBANCE.

An easement of a right of way acquired by a railroad company will be protected by injunction against interference, without regard to the solvency of the persons interfering therewith.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 15, 17, 99; vol. 17, Cent. Dig. Easements, § 135.]

2. EASEMENTS—OBSTRUCTION—INJUNCTION.

Before a railway company is entitled to invoke the aid of equity in protecting its easement of right of way, it must show that it has a right of way, together with the extent of it, and that defendants are obstructing, or threaten to obstruct, its use.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 134, 135.]

3. INJUNCTION—TEMPORARY INJUNCTION.

Where, in a suit to prevent interference with an easement, there is a controversy in respect to the facts necessary to be proved to entitle plaintiff to an injunction, both parties will be restrained from interfering until a trial can be had.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 305, 306.]

4. RAILROADS — FAILURE TO INCORPORATE WITHIN TIME PRESCRIBED.

The failure of a railway company to organize under an act authorizing its organization within the time prescribed therein does not prevent a valid organization thereafter, unless a forfeiture has been declared in proceedings instituted by the state.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 27; vol. 12, Cent. Dig. Corporations, § 27.]

5. EMINENT DOMAIN—POWER TO CONDEMN—RAILROADS.

Priv. Laws 1854-55, p. 280, c. 230, entitled "An act to incorporate the C. Railroad Company," confers on the company, when formed, the power to condemn a right of way 100 feet wide on each side of the center of its track. Priv. Laws 1861-62, p. 116, c. 129, entitled "An act to incorporate the C. Railroad Company," makes no reference to the prior act, and confers on the company, when formed, the power to condemn land for a right of way and other purposes necessary to carry into effect the purposes of the company. Priv. Laws 1862-63, p. 27, c. 28, entitled "An act to amend the charter of the C. Railroad Company," expressly refers to the act of 1861, and confers on the railroad company power to condemn a right of way 200 feet wide, and provides for the acquisition of a right of way after two years from entry, which provisions are contained in the first act, but not in the second. There was no direct proof under which act the company was organized. *Held*, that the railroad company acquired its corporate existence by virtue of the act of 1861, and that act, together with its amendments, regulate the power and method of the acquisition by the company of a right of way.

6. RAILROADS—RIGHT OF WAY—ACQUISITION—DEEDS—CONSTRUCTION.

An act authorizing the incorporation of a railroad company conferred on it the power to condemn land for a right of way and all other purposes of the company. An owner, granting to the company a right of way, granted a right of way to so much, and no more, than the company could acquire under its right to condemn for a right of way. *Held*, that the grant conferred on the railway company an easement of

a right of way of 100 feet in width, as Rev. Code, c. 61, confers on railroads the power to condemn land of the width of not less than 80 feet and not more than 100 feet.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 159, 100.]

7. SAME—ABANDONMENT.

Under Revision 1905, § 388 (Rev. Code, c. 65, § 23), providing that no railroad company shall be barred of or presumed to have conveyed any right of way which may have been condemned or otherwise obtained by any statute of limitation, or by any occupation of the same by any person, the possession by individuals of land covered by a railroad right of way cannot operate as a bar to or be the basis for any presumption of abandonment by the railway of its right of way.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 214; vol. 1, Cent. Dig. Adverse Possession, §§ 14, 306, 338, 339.]

8. SAME—ACTION BY LANDOWNER.

Priv. Acts. 1862-63, p. 30, c. 26, § 9, provides that, in the absence of any contract with a railroad company in relation to land through which its road may pass, it shall be presumed that the land on which the road may be constructed, together with 100 feet on each side of the center of the track has been granted to it by the owner, unless the owner shall apply for the assessment of the value of the land within two years after the finishing of such portion of the road. A railroad constructed its track between the termini named in its charter. Part of the track was built over the lands of an owner with whom no contract therefor was made, and without condemning it. The owner did not apply for the assessment of the value of the land within two years after the construction of the track. *Held*, that the railroad company acquired a right of way, though after the expiration of the two years it built side tracks; the building thereof not being a continuance of the construction of its road.

9. EASEMENTS—INTERFERENCE WITH RIGHT OF WAY—REMEDY.

Since a railway company is held accountable for the condition of its right of way, and may be compelled to build side tracks and other structures necessary for the discharge of its duties to the public, it has the right to be the judge of the necessity and extent of such use, and a person in the possession of the right of way cannot, by denying the necessity for its use by the company, drive it to ejectment, but it may obtain the aid of equity to restrain any obstruction to its right of way.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Easements, §§ 134, 135.]

Appeal from Superior Court, Wake County; Webb, Judge.

Suit by the Seaboard Air Line Railroad Company against Percy J. Olive and others. From an order declining a motion for an injunction, heard on notice, plaintiff appeals. Reversed.

T. B. Womack and Hayes & Pace, for appellant. Argo & Shaffer, R. N. Sims, and J. M. White, for appellees.

CONNOR, J. This case comes up on appeal by plaintiff from an order of Judge Webb declining a motion for an injunction, heard upon notice. Plaintiff, in the affidavit of its superintendent, sets up a claim to an easement over the lands of defendants, measuring from the center of its track, 100 feet on each side. For the purpose of showing

title, the following statutes were introduced: "An act to incorporate the Chatham Railroad Company." Priv. Laws 1854-55, p. 280, c. 230. This act confers upon the company, when formed in accordance with its provisions, power to condemn a right of way over lands on its route "one hundred feet wide on each side of the center of its track." "An act to incorporate the Chatham Railroad Company." Priv. Laws 1861-62, p. 116, c. 129. This act makes no reference to the act of 1854-55. It confers upon the company, when formed, the power "to condemn land for right of way and other purposes necessary to carry into effect the purposes of said company" and all "rights, privileges and immunities, and be subject to the limitations and restrictions of corporations in this state." "An act to amend the charter of the Chatham Railroad Company." Priv. Laws 1862-63, p. 27, c. 26. This act makes no specific reference to either of the other acts. Among other provisions, express power is conferred to condemn land for its track, etc., "one hundred feet on each side of the center of the track," etc. It is further provided that, in the absence of any contract or contracts with said company in relation to land through which the said road may pass, it shall be presumed that the land on which said road may be constructed, together with 100 feet on each side of the center of the track, has been granted to the company by the owner, and the company shall have good title and right thereto, and shall hold and enjoy the same as long as the same may be and for the purposes of the company, unless said owner, at the time of finishing the part of the road on his land, shall apply for the assessment of the value of the land within two years next after the finishing of such portion of the road. Two ordinances of the convention of 1861, amending the "charter of the Chatham Railroad," expressly referring to the act of 1861. The act of 1871 authorizing the Chatham Railroad Company to change its name to the Raleigh & Augusta Air Line Railway (Laws 1871-72, p. 11, c. 11). Laws 1899, p. 115, c. 68, authorizing the Raleigh & Augusta Air Line Railway Company to consolidate with the Raleigh & Gaston Railroad Company. Laws 1901, p. 463, c. 168, authorizing said companies to consolidate with other companies named therein, forming the defendant company. Articles of consolidation and merger executed pursuant to the act of 1901. These acts and the articles of merger and consolidation vest in the plaintiff all of the rights, privileges, powers, etc., of the several companies entering into the merger. *Spencer v. Railroad*, 137 N. C. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604. Plaintiff introduced the affidavit of Mr. Jenks, its superintendent, setting forth that the Chatham Railroad Company was incorporated by Acts 1862-63, p. 27, c. 26; that the said company com-

pleted its railroad through the town of Apex, in which the lands in controversy are situate, more than 30 years ago; that the owners of the lands at and near the town of Apex failed to apply for an assessment of the value of the lands taken by said railroad for its right of way for more than two years after the construction and completion of said road through their land; that by reason of the construction of the Durham & Southern Railroad, which crosses the plaintiff's road at Apex, and the increase in freights and business, it is essentially necessary that plaintiff shall build additional facilities at or near said town, including side tracks, warehouses, station, etc., rendering it necessary to use and occupy a large portion of its right of way in order that it may meet the demands of the public for transportation of passengers and freight; that, upon the application of a number of the citizens of Apex, the Corporation Commission on August 4, 1906, made an order requiring the plaintiff and the Durham & Southern Railway Company to erect a Union Depot and to provide adequate freight facilities at said town within 90 days from date of said order; that plaintiff is engaged in a bona fide attempt to obey said order, and to that end has a large force of hands making excavations for the Union Depot, warehouses, and side tracks necessary to provide adequate facilities to serve the public, etc.; that defendants are in the actual possession of the land over which its right of way runs, and are forbidding and otherwise preventing plaintiff from proceeding with said work.

Defendant J. M. White, in behalf of his wife, Mrs. Lydia White; avers in an affidavit: That the Chatham Railroad Company was incorporated by the act of 1861 and not of 1863. That said act of 1863 was an amendment of the act of 1861. That his wife is the daughter of P. W. Dowd, deceased, and inherited from her father the lot upon which she resides and over which plaintiff claims a right of way of 100 feet from the center of its track. That her father, together with a number of other persons, owners of land over which said Chatham Railroad was to be constructed, on May 1, 1862, entered into a contract with said corporation, a copy of which is attached. The contract referred to, executed by P. W. Dowd and a number of other persons, recites that whereas, the Chatham Railroad Company has been created for the purpose of effecting a communication between the North Carolina Railroad Company and the coal fields of Chatham County; and whereas, the benefits which would arise from the building of said road would exceed the damage, etc.—in consideration of the premises, the said parties granted and conveyed to the said Chatham Railroad Company a right of way over their lands, with power to enter upon same, "according to the pleasure of said

company," to lay out, use, and occupy such portion of said land contiguous to such railroad as they may deem necessary for sites for their depots, tollhouses, warehouses, engine sheds, workshops, water stations, woodsheds, or other buildings or yards for the necessary accommodation of said company or for the protection of their property; it being expressly understood that so much and no more of the lands belonging to, owned, or held by us severally and respectively is hereby given, granted, and surrendered to the said Chatham Railroad Company, than the said company, by the act of the General Assembly of the state of North Carolina incorporating said company and the ordinances of the convention of the state in amendment thereof, would have a right to condemn for the use of said company." Following this language is a provision that no portion of said lands upon which a dwelling house, yard, garden, or burial ground is situate shall be entered upon in such a way as to disturb any such yard, garden, etc. This deed is under seal and duly recorded June 30, 1863. That the said contract gave plaintiff no right to enter upon or take more land than was necessary to construct said road at that time. That said company under and by virtue of the said contract entered upon the land and constructed its road, taking only so much as was necessary for that purpose. That the strip of land sought by the plaintiff in this action is a part of the yard and garden of defendants J. M. White and wife, and that the construction of the side track would take 100 feet lying between the dwelling and the present road and, by the digging of a cut of 10 feet, cause the destruction of a public thoroughfare which has been in existence more than 30 years, thus cutting off all ingress and egress on that side, and altogether rendering practically untenable the house as now situated. That Mrs. White has been in the open, adverse possession of this land for more than 30 years. That she has reared her children there, and that she is strongly attached to the property by reason of the memories connected with her long residence upon it. That it is entirely practicable for plaintiff to build its side track upon its own undisputed land, and reach the Union Depot without in any way interfering with the premises of Mrs. White. Defendants admit that they object to plaintiff entering upon the premises, insisting that it has no right to do so. They deny that they have resorted to any other than lawful means to prevent plaintiff entering upon their lands.

Defendant Percy J. Olive, in an affidavit, admits that none of the other defendants nor their grantors have made any application to have damages assessed for the right of way used and occupied by plaintiff and its predecessors. He denies that plaintiff has acquired a right of way of 100 feet, measuring

from the center of the track on each side thereof, or that the road has been completed. He says that the plaintiff is building the Union Depot, ordered by the Corporation Commission, on land which it has purchased, and that the right of way over defendants' land is not necessary to meet or discharge any duties to the public. He also alleges that plaintiff has instituted an action of ejectment to recover possession of the alleged right of way, and that it is not entitled to an injunction pending the trial of said action. Defendants insist that, before an injunction shall issue restraining them from preventing plaintiff entering upon their lands, the issues of fact raised by the affidavits should be settled by the jury.

It is clear that, from any point of view which we may take of this case, the plaintiff acquired only an easement over defendants' land. It is also clear that the remedy, if any, to which plaintiff may show itself entitled, whether granted on the affidavits and proofs, or at the end of the litigation, is in its character injunctive, either mandatory or prohibitory. It is by this method that the courts protect parties in the enjoyment of an easement, when not left to their action for damages for interference therewith. It would seem clear that when, as in the case of a railroad company, a right of way is acquired by any of the statutory methods, or by grant, for the purpose of enabling it to perform its duty to the public, such easement will be protected by injunction. It would be unreasonable to permit a railroad company to acquire a right of way for the purpose of constructing its tracks and necessary buildings, and, when it is invaded or its enjoyment interfered with, confine the company to an action for damages. In this way the operation of railroads might be so much hindered that they would not be able to discharge their public duties, the primary object for which they are chartered. The law is well stated in Beach, Mod. Eq. § 676: "The jurisdiction of a court of equity to protect a franchise from unlawful invasion or disturbance by injunction is clearly settled and has been recognized as benign and salutary. The ground of such jurisdiction is usually the prevention of irreparable injury, the avoidance of a multiplicity of suits, and the abatement of annoyances in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege as well as the party interested. And while the court will not interpose to prevent a mere trespass of an ordinary character, yet, when a trespass or a series of trespasses will operate to destroy or seriously impair the exercise of a franchise, the apprehended injury will be enjoined."

If one may obstruct the right of way of a railroad company and prevent it laying its

tracks, or otherwise providing facilities for transportation of freight and passengers, and be responsible only to an action for damages, it would be impracticable for the Corporation Commission to enforce its orders providing for Union Depots, double tracks, and other means necessary to the convenience and safety of the public. Injunctive relief against interference with the use of the right of way of a railroad company is not given because of any special consideration for these corporations, but because they are public agencies, chartered, organized, and given the right of eminent domain, in contemplation of law, to serve the public. They are a part of the system of highways of the state. We find no difficulty in holding that the plaintiff is entitled to injunctive relief against interference with its right of way, without regard to the solvency of persons interfering therewith. It is well settled in this state that the company acquires, either by the statutory method of condemnation or by presumption, no title to the land, but an easement to subject it to the uses prescribed. *Blue v. Railroad*, 117 N. C. 644, 23 S. E. 275; *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779, in which the same charter now being considered was before the court; *Barker v. Railroad*, 137 N. C. 214, 49 S. E. 115. Before the plaintiff is entitled to invoke the injunctive power of the court, it must show clearly: (1) That it has a right of way over the lands in controversy; (2) the extent of such right; (3) that defendants are obstructing or threaten to obstruct its use. If, upon this record, there is a controversy in respect to any facts necessary to be proved to entitle the plaintiff to the injunction, both parties will be restrained from trespassing or interfering until a trial can be had.

With these preliminary questions disposed of, we proceed to inquire whether, upon all of the testimony and the several acts under which plaintiffs claims to have corporate existence, it is entitled to the relief demanded. We are met, at the threshold, with a controversy in regard to the origin of the corporate life of the Chatham Railroad Company. In any one of the several aspects of the controversy, it is necessary to fix the date, and therefore the act, under which the company acquired a legal status. The affidavit of Mr. Jenks states that the company was incorporated by the act of 1863. The defendants allege that it was incorporated by the act of 1861. On the argument plaintiff contends that its origin is based upon the act of 1854. If the plaintiff's contention in this respect is sustained, it had the power to condemn a right of way of 200 feet in width, and it would seem that the deed of Mr. Dowd and others confer a right of way of the same width. This act also contains the provision that an entry raises the presumption of title perfected at the end of two years. If, on the contrary, the corporate existence is based upon the act of 1863, the deed of Dowd and

others, being dated May 1, 1862, is invalid; there being no corporate entity at that date capable of taking the grant. It is not necessary to inquire whether Acts 1854-55, p. 280, c. 230, was repealed by Acts 1860-61, p. 116, c. 129. While there is much similarity in the provisions of the two acts, there are marked differences, not necessarily in conflict, but showing that for some reason the persons who were interested in the proposed road wished to have a new charter. But one of the persons named in the act of 1854 is named in that of 1861. We concur with the plaintiff's counsel that the failure to organize under the act of 1854, within the two years prescribed, did not prevent a valid organization thereafter, unless forfeiture was declared upon proceedings instituted by the state. *Womack, Pr. Corp.* 64-68, where the authorities are cited. While this is true, it may well be that, in view of the express provision that upon failure to begin work within two years, etc., "the privileges here granted shall be forfeited and cease," etc., those interested in the proposed enterprise preferred to avoid any possible danger of a forfeiture by procuring a new charter. Again, we find that, when amendments were desired to the charter from the convention of 1861, the ordinances by which they were made expressly refer to the charter as the "act of 1861 (chapter 129), ratified February 15, 1861," etc. The defendants are not seeking to attack collaterally the charter of the company, as in *Railroad v. Lumber Co.*, 114 N. C. 690, 19 S. E. 646, but are seeking to ascertain under which of two charters the incorporators organized. It is well settled that the incorporators of a proposed private corporation must accept the charter, but from organization by the incorporators pursuant to its provisions acceptance will be presumed. *Fertilizer Co. v. Clute*, 112 N. C. 440, 17 S. E. 419; *Womack, Pr. Corp.* 76, 77. While there is no direct evidence in the record under which act the company was organized, we find that by Acts 1862-63, p. 27, c. 26, amendments are made to "the charter of the Chatham Railroad Company." This act does not expressly refer to either that of 1854 or 1861, but in section 4 (page 28) reference is made to the ordinance of the convention entitled "An ordinance in addition to an amendment of an act of the General Assembly, ratified the 15th day of February, 1861, entitled 'An act to incorporate the Chatham Railroad,'" etc. By sections 7 and 8 (page 28-30) of this amendatory act power is given to condemn a right of way over lands "of one hundred feet on each side of the center of the track," etc. This is followed by section 9 (page 30), providing for the acquirement of right of way after two years from entry, etc. It will be observed that neither of these provisions are in the act of 1861, while both of them are in the act of 1854 in substantially the same language as in the amendment of 1863. This act is manifestly an amend-

ment to the act of 1861, and not of 1854. In the light of these facts, we are brought to the conclusion that the Chatham Railroad Company acquired its corporate existence by virtue of Acts 1860-61, p. 116, c. 129, and that we must look there and to the acts amendatory thereof for the power and method of acquiring rights of way.

As the right of the plaintiff to a right of way over the land owned by Mrs. White is dependent upon an entirely different basis than to the lands of the other defendants, it will be best to discuss this question first. Reading the deed or grant of Mr. Dowd and others in the light of the act of 1861, we must hold either that it is void for uncertainty, or find some standard by which to apply the maxim, "*Id certum est quod certum reddi potest.*" The grant expressly limits the extent of the right of way to "so much and no more * * * than the said company by the act of the General Assembly of the state of North Carolina incorporating said company * * * would have a right to condemn for the use of said company." The act of 1861 confers the power to "condemn land for right of way and all other purposes of said company." We are no nearer a solution of the question as to the width of the right of way when we read the grant in the light of this language. If we hold that a right of way of the width necessary to carry into effect the purposes of the company was granted, we are confronted with the question whether the words "purposes of the company" must be confined to the purposes which existed at that time, and that its power to enter and occupy was exhausted when the road was constructed. This construction would, in the light of what we know to be the purpose of constructing a railroad, be entirely too narrow. It would confine the company to the soil actually covered by its cross-ties and rails, with the drains on either side. When we examine the charters of other railroads granted by the Legislature from 1833 to 1860, we find that, when the width of the right of way is fixed, it is usually 100 feet from the center of the track. Rev. Code, c. 61, entitled "Internal Improvements," confers upon all railroad companies the power to condemn land of the width of "not less than eighty feet and not more than one hundred feet." It would seem that, in the absence of any limit in the charter, the Chatham Railroad Company by the general public law referred to and the express grant of all "privileges, rights, etc., of corporate bodies in the state," had "the right to condemn" to the extent of 100 feet, and thus we find a standard by which to measure the right granted by the deed of May, 1862. Unless we can, in this way, give effect to the deed by rendering the description of the easement certain, we would be compelled to hold it invalid. The maxim, "*Ut res magis valeat quam pereat,*" admonishes us that it is our

duty to uphold the deed, if by reasonable construction, it can be done. We think that the words, "so much as the said road would have the right to condemn," carry the right of way to the extent of 100 feet, which would be fixed by adopting the center of the track as the point from which the measurement should be made, extending 50 feet on each side. This construction is sustained by the decisions of this court in *Beattie v. Railroad*, 108 N. C. 425, 12 S. E. 913; *Lumber Co. v. Hines*, 127 N. C. 181, 37 S. E. 152.

Defendants call to our attention several authorities which apparently militate against this view and hold that, where the description is uncertain, the right of the company will be restricted to the land actually occupied by the company. We have examined the cases, and find but one which is not easily distinguished from the language used in the grant before us. In *Ft. Wayne, etc., Railroad v. Sherry*, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48, the grant was a right to construct said railroad agreeably to and in accordance with the laws of the state of Indiana, known and designated as "An act to provide for the incorporation of railroad companies," etc. The statute authorized the company to acquire by condemnation a right of way "six rods in width." The court was of opinion that, as the company was not required to acquire six rods, but could, if it saw proper, acquire less, the language of the statute did not make certain the language of the deed. It has been held by this court that a railroad company is not required to condemn the full width authorized by the charter (*Beal v. Railroad*, 136 J. C. 298, 48 S. E. 674); but it has the "right to condemn" to the prescribed limit, and this is the standard fixed by the deed. In the case of *Onthank v. L. S. & M. S. R. R.*, 71 N. Y. 194, 27 Am. Rep. 35, the easement granted was a right to lay a water pipe. It was properly held that, when the right was once exercised, the location could not be changed. We fully concur with the learned counsel for the defendants that such is the law. We are now endeavoring to ascertain the extent of the right. What passed by the deed? In *Hargis v. Kansas City, C. & S. Ry.*, 100 Mo. 210, 13 S. W. 680, a right of way of indefinite width was given. So, too, in this case. The court said: "Supposing there was no definite agreement as to width of the right of way, but an intention to give the right of way, then we think the railroad company, in entering thereunder and building its road at large expense, acquired the right of way to the extent authorized by law. The landowner has not manifested his intention to give less than the company could acquire under the statute, nor has the company sought to limit its appropriation to any less amount, and it seems to us that the only rule that would be fair and just to both parties in most cases of this sort, so far as the extent of appropriation is

concerned, is the rule which the law provides." 1 Wood on Railways, § 211. While it is true, as stated in the brief, that Judge Elliott says that, when the width of the right of way is not specified in the grant, the company will, in general, acquire only so much as is actually taken and used, or is reasonably necessary, he adds: "There is much reason, however, for holding that where the width is not specified, and there is nothing, either in the contract or in the acts of the parties, indicating that less than the statutory width was granted, it will be presumed that a right of way of the full statutory width was intended." The decided cases are not uniform. 23 Am. & Eng. Enc. 701. It must be noted that the grant or deed for the right of way signed by Mr. Dowd is also signed by 33 other persons. It does not appear what distance is covered by the lands of the several grantors, but it is not reasonable to suppose that the right of way over the lands of so many persons was intended to be confined to the land actually occupied. We are therefore of the opinion that the deed was a valid grant of a right of way, and that, read in the light of the statutes, its width was 100 feet, or 50 feet on each side of the center of the track. This being so, the plaintiff acquired the same right as if it had condemned the right of way pursuant to chapter 61, Rev. Code.

The question next arises, what use may it make thereof? and whether it has lost or forfeited such rights as it acquired. The defendant Mrs. White says, and we take it as true, that she and her father had been in the actual occupation and use of the land, except that portion upon which the track is located, for more than 40 years. Whatever effect such possession may have had is controlled by the provisions of Rev. Code, c. 65, § 23: Revisal 1905, § 388: "No railroad * * * company shall be barred of or presumed to have conveyed, any real estate, right of way, easement, which may have been condemned, or otherwise obtained for its use as a right of way, depot, station house, or place of landing, by any statute of limitation or by occupation of the same by any person." This statute was in force in 1862, at the date of the grant to plaintiff. It was commented upon and sustained in *Railroad v. McCaskill*, 94 N. C. 746; *Bass v. Nav. Co.*, 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247. The possession by defendants of the land covered by the right of way, therefore, cannot operate as a bar to or be the basis for any presumption of abandonment by the Chatham Railroad Company or its successors. As the other questions apply with equal force to all of the defendants, we defer discussing them until we have disposed of the branch of the case affecting the other defendants.

In regard to the right of way claimed over the lands of the other defendants, there being no contract or grant and no condemnation, the plaintiff relies upon the provisions of the charter as amended by Acts 1862-63, p. 30,

c. 26, § 9, set forth in the statement of facts. The same provision is found in the charter of other railroad companies, and has been sustained by several decisions of this court. In *McCaskill's Case*, supra, construing the identical language, Smith, C. J., said: "The presumption of the conveyance arises from the company's act in taking possession and building the railway, when, in the absence of a contract, the owner falls to take steps for two years after it has been completed for recovering compensation. It springs out of these concurring facts, and is independent of inferences which a jury may draw from them. If the grant issued, it would not be more effective in passing the owner's title or estate. Thus vesting, it remains in the company as long as the road is operated, of the specified breadth." We had occasion in *Barker v. Railroad*, 137 N. C. 214, 49 S. E. 115, to consider the question, and stated the conclusion to which we arrived as to the construction of the statute. The amendment of 1863 conferred upon the Chatham road the right to acquire the right of way by presumption as prescribed by the statute. While the exact dates are not given, we do not understand that any controversy is made in regard to the entry upon the lands and construction of the road by the Chatham Railroad Company, since the amendatory act of 1863, and that there was no contract authorizing such entry. This being so, we can see nothing to prevent the acquisition of the right of way under the provisions of the statute by the admitted failure to have the damages assessed within the two years. The defendants deny that the company has ever completed the road. We do not understand this denial to be that the company has not constructed a railroad between the termini named in the charter and amendments thereto, but that, by building side tracks, it continues to construct, the condition has not arisen making the bar complete. We think this construction of the statute too narrow. If adopted, the provision would be made of no effect. It will be observed that the requirement in this respect is not that the entire road shall be completed, but that the bar becomes complete at the end of two years "after the finishing of such portion of the road." As we said in *Barker's Case*, supra: "With the policy which prompted the Legislature, in the early history of railroad building in the state, to put this provision in the charter of the contemplated roads, we have nothing to do. Finding them to be constitutional, it is our duty to interpret and enforce them in accordance with well-settled principles of legal construction."

The point of view from which charters for railroads were drawn in this state 50 years ago must not be lost sight of in construing them in the light of present conditions. If, to induce the investment of capital in the construction of railroads and development of the country, large privileges were conferred,

not inconsistent with the exercise of the sovereign power of the state in controlling them, we may not construe them away without doing violence to sound principle and fair dealing. When these rights of way were granted or statutes enacted permitting their acquisition in the exercise of the right of eminent domain, it was contemplated that they should be of sufficient width to enable the company to safely operate the road and protect the adjoining lands from fire communicated by sparks emitted by the engines. Land was cheap and population sparse. The railroads, as the charters show, were to be built by the citizens of the state; the capital stock to be subscribed by large numbers of people. Legislatures were ready to make broad concessions to these domestic corporations, and, as shown by the record in this and other cases in this court, the owners of lands, because the "benefits which will arise from the building of said railroads to the owners of the land over which the same may be constructed will greatly exceed the loss which may be sustained by them," were "desirous to promote the building" thereof, and to that end to give to them rights of way over their lands. When the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long deferred assertion of their full extent may work hardship. In *McCaskill's Case*, supra, the court held that the company was not required to use every part and parcel of the condemned land at once, and a permissive use of a portion of such land did not deprive the corporation of the right to take possession of the land when needed for corporate purposes. It is supposed that this decision is modified, in respect to the right of the company to occupy the entire right of way by *Railroad v. Sturgeon*, 120 N. C. 225, 28 S. E. 779. We do not find any language in the opinion in that case conflicting with the proposition that the company is entitled to occupy so much of the right of way as may be necessary to accomplish the purpose of the original acquisition. Mr. Justice Montgomery, in *Sturgeon's Case*, says: "What reasonable meaning can be attached to the words 'for the purpose of the company,' except that the land should be used for such purposes as are conducive and necessary to the conducting of the business of the company; that is, of safely and rapidly transporting and conveying passengers and freight over its railroad. That is the whole business of the company. They need land for no other purposes than to properly construct their roadbeds and drain them, build side tracks when necessary, and houses for their employes, warehouses, and station houses, with convenient ingress and egress, and for a few other purposes that may have escaped our attention. If the company should need the whole of the right of way for these pur-

poses, it has the right to use the whole." In that case, the action to recover possession of the right of way was dismissed because the complaint did not allege that the land occupied by the defendant was necessary for the purposes of the company. In *McCaskill's Case* this question was not raised.

Defendants say that, conceding the law to be as stated, they deny that the portion of the right of way in controversy is necessary for the purposes of the company, and that this denial raises an issue of fact, which must be determined by a jury. If this be a proper construction of the law announced in *Sturgeon's Case*, very serious consequences would follow. Any person in the possession of the right of way of a railroad could, by denying the necessity for its use by the company, drive it to an action of ejectment, delaying the laying of a side track and building of a blockhouse or station, ordered to be built by the Corporation Commission, or decided by the company to be necessary for the safety of the travelers or moving of freight. We cannot think the court ever intended to so hold. As the company is held accountable for the condition of its right of way, and may be compelled to build side tracks and other structures necessary for the discharge of its duties to the public, it must have the correlative right to be the judge of the necessity and extent of such use. The question was presented and discussed by Chief Justice Shaw in *Brainerd v. Clapp*, 10 Cush. (Mass.) 6, 57 Am. Dec. 74. After a clear statement of the extent to which railroad companies may use their right of way at the time of construction, he says: "And the court are also of the opinion that the right and power of the company to use the land within their limits may not only be exercised originally, when their road is first laid out, but continues to exist afterwards; and if, after they have commenced operations, it is found necessary, in the judgment of the company, to make further uses of the land assigned to them for purposes incident to the safe and beneficial occupation of the road, * * * they have a right to do so to the same extent as when the railroad was originally laid out and constructed." In that case the judge charged the jury that they were the judges of the necessity. The court says: "We think the jury ought to have been instructed that the company had a right, under the powers given them by their act of incorporation, to cut down the trees in question, as one of the acts to be done on the land within the five rods, to fit and prepare the track for the safe and convenient use of it, for the transportation of persons and freight by cars and locomotive engines; that they were the judges of what the exigency required." This we think the correct view. Of course, the right is limited by the express words of the grant "for the use of the company." Within that limit the officers of the company must be permitted

to exercise their judgment. To permit others to do so would seriously interfere with the power of the roads to meet the constantly increasing demands of the public.

We have not discussed the provision in the deed or the charter prohibiting the plaintiff from entering upon the yard, garden, burial ground, etc., of defendants, because it is not alleged that any portion of the land in controversy was so used at the date of the acquisition of the right of way. If it has been appropriated to such use since, the right of the plaintiff would not be thereby interfered with. In drawing the injunction order, provision should be made to prevent any unreasonable or unnecessary damage to defendants' premises, by affording reasonable time for gathering crops, removing fences, and otherwise protecting defendants' property. These matters may be dealt with by the court in the order to be made herein.

Upon a careful and anxious examination of the entire record, we find no controverted facts affecting the legal merits of the case. We are of the opinion that there was error in his honor's order refusing the injunction; that in regard to the lands of Mrs. White the plaintiff is entitled to a right of way of 50 feet on each side of the center of the track, to be occupied and used for the "purposes of the company"; that in regard to the other defendants the right of way extends 100 feet on each side of the center of the track, for like purposes; that the defendants should be restrained from preventing or interfering with the use of such right of way; that this opinion be certified to the superior court of Wake county, to the end that further proceedings may be had in accordance therewith.

Error.

STATE v. SCOTT.

(Supreme Court of North Carolina. Oct. 16, 1906.)

CRIMINAL LAW — VERDICT — FORM — SUFFICIENCY.

Where the jury stated the facts essential to a conviction and upon them found defendant guilty, and added that upon their opinion of the law, of which they were ignorant, they rendered a verdict of not guilty, it was proper for the court to adjudge defendant guilty.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2092.]

Appeal from Superior Court, Union County; Justice, Judge.

Robert Scott was convicted of selling liquor without a license, and he appeals. Affirmed.

Williams & Lemmond, for appellant. The Attorney General and Walter Clark, Jr., for the State.

PER CURIAM. The defendant was indicted for selling liquor without a license in July, 1902, when there was a law forbidding the sale of liquor without a license in Union

county. His counsel contends that this law was repealed by subsequent enactments which still made it an offense to sell liquor without a license, but which repealed all laws in conflict with them. It seems to us clear that the question raised in this case is the same as that which was presented in *State v. Perkins*, 141 N. C. —, 53 S. E. 735. There is really no substantial difference between the two cases, and that case must govern this one. The later act repeals the earlier one only in so far as they are in conflict. It cannot retroact so as to affect offenses committed prior to its passage, and the earlier act cannot operate prospectively, so as to affect offenses committed in the future. Their respective fields of operation are bounded by a line drawn at the date of the later act; the earlier act applying to offenses committed before, and the later to those committed after, that date. As neither can trench upon the legitimate province of the other, there is no necessary repugnancy between them. The earlier act, therefore, is repealed, but only as to offenses committed after the passage of the later one, and, as to all offenses committed before that time, it has its contemplated force and effect. In this way the two acts are brought into harmony, and the intention of the Legislature is not only effectuated, but given full play.

The form of the special verdict was, it is true, a little unusual, but the jury stated the facts essential to the defendant's conviction, and upon them found him guilty, adding that "upon their opinion of the law, of which they were ignorant, they rendered a verdict of not guilty." This the judge properly ignored as surplusage, or at least as erroneous, and adjudged the defendant guilty upon the facts ("Utile per inutile non vitiatur"). Indeed, it would seem that the jury meant to submit the question of guilt to the court upon the facts, though they expressed their intention to do so somewhat awkwardly. The result of the case was the correct one.

No error.

McCOY et ux. v. CAROLINA CENT. R.
(Supreme Court of North Carolina. Oct. 23, 1906.)

1. RAILROADS—FIRES—ACTION—ISSUES AND PROOF.

In an action against a railroad company for fire alleged to have been negligently set out, the only allegation of negligence was that defendant carelessly and negligently allowed its right of way to become foul with dry grass and other inflammable matter, which was fired by sparks from a passing engine, and that the fire immediately reached and burned over plaintiff's land. Plaintiff's only witness testified that the place where the fire caught was very clean; that there was some dry grass on the right of way, which had been burned over in the spring of 1900; that there was an extraordinary drought at that time; and that the fire that burned over plaintiff's land started in a bay not shown to have been on the right of way. Held, that the evidence failed to establish the negligence alleged.

2. NEGLIGENCE—PLEADING—VARIANCE.

Where a complaint specifies and particularizes the negligence relied on, plaintiff cannot recover on proof of negligence other than that alleged.

[Ed. Note.—For cases in point, see vol. 87, Cent. Dig. Negligence, § 208.]

Appeal from Superior Court, Brunswick County; O. H. Allen, Judge.

Action by L. C. McCoy and wife against the Carolina Central Railroad. From a judgment for plaintiff, defendant appeals. Reversed.

The plaintiff sued to recover damages alleged to have been sustained by reason of the defendant's negligence in keeping a foul right of way, to which it was charged that fire was communicated from defendant's engine and thence to plaintiff's land. The following issues were submitted: "(1) Is the plaintiff the owner of the lands mentioned and referred to in the complaint? A. Yes. (2) Was the plaintiff damaged by the negligence of the defendant, as alleged in the complaint? A. Yes. (3) What damage is plaintiff entitled to recover? A. \$250."

Weaver & Ruark, for appellant.

BROWN, J. The only allegation of negligence set out in the complaint is as follows: That on said date the said defendant carelessly and negligently allowed its right of way to become foul with dry grass and other inflammable matter, which was fired by sparks from a passing engine, the fire immediately reaching plaintiff's land, burning over said land, destroying and burning up quantities of timber, pine, straw, and other products of value, to plaintiff's damage \$800." It is to be observed that no negligence is alleged other than such as relates to the condition of the right of way. The controversy is therefore limited to two inquiries: Was the right of way in the condition alleged? If so, was the fire caused by such alleged negligence?

The plaintiff offered the following evidence: L. C. McCoy testified solely to the title to the land and damages. He knew nothing of the fire or its cause, or the condition of the right of way. Charles McCoy testified: "I was at Northwest Station on the day of the fire. The train had passed going towards Wilmington. After it passed a fire sprang up. The place where the fire started was between the telegraph pole and the railroad track on the right of way. The fire also caught further down in a bay adjoining the right of way. This second fire, which caught in the bay, broke out into a big fire and burned over the land, and is the one which did the damage. There was some dry grass where the fire first started." On cross-examination he said: "I do not know the width of the defendant's right of way where the fire started. I do not know the width of the right of way at the point where the bay ad-

joined same. I do not know whether the telegraph pole is on the defendant's right of way. The place where the fire first started was very clean. There was a little dry grass. It had been burned over in the spring of 1900. There was an extraordinary drought at that time. It had been a very long dry spell and rain was much needed. When the fire started in the bay, it broke out into a big fire, and burned over the land." At the conclusion of this evidence plaintiff rested. Thereupon defendant moved to nonsuit plaintiff and dismiss the action under the statute for that there was no evidence of negligence as alleged in the complaint. This motion was overruled and defendant excepted. The defendant introduced five witnesses, who testified that the right of way was perfectly clean and had recently been "burned off" by the section master, and also that the damage was very small, and rested its case. Plaintiff offered no other testimony. Defendant renewed motion to nonsuit, which being overruled, defendant excepted. The defendant also requested the court, among other matters of law, to charge that there was no evidence of the existence of inflammable or combustible material on the right of way, which was refused, and defendant again excepted.

We think the motion to nonsuit should have been sustained. The only allegation of negligence relates to the condition of the right of way, and the second issue pointedly refers to that specific negligence alleged in the complaint and to no other. As will be seen by his honor's charge, the case was tried with reference to that character of negligence only. The court charged as follows: "This is an action for damages alleged to have been sustained by reason of negligence of the defendant in allowing its right of way to become foul with inflammable material, and by reason of a fire originating on said right of way and burning over plaintiff's lands. The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that inflammable material had been allowed to accumulate upon defendant's right of way, and that, by reason of the existence of the same, a spark emitted from defendant's engine ignited such inflammable material." There is no evidence whatever that the defendant was negligent as to the condition of the right of way, or that the fire caught on the right of way because of any accumulation of inflammable material, as alleged in the complaint. The plaintiff's only witness testified that the place where the fire caught was very clean; that there was a little dry grass on the right of way, and that it had been burned over in the spring of 1900. He also said: "There was an extraordinary drought at that time; it had been a very long dry spell." The fact that there was a "little dry grass" on the right of way in a period of extraordinary drought is

not negligence. But, if it was, that grass did not catch fire, for the witness distinctly says the place where the first fire caught was "very clean." It caught nowhere else on the right of way. Furthermore, the fire which caught on the right of way at the "very clean" place mentioned by the witness spread no further. It died out, and did not get off the right of way, due probably to its clean condition. According to the witness it was not this fire which spread over plaintiff's land but another fire which originated further down and off the right of way. The evidence therefore fails to sustain the only allegation of negligence set out in the complaint. That allegation specifies and particularizes the negligence, and the plaintiff cannot recover on any other. It is a settled maxim of the law that proof without allegation is as unavailing as allegation without proof. The authorities are in accord. *Moss v. Railroad*, 122 N. C. 891, 29 S. E. 410; *Conley v. Railroad*, 109 N. C. 692, 14 S. E. 303; *Elliott on Railroads*, § 1594.

The evidence in the case having failed to prove the alleged negligence set out in the complaint, the motion to nonsuit should have been allowed. For failing to do so there is error, and the case is reversed.

ANDERSON et ux. v. WILKINS.

(Supreme Court of North Carolina. Sept. 25, 1906.)

CONSTITUTIONAL LAW—STATUTES—RETROSPECTIVE OPERATION—REMEDIES.

Revisal 1905, § 1591, declaring that all parties not in esse, who may take property on contingency under any will, are bound by any proceedings theretofore had for the sale thereof, in which all persons in being, who would take such property if the contingency had then happened, have been properly made parties, provided that the act shall not affect any vested right, is a valid exercise of legislative power as to contingent rights previously created; and where a testator dying in 1896 directed that, if either of his children named in his will should die leaving no children living at his death, the land devised to such child so dying should descend to his surviving brothers and sisters and to the issue of such as may be dead, and special proceedings were had by one of the devisees in 1896 for a sale of the land devised to her, in which all the persons in being interested in the will were made parties, a conveyance of such interest pursuant to a decree regularly entered passed a good title.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 542.]

Appeal from Superior Court, Wilson County; Long, Judge.

Action by W. P. Anderson and wife against R. S. Wilkins for specific performance of a contract to convey land. From a judgment for plaintiffs, defendant appeals. Affirmed.

The following are the facts found by the judge: The plaintiffs contracted to sell to the defendant a lot in Wilson for \$1,000, and tendered a deed for it; but the defendant refused to pay the purchase money, alleging

that the title is defective. The lot is a part of a larger parcel of land in the same town which was devised to the feme plaintiff (formerly Lucy Whitehead) by her father, H. G. Whitehead. He had four other children, Robert B., H. G., William B. and James S. Whitehead, all of whom survived him. Before August 31, 1896, the feme plaintiff had intermarried with her coplaintiff, and on said date they had living one child, Mary Gray Anderson, who is still living. Prior to said date H. G. Whitehead, Jr., had intermarried with Nolla G. Whitehead, and on that date they had living one child, Dorothy Whitehead, and since said date there has been born of said marriage another child, Nolla G. Whitehead; both of said children being still alive. At the said time neither Robert B. Whitehead, William B. Whitehead, nor James S. Whitehead were married, and William B. and James S. Whitehead were minors; F. W. Barnes being their regularly appointed guardian. On August 31, 1896, the plaintiffs in this case and their daughter, Mary Gray Anderson, and H. G. Whitehead, Jr., and his wife, Nolla G. Whitehead (the infant being represented by a next friend duly appointed by the court), instituted a special proceeding before the clerk against Robert, W. B., and James S. Whitehead for a sale of the land; the minors being represented by their guardians. This proceeding was regular in form, and the court decreed that a sale be made of the land devised to the feme plaintiff, Lucy W. Anderson, by her father, discharged of the limitations imposed by the will, and this judgment was afterwards regularly approved by the judge of the superior court. At all stages of this proceeding the respective parties were represented by counsel. All persons in being who would have taken under the will, if the contingency hereinafter mentioned had then happened, were duly made parties to that proceeding. Since the coming of age of all the children of H. G. Whitehead, Sr., they have executed, pursuant to the said judgment, a mutual deed of exchange and release, each thereby releasing any and all present or future interest which he or she had in and to the property of the other. The defendant admits that H. G. Whitehead, Sr., at the time of his death, which occurred prior to August 31, 1896, had a good and indefeasible title to said lot, and that by the deed which the plaintiffs have tendered he will acquire a good title, unless the same is rendered defective or unsound by the following clause in the will of the said Whitehead, which extends to and qualifies all the devises made to his children by that instrument: "Item 24. It is my further will that, if either of my children herein named should die leaving no child living at his or her death, then and in that case I will that the land devised herein to such child so dying shall descend to his or her surviving brothers and sisters, and to the

issue of such as may be dead; such issue representing their parents." The case was submitted to the court below upon an agreement that the judge should find the facts and enter judgment thereon according to his opinion of the law. The court concluded that, under section 1591 of the Revisal of 1905 and the judgment of the clerk as approved by the judge, the plaintiffs can convey a good and perfect title, and, having entered judgment accordingly against the defendant, he appealed.

John E. Woodard, for appellant. F. A. Woodard and Connor & Connor, for appellees.

WALKER, J. (after stating the case). We need only consider the question raised as to the validity of Acts 1905, p. 109, c. 93 (Revisal 1905, § 1591), by which all parties not in esse who may take property, in expectancy or upon a contingency, under limitations in deeds or wills, are bound by any proceedings theretofore had for the sale thereof, in which all persons in being who would have taken such property, if the contingency had then happened, have been properly made parties; it being expressly provided that the act shall not affect any vested right or estate. It is not questioned that the proceeding under examination was regularly conducted in all its stages, or that the title which the defendant will acquire under the deed tendered by the plaintiff will be undoubtedly a good and perfect one, if that act is a valid exercise of legislative power. The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the Legislature to dispense with it by subsequent statute; and if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the Legislature might have made immaterial by prior law, it is equally competent to make the same immaterial by a subsequent law. *Cooley on Const. Lim.* (7th Ed.) p. 531. The general rule, therefore, is that the Legislature may validate retrospectively any proceeding which might have been authorized in advance, even though its act, it has been said, may operate to divest a right of action existing in favor of an individual, or subject him to a loss he would otherwise not have incurred. 6 Am. & Eng. Enc. 940. There are, of course, exceptions to this rule; but this case is not within any of them. In regard to the validity of retroactive legislation, so far as it may affect only expectant or contingent interests, we think the law is well settled that the power thus to deal with such interests resides in

the Legislature. Justice Woodbury stated the rule with great clearness, and what he said has been accepted by the courts and law writers as an authoritative utterance and as declaring the true doctrine upon the subject. Laws enacted for the betterment of judicial procedure and the unfettering of estates, so as to bring them into market for sale, cannot be regarded as opposed to fundamental maxims, "unless," as he says, "they impair rights which are vested, because most civil rights are derived from public laws, and if, before the rights become vested in particular individuals, the convenience of the state necessitates amendments or repeals of such laws, those individuals have no cause of complaint. The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee." *Merrill v. Sherburne*, 1 N. H. 213, 8 Am. Dec. 52; *Cooley* (7th Ed.) p. 511. Chancellor Kent, in speaking of retroactive statutes, says substantially that while such statutes, affecting and changing vested rights, are very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void, yet that this doctrine is not understood to apply to remedial statutes, which may be of a retroactive nature, provided they do not impair contracts, or disturb absolutely vested rights, and only go to confirm rights already existing, and proceed in furtherance of the remedy by curing defects and adding to the means of enforcing existing obligations. Such statutes have been held valid when clearly just and reasonable, and conducive to the general welfare, even though they might operate in a degree upon existing rights. 1 Kent, Com. 445; *Cooley*, supra. So long as the interest remains contingent only, the Legislature may act, for a bare expectancy, or any estate depending for its existence on the happening of an uncertain event, is within its control, not being a vested right which is protected by constitutional guarantees. If this be so, the nature of estates and their enjoyment must to a certain extent, and indirectly, be subject to legislative control and modification in order to promote the public welfare. *Smith on Statutory & Const. Constr.* 412.

In this country estates in tail have very generally been turned into estates in fee simple by statutes the validity of which is not disputed. *De Mill v. Lockwood*, 3 Blatchf. 56, Fed. Cas. No. 3,782; *Lane v. Davis*, 2 N. C. 277; *Minge v. Gilmour*, Id. 279. Such statutes operate to increase and render more valuable the interest which the tenant in tail possesses, and are not, therefore, open to objection from him, and as no other person in these cases has any vested right, either in possession or expectancy, to be affected by such a change, the expectation of the heir presumptive, which is at best but a contingent interest, must be subject to the same control as in other

cases. Cooley (7th Ed.) 512. It has also been held that the Legislature has the power by special act to confirm a conveyance in fee simple of a tenant in tail (Comstock v. Gay, 51 Conn. 45), although, perhaps, this could not have been done, if the possibility of issue had become extinct, and where the estate of the tenant had ceased to be one of inheritance, and a reversionary interest had become vested (1 Washburn, R. P. 81-84, and notes). Numerous cases can be cited in which such power has been held to belong to the Legislature, where the interest to be affected is only contingent, or at least not vested. Kearney v. Taylor, 15 How. (U. S.) 494, 14 L. Ed. 787; Randall v. Krieger, 23 Wall. (U. S.) 137, 23 L. Ed. 124; 6 Am. & Eng. Enc. (2d Ed.) p. 957, where the authorities are collected. An illustration of the application of this settled principle is to be found in the decisions of this court, in which statutes validating certain judicial acts and proceedings have been upheld. Howerton v. Sexton, 90 N. C. 581; Carter v. Rountree, 109 N. C. 29, 13 S. E. 716; Bass v. Navigation Co., 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247; Barrett v. Barrett, 120 N. C. 127, 26 S. E. 691, 36 L. R. A. 226. See, also, Bank v. Bank, 22 Wall. (U. S.) 276, 22 L. Ed. 871. But it seems useless to pursue this line of thought any further, in view of the recent decision in Springs v. Scott, 132 N. C. 548, 44 S. E. 116, where Mr. Justice Connor, speaking for the court in a learned and exhaustive discussion of a similar question, as to the validity of Acts 1903, p. 123, c. 99 (Revisal 1905, § 1590), in respect to its retrospective operation upon the will considered in that case and the estates that are created thereby, demonstrates by reason and authority that the act is valid, even when allowed to reach back and affect estates already created by will, so far, though, only as it is permitted to apply to interests not yet vested. If the act of 1903 can be thus sustained, we do not see why judicial proceedings, conducted in substantial conformity to its requirements, may not with equal reason be validated by the act of 1905. The cases are to be distinguished from those where the power has been denied by the fact that the estates to be affected have not yet become vested, so as to be brought under the protection of the Constitution, or of any principles of natural right or justice, as expressed in the maxim, "*Jura naturæ sunt immutabilia*," and which are said to be paramount, or "*leges legum*," without any express constitutional sanction. Coke, Litt. § 212. The decision in Springs v. Scott was approved in Hodges v. Lipscomb, 133 N. C. 199, 45 S. E. 556, a case in which it appeared that the will was made prior to the passage of the act of 1903 (128 N. C. 57, 38 S. E. 231). It was there held that the act of 1903 operated retrospectively, so as to apply to contingent interests created

by a will which had already taken effect by the death of the testator.

If the judicial act of taking the probate of a deed, which renders the latter void as to a married woman because of a defect in the privy examination, can be made valid by subsequent legislation, it would seem that a proceeding to sell land for the purpose of reinvestment, which the court finds will inure to the benefit of all parties interested, should be subject to legislative action in order to correct errors of procedure, especially when vested rights are not impaired. A closer analogy may be found in those statutes which have been passed to validate judicial proceedings for the sale of land, in which infants who were interested parties had not been personally served with process, though their interests were represented by a guardian ad litem. In those cases, notwithstanding the law required personal service both upon the infant and the guardian ad litem, this court held such statutes to be a valid exercise of the legislative power. Those cases and this one have this feature in common: that the doctrine of virtual representation applies to each; but the reason in favor of a proceeding like the one we have under consideration is stronger than in the other case, as in the former the only interest which can be affected has not vested, and is not likely to vest, while in the latter the infants had vested interests, which might be prejudiced by upholding the legislation. When we refer to the principle of "virtual representation," we do not mean to imply that the proceeding to sell this land could be sustained without the aid of the act of 1905, as being within the rule laid down in *Re Dodd*, 62 N. C. 97, and fully explained and elucidated by Mr. Justice Connor in *Springs v. Scott*, supra. Mrs. Anderson, by virtue of the devise, took a fee which is determinable upon her dying without children (*Whitfield v. Garris*, 134 N. C. 24, 45 S. E. 904), and not merely a life estate, with remainder by implication or construction of law to her children, as was the case with the devisee in *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756. We have not, therefore, the precise facts which were presented in *Re Dodd*, or in *Springs v. Scott*. Whether this case is substantially within the principle of those decisions, and the former proceeding to sell the land can, for that reason and upon the ground of virtual representation, be declared valid, we need not decide, or even consider, as this case can well be disposed of on the other ground, namely, that any defect in the proceeding is cured by the statute.

There was no error in the opinion and judgment of the court.

Affirmed.

CONNOR, J., did not sit in the hearing of this appeal.

SMITH v. MOORE.

(Supreme Court of North Carolina. Oct. 16, 1906.)

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED—STATEMENTS BY ATTORNEY.

Under Code, §§ 589, 590 (Revisal 1905, §§ 1629, 1631), making parties and persons interested competent witnesses subject to the provision that they may not testify in their own behalf against a party representing a decedent as to transactions or communications with the decedent, in an action against a widow to set aside a deed to her deceased husband, testimony by plaintiff as to statements by the decedent's attorney in his presence is inadmissible, especially where the attorney is also dead.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 653-655.]

2. EVIDENCE—DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.

A declaration by a grantor, since deceased, not in privity with either party to a suit, that she had made a deed of land to her son-in-law because of the many kindnesses he had shown her and her high regard for him, was admissible in its entirety as a declaration against interest, though particular parts of the statement may not have been against her interest.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1187.]

3. SAME.

In an action by a daughter to set aside a deed of her mother and herself, where the plaintiff introduced evidence of a declaration by the grantee's attorney in his presence that the instrument executed was a will, evidence of statements by the mother, since deceased, that she and her daughter had executed a deed were not inadmissible on the ground, that, though the mother knew the instrument was a deed, the daughter may have been misled to believe that it was a will.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1135-1141.]

4. DEEDS—FRAUD—PRESUMPTIONS—CONFIDENTIAL RELATIONS OF PARTIES.

Where the grantee in a deed is the agent, confidential friend, and adviser of the grantors, the law raises a presumption of fraud, and imposes on the grantee the burden of showing that the transaction was fair and honest.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 589.]

5. SAME—RELEVANCY OF EVIDENCE.

The grantee's failure to register the deed till 10 months after its date may be considered in determining the issue as to fraud.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 609.]

6. TRUSTS—CONVEYANCE OF TRUST PROPERTY—EFFECT.

Where one holding the legal title to land in trust for a mother for life with the remainder for her daughter executes a deed conveying such estates to them, and they make a deed of their interest to a third party, the grantee in the latter deed holds the full legal and equitable title, at least after the death of the mother, and does not hold it in trust for the daughter.

Appeal from Superior Court, New Hanover County; W. R. Allen, Judge.

Action by Louise B. Smith against Susan E. Moore and others. From a judgment in favor of plaintiff, defendant Susan E. Moore appeals. Reversed, and new trial granted.

The object of the action is to set aside a deed for a lot in the city of Wilmington

at the northeast corner of Second and Red Cross streets which was executed to Mr. Moore, the husband of the defendant Susan E. Moore, and the father of her codefendants, by Mrs. Mary E. Smith and her daughter, the plaintiff, and which it is alleged was obtained by fraud. The lot was devised in 1862 by Samuel Frink, the father of Mrs. Mary E. Smith and grandfather of the plaintiff, to his son Lorenzo Frink and Henry Nutt and the survivor of them, in trust for the sole and separate use of his daughter, Mary E. Smith, for and during her life, and at her death to such of her children as should then be living and the issue of such as might be dead, the issue to take per stirpes. Mr. Nutt died in 1881, and on February 27, 1885, Lorenzo Frink conveyed the said lot "to Mary E. Smith for life with remainder to Louise B. Smith in fee, reciting in the deed that the lot had been devised to Mary E. Smith for her sole and separate use, so that it would not become liable for the debts of her then husband, that the latter had since died, leaving his widow, Mary E. Smith, who was well advanced in years, and an only child, Louise B. Smith, his other children being dead without issue surviving them. He had three children, Rebecca Smith (who was the first wife of Mr. Moore and died in 1869 leaving one child who died in 1884), the plaintiff, and another who died without having married. Mrs. Mary E. Smith died intestate in April, 1895, and Mr. Moore died in 1900. The plaintiff attacked the deed from her mother and herself to Mr. Moore upon the ground that, at the time it was executed, his attorney stated to her in the presence of her mother and Mr. Moore that it was a will; that she was ill at the time and confined to her bed, and that she signed the deed thinking that it was a will and she did not know it was a deed until after Mr. Moore's death. There was evidence in corroboration of the plaintiff's testimony, consisting of statements to the same effect made afterwards by her to other persons. It was admitted that Mr. Moore was "the agent, confidential friend and adviser of the plaintiff and her mother." It was also in evidence that the plaintiff and her mother remained in possession of the premises conveyed by the deed until the mother's death, and that after her death the plaintiff has continued in possession to the present time. The deed to Mr. Moore was executed March 3, 1885, and registered January 23, 1886. The defendants introduced in evidence a paper writing in the form of a lease from Mr. Moore to Mary E. Smith and the plaintiff, dated March 15, 1885, by which he covenanted and agreed that they should occupy and possess the said lot "for and during the term of their joint lives, and after the death of either of them, then for the term of the natural life of the survivor of them, yielding and paying therefor annually on the 15th day of March in each and every year during the said term one cent

as rent." The plaintiff put in evidence a letter from Mrs. Smith to Mrs. Moore's attorney, dated March 2, 1885, in which she expressed the greatest affection and esteem for her son-in-law, Mr. Moore, and referred in strong terms to his many kindnesses and to his sympathy for her, and further, to the fact that he had paid her taxes and insurance for 20 years, repaired her house, and in other ways assisted her in time of need. She states it to be her first and greatest wish, if she should outlive her child (the plaintiff), that the house and lot should "descend" to him and his children, and she evinced the greatest anxiety that he should own the lot free from any claims against her. Then she states that she gives to him all of her household furniture, books, pictures, and silver to dispose of as he thinks best. The plaintiff stated that this letter was introduced to show that the attorney was not authorized to draw a deed but a will. The defendant put in evidence the deposition of Mrs. Boudinot, and proposed to prove by her that Mrs. Smith, who was her sister, had stated to her that she had executed the deed to Mr. Moore, and gave substantially the same reasons for so doing as those set forth in the letter to the attorney. The testimony was excluded by the court, and the defendants excepted. On cross-examination she testified that Mrs. Smith had told her the deed had been executed, giving in detail what was said by her about the deed. She also stated that the plaintiff had told her "that she had signed a deed and that she and her mother had fixed it all up." The defendant objected to the testimony of the plaintiff as to what was said to her by his attorney in the presence of Mr. Moore at the house, and also as to what was done at that time. The objection was overruled, and the defendants again excepted. It was shown that the attorney had died before this action was commenced. The court charged the jury that, if Mr. Moore was the agent of the plaintiff and her mother and attended to their business and they were in the habit of relying on him for advice, this would constitute such a confidential relation between them that from it the law raised a presumption of fraud, which would be evidence of fraud to be considered by the jury, and the burden would then rest on the defendants to show that the transaction was fair and honest, and if they had failed to do so the jury should answer the issue "Yes"; that this presumption was rebuttable and if upon all the evidence the jury found that the transaction was fair and honest, they should answer the issue "No"; that the letter of March 2, 1885, did not authorize the attorney to draw a deed in fee simple, and that the listing of the property for taxes by Mr. Moore in the name of Mrs. Smith and after her death in the name of her heirs, the failure to register the deed from March 3, 1885, to January 23, 1886, and the continued possession of the lot by the plaintiff, were

circumstances to be considered by the jury. The defendants objected to that part of the charge as to the nonregistration of the deed. The court further charged that if the jury should find the facts to be those related by the plaintiff in her testimony as to what occurred at the time the deed was executed, the transaction would be fraudulent and they should answer the issue "Yes," but if they did not find by the greater weight of the evidence that the execution of the deed was procured by fraud they should answer the issue "No." The jury for their verdict found that the deed was procured by fraud, and, judgment having been entered thereon, the defendant appealed, and specially assigned as errors the several rulings and the instructions of the court to which exceptions had been taken.

Rountree & Carr and Bellamy & Bellamy, for appellant. John D. Bellamy & Son and E. K. Bryan, for appellee.

WALKER, J. (after stating the case). The testimony of the plaintiff as to what was said and done when Mr. Moore and his attorney were at her home for the purpose of having the deed executed was incompetent, because the witness, under the admitted circumstances of this case, was disqualified by the statute to speak of that matter, and not because the facts related were not pertinent to the inquiry. It is a principle of the common law, and one of its favorite maxims, as well as an indispensable requirement of justice, that they who are to decide shall hear both sides, giving the one an equal opportunity with the other of knowing what is urged against him and of making good his claim or defense, if he has any. This rule, so essential to the fair administration of the law, was embodied in the maxim, "No man should be condemned unheard" (*audi alteram partem*). At common law, no party to an action or person having an interest in the event of the same, was permitted to testify in his own behalf, with certain well-defined exceptions. The Legislature, deeming this exclusion to be founded upon an insufficient reason and to be unjust in itself, changed the law in this respect and admitted interested parties as witnesses subject to the wise provision that no such party should be allowed to testify in his own behalf against the other party representing a deceased person as to a transaction or communication between him and such deceased person. Code, §§ 589, 590; Revisal 1905, §§ 1629, 1631. So we see that the ancient principle of the law, to which we have referred, has been preserved in this enactment, and one of the parties to the transaction will not be heard if the other is dead and cannot, therefore, be called in reply. "The proviso rests on the ground, not merely that the dead man cannot have a fair showing, but upon the broader and more practical ground, that the other party

to the action has no chance, even by the oath of a relevant witness to reply to the oath of the party to the action, if he be allowed to testify. The principle is, unless both parties to a transaction can be heard on oath, a party to an action is not a competent witness in regard to the transaction." *McCanless v. Reynolds*, 74 N. C. 301. This construction was approved in *Pepper v. Broughton*, 80 N. C. 251, and the defendant forbidden, as a witness, to testify that he had not refused to speak to Lougee, his father-in-law, who was then deceased, although the plaintiff introduced testimony showing the mere declaration of Lougee that he had, and although both parties claimed under the deceased person. The idea was that the opposing testimony should be of the same kind, whereas, in fact, Pepper had only an unsworn declaration to stand against and overcome the proposed sworn testimony of Broughton. In *McRae v. Malloy*, 90 N. C. 521, the defendant proposed to show a conversation between himself and the attorneys of the plaintiff's intestate (who were then living and who were present at the time of the communication) touching a matter relevant to the controversy. The testimony was excluded, and this court held the ruling to be correct, although the attorneys were still living at the time of the trial and could have testified and thus arrayed two witnesses in behalf of the plaintiff against only one for the defendant, and he the defendant himself and therefore vitally interested. This seemed to present a strong reason for making an exception to the rule of exclusion, but the court adhered to the principle that the dead man could not be heard and therefore the living one must not be. The attorneys were present and speaking and acting for their client, and with his constant and direct sanction in all that was said and done, and it was the same as if he had acted personally. "Qui facit per alium facit per se." It will be observed that there the attorneys were living and here the attorney is dead. The case is directly in point and decisive of this one, though this is much stronger, if anything, than that one, by reason of the fact that the attorney is dead. The law is explicit that the one party shall not testify if the other cannot, and this without reference to the presence of third parties at the time of the transaction, unless the representative is himself examined in his own behalf, or the testimony of the deceased person is introduced, as to the same transaction. If we reverse the position of the parties on the record, *Halyburton v. Dobson*, 65 N. C. 88, is a case exactly like ours. There the plaintiff's testator, Harshaw, went with the defendant to the office of the testator's attorney, Pearson, who advised him to take certain money from the defendant and the latter proposed to show this by his own tes-

timony, it being material to the controversy. He was held to be incompetent, though he took no part in the conversation which was confined to Pearson and Harshaw. Judge Pearson, for the court, said: "The reason for the exception is apparent. There could never be a recovery against an unscrupulous party if he were permitted to testify where it would be impossible to contradict him. The statute ought to be construed in view of this mischief." The result is that, where an attorney acts or speaks for his client, or an agent for his principal, in his presence, the one is by the law thoroughly identified with his client and the other with his principal, as much so as if the attorney or agent had not been present at all and the client or principal had acted for himself, or the existence of the former had been merged into the latter. We thus preserve the saving principle of the law that the litigants must both be heard, each being given an equal chance, and equality of opportunity means that the one shall be silenced unless the other also is living and can speak. The court erred in admitting the testimony to which the defendant objected. This case is not like either *Peacock v. Stott*, 90 N. C. 518, or *Johnson v. Townsend*, 117 N. C. 338, 23 S. E. 271. There the deceased had been jointly interested with another person who was present at the time of the transaction and who survived. In *re Peterson*, 136 N. C. 13, 48 S. E. 561. This is sufficient to dispose of the appeal did we not think other questions are raised which should be considered as, in all probability, they will again be presented, and it is well to express our views in regard to them for the guidance of the judge who will preside at the next trial.

The second assignment of error, embracing the next six exceptions, relates to the exclusion of a part of Mrs. Boudinot's testimony which was taken by deposition. She deposed, among other things, that Mrs. Smith, who was her sister, had told her that she had made a deed to Mr. Moore for the lot, and, in the conversation with her, used language substantially similar to that which is contained in her letter to Mr. Moore's attorney, dated March 2, 1885. It would seem that the defendants, by question 16 and 17, and her answers thereto, on the cross-examination, had received the full benefit of her testimony as to the fact that both the plaintiff and her mother, Mrs. Smith, had admitted the execution of the deed, or of the paper in question as a deed. But if the testimony of Mrs. Boudinot, which was excluded, is competent, it was error to reject it, and besides all of what was said by Mrs. Smith to her sister, Mrs. Boudinot, is not included in the answers of the latter to questions asked on her cross-examination. We will therefore consider the competency of all that was said. The testimony was evidently ruled out by the court because it

was regarded as nothing more than hearsay, but we think it comes within one of the well-known exceptions to the rule excluding such testimony. Declarations of a person, whether verbal or written, as to facts relevant to the matter of inquiry, are admissible in evidence, even as between third parties, where it appears: (1) That the declarant is dead; (2) that the declaration was against his pecuniary or proprietary interest; (3) that he had competent knowledge of the fact declared; (4) that he had no probable motive to falsify the fact declared. 1 Elliott on Ev. §§ 439-454, where the subject is fully discussed. The declaration is admissible as an entirety, including statements therein which were not in themselves against interest, but which are integral or substantial parts of the declaration, the reason why this is so being that the portion which is trustworthy, because against interest, imparts credit to the whole declaration. It will be well to consider the origin and development of these two principles separately. The earliest case on the subject of such declarations is *Searle v. Lord Barrington*, 2 Strange, 826; *Lord Barrington v. Searle* (on appeal) 3 Brown's Cases, 535; *Id.*, 8 Mod. 278. In that case, decided in 1730, an indorsement of a payment of interest on a note was admitted to repel the statute of limitations. The case was ably argued and remarkably well considered. It originated in the Court of King's Bench and was tried at Guildhall before Lord Raymond, then Chief Justice, who admitted the proof of payment and afterwards it was heard in the Exchequer Chamber and the House of Lords respectively, where the ruling was sustained. It is regarded as the first and leading case, and is reviewed, in connection with the subsequent cases on the same question to the year 1833, in *Gleason v. Atkin*, 3 Tyrwh. (Exch.) 289. It was there held, following the lead of the earlier case, that, as the declaration was against interest and as there was no motive to misrepresent, it was admissible, not only against privies in blood or estate, but against all the world. The rule as thus established is said to be founded on a knowledge of human nature. Self-interest induces men to be cautious in saying anything against themselves, but free to speak in their own favor. We can safely trust a man when he speaks against himself, and the law, in this instance, substitutes for the sanction of a judicial oath the more powerful one arising out of the sacrifice of a man's own interests. This natural disposition to speak in favor of, rather than against interest, is so strong, that when one has declared anything to his own prejudice, his statement is so stamped with the image and superscription of truth that it is accepted by the law as proof of the correctness and accuracy of what was said, and the fact that it was against interest is taken as a full guaranty of its truthfulness in place, not only of an oath, but of

cross-examination as well, they being the usual tests of credibility. A discussion of this rule of evidence, which shows how thoroughly it has been adopted by the courts, whether the declarations are in the form of mere words or of written entries will be found in 1 Gr. Ev. (16th Ed.) §§ 147-154; 2 Wigmore, Ev. §§ 1455-1471; McKelvey on Ev. pp. 254-261. The case of *Higham v. Ridgeway*, 10 East, 109, 3 Smith's L. C. (9th Am. Ed.) 1, recognized the principle to its fullest extent and held that it embraced, not only the particular statement which was against interest, but others contained in it, Lord Ellenborough saying that it is idle to admit a part without the context. "All parts of the speech or entry may be admitted which appear to have been made while the declarant was in the trustworthy condition of mind which permitted him to state what was against his interest." 2 Wigmore, Ev. § 1465. Especially should the part of the declaration that is not dis-serving be admitted if it is not in itself self-serving and tending, therefore, to promote the interest of the declarant. In *Reg. v. Overseers*, 1 B. & S. (101 E. C. L.) 763, the rule was held to apply to oral declarations as well as to written entries or averments, the difference between the two affecting rather the weight than the competency of the testimony.

The three leading cases we have cited have been approved in the later decisions, and are regarded by the law-writers as having firmly settled the principle to which they severally relate. 9 Am. & Eng. Enc. of Law (2d Ed.) pp. 8-13; 16 Cyc. 1217-1222; *Davies v. Humphreys*, 6 M. & W. (Exch.) 152; *Warren v. Greenville*, 2 Strange, 1129; *Doe v. Robson*, 15 East, 32; *Doe v. Jones*, 1 Camp. 387; *Marks v. Colnaghi*, 3 Bing. N. C. 408; *Percival v. Nanson*, 7 W. H. & G. (Exch.); *Queen v. Churchwardens*, 101 E. C. L. 761 (1 B. & S.) 763; *Doe v. Cartwright*, 1 O. & P. 216 (11 E. C. L. 373); *Doe v. Rawlings*, 7 East, 279; *Middleton v. Melton*, 10 B. & C. 319 (21 E. C. L. 84); *Taylor v. Williams*, L. R. 3 Ch. Div. 605. In the case last cited Sir George Jessell said: "It is no doubt an established rule in the courts of this country that an entry against the interest of the man who made it is receivable in evidence after his death for all purposes," and that the argument against its competency, based upon the nature of the particular evidence offered, as affecting its weight, has nothing to do with it. "The question of admissibility is not a question of value." The cases decided in this country are quite as emphatic and as much to the point. *Elsworth v. Muldoon*, 15 Abb. Prac. (N. S.) 440. That case also decides that it makes no difference whether the deceased and the party against whom the declaration is offered were in privity or not. Cases which are very instructive and which review the English decisions at length are *County of Mahaska v. Ingalls*, 16 Iowa, 81, *Livingston v. Arnoux*, 56 N. Y. 519, *James*

v. O'Bryan, 74 Ala. 78, and Halvorsen v. Moon, 87 Minn. 18, 91 N. W. 28, 94 Am. St. Rep. 669. See, also, McDonald v. Wesendonck (Sup.) 62 N. Y. Supp. 764; Heldenheimer v. Johnson, 76 Tex. 200, 18 S. W. 40; Quinby v. Ayres (Neb.) 95 N. W. 464; Hinkley v. Davis, 6 N. H. 210, 25 Am. Dec. 457; Taylor v. Gould, 57 Pa. 152; Bartlett v. Patton, 33 W. Va. 71, 10 S. E. 21, 5 L. R. A. 523; Railroad v. Fitzgerald, 108 Ga. 507, 34 S. E. 316, 49 L. R. A. 175. They all support the doctrine of the leading cases we have cited. This species of evidence was at one time said to be anomalous and to stand on the ultima thule of competent testimony, but an unbroken line of decisions in England and one almost so in this country, have established beyond question that verbal declarations are receivable under the conditions we have mentioned, even in controversies between third parties. The law is thus strongly stated in Hinkley v. Davis, supra: "In many cases where a man has the means of knowing a fact, and it is against his interest to admit it, his admission is evidence even against another person. The evidence results, in such a case, from the improbability of a man's admitting as true what he knows to be false, against his interest. In some cases such an admission is as strong against another person as it is against the person who makes it." Lord Ellenborough thus tersely presented somewhat the same view of the matter when, in Doe v. Robson, supra, he said: "The ground upon which this evidence has been received is that there is a total absence of interest in the person making the entry (or declaration) to pervert the fact, and at the same time a competency in him to know it."

There is nothing that so strongly attests the truth of what a person declares, not even his oath and the searching light of a cross-examination, as when he has asserted the existence of a fact and it appears that his interest at the time lay the other way. Doe v. Jones, supra. The words of sacred writ, "He that sweareth to his own hurt and changeth not," were uttered long before the era of our jurisprudence, and set before us, not only one of the most exalted attributes possessed by the exemplar of true virtue and probity, but embodied at the same time the highest standard by which we can safely gauge our trust and confidence in human testimony. It is not at all a matter for surprise, therefore, that the common-law jurists should have regarded it as a perfectly safe test for discerning the truth in judicial investigation. This rule of evidence has been fully adopted by this court as its decisions will show. The principal case is Peck v. Gilmer, 20 N. C. 391. Recognizing the authority of the cases at common law, to which we have referred, Judge Gaston, for the court, thus states the principle: "It is a well-established rule that where a person

who has peculiar means of knowing a fact, makes a declaration or written entry of that fact which is against his interest at the time, such declaration or entry is, after his death, evidence of the fact as between third persons." This case was followed, and the rule as therein stated applied, in Peace v. Jenkins, 32 N. C. 355; Patton v. Dyke, 33 N. C. 237; Williams v. Alexander, 50 N. C. 162; Carr v. Stanly, 52 N. C. 131; Jones v. Henry, 84 N. C. 324, 37 Am. Rep. 624; McCannless v. Reynolds, 67 N. C. 268; Braswell v. Gay, 75 N. C. 515. We must not confuse these declarations with entries made in a due course of business or in the discharge of a public duty, nor with a declaration which accompanies and explains an act and deemed, therefore, to be a part of the res gestæ (Yates v. Yates, 76 N. C. 142) because, while they are all admitted as evidence, they are not so admitted for the same reason.

We must now consider whether the declaration of Mrs. Smith to Mrs. Boudinot comes within the rule stated. Was it a declaration against her interest at the time she made it? We think it was. She was then in possession of the lot and ostensibly the owner thereof, and when she declared that she had parted with her title and did not own the estate of which she was apparently seised, it could not be anything other than such a declaration. In Ivatt v. Finch, 1 Taunton, 141, Lord Mansfield, speaking of the declaration of a party that she had assigned or transferred certain property, said: "The evidence ought to have been received, though undoubtedly such declarations would be entitled to a greater or less degree of attention according to the circumstances by which they were accompanied. The admission, supposed to have been made by Mrs. Watson, was against her own interest." The evidence was received. To the same effect are Bank v. Holland, 99 Va. 501, 39 S. E. 126, 55 L. R. A. 155, 86 Am. St. Rep. 898; Reg. v. Overseers, 1 B. & S. 763 (101 E. C. L. 768, 769); Chadwick v. Fonner, 69 N. Y. 404; Turner v. Tyson, 49 Ga. 165; Bowen v. Chase, 98 U. S. 254, 25 L. Ed. 47. Cases which appear to be directly in point are Lyon v. Ricker, 141 N. Y. 225, 36 N. E. 189; Tuggle v. Hughes (Tex. Civ. App.) 28 S. W. 61, and Howell v. Howell, 47 Ga. 492. We have seen that any other statement associated in the declaration with the one against interest is just as competent as the latter, and especially is that true in a case like the one at bar where the collateral statement bears directly on the other and tends to confirm and strengthen it. The deed to Mr. Moore is attacked for fraud, because what was in fact a deed was represented to be a will, and the declaration by Mrs. Smith to Mrs. Boudinot was, not only that she had made a deed, and therefore, knew the character and contents of the paper writing,

but that she executed it upon a meritorious consideration, and substantially that she acted freely and voluntarily when she did so. What could be more against her interest than such a statement, and what could carry with it more conclusive evidence of its truth and accuracy? It was in disparagement of her apparent title and made at a time which was recent with respect to the date of the main transaction, when it must be supposed she had a clear recollection of what had occurred, and also long prior to the beginning of this controversy—*ante litem motam*. Her interest was all on the side of herself and her daughter who lived with her, or at least it must now be supposed to have been that way, nothing else appearing. Her motive was a most commendable one—gratitude for what Mr. Moore had done for her—and she spoke with feeling and emphasis; but this does not have the effect in law, as the cases show, to rebut the presumption that she was declaring against her own interest. But it may be suggested that she was not in privity with her daughter, the plaintiff, as she had but a life estate and her daughter a contingent remainder, which, since the death of her mother, has become a vested one in interest and possession. This is true, but it does not prevent the application of the rule, for, the declaration being against interest, it is admitted because of the likelihood of its being true and of its general freedom from any reasonable probability of fraud or imposition, and is for that reason held to be competent as to third parties. It is not, therefore, within the principle of exclusion, as being *res inter alios acta*. *Lyon v. Ricker*, 141 N. Y. 225, 36 N. E. 189; *Higham v. Ridgeway*, *supra*.

It may be further objected that, even if the declaration is otherwise competent, the fact that Mrs. Smith supposed she had executed a deed is not evidence that the plaintiff had the same opinion as to the nature of the instrument. There is every reason, we think, why, under the peculiar facts of the case, we should hold this objection to be untenable and the reason for it to be unsound. The allegation is that the deed was executed at the home of Mrs. Smith and her daughter, in the presence of Mr. Moore, the attorney, and some other persons who are now dead, the plaintiff being the sole survivor of those then present. The deed was executed by the mother and daughter then and there, and the alleged representation of the attorney was to both of them at that time. It was all one and the same transaction, without a single break in its continuity from beginning to end. Under such circumstances, can it be denied that the impression received by Mrs. Smith of what was said and done, the execution of the deed being a joint act, is at least some evidence as to what the true nature of the transaction was, and as she heard what the

attorney said, should it not be received as some evidence of what his words were and what they really meant, and finally, may it not safely be admitted to show that possibly the plaintiff is mistaken as to what was said and as to what did occur? Where two persons have equal opportunity of knowing a fact, one is as competent to give a correct account of it as the other, or at least should be. We frequently receive the evidence of two persons, one against the other, as to whether a certain thing was done or not, one testifying that he saw it done and the other that he did not. The declaration of Mrs. Smith was equivalent to her saying that she did not hear any such representation made as that which is imputed to the attorney, or that it was not in fact made according as her testimony is construed. We are constrained to think that the evidence is both competent and relevant, and should be heard by the jury in its entirety.

Before taking leave of this part of the case, we will refer to three cases which seem to be very much in point just here. The first is that of *Lamar v. Pearre*, 90 Ga. 377, 17 S. E. 92, which bears a striking resemblance to our case in several of its features. There it was held, when it was attempted to establish a trust in certain property, that a declaration of a life tenant as to the subject under investigation was competent against the remainderman, as it disparaged her own estate in the property and was, therefore, against her interest, and that the additional statements relevant to the principal fact and embraced with it in the declaration against interest were also competent. In that case, as here, the life tenant and remainderman acquired their interests under a settlement in trust for their benefit. The two cases are practically parallel. The second is *Howell v. Howell*, 47 Ga. 492, in which the deed in question was attacked as having been procured by undue influence and fraud. The declarations of the donor were held competent to show that he knew the nature and contents of the paper, and to repel the imputation of fraud. The third is *Bowen v. Chase*, 98 U. S. 254, 25 L. Ed. 47, which, while not precisely like the other two cited cases, nor like our case, in the object for which the suit was brought, is, in its main features, and so far as the general question now being discussed is concerned, enough like them to be an important authority in support of the principle we have already stated and applied. The cases in our own reports which approach more nearly than any others to a decision of the very question here presented, are *Pearce v. Jenkins*, 32 N. C. 355; *Patton v. Dyke*, 33 N. C. 237.

The fact that the plaintiff relies on the continued possession of the lot by herself and her mother, after making the deed, as evidence of the false representation, imparts

still greater significance to the mother's declaration, as from her declaration the jury might have found that she did not so regard the retention of possession by her and her daughter, and that the latter shared in that view, the fraud being alleged to have been practiced upon both of them at the same instant of time, and it being, therefore, at least probable that it produced the same impression upon both. Speaking with reference to a case somewhat similar, Judge Nash said: "The declarations were made by a man, upon the subject in controversy, against his interest, and when he could have no conceivable interest to declare that which was not true," *Pearce v. Jenkins*, supra, and so we say here concerning the declaration in question. The text-books and the cases do not justify the statement that this species of evidence is anomalous in character and approaches the verge of admissible testimony, for even a cursory examination of the authorities will show that it is well-nigh universally conceded to be an established exception to the rule excluding hearsay, and an unshakable principle in the law of evidence. As Lord Ellenborough said in the opening passage of his opinion in *Hilgham v. Ridgeway*, 10 East, 106: "We should be extremely sorry if anything fell from the court upon this occasion which would in any degree break in upon those sound rules of evidence which have been established for the security of life, liberty, and property; but, in declaring our opinion upon the admissibility of the evidence in question, we shall lay down no rule which can induce such ruinous consequences, nor go beyond the limits of those cases which have been often recognized, beginning with that of *Warren v. Greenville*."

Having disposed of this exception, we now proceed to consider the remaining questions in their order.

We cannot sustain the exception to the instruction of the court that, from the relation of the parties, Mr. Moore being the "agent, confidential friend, and adviser of the plaintiff and her mother," the law raised a presumption of fraud as to any transaction between them, which is evidence of fraud to be considered by the jury, and imposes upon the defendants the burden of showing that the transaction was fair and honest and that, if the defendants had failed so to do, the jury should answer the issue as to fraud "Yes." With reference to fiduciary relations from which presumptions of fraud or undue influence are raised, that of principal and agent is thus classified: (1) When one is the general agent of another and has entire management of his affairs, so as in effect to be as much his guardian as the regularly appointed guardian of an infant, a presumption of fraud, as matter of law, arises from a transaction between the agent and his principal for the former's benefit,

and it will be decisive of the issue in favor of the principal unless it is rebutted. (2) When the only relation is that of friendly intercourse and habitual reliance for advice and assistance and occasional employment in matters of business as agent, a presumption of fact only is raised from such a transaction which may be strong or slight according to circumstances. The latter is for the jury to consider and act upon. *Lee v. Pearce*, 68 N. C. 76; *Timmons v. Westmoreland*, 72 N. C. 587; 1 *Bigelow on Fraud* (1890) p. 295. "When a party, complaining of a particular transaction, such as a gift, sale, or contract, has shown to the court the existence of a fiduciary or a confidential relation between himself and the defendant, and that the defendant occupied the position of trust or confidence therein, the law raises a suspicion or, it is often said, a presumption of fraud; a suspicion or presumption, arising as matter of law, that the transaction brought to the notice of the court was effected through fraud or, what comes to much the same thing, undue influence by reason of his occupying a position affording him peculiar opportunities for taking advantage of the complaining party. Having special facilities for committing fraud upon the party whose interests have been intrusted to him, the law, looking to the frailty of human nature, requires the party in the superior situation to show that his action has been honest and honorable." 1 *Bigelow on Fraud*, p. 261, et seq. This presumption is raised where there have been dealings between the parties, because of the advantage which the situation of the parties respectively gives to one over the other. The doctrine rests on the idea, not that there actually was, but that there may have been fraud, and an artificial effect is given to the fiduciary relation beyond its natural tendency to produce belief of the fact that fraud really existed. *Lee v. Pearce*, supra. It does not appear clearly from the evidence or the admission whether or not Mr. Moore was the general agent of the plaintiff and her mother at the time the deed was executed and had the management of their entire business, nor does it appear what was the nature and scope of his agency. It is merely said that he was their agent. We take it that this was intended to mean a general agency investing him with control and management of all of their affairs, and so considered, in connection with the other part of the admission, that he was also their confidential friend and adviser, we think the charge of the court was correct. In *Lee v. Pearce*, the chief justice, referring to the facts of that case (68 N. C. at page 87), says: "Our case would seem, from what appears by the statement, to come under the last instance [second class mentioned above], for there is no evidence that Pearce was the general agent of Mrs. Lindsay, intrusted with the

management of all of her affairs or business, although he was looked up to by her, and relied on for advice and assistance, and frequently acted as her agent in buying wood and leasing her property—all of which evidence should be passed upon by a jury, as raising a presumption of fraud or undue influence, and as being a link in a chain of circumstantial evidence." It may be that the proof at the next trial will disclose just such a relation as there described, and change the nature of the presumption or weaken its force. Be this as it may, we do not think his honor upon the facts as presented at the trial, and, as we now construe them, misapplied the rule, as stated in *Lee v. Pearce*. The presumption of fraud is of course a rebuttable one.

The last assignment of error questions the correctness of the charge so far as it relates to Mr. Moore's failure to register the deed from the day of its date, March 3, 1886, to January 3, 1886, it being 10 months. In the trial of questions of fraud the evidence necessarily takes a wide range, and great latitude is allowed in adducing proof to disclose the true nature of the transaction, and it has been said to be enough if the evidence falls within a broad interpretation of the rule of relevancy. Circumstances very slight and apparently trivial in themselves are permitted to be shown in connection with the other facts in order to sustain the allegation of fraud. 1 *Bigelow on Fraud*, 146. The plaintiff does not contend that Mr. Moore was compelled to register the deed under the statute, it being good as between the parties without registration, which is required only to protect the grantee against creditors and subsequent purchasers. *Nadal v. Britton*, 112 N. C. 180, 16 S. E. 914. But she says that withholding this deed from record was some evidence of a purpose to conceal it, so that the public could not see it and thereby diminish the chance of the grantor's discovering that it was a deed instead of a will. While perhaps very slight evidence and inconsequential in itself, we yet think that it was a circumstance to be left to the jury with the other facts. But the court should be careful, in submitting it, to direct their attention also to the fact that the deed was registered on January 3, 1886, and has remained on the record to the bringing of this suit. This fact they should consider in connection with the other, in order to determine what weight they will give to the latter.

We have discussed all of the exceptions as they may be repeated if there is another appeal and we had not done so, but we order a new trial because of the error committed in permitting the plaintiff to testify as to what the attorney said in the presence and hearing of herself and her grantee, now deceased.

The plaintiff's counsel contended that the deed of Lorenzo Frink to her and her mother,

vested the legal title in them in trust to serve the uses declared in the will of Samuel Frink, and that Mr. Moore, under the deed to him, took the title in the same plight as they formerly held it. It is not necessary to discuss this proposition so far as the life estate of Mrs. Smith is concerned as it terminated at her death, and is therefore out of the way. But see *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728. If the plaintiff acquired the legal title by the deed of the trustee, Lorenzo Frink, it either merged with her equitable estate, or, if it was held by her separately from it, as contended, then when Mrs. Smith died, there being no longer any need for the separation of the two estates, the plaintiff's contingent remainder having become a vested one, the statute, if she had not conveyed to Mr. Moore, would have transferred the seisin or possession to the use. By her deed to Mr. Moore, she passed both the legal and equitable estate held by her—that is, all the interest she then had—and when Mrs. Smith died the statute executed the use in the same manner, if he who was then entitled to the use had not already, in another way, acquired the seisin and the operation of the statute was not, therefore, required to vest it in him. It is not necessary to inquire whether the deed of Lorenzo Frink had the effect to convey his legal title, as the same result would follow if it did not have the effect, for in that case, it would have descended to his heirs charged with the trust, and their seisin would, at the death of Mrs. Smith, have been transferred to the use as it was no longer required to remain in them to serve the purposes of the trust. *Cameron v. Hicks*, *supra*. If the plaintiff did not acquire the legal title by the deed of Lorenzo Frink, or if she did and it was held by her separate from the use, her deed, she having at the time a contingent remainder, was sufficient to pass the latter to Mr. Moore by way of equitable assignment and operated, not merely as an executory contract to convey, but as an executed one by way of passing her interest. This was expressly decided in the recent case of *Kornegay v. Miller*, 137 N. C. 659, 50 S. E. 315, 107 Am. St. Rep. 505, where the subject is so fully and clearly discussed by Mr. Justice Connor as to make it unnecessary that we should pursue the inquiry any further. See, also, *Cheek v. Walker*, 138 N. C. 446, 50 S. E. 863; *Gray v. Hawkins*, 133 N. C. 1, 45 S. E. 363; *Bodenhamer v. Welch*, 89 N. C. 78; *Watson v. Smith*, 110 N. C. 6, 14 S. E. 640, 23 Am. St. Rep. 665. So that, *quacunque via* data, Mr. Moore got the complete and perfect title, legal and equitable, by the transaction, and his widow and her heirs are entitled to keep and enjoy the same, unless the deed to him was obtained by the fraud charged in the complaint, or can in some other way be invalidated.

For the reason we have already stated a new trial is awarded.

New trial.

HOKE, J., concurs in the result.

WALL v. WALL et al.

(Supreme Court of North Carolina. Oct. 28, 1906.)

1. BOUNDARIES—DESCRIPTION—WATER COURSES.

Where a deed names a nonnavigable river as a boundary, the grantee takes to the thread of the stream, including an island between the thread of the stream and the main body of the land conveyed.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 113.]

2. EJECTMENT—TITLE OF PARTIES—COMMON SOURCE—ESTOPPEL.

In ejectment, where defendants claim under a deed executed in 1843, and plaintiff claims under a grant from the state in 1879, defendants are not estopped to deny the plaintiff's title derived from the state by introducing a grant from the state in 1882, where there was no evidence that the grant of 1882 included the land in controversy.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 114, 58.]

3. ADVERSE POSSESSION—NATURE AND REQUISITES—USE OF LAND.

Where those under whom defendants in ejectment claim title to an island in a non-navigable river have been in possession for over 50 years under color of title consisting of ownership and possession of the mainland on both sides of the river, and have taken timber from the land constantly for various purposes and pastured goats and cattle there, and cleared a part of the land, this was sufficient actual possession under color of title to ripen into an indefeasible title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 113, 82, 111, 106.]

Appeal from Superior Court, Anson County; Moore, Judge.

Action by Edwin Wall against John T. Wall and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. H. McLendon, for appellant. Robinson & Caudle and J. A. Lockhart, for appellees.

BROWN, J. The locus in quo is an island in the Pee Dee river, called "Martin's Island," containing about six acres of land. The evidence tends to prove that the island is separated from the Anson county mainland by a narrow "thoroughfare" of the river about 80 feet wide, which can be easily forded. The main body of water, which flows between the island and the Richmond county side, is 300 yards wide. The island is on the Anson county side of the "thread" of the stream. Plaintiff claims title under a grant from the state to plaintiff dated April 1, 1879, which describes the island. Defendants claim under deed dated December 15, 1843, from William Locke to Stephen Wall, from whom defendants derive title.

We will not consider the 29 exceptions in

the record serialim, but will group the contentions of the parties under three heads: First. Does the description in the deed from William Locke and wife to Stephen Wall cover the island in controversy? Second. Is the defendant estopped to deny the state's title by the introduction of the grant of 1882? Third. Was there sufficient evidence of adverse possession on the part of the defendant?

1. The description in the deed is as follows: "Beginning at a black oak southwest of Pee Dee river, Wm. W. Koy's corner tree, and runs with W. Koy's line south 15 chains, to a pine, etc.; then east 29 chains, to the river; then up the various courses of said river, to the beginning—containing 300 acres." It appears in evidence that Stephen Wall owned and occupied the land on both sides the Pee Dee river opposite Martin's Island. It was decided as long ago as 1831 that the Pee Dee at this point was not a navigable stream, and that the owners of the land on each side of it have a right to the middle of the river. *Ingram v. Threadgill*, 14 N. C. 61. The same is the law in respect to rivers which divide nations. *Handly v. Anthony*, 5 Wheat. (U. S.) 374, 5 L. Ed. 113. It is not disputed that, if the call of the deed is extended to the thread or middle of the stream, and then up the various courses thereof to the beginning, the land in controversy is included in its boundaries. There is no rule of the common law better settled, and more universally adopted in this country, than that which prescribes that a grant of land bounded in terms by a creek or river not navigable carries the land to the grantee usque ad flum aquæ, to the middle or thread of the stream. *Wilson v. Forbes*, 13 N. C. 30; *Ingram v. Threadgill*, supra; *Williams v. Buchanan*, 23 N. C. 535, 35 Am. Dec. 760; *Rowe v. Lumber Company*, 128 N. C. 303, 38 S. E. 896; and *Id.*, 133 N. C. 433, 45 S. E. 830. The evidence shows conclusively that the thread of the Pee Dee is the dividing line between Richmond and Anson counties, and that it runs between Martin's Island and the Richmond side of the river. In fact the plaintiff's grant describes the island as located in Anson county.

2. The defendant introduced grant from the state to Stephen G. Wall dated December 20, 1882, for a tract of 130 acres of land. During the argument, plaintiff's counsel contended that by this grant it was shown that both plaintiff and defendant claimed under a common source, that defendant was estopped to deny the state's title, and that plaintiff, having the older grant, is entitled to recover. There is nothing upon which to base such contention. Neither plaintiff nor defendant had offered any evidence locating said grant of 1882, and there is nothing on its face which indicates per se that it covers Martin's Island. The defendant stated it did not cover the land in controversy, and the court permitted him to withdraw it as evidence. As its

relevancy to the matter at issue is not disclosed, we see no error in this. It was a matter within the sound discretion of his honor. Besides, the plaintiff did not ask to be permitted to reintroduce this grant and to offer evidence locating the island within its boundaries.

3. The evidence tends to prove that Stephen Wall owned and was in possession of the land on both sides of the river opposite Martin's Island for some years prior to the War, and that his possessions extended one-half mile or more up and down the river on the Anson side and for two or three miles on the Richmond side, and that he was in possession of it at the time of his death in 1845. Stephen Wall devised "to my brother James Wall's two youngest sons, to wit, these by his last wife, all the land I own in Anson county, supposed to be about 500 acres." The sons by the last wife of James Wall were A. G. and S. G. Wall, under whom defendant justifies his right to possession. As Stephen Wall was the owner and in possession of the lands on both sides of the river, he is presumed to have title to the island between. *Prima facie*, the title to the bed of an unnavigable stream to the thread thereof, and to islands between the mainland and said thread, is in the owner of the adjacent mainland. Where the lands on both sides the stream belong to the same person, the entire bed of the stream and all the islands therein between such lands belong to him. 17 A. & E. Encyc. Law (2d Ed.) 532, and cases cited; *Granger v. Avery*, 64 Me. 292; *Stolp v. Hoyt*, 44 Ill. 220. Independent of such presumed title, there is abundant evidence of such actual possession of the island as ripens the color of title under the Locke deed into an indefeasible title. The evidence tends to prove that the defendant and those under whom he claims took possession in 1845; that they got timber off the island constantly for various purposes; that after 1854 the island was used more than any other part of defendant's land for getting timber; that goats were placed there, and cattle pastured on it, and in 1899 defendant cleared two acres of the land; that from 1890 until the trial defendant used the island all winter every year for cattle pasturage.

Upon a review of the entire record, we are of opinion that the case was well tried, and that there is no error.

HATCHER v. FAISON.

(Supreme Court of North Carolina. Oct. 23, 1906.)

1. JUDGMENTS—ACTION OF ATTORNEY—BONA FIDE PURCHASER.

Where a defendant has been served and was represented in open court by a regularly practicing solvent attorney, though without authority, defendant is bound by the judgment rendered against him, which, after notice, he took no steps to vacate, as against an innocent

purchaser of the judgment or at execution sale thereunder.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 80.]

2. APPEARANCE—NONSERVICE—WAIVER.

Where a defendant appears in the action, either personally or by a duly authorized attorney, he thereby waives service of summons.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 91-102.]

3. JUDGMENTS—REVIVER—DEFAULT.

Where notice to show cause why a judgment should not be revived is served, failure to defend gives the revived judgment no more efficacy than the original judgment possessed.

4. SAME—VACATION.

A judgment having been assigned, an order of reviver was entered on default. The revived judgment recited service of summons and appearance of defendant by counsel. Subsequent admissions by the judgment debtor were proved, in which he agreed to secure the debt by a deed of trust. There was a failure to set up any defense to the motion to revive or any proceeding to set aside the judgment of revivor for more than 16 years; and there was not any showing of a meritorious defense. *Held*, that a motion to open the judgment, the effect of which would be to defeat the claim by a plea of limitations, would be denied.

Appeal from Superior Court, Duplin County; Shaw, Judge.

Motion by J. F. Faison, as administrator of W. A. Faison, deceased, against B. H. Hatcher, to set aside a judgment. From an order denying the motion, petitioner appeals. *Affirmed*.

Grady & Graham, for appellant. F. R. Cooper, J. D. Kerr, and G. E. Butler, for appellee.

CLARK, C. J. This is a motion made at August term, 1906, of Duplin, by J. F. Faison, administrator of W. A. Faison, to set aside a judgment rendered at February term, 1889, of said court. The court at January term, 1906, refused the motion, and found the following facts: On 11th January, 1889, the plaintiff issued a summons against F. L. Faison, administrator of A. M. Faison, W. A. Faison, and William Boyette, returnable to February term of Duplin. It was duly served on F. L. Faison and Boyette, and returned, "Served on W. A. Faison by leaving a copy at his house." On the docket for that term, on the margin opposite the names of defendants, is entered "Faison," which the judge finds stood for the name of Henry E. Faison, an attorney at law practicing in said court. A verified complaint was filed, setting out a promissory note under seal, signed by A. M. Faison, with W. A. Faison and William Boyette sureties. No answer was filed, and judgment by default final was taken for the principal and interest of said note, which judgment recited that "the defendants have been duly served with summons," that a duly-verified complaint had been filed, and no answer. When the case was called Henry E. Faison, who was a practicing attorney in said court, and whose name was entered as counsel for the defend-

ants, stated to the court that he had read the judgment and examined into the merits of the case, and that he had no defense whatever to said action, and that there was no objection to the court signing the judgment set out in the record. After the judgment was rendered W. A. Faison had several conversations with Henry E. Faison, in which he stated that he owed the said debt and told him that he had made provision in a deed of trust to pay said judgment. On 15th of September, 1890, W. A. Faison made a deed in trust in which he provided for the payment of sundry judgments, and among them he recited the aforesaid judgment, placed it in the first class, and required payment of one-half thereof. The judge further finds that Henry E. Faison was not employed by W. A. Faison, and in fact did not represent him when the judgment was taken. On 1st October, 1889, the judgment was assigned to C. S. Boyette, who on 14th January, 1889, instituted proceedings to revive said judgment, in which the notice to show cause was served on F. L. Faison, administrator, and on W. A. Faison, neither of whom made any defense, which fact and the service of notice are recited in the order reviving the judgment. W. A. Faison never contested the validity of the judgment and died 31st December, 1904, and this motion was first instituted by his administrator, doubtless merely in discharge of what he deemed his official duty.

There is no suggestion that there is any defense to the plaintiff's cause of action, should the judgment be set aside. When a defendant has been served with process, he should pay proper attention to the matter. Therefore, if a solvent attorney practicing regularly in said court, though not authorized by him, assumed to represent him in open court, he is bound by the judgment, certainly as to an innocent purchaser of said judgment, or at an execution sale under it, when, with notice of said judgment, he takes no steps to set it aside. *University v. Lassiter*, 83 N. C. 38; *Chadbourn v. Johnston*, 119 N. C. 288, 25 S. E. 705. On the other hand, though a party is not served with summons, if he appeared in the action either personally or by duly authorized attorney, this waives service of summons. *Caldwell v. Wilson*, 121 N. C. 425, 28 S. E. 554. But these cases would not sustain the proposition that when there is no service of summons an unauthorized appearance by counsel would put the party in court, and bind him by the judgment obtained in said action. It is also true that when notice to show cause why a judgment should not be revived is served, failure to defend gives the revived judgment no more efficacy than the original judgment possessed. *Koonce v. Butler*, 84 N. C. 221. But "when a judgment regular upon its face recites that there has been service of process, an innocent purchaser will be protected." *Harrison v. Hargrove*, 120 N. C. 96, 26 S. E. 936, 58 Am. St. Rep. 781. And this applies to the purchaser

and assignee of the judgment equally with the purchaser at execution sale under the judgment. "While courts have the power to correct their records, and set aside irregular judgments at any time, they will not exercise this power where there has been long delay or unexplained laches on the part of those seeking relief against the judgment complained of, especially where the rights of third parties may be affected." *Harrison v. Hargrove*, 109 N. C. 346, 13 S. E. 939. The judgment here is in the hands of an assignee, who has the right to rely upon the above-recited circumstances; i. e., the recital in the judgment of the service of summons that counsel purported to represent W. A. Faison, the subsequent admissions of W. A. Faison of the justice of the judgment in conversation with the said counsel and provision made by him in deed of trust for payment of judgment, the failure to set up any defense to the motion to revive, the acquiescence for more than 16 years, and the absence of any meritorious defense. The effect of opening the judgment would be to permit the defeat of the claim by the plea of the statute of limitations.

The order denying the motion to set aside the judgment is affirmed.

WALKER and CONNOR, JJ., concur in result.

McKEITHEN v. BLUE.

(Supreme Court of North Carolina. Oct. 23, 1906.)

1. HOMESTEAD—PROTECTION OF RIGHT—RETURN OF APPRAISERS—EXCEPTIONS—REQUISITES.

The judgment debtor filed with the clerk exceptions to the allotment of homestead and personal exemption by appraisers, attaching the exceptions to the return of the appraisers on file. No notice was given plaintiff or his attorney, and no undertaking for costs was filed, though subsequently a check was filed in lieu thereof. More than 10 days after the filing of the appraisers' return, additional exceptions were filed. *Held* insufficient as exceptions under Revisal 1905, § 699, authorizing the debtor, within 10 days after the filing of the return, to notify the adverse party and file exceptions attached to a transcript of the return.

2. SAME—SELECTION—DEBTOR'S CHOICE.

Const. art. 10, §§ 1, 2, guarantees a homestead and personal property exemption "to be selected by the owner." Revisal 1905, § 688, requires appraisers to value the homestead and lay off to the owner "such portion as he may select." Section 693 provides that, in case of no selection by the owner or any one in his behalf, the appraiser shall make such selection for him. Section 697 requires exempt personalty "to be by him [the debtor] selected." *Held*, that allotment and appraisal by appraisers during an absence of defendant, which was without his fault and had no connection with the allotment or appraisement, was void.

3. SAME—PROTECTION OF RIGHT—MOTIONS—RETURN OF APPRAISERS—EXCEPTIONS.

Though exceptions to appraisers' selection of homestead and exempt personalty are somewhat irregular as exceptions to the valuation and allotment prescribed by Revisal 1905, § 699, yet, where they call the court's attention to the

violation of the debtor's constitutional right to select his homestead and exemptions, and all the parties are before the court and the facts found, the proceedings may be treated as a motion in the cause and relief administered.

Appeal from Superior Court, Moore County; Fred Moore, Judge.

Action by N. A. McKeithen against N. A. Blue. From a judgment dismissing exceptions to the allotment of homestead and personal exemptions, defendant appeals. Reversed and remanded, with directions.

The sheriff of Moore county, having in his hands for collection an execution issued upon a judgment in favor of the plaintiff against the defendant, summoned appraisers to allot and set apart to said defendant his homestead and personal property exemptions. On January 6, 1906, the sheriff, by his deputy, together with said appraisers, went to the home of the defendant for the purpose of notifying him of their proceeding and giving him an opportunity to select his homestead and personal property exemption, and also for the purpose of laying off and allotting the defendant's homestead and personal property exemption. The defendant was not at his home, but was in the country, and his absence had no connection with the visit of the sheriff and jurors. Thereupon, and without notice to the defendant, the said jurors, after being duly sworn, laid off and allotted to the defendant his homestead, etc., and signed the return thereof. Said return was delivered to the sheriff, with the execution, who, on the 18th day of January, 1906, filed same in the office of the clerk of the superior court of Moore county. No minute of said return has been made on the execution, minute or judgment docket in said clerk's office. On January 22, 1906, the defendant, by his attorney, filed exceptions to said allotment in the office of the said clerk, which were attached to the said return. No undertaking for cost was filed with said exceptions, but on March 5, 1906, a check for \$100 was filed with said clerk in lieu of such undertaking. On March 5, 1906, additional exceptions were filed to said returns. No notice of said exceptions, filed on either day, was given plaintiff or his attorneys or served upon the sheriff of Moore county. The attorneys for plaintiff entered a special appearance for the purpose of lodging a motion to dismiss the exceptions. His honor, after finding the foregoing and other facts not material to the disposition of the appeal, declined to pass upon the questions raised or attempted to be raised by said exceptions, and dismissed the proceeding, including the exceptions. To this judgment defendant duly excepted and appealed.

H. F. Seawell and Murchison & Johnson, for appellant. U. L. Spence, for appellee.

CONNOR, J. (after stating the case). Among other exceptions filed by the defend-

ant is the following: "Because he was not given an opportunity to be present and select such portion of his property as he might choose to constitute his homestead and be exempt from levy and sale under execution." His honor and the counsel in the cause treated this proceeding as an exception filed by defendant pursuant to the provisions of Revisal 1905, § 699, because he was "dissatisfied with the valuation and allotment of the appraisers," etc. The procedure prescribed by that section of the Revisal is clear and explicit. If defendant's contention be treated as coming within the statute, we concur in the opinion of his honor that it cannot be sustained. He failed in several material and essential particulars to comply with its plain requirements. This is settled, both by the language of the statute and the decision of this court in *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780. We are of opinion, however, that the basis of defendant's exceptions to the action of the sheriff and appraisers involves his constitutional and statutory right to select his homestead, and to that end to have notice of the time of its appraisal and allotment. Const. art. 10, §§ 1, 2, are explicit in guarantying to every resident of the state his homestead and personal property exemption of the value fixed "to be selected by the owner thereof." The statute (Revisal 1905, § 688), in accordance with the Constitution, provides that the appraisers, after being sworn, shall "proceed to value the homestead with its dwelling and buildings thereon, and lay off to said owner such portions as he may select, or to any agent, attorney, or other person in his behalf," etc. To meet the contingency of the owner of the homestead not being present to exercise his right of selection, it is provided by section 693 as follows: "In case no election is made by the owner, his agent, attorney, or anyone acting in his behalf, of the homestead, to be laid off as exempt, the appraisers shall make such election for him, including always the dwelling and buildings used therewith." A similar provision in respect to the selection of the personal property exemption is made by section 697. It is thus apparent that the defendant was entitled to an opportunity to be present and exercise his constitutional right to select his homestead, and, as it appears upon the face of the return he was not present, by no fault of his own, the appraisal and allotment was void. This is held in *McGowan v. McGowan*, 122 N. C. 164, 29 S. E. 372. In that case the present Chief Justice said: "Const. art. 10, § 2, gives him the right to make the selection and Code 1883, § 508, provides that the appraisers shall lay off such portion as he may select. As it appears that this was not done, and that the petitioner was given no opportunity to select, it was error to dismiss the exceptions. They should have been sustained, and the matter remanded to the appraisers, that they might give the defendant such opportunity." We

think this conclusive of the defendant's right. While his proceeding was not, in some respects, regular, we think that, it having been called to the attention of the court, his constitutional right had not been preserved, the matter of form becomes immaterial. We may treat the proceeding as a motion to bring up the record or as a rule upon the sheriff to show cause why the appraisement should be set aside as invalid. From either point of view, the facts having been found by his honor and all the parties being before the court, we see no reason why the proceeding should not be treated as a motion in the cause and relief administered. The cause should be remanded with direction to the court below to set aside the appraisement, for the reasons given, and an order that the appraisers, after notice to the defendant, proceed to appraise and allot his homestead as provided by law.

Reversed.

CHERRY et al. v. CAPE FEAR POWER CO.

(Supreme Court of North Carolina. Oct. 23, 1906.)

1. DEEDS—CONSTRUCTION—ESTATE ACQUIRED—REMAINDERS.

Land was conveyed to a husband in trust for his wife for her use for the joint lives of the husband and herself, and if she survived her husband to her in fee, and if she died under coverture leaving children then to the children in fee. *Held*, that the conveyance gave to the wife an equitable estate for the joint life of her husband and herself, and a contingent remainder in fee, dependent on her surviving him, with remainder over to her children depending on her predeceasing him.

2. TRUST—DISPOSITION OF TRUST PROPERTY—RESTRAINT ON ALIENATION BY CESTUI QUE TRUST.

The conveyance provided that the wife could not sell without the consent of the trustees, and that in case she survived the husband the property should be conveyed to her, and in case of her death in the lifetime of her husband leaving children the land should be conveyed to the children. *Held*, that the provision placing a restraint on the wife's right of alienation, without the consent of the trustee, applied to her power to sell her estate in the property, and did not indicate an intention to permit her to dispose of a larger estate than that vested in her.

3. SAME—CONVEYANCE—RIGHTS ACQUIRED.

The husband and wife conveyed the premises to a third person by a deed professing to convey the fee. *Held*, that the third person acquired the wife's interest, and his possession to the day of her death, leaving husband and children, was rightful.

4. LIMITATION OF ACTIONS—ACCRUAL OF CAUSE OF ACTION.

Where a husband and wife conveyed premises in which they had a life interest to a third person by deed, professing to convey the fee on the death of the wife, the life tenant's right of entry accrued, and limitations began to run from that date, and their rights were barred at the end of seven years.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Limitation of Actions, §§ 220-232.]

5. SAME—DISABILITIES—STATUTES.

A married woman, acquiring a right to enter into the possession of real estate prior to the adoption of Acts 1899, p. 206, c. 78, amending Code Civ. Proc. §§ 148, 163, relating to disabilities of married women, by removing such disabilities, is not within the act.

Appeal from Superior Court, Chatham County; Justice, Judge.

Action by L. G. Cherry and others against the Cape Fear Power Company. From a judgment in favor of and against certain of the plaintiffs, defendant and certain of the plaintiffs appeal. Affirmed on both appeals.

This action, brought by the plaintiffs for the recovery of the real estate described in the complaint, was heard by his honor, Justice, J.; jury trial having been duly waived. He found the following facts: That this action was begun on February 10, 1906; that Margaret A. Moore and her intended husband, J. A. Harman, duly executed a marriage settlement and deed of trust to Joel Hines on December 18, 1855, conveying, among other property, the land in controversy, upon the following trusts, to wit: "To have and to hold her distributive share of said land unto him, the said Joel Hines, his heirs, executors, administrators and assigns, upon the trusts, nevertheless, and to and for the uses, intents and purposes hereinafter set forth and expressed, viz.: That during the joint lives of the said James A. Harman and Margaret A. Moore, the said Joel Hines shall suffer and permit the said Margaret A. Moore, notwithstanding her coverture, to remain in possession and occupy the rents and profits of the said tract of land and negro slaves for her sole and separate use, but so that the said Margaret A. shall not sell, transfer, mortgage or in any wise change the same without the consent of the said Joel Hines; and should the said Margaret A. Moore survive the said James A. Harman, then and in that event the said Joel Hines, his heirs, etc., shall transfer and convey the said draw of land and negro slaves and their increase unto the said Margaret A. Moore; but should the said Margaret A. Moore die in the lifetime of the said James A. Harman leaving any child or children surviving her by the said James A. Harman, then and in that event the said Joel Hines, his heirs, executors or administrators shall hold the said draw of land and negro slaves and their increase, to the sole use and benefit of such child or children, and convey the same to them at any time if they or any of them should survive the said Margaret A. Moore; but should there be no issue from the said Margaret A. Moore, and James A. Harman, and the said Harman should survive Margaret A. Moore, he is to have the use and profits of one-half of the said negroes during his lifetime, but not the land." There are some ulterior, contingent limitations not necessary to be noted in the decision of this appeal. That shortly thereafter Margaret A. Moore and J. A. Harman were duly married and lived together as man and wife until the death of Margaret, on June 25, 1885. That by decree of the superior court of

equity of New Hanover county, in an action duly instituted in said court, Joel Hines was permitted to resign as trustee, and Oliver P. Mears was thereupon duly appointed trustee in his stead, and duly accepted the said trust. That, out of funds arising from sale of some of the property conveyed in deed of trust to Joel Hines, the real estate described in the complaint was purchased and deed made conveying the same upon the terms and trusts declared in said marriage settlement. That subsequently, in 1859, by a decree made in the court of equity of New Hanover, duly instituted and pending, Oliver P. Mears was permitted to resign the trust, and J. A. Harman was duly appointed trustee and accepted the same, and pursuant to said decree the said Oliver P. Mears, on January 27, 1859, executed and delivered to J. A. Harman a deed conveying, among other property, the land described in the complaint, to be by him held upon the same trusts as declared in the marriage settlement. That on May 16, 1868, J. A. Harman and Margaret A. Harman executed and delivered to H. H. Prince a deed in fee simple for said land. That H. H. Prince entered upon said land and took possession thereof, and subsequently conveyed it to J. M. Heck, and the defendants acquired the title thereto by mesne conveyances, the said deeds conveying the land in fee with full covenants of warranty, and the several successive owners entered into open and actual possession thereof, and have held and maintained such possession continuously under their deeds since said 16th of May, 1868. That Margaret A. Harman died on June 25, 1885, and James A. Harman died on May 2, 1903. That Margaret A. Harman died leaving, surviving her, the following children, to wit: John Edgar, born 6th day of November, 1856; Mary P. Cherry, wife of L. G. Cherry, born 12th day of August, 1858, and was married 27th day of December, 1877; Harriet Irene Howard, wife of M. E. Howard, born 10th day of March, 1860, and married ——— day of ———, 1888; Viola Braddy, born 27th day of December, 1869, and was married in September, 1889; V. C. Wren, wife of J. L. Wren, was born 13th day of November, 1863, and was married after she became 21 years of age; Clarence H. Harman, born 24th day of August, 1866; George L. Harman, born on the 31st day of October, 1871. That Mrs. Mary P. Cherry, Mrs. Harriet Irene Howard, Mrs. V. C. Wren, and Mrs. Viola Braddy have remained continuously, since their marriage, *femes covert*. The court, upon the foregoing facts, concluded as a matter of law that the plaintiffs Mary P. Cherry and Viola Braddy are entitled to recover one-seventh each of the land, and to be let into possession of said land with the defendants; that the plaintiffs Harriet Irene Howard, V. C. Wren, Geo. L. Harman, and Clarence H. Harman are not entitled to recover of the defendants any part of said

land, but that any title they may have had is vested in the defendants. To so much of said judgment as declares and adjudges that Mary P. Cherry and Viola Braddy are entitled to one-seventh each of said land and to be entitled to be put in possession thereof, and the writ therefor, the defendants except and assign the same as error. The plaintiffs Harriet Howard, V. C. Wren, Geo. L. Harman, and Clarence H. Harman except to said judgment. Both parties appeal to the Supreme Court.

H. A. London & Son, for plaintiffs. Manning & Foushee and Womack, Hayes & Bynum, for defendant.

CONNOR, J. (after stating the case). Eliminating so much of the history of the title to the land in controversy as precedes the execution of the deed by Judge Meares to J. A. Harman, trustee, the case comes to this: The locus in quo was conveyed to Harman to hold in trust for his wife, Margaret A., for her sole and separate use for the joint lives of her husband and herself, and if she survived her husband then to her in fee.

But if she should die while under coverture, leaving children surviving, then to such children in fee. Other contingent estates are provided for; but as the first limitation has been met, and the fee vested, it is unnecessary to set them out. Thus, as we construe the deed, Mrs. Harman had an equitable estate for the joint life of her husband and herself and a contingent remainder in fee dependent upon her surviving him, with remainder over to her children dependent upon her predeceasing her husband. The further provision placing a restraint upon her right of alienation, without the consent of her trustee, applies to her power to sell, transfer, etc., her interest or estate in the property. There is nothing on the face of the deed indicating an intention to permit her to dispose of a larger estate than that vested in her. In that respect the deed differs from that in *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728, wherein the power to appoint was "in fee or otherwise," and *Kirkman v. Wadsworth*, 137 N. C. 453, 49 S. E. 962, where the power was to appoint "such estates as the feme covert might limit." The draftsman evidently thought that Mrs. Harman, unless restrained by the deed, would have the power to dispose of her equitable separate estate as a *feme sole*, as was the English doctrine and once so held by us, and, for her protection, placed restraint upon her power by prescribing that she could do so only with the consent of her trustee. The substitution of her husband as trustee was permissible and valid. *Kirkman v. Wadsworth*, *supra*. It is not material to inquire whether the deed from Mr. and Mrs. Harman refers to the power or not. If necessary that it should have done so,

we think that there is sufficient evidence upon the face of the deed to show that they were pursuing the power. It is, however, well settled that the deed is a valid execution of the power to the extent of conveying her interests. The question is fully discussed and the authorities cited by Mr. Justice Brown, in *Kirkman v. Wadsworth*, supra. Prince, the grantee, in the deed of May 16, 1863, acquired all of the right, title, and interest of Mrs. Harman, and his possession under the deed to the day of her death, June 25, 1885, was rightful. In this respect the case is distinguished from *King v. Rhew*, 108 N. C. 696, 13 S. E. 174, 23 Am. St. Rep. 76, *Kirkman v. Holland*, 189 N. C. 185, 51 S. E. 856, and *Cameron v. Hicks*, supra. In neither of these cases did the trustee join in the deed, and no title passed as against him by the deeds executed by the cestui que trustant. For this reason the entry by the grantee was an ouster of the trustee and put him to his action, the statute thereby began to run against him, with the result that by lapse of time his right of entry was barred, and the right of his cestui que trustant fared the same fate. Here the entry was rightful and the possession continued to be so until the death of Mrs. Harman, June 25, 1885. Upon the happening of that event her interest ceased, and it became the duty of the trustee to convey the land to her children, the present plaintiffs. As the purpose of the trust was fully accomplished, the necessity and reason for keeping the legal and equitable estates separate no longer existed, and by operation of the statute of uses, aptly called "parliamentary magic," the use becomes executed and the legal estate vested in the plaintiffs. *McKenzie v. Sumner*, 114 N. C. 425, 19 S. E. 375; *Perkins v. Brinkley*, 133 N. C. 154, 45 S. E. 541. When an estate is given to a trustee for a special purpose creating a special trust, as for the sole and separate use of a feme covert or to preserve contingent remainders, the legal title vests in him so long as the execution of the trust requires it, and no longer. *Battle v. Petway*, 27 N. C. 576, 44 Am. Dec. 59; *Cameron v. Hicks*, supra; *Steacy v. Rice*, 67 Am. Dec. 447. The plaintiffs' right of entry therefore accrued upon the death of their mother, and the statute began to run from that time. As the deed from Mr. and Mrs. Harman professed to convey the fee, it was good as color of title from that time, and the plaintiffs, unless under disabilities, were barred at the end of seven years, or on June 25, 1892. His honor found that two of the plaintiffs were at that time, and until the beginning of this action continued, under disabilities. As to the others, the statute is a bar. Several interesting questions were discussed in the briefs and the oral arguments which, in view of the construction which we have put on the marriage settle-

ment, do not arise. The feme plaintiffs are not within the provisions of Acts 1899, p. 209, c. 78. They had seven years from February 13, 1899, or until February 13, 1906, to sue—the action was begun February 10, 1906.

We concur with his honor in both appeals.
Let it be certified that there is no error.

PERRY et ux. v. HACKNEY.

(Supreme Court of North Carolina. Oct. 23, 1906.)

1. DEEDS — DELIVERY — ASSENT OF PARTIES — ALTERATION — EFFECT.

A deed was originally executed to P. as grantee, but after it was acknowledged, and before it was registered, P.'s name was stricken and the name of his wife inserted as grantee, without the grantor's knowledge or consent, and in this form the deed was registered. *Held* that, the deed never having been delivered by the grantor to the wife, it passed no title to her, both for that reason and because there was no meeting of minds.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 116-121.]

2. EJECTMENT — PARTIES — RECOVERY BY PLAINTIFF PRO FORMA.

Where a husband was a mere pro forma party to his wife's suit to recover a tract of land, and there was no allegation in the complaint that the husband had title or right to possession, he was not entitled to recover on proof that the equitable title to the property was in him.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Ejectment, §§ 16, 53, 165-170.]

3. WILLS — CONSTRUCTION — RULING IN SHELLEY'S CASE.

Where testator bequeathed to R. the use, benefit, and profit of all his estate, real, personal, and mixed, of every species and description, during her natural life, and to the lawful heirs of her body after her death, it passed a fee in the property included in the devise under the rule in *Shelley's Case*.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1372-1378.]

Appeal from Superior Court, Chatham County; Moore, Judge.

Action by J. W. Perry and wife against Spencer Hackney. From a judgment for defendant, plaintiffs appeal. Affirmed.

Civil action tried before Moore, J., and a jury at May term, 1906, of Chatham superior court. The feme plaintiff sued to recover a tract of land, and her husband was joined with her pro forma; there being no allegation in the complaint of his title or right of possession. The sole allegation was that the wife owned the land and was entitled to the possession thereof, and the prayer was that she be declared to be the owner, and that she recover the possession. It is presumed, of course, that the case was tried upon the only issue raised by the pleadings; the issue upon which it actually was tried not being set out in the record. It was admitted that Stepheness Chambliss owned the land, and that he died leaving a will by which he devised it in the following terms: "I will and bequeath unto Nancy

Richardson the use and benefit and profit of all my estate, real, personal and mixed, of every species and description whatever, during her natural life, and to the lawful heirs of her body after her death." Nancy was his granddaughter. She died about six years ago, leaving her surviving, three children, John, Hannah, and Sarah. Hannah conveyed the land to J. W. Perry, one of the plaintiffs, by deed dated August 7, 1878, and sufficient in form to pass the entire estate in the premises. This deed was acknowledged by the grantor, and afterwards the name of J. W. Perry, the original grantee, was stricken out and that of his wife, M. E. Perry, inserted without the consent or knowledge of the grantor, and, in this form, it was registered. There was testimony as to the possession of the property which need not be stated as, in the view taken of the case, it has become immaterial. There was evidence that Nancy Richardson conveyed the land to Elizabeth Hackney, mother of the defendant. The plaintiff introduced the will of Stepheness Chambless and the deed of Hannah J. Richardson in evidence. The court held that the deed did not convey any title to the feme plaintiff and, on motion, dismissed the action, under the statute. The plaintiff excepted and appealed.

The clause of the will of Stepheness Chambless referred to in the opinion is as follows: "Item 2. My will and desire is that in consideration of meritorious services rendered to me by my granddaughter, Nancy Richardson, wife of Frederick Richardson, and the natural affection I have for her, I will and bequeath unto the said Nancy Richardson the use and benefit and profit of all my estate, real, personal and mixed, of every species and description whatever, during her natural life, and to the lawful heirs of her body after her death."

Womack, Hayes & Bynum, for appellants.
H. A. London & Son, for appellee.

WALKER, J. (after stating the case). The first question raised is the sufficiency of the deed of Hannah Jane Richardson to pass title to the feme plaintiff. The deed was originally made to John W. Perry, his name was erased and that of his wife inserted in its place, and, as thus altered, it was registered. The deed therefore, which was made to John W. Perry, has never been registered, and the deed which was registered was not the one made by Hannah Jane Richardson. A deed presupposes a contract, and, indeed, is itself an executed contract, passing the equitable title after delivery and before registration; the latter taking the place of livery of seisin to the grantee, and after registration the seisin or legal estate also passes. *Davis v. Incocoe*, 84 N. C. 386; *Hare v. Jernigan*, 76 N. C. 471; *Respass v. Jones*, 102 N. C. 5, 8 S. E. 770. The deed before registration may be redelivered or

surrendered, as the cases we have already cited show, and a deed made by the grantor to a new grantee, at the request of the first grantee, if there is no fraud or other vice in the transaction. But that is not our case. A contract requires the assent of two minds to one and the same thing, and so, as to a deed, says Blackstone, for it is essential to its validity that there should be parties able and willing to contract and be contracted with for the purposes intended by the deed and a thing or subject-matter to be contracted for, all of which must be expressed by the parties in their deed. It therefore follows that there must be a grantor, a grantee, and a thing granted, and in every lease, a lessor, a lessee, and a thing demised. 2 Blk. 295-297. Consent, which is the vital element of every contract, is wanting here. Hannah J. Richardson never agreed to be bound by a conveyance to the person whose name was inserted in the deed after its execution by her. She had an undoubted right to determine, by the exercise of her contractual right of selection, to whom she would convey the land. There is another reason why the deed to the feme is not good. A deed must always be consummated by delivery, which is the final act of execution, and this delivery must be either actually or constructively made by the grantor to the grantee. There has been no delivery by the grantor to Mrs. Perry. The only contract so far as she is concerned, if there was any at all, was between her husband and herself, and the only delivery was by him to her, and that even was not the delivery of a deed, in the sense of the law, but of a paper writing having no legal efficacy as an instrument passing title. We therefore hold that the deed to J. W. Perry, when altered by the insertion of his wife's name, was not binding on the grantor and did not transfer any title to her. *Respass v. Jones*, supra; *Holles v. Harris*, 96 Ala. 288, 11 South. 877; *Hill v. Nisbet*, 58 Ga. 586. The deed was afterwards restored to its original form by the reinsertion of the name of J. W. Perry. It may be that he could have recovered on his equitable title, if this was his suit, and he had properly pleaded and relied on his title. *Murray v. Blackledge*, 71 N. C. 492; *Condry v. Cheshire*, 88 N. C. 375; *Farmer v. Daniel*, 82 N. C. 152. But it is in fact his wife's suit, to which he is made a party only pro forma, and there is no allegation in the complaint to which proof of his equitable interest can apply. It is familiar learning that there must be allegation as well as proof, and they must correspond. There was no request for an amendment, if one could have been allowed under the circumstances, which we do not decide.

This disposes of the appeal and affirms the judgment, but the counsel have asked us to pass upon the other question as to the construction of the will of Stepheness Chambless, in order to prevent further litigation.

As we have a decided opinion upon that matter, we will do so, for it may enable the parties to adjust their differences. The appellant contends that only a life estate was given to Nancy Richardson by the will, as the land was not devised, but merely its "use, benefit and profit" and for this reason the rule in *Shelley's Case* does not apply. We think the words are sufficient to pass the estate in the land, and that the rule does apply. The words "all my rents" were held sufficient to pass real estate, for it was said to be according to the common phrase, and usual manner of some men, who name their lands by their rents. 3 Gr. Cruise (2d Ed.) p. 229 (7 Cruise, 176). So a devise of the "rents, issues and income" of lands was held to pass the land itself. *Anderson v. Greble*, 1 Ashm. (Pa.) 186. A person having let several houses and lands for years rendering several rents, devised as follows: "As concerning the disposition of all my lands and tenements, I bequeath the rents of D. to my wife for life, remainder over in tail"—the question being whether, by this devise, the reversions passed with the rents of the lands, it was resolved that they did, as that was clearly the intention, and the will should be construed according to the intent to be gathered from its words. *Kerry v. Derrick*, *Crokes*, Jac. 104; *Allan v. Backhouse*, 2 Ves. & B. 74. A devise of the income of land was held to be in effect a devise of the land (*Reed v. Reed*, 9 Mass. 372), so a devise of the "rents, profits and residue" of the testator's estate received a like construction. *Den v. Drew*, 14 N. J. Law, 68. In *Parker v. Plummer*, Cro. Eliz. 190, there was a devise in the following words: "I will that my wife shall have half the issues and profits of the land during her life"—the question being whether she had any interest in the premises or was only entitled to have an account of rents. It was determined that she had an estate, "for to have the issues and profits and the land were all one," and the same was held with respect to a devise of a "moiety of the rents, issues and profits of my estate"; the words being equivalent to a devise of the estate in fee. *Stewart v. Garnett*, 3 Sim. 398. See, also, *Beekman v. Hudson*, 20 Wend. (N. Y.) 53; *Cook v. Gerrard*, 1 Saund. 186c; *Whitome v. Lamb*, 12 M. & W. 813; *Mannox v. Greener*, L. R. 14 Eq. 456. The language of this will is much stronger to show an intention to devise the land itself than was that used in any of the cases cited. It appears that he gave to the heirs of her body precisely the same interest that he gave to the life tenant. If he intended that they should have the corpus, why should not the mother also have it, by the same construction of his words. The law searches for the intention of the testator and executes it when discovered, without any special regard to the particular manner of expressing it; testators generally being inopis consilii. In this case, there is no reference

to the corpus, either in the first or second limitation, but each, as to the subject of the devise, is couched in the same terms. No trustee is appointed to hold the legal title, and it cannot be supposed that the testator intended the legal title to remain in his heirs forever for the "use, benefit and profit" of those named in the will. Those words are appropriate in law, as the authorities show, to create a beneficial interest in the land, and show clearly an intention to do so. There is no apparent reason for keeping the legal and beneficial interest apart, and we must presume that they were intended to go together to the object of the testator's bounty. But if the testator ever withheld the legal estate, and it descended to his heirs, he used words fit, and sufficient in law, to raise a use in favor of his granddaughter, Nancy Richardson. Why did not the statute execute the use by drawing the legal title to it and thus unite the two estates, so as to form what is called in *Fleta* the only perfect title, "*Fiat juris et seisinæ conjunctio*." 2 Blk. 311. Not only does the very language of the will, when considered in its ordinary sense, clearly indicate a purpose to give both the legal and beneficial interest to the devisee, but the inference thus drawn from it is in accordance with the interpretation of the law. "In the construction of wills, adjudged cases may very properly be argued from, if they establish general rules of construction, to find out the intention of the testator, which intention ought to prevail if agreeable to the rules of law." *Goodlittle v. Whitby*, 1 Burrows, 238. We think those rules, as well as the proper understanding of the words used, justify our construction of the will. The law carries into effect the intention of the testator, if sufficiently expressed, however defective the language may be. This is one of the rules of construction. The case of *Floyd v. Thompson*, 20 N. C. 616, seems to be directly in point, as the language is substantially identical with that of the devise in question. There the property was limited to the use and benefit "of the legatees for life and then to 'descend' to the heirs of their body," and the words were held to denote that the heirs took in succession from, and not merely after, the first taker. *Ruffin*, C. J., added: "If the subject here had been land, the daughter [first taker] would undoubtedly have the fee, and we think less than the entire property in the slaves will not satisfy the words." To the same effect are *Donnell v. Mateer*, 40 N. C. 7; *Worrell v. Vinson*, 50 N. C. 91; *King v. Utley*, 85 N. C. 59; *Ham v. Ham*, 21 N. C. 598. In the case last cited the subject is fully discussed and the authorities collated by Daniel, J. The conclusion is therefore irresistible that the testator used the words "use, benefit and profit" as synonymous with the land itself. 3 Gr. Cruise, p. 229; 2 Underhill on Wills, § 692.

Having settled this point, it is not difficult to decide that the rule in *Shelley's Case* ap-

plies to the limitation. It is within the very words of the rule, for where the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, in fee or in tail, always, in such case "the heirs" are words of limitation of the estate, and not words of purchase; and superadded words of limitation, not varying the course of descent, do not prevent the application of the rule. *Shelley's Case*, 1 Coke, 104. The rule applies only where the same persons will take the same estate, whether they take by descent or purchase, in which case they are considered to take by descent. *Ward v. Jones*, 40 N. C. 400; *Howell v. Knight*, 100 N. C. 257, 6 S. E. 721. They who take in remainder must take in the quality of heirs according to the course of descent established by law. The rule is one of law, and not merely one of construction, for the purpose of ascertaining the intention, and, when the words of the limitation bring the case within the rule, it applies regardless of the intent, or, if expressed differently, the intention is presumed to be in accordance with that which the law implies from the use of words having a fixed and definite meaning. *Leathers v. Gray*, 101 N. C. 162, 7 S. E. 657, 9 Am. St. Rep. 30; *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444; *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450; *Pitchford v. Limer*, 139 N. C. 13, 51 S. E. 790. Under the devise in this will, the limitation over carries the estate to the same parties whether they take by descent or by purchase, and the words "heirs of the body" are therefore words of limitation, and not words of purchase, as those so designated are presumed to take by descent in the quality of heirs. *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Mills v. Thorne*, 95 N. C. 362. It follows that Nancy Richardson acquired a fee simple under the devise. If she conveyed to Mrs. Hackney, her daughter Hannah J. Richardson got nothing by descent, and her deed to J. W. Perry consequently passed nothing to him. She had nothing to grant. But if she had not parted with her title and died intestate, her three children took from her by descent, as tenants in common. We do not know what are the facts, as they were not found; the case having been taken from the jury. There is no error in the ruling of the court.

No error.

DEWEY et al. v. ATLANTIC COAST LINE et al.

(Supreme Court of North Carolina. Oct. 23, 1906.)

1. RAILROADS—LOCATION—CHANGE.

Revisal 1905, § 1097, subsec. 3, empowering the corporation commission, when practicable, and under the limitations contained in the act to require railroads to construct and maintain a union depot in cities and towns, and giving to the railroads subject to such order the ex-

press power to condemn lands, confers on the roads the incidental right to make such changes in their line and route as are necessary to accomplish the purpose designed, and to make the depot available to the traveling public, as contemplated by the act.

2. SAME—DEPOT—INJUNCTION.

Where the erection of a union depot by railroads and the change of their lines to make the depot available to the traveling public are authorized by law, these acts will not be restrained, though causing injury to the business of plaintiffs.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 123.]

3. SAME—STATUTORY PROVISION.

Revisal 1905, § 2573, prohibiting the changes in railroad routes in cities except when sanctioned by a two-thirds vote of the aldermen, applies only where the railroad of its own volition contemplates a change of route, and not where the changes are required by order of the corporation commission, acting within its legislative authority.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 123.]

4. SAME—LOCATION OF DEPOT BEYOND CITY LIMITS.

The location of a union depot at the terminus of an important and much frequented street, 210 feet from the corporate line, within four blocks of the former depot in the city, and within the police jurisdiction of the city, the location being ordered by the corporation, will not be restrained because of its being beyond the city limits.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 131.]

Appeal from Superior Court, Wayne County; Webb, Judge.

Action by Charles Dewey and others, on behalf of themselves and other citizens of Goldsboro, against the Atlantic Coast Line and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Motion to dissolve a restraining order, heard before Webb, Judge, at May term, 1906, superior court of Wayne county. Defendants, the Atlantic Coast Line, Atlantic & N. C. Railroad, and Southern Railway, intending to carry out an order of the corporate commission directing that they establish and maintain a union passenger depot at the terminus of Walnut street, about 210 feet from the western boundary of the city of Goldsboro, and within the police jurisdiction of the same, were stayed by temporary restraining order, issued in the cause at the instance of plaintiffs. The material facts connected with the order of the corporation commission in the premises are as follows: "For many years the city of Goldsboro and its citizens and the traveling public generally have been insisting upon the erection and maintenance of a union passenger station at Goldsboro, N. C. Pursuant to this sentiment, the city of Goldsboro, on July 5, 1905, passed the following resolutions: 'Goldsboro, N. C., July 5, 1905. The following preamble and resolutions were adopted by the board of aldermen of the city of Goldsboro at a regular session of said board on July 3, 1905: Whereas, the city of Goldsboro is the terminus of three

railroads, and the most important way station of a fourth railway, and whereas, all of said railroads do a large passenger traffic in said city; and whereas, said railroads have provided absolutely no shelter for passengers entering or leaving their trains; and whereas, the waiting and baggage rooms are not of sufficient size to supply their intended purposes, and are not up to date in their appointments—therefore, be it resolved by the board of aldermen of the city of Goldsboro, that the corporation commission of this state be requested to take speedy action to cause the erection of a proper passenger depot in said city. Resolved further, that the clerk of this board transmit a copy of these resolutions, attested by the seal of the city, to said corporation commission. [Signed] D. J. Broadhurst, Clerk. [Seal.] Which said resolutions were laid before the North Carolina corporation commission; that in pursuance of said resolutions, the North Carolina corporation commission gave notice that it would hear the petition of the city of Goldsboro at Goldsboro January 4, 1906, and thereupon the city of Goldsboro, through its board of aldermen, adopted the following resolutions: 'Goldsboro, N. C., December 20, 1905. The following preamble and resolutions were adopted at a meeting of the board of aldermen of this city, held this day, to wit: Whereas, the North Carolina corporation commission has given official notice that the petition of this board for the erection of a proper passenger depot in this city has been set for hearing at this place on Thursday, January 4, 1906, therefore, be it resolved by the board of aldermen of the city of Goldsboro that in behalf of the citizens we thank the commission for their response to our petition, we urge them to require speedy action in giving relief to a long-suffering public, and we express no choice as to the location of the said depot; being willing to abide by the action of the commission, which represents the traveling public no less than the citizens of Goldsboro. Resolved further, that a copy of these resolutions be furnished the commission upon their visit here on the 4th of January, 1906. [Signed] D. J. Broadhurst, City Clerk.' That upon said hearing at Goldsboro on January 4, 1906, the said railroads moved the commission to continue the proceedings ninety days, in order that they might confer and choose some available site. That on April 3, 1906, the railroad companies reported to the corporation commission that they had agreed upon the location of said union passenger station, and accompanied their report with a blueprint showing tracks connected therewith. That said site selected was at the foot of Walnut street, about four blocks from the present stopping place of the trains of said railroads. That thereupon all the plaintiffs filed exceptions to said report, alleging as ground therefor that such location

would greatly inconvenience the citizens of Goldsboro and the traveling public, and work irreparable damage to a large proportion of the property owners of the city of Goldsboro. That thereupon, to wit, on the 3d day of May, 1906, at Goldsboro, after due notice to the city of Goldsboro, to the railroads, and to the parties excepting, the North Carolina corporation commission gave a full hearing to all parties, petitioners, and exceptors. That at said hearing the plaintiffs herein were represented by W. T. Dortch, Esq., and appeared in person, and a number of them were examined as witnesses. That the Hon. George Hood, mayor of the city of Goldsboro, stated that the site agreed upon, or any other that would be acceptable to the corporation commission, would be satisfactory to the city of Goldsboro. That after a full hearing of said matters, the corporation commission found the following facts, to wit: 'That the location agreed upon is accessible and available for each of the three railway companies. That it is within four blocks of the site used at present by the said railway companies, and that the grounds are sufficient and ample for the construction of waiting sheds and buildings necessary for the convenience, comfort, and protection of the traveling public, and this location will promote the convenience of the traveling public. That there is constant and increasing danger resulting from the operations of the trains on Center street, and that will, to a great extent, be removed by adopting the proposed site'; and thereupon the North Carolina corporation commission ordered that the union passenger station be located at the terminus of Walnut street, Goldsboro, being the site proposed by the defendant railroad companies. That in obedience to this order of the North Carolina corporation commission, and for no other purpose, and with a motive to subvert the public in the best possible way, and in obedience to law, the said railroad companies were at the beginning of this action taking steps to construct tracks leading to the said proposed union passenger station."

No appeal was taken from this order of the corporation commission, but on May 7, 1906, the board of aldermen of the city of Goldsboro, by a vote of five to four, passed a resolution of protest against the proposed location on the site selected. The four minority members filed a dissent, and adhered to the original resolution of the board. Defendants, as stated, were preparing to carry out the order of the commission, when plaintiffs, for themselves and all other citizens of Goldsboro who would make themselves parties, instituted the present suit, claiming that the order of the commission and the action of defendants thereunder were without warrant of law; that the three railroads heretofore and for many years had their tracks and operated their trains along Center

street of the city of Goldsboro, and this is the location of all the defendant roads in and through the city of Goldsboro; and they have also for many years past had and used a joint ticket office and waiting room rented for the purpose in a building on Center street, near the hotel Kenon in said town. The interest of some of the plaintiffs in property claimed to be damaged and the grievances alleged as the basis of their demand are thus stated in the complaint: "That they are informed and believe under the charter of said railroad companies it is their duty to continue said right of way along said Center street. That, as they are informed and believe, the citizens of Goldsboro, relying, as they have a right to rely, on the presumption that the railroad companies in maintaining their right of way would conform to their charter provisions, and upon the strength of this presumption, have made large investments at this point, and the town of Goldsboro has been built up along said street and adjacent thereto, with a view to a permanent location of said railroads along said street. That the plaintiffs, relying upon said presumption, have invested large sums at or near said point, and along said Center street and on the streets adjacent thereto, and they are of the opinion that the removal of said right of way and tracks of said railroad from said street will greatly injure and impair their investments and property rights along said streets adjacent thereto, as well as the commercial interests and conveniences of all the citizens of the city of Goldsboro. That some of the plaintiffs, to wit, H. Well & Bros. and M. E. Robinson, are largely interested in two large and costly hotels, constructed immediately upon the east side of said Center street, and near said ticket offices of said railroads, and an ice plant immediately east of said right of way, and one of the plaintiffs, Charles Dewey, is largely interested in foundry works established immediately on the western side of Center street, and all other plaintiffs have other and valuable properties either upon said street or adjacent thereto, which in their opinion would be greatly endamaged if the said right of way and tracks of said railroads were removed from said street." Defendants deny that they have any intent to abandon their right of way or discontinue the use of their tracks along Center street for purposes of carrying and delivery of freight, but avow their intention of carrying out the order of the commission in reference to the passenger depot and the operation of their passenger trains. That a compliance with the order of the commissioners will involve some change of the roads in and near Goldsboro, to enable the passenger trains to make use of the union depot at the site selected, and no power to do this after the roads have

been once located appears in the charters of the company, so far as same have been examined or put in evidence. Upon the facts, the judge below dissolved the restraining order, and plaintiffs excepted and appealed.

W. C. Munroe and Dortch & Barham, for appellants. Aycock & Daniels and Isaac F. Dortch, for appellees.

HOKE, J. (after stating the case). The Revisal of 1905 (section 1097, subsec. 3) empowers and directs the corporation commission to require, when practicable, and when the necessities of the case in the judgment of the commission demand it, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, convenience, and accommodation of the traveling public, and to unite in the joint expense of erecting, constructing, and maintaining said union passenger depot, etc. Another clause of said section confers on the railroads so ordered to construct a depot the power to condemn land for the purpose, and the section closes with the proviso that nothing in the section shall be construed to authorize the commission to require the construction of a union depot should the railroad companies have separate depots which in the opinion of the corporation commission are adequate and convenient and offer suitable accommodation for the traveling public. The power of the Legislature to enact a statute of this character has been established by numerous and well-considered decisions of this and other courts of supreme jurisdiction, and is no longer open to question. *Industrial Siding Case*, 140 N. C. 239, 52 S. E. 941; *Corporation Commission v. Railroad Co.*, 189 N. C. 126, 51 S. E. 798, and authorities cited. The corporation commission having taken action under the above statute, the rights of the parties to the controversy may be made to depend largely upon its true interpretation. The statute, in its principal purpose, may be considered as remedial in its nature, and as to that feature will receive a liberal construction. *Endlich on Interpretation of Statute*, §§ 107, 108; *Lewis Sutherland*, *Statutory Construction*, § 338. In a note to this citation from *Endlich*, it is said: "In any classification of Acts of Parliament, the most important is that by which they are divided into remedial and penal statutes; or, rather, into such as are construed liberally and such as are construed strictly." The author in the text further says: "Of such statutes, as distinguished from penal statutes, more especially is it said that they are to be construed liberally to carry out the purpose of the statute to suppress the mischief and advance the remedy contemplated by the Legislature." And further: "The object of this kind of statute being to correct a weakness in the old law, to

supply an omission, to enforce a right, or redress a wrong, it is but reasonable to suppose that the Legislature intended to do so effectually, broadly, and completely, as the language used, when understood in its most extensive signification, would indicate." Another accepted rule of construction is that, "whenever a power is given by statute, everything necessary to make it effective or requisite to attain the end is inferred." Sutherland, *Statutory Construction*, 508. Endlich on *Construction of Statutes*, 418. The first author, at page 518, further states: "It is a well-established principle that statutes containing grants of power are to be construed so as to include all things necessary to accomplish the object of the grant. The grant of an express power carries with it, by necessary interpretation, every other power necessary and proper to the execution of the power expressly granted."

Applying these principles to the case before us, we think it clear that the statute empowering the corporation commission, where practicable, and under the limitations contained in the act, to require railroads to construct and maintain a union depot in cities and towns, and giving to the railroads subject to such order the express power to condemn lands, will confer on the roads the incidental right to make such changes in their line and route as are necessary to accomplish the purpose designed, and to make the depot available and accessible to the traveling public, as contemplated by the act. The authorities cited by the defendant from 70 Fed. 748 (*United States v. Rarers* [D. C.]) and 940 (*United States v. A Certain Tract of Land* [C. C.]) are to the effect that the right of eminent domain is never implied, and can only be exercised under and by virtue of an express grant. Here, as stated, the power of eminent domain is given in express terms to the railroads, which act under the statute and pursuant to orders properly made by the corporation commission.

We do not think the position of defendant is well taken that the corporation commission can only act when the roads can connect on the right of way as already laid out. Such a construction is altogether too restricted, and, if allowed, would go far to defeat the beneficent purpose of the Legislature. The words of the act are general, and the remedy was intended to apply to all the towns and cities in the state, where, in the legal discretion of the commissioners, the move is practicable. the convenience of the traveling public require it, and the existing facilities, in the judgment of the commissioners, are inadequate. If this be a correct interpretation of the statute, then it follows, of necessity, that the plaintiffs must fail in their action. The defendants, having legislative authority to make the proposed change, are acting within their

right. So far as now appears, they are only doing, or proposing to do, "a lawful thing in a lawful way," and in such case, if harm comes to a third person, it is not a wrong for which the law will afford redress. It is *damnum absque injuria*. *Thomason v. Railway Co.*, 55 S. E. 205 (plaintiffs appeal at this term); *Broom's Legal Maxims* (8th Ed.) p. 200; *Pollock on Torts* (7th Ed.) pp. 128, 127; *Am. & Eng. Ency.* (vol. 8) p. 697. The doctrine is well stated in this last citation as follows: "It may be stated as a general rule that if the Legislature, acting within its constitutional limitations, directs or authorizes the doing of a particular thing, the doing of it in the authorized way and without negligence cannot be wrongful. If damage results as a consequence of its being done, it is *damnum absque injuria*, and no action will lie for it."

The principal objection urged by plaintiffs against the validity of these proceedings is that a railroad company has no right to change its route without legislative authority; that having once exercised its discretion in locating its line, the power is exhausted, and such location cannot be thereafter changed. The position is sound as a rule, and the authorities cited in the carefully prepared and learned brief of appellants' counsel are apt to support it. It is not necessary, however, that the power to change a route should be given in the charter or a direct amendment thereto; but, as stated in one of the authorities, "it may be given by charter or by special enactment, or by the general railroad laws of the state." Under the construction we have given the statute, there is legislative authority for the proposed change, and, the power of eminent domain having been expressly given to the extent required to carry out the purpose of the statute, this position of plaintiff is now without force, and the authorities referred to no longer apply.

It is further insisted that by section 2573 of the Revisal of 1905 the contemplated change can only be made when sanctioned by a two-thirds vote of the aldermen of the city of Goldsboro. It may be that such sanction could be found in the fact that the board of aldermen, as such, were the actors who set this proceeding in motion, and in their resolutions of July 6, 1905, and July 4, 1906, unanimous, so far as the record discloses. But, without passing on this question, we are of opinion that this requirement of a two-thirds vote only applies where the railroad, of its own volition and for its own convenience, contemplates a change of route. It is found in the general railroad law as a clause in the section which confers on the directors of a company the power to voluntarily change their route, and does not apply to cases like the present, where the corporation commission, acting

under express legislative authority and direction, requires the railroad to make the change for the convenience of the general public.

Again, it is insisted that the site selected is not within the corporate limits of the city, and that to permit this contemplated action on the part of the roads would be to side track the city of Goldsboro, to the great damage of the city and the citizens owning property therein; and we are referred to decisions where railroad companies have been restrained from a move of this character at the instance of citizens owning property within the limits of the city or town, and which would suffer depreciation in value by reason of the change. But we do not think this position is borne out by the facts, or that it is available in law to sustain the plaintiffs. The site selected is at the terminus of Walnut street, an important and much frequented street of the city, just 210 feet from the corporate line, within four blocks of the former depot on Center street, and within the police jurisdiction of the city. There is authority for the position that such placing may be considered within the city, as a matter of reasonable construction. *Old Ladies' Home v. Hoffman*, 117 Iowa, 716, 89 N. W. 1066; *City of Wichita v. Burleigh*, 36 Kan. 84, 12 Pac. 332. But, however this may be, the corporation commission, the body authorized and required by law to determine the matter, after full and due inquiry have fixed upon this as the proper site, and they give, as it seems to us, good reason for their decision as follows: "That the location agreed upon is accessible and available for each of the three railway companies; that it is within four blocks of the site used at present by the said railway companies, and the grounds are sufficient and ample for the construction of waiting sheds and buildings necessary for the convenience, comfort, and protection of the traveling public; that there is constant and increasing danger resulting from the operation of the trains on Center street; and that, to a great extent, will be removed by adopting the proposed site." We do not think, therefore, that the facts support the claim of plaintiff that the city of Goldsboro is being side-tracked, and, on the authorities cited, to the effect that a citizen of the town, owning property therein, may, under given circumstances, interfere by action to prevent a railroad from removing its tracks from the town limits, they all rest on the basic position that the contemplated move on the part of the railroad is without warrant of law.

Where, as in this case, the railroads are proceeding to do an authorized act, and in a lawful manner, there is no legal wrong done the plaintiffs, and the judge below was right in denying relief. There is no error, and the judgment below is affirmed.

Affirmed.

RABURN v. PENNSYLVANIA CASUALTY CO.

(Supreme Court of North Carolina. Oct. 23, 1906.)

COSTS—APPEAL—BOND.

Revisal 1905, § 1279, provides that if in any court of appeal there be judgment for a new trial, or if the judgment be partly affirmed and partly disaffirmed, the costs shall be in the discretion of the court. Upon the appeal of a defendant in a case in which there was a prosecution bond, a partial new trial was granted upon only one issue out of several. *Held*, that the costs of the appeal remained in the court's discretion, notwithstanding the provision of section 1251 that where an action is brought or a case appealed in which security for the prosecution thereof shall have been given, and judgment shall be rendered against plaintiff for defendant's costs, judgment shall also be given against the sureties for such costs.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 883.]

Action by S. C. Raburn against the Pennsylvania Casualty Company. Motion of defendant for judgment against sureties to plaintiff's prosecution bond. Motion denied.

S. Gallert, for defendant.

PER CURIAM. The defendant appealed and a new trial was granted upon the fourth issue. 141 N. C. 425, 54 S. E. 283. The defendant now moves for judgment and execution against the prosecution bond of plaintiff for the costs of the appeal. This would be allowed under the terms of Revisal 1905, § 1251, if the defendant had gained an entire reversal in this court, but as it was awarded a partial new trial only, and as to one issue only out of several, the costs are in the discretion of this court (Revisal 1905, § 1279), and each party will pay his own costs of the appeal.

Motion denied.

YARBOROUGH v. BANKING, LOAN & TRUST CO.

(Supreme Court of North Carolina. Oct. 23, 1906.)

1. APPEAL—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE—SUBSEQUENT ADMISSION OF EVIDENCE—EFFECT.

The error, if any, in sustaining an objection to a question asked a witness as to how the signature of a check alleged to be forged compared with the signature of a genuine deed, where the witness had not qualified as an expert, and where neither the check nor the deed were produced, was rendered harmless by the court subsequently permitting the witness, on qualifying as an expert, to testify on the subject.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4171-4177.]

2. BANKS AND BANKING—DEPOSITS—ACTION BY DEPOSITOR—EVIDENCE.

Where, in an action against a bank for a deposit, the questions were whether the depositor signed the check for the amount of the deposit payable to a third person and paid by the bank, or whether she ratified the payment by the bank, the admission in evidence of a part of a

paragraph of the answer setting up the defense that the remedy of the depositor was against the third person who had received the money, and excluding the part of the paragraph stating the legal conclusions and hearsay, was not prejudicial to the bank.

3. SAME—PAYMENT OF FORGED CHECK—LIABILITY.

A bank paying out a depositor's money on a forged check cannot cast on the depositor the duty of seeking to recover it from the person receiving it.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 438-451.]

4. SAME—PAYMENT—BURDEN OF PROOF.

A bank sued for a deposit which it admits having received has the burden of proving payment.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 518-520.]

5. SAME—EVIDENCE—INSTRUCTIONS.

A married woman depositing money in a bank in her own name sued the bank therefor. The bank paid a check bearing the depositor's name for the amount thereof. The proceeds of the check were placed in another bank to the credit of her husband. The check was paid in December, 1904, and the bank received no notice of any objection thereto until September, 1905. She denied signing the check, and the testimony on the issue of ratification was conflicting. Held, that an instruction authorizing the jury to consider, in determining whether the wife ratified the deposit in her husband's name, whether she dealt with the fund after it had been deposited in her husband's name, knowing that it was in her husband's name, or if with that knowledge she allowed it to remain in his name without taking steps to have the same placed to her credit, and if the jury found that she adopted the deposit in her husband's name the bank was not liable, otherwise it was, properly submitted the issues to the jury.

Appeal from Superior Court, Cumberland County; O. H. Allen, Judge.

Action by Amanda Yarborough against the Banking, Loan & Trust Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff, a married woman, deposited during the month of December, 1904, in defendant banking company the sum of \$1,200, which was duly credited to her account, and deposit ticket sent her. On September 21, 1905, she drew a check on the bank for said deposit, payment of which was refused, said check returned to her indorsed "No funds." This action is prosecuted to recover the amount of said deposit. Defendant admitted that plaintiff made the deposit, but by way of defense alleged: That on the 23d day of December, 1904, a check for the amount thereof, to which plaintiff's name was signed, payable to the National Bank of Fayetteville, was presented to, and paid by, defendant. That thereafter, about January 1, 1905, at the end of the current month, the regular monthly statement of the plaintiff's account, together with said check as a voucher, was mailed, addressed to her at Hope Mills, N. C. That defendant received no notice of any objection thereto until September, 1905. That the proceeds of said check were placed to the credit of plaintiff's husband, J. R. Yarbor-

ough, in said National Bank of Fayetteville, and that plaintiff was notified thereof, and acquiesced in and ratified the same, drawing checks thereon. Defendant, for a further defense, alleged: That the check of the plaintiff, or what purported to be her check, for the sum of \$1,200 in favor of the National Bank of Fayetteville as payee, which was presented to and paid by the defendant on or about the 23d day of December, 1904, was duly indorsed and forwarded for collection by the said National Bank of Fayetteville. That the said National Bank of Fayetteville was at that time, and still is, a solvent bank, and that the defendant relied on their indorsement as a guaranty of the genuineness of the signature of the plaintiff, the defendant not having the plaintiff's signature on file, and paid the check without question. That if there is any liability on the part of any one to the plaintiff, the liability exists against the said National Bank of Fayetteville, which is a necessary party to this action. For a further defense the defendant alleges: That in paying the check, or what purports to be the check, of Amanda Yarborough for the sum of \$1,200 to the payee, the National Bank of Fayetteville, as alleged, it relied, not only upon the indorsement of said bank as a guaranty, but also upon the established usage among banks which requires that a check made payable to a bank shall be placed to the credit of the drawer, or his order alone. That as the defendant is informed and believes, the said National Bank of Fayetteville, contrary to all usage, precedent, and law, placed the said fund to the credit of the said J. R. Yarborough, the plaintiff's husband, and paid out the said fund upon his checks, rendering the said National Bank of Fayetteville liable to it for said sum, or liable to the plaintiff should she be entitled to recover.

Plaintiff, in her reply to the new matter contained in the answer, denied that she had signed the check of December 23, 1904, or that she had received the statement of January, 1905, or that she knew of or had acquiesced in or ratified the transfer of the amount of her deposit in defendant bank to the credit of her husband in the National Bank of Fayetteville. The following issues were submitted to the jury:

"(1) Did plaintiff, Mrs. Yarborough, deposit \$1,200 with the defendant, as alleged? Ans. Yes. (2) Did the defendant pay to the National Bank of Fayetteville \$1,200 upon a check signed by the plaintiff, as alleged in the answer? Ans. No. (3) Did the plaintiff know that the \$1,200 had been transferred to the National Bank of Fayetteville, and that it was deposited there to the husband's credit, and did she ratify such transfer? Ans. No." There was a judgment upon the verdict, and defendant appealed.

H. L. Cook, for appellant. Q. K. Nimocks and Sinclair & Dye, for appellee.

CONNOR, J. (after stating the case). There are a large number of exceptions to his honor's ruling in the record. In defendant's brief several are abandoned or not relied upon. The first exception discussed in the brief is No. 11 in the record. Mr. Cunningham, the cashier of defendant, being examined, testified that he paid, on December 28, 1904, a check for \$1,200 signed by Amanda Yarborough payable to the National Bank of Fayetteville. He was asked how the signature to the check compared with the signature of plaintiff to a deed admitted to be genuine. Neither check nor deed was produced, and witness had not qualified as an expert. Plaintiff's objection was sustained, and defendant excepted. Later, in the examination of this witness, he qualified himself as an expert, when he was permitted to express his opinion that the signature to the check was the same as that to the complaint, saying: "It is the same handwriting." Whatever force there was in the defendant's exception to the rejection of the testimony is clearly dissipated by the admission of the same evidence after the witness had qualified as an expert. We cannot concur with the ingenious argument of defendant's counsel that the opinion of a witness before qualifying as an expert is of more value, or that a jury would so regard it, than after qualifying as such. There may be a prejudice in the minds of jurors against the testimony of experts in handwriting, but the court could hardly take note of it, as a matter of law. As neither the check nor the deed were in the hands of the witness at the time the question was asked, so that if he had expressed an opinion he could have been cross-examined, it is exceedingly doubtful whether his honor's ruling was not correct. However that may be, the defendant had the full benefit of the opinion of the witness. The exception cannot be sustained.

The next exception discussed in the brief is pointed to his honor's ruling in regard to the admission of certain portions of the answer. The record shows that the sections of the answer involved in the exception were introduced by defendant. It is insisted in this court that the plaintiff introduced them. Counsel agree that we may so consider the record. His honor admitted sections 4 and 5 of the answer, "except as to parts containing legal conclusion and hearsay." Defendant contends that, by excluding these portions of the answer, the jury were misled, or, as stated in the brief, "the portions admitted by the court were doubtless construed by the jury to be an admission on the part of the defendant of its liability to the plaintiff, whereas, if the entire paragraph had been admitted, it would have appeared otherwise." An examination of the language of the two sections shows that they do not allege any facts which could, to any material extent, affect the real question involved in

the issues. The only question to be passed upon by the jury were whether the plaintiff signed the check, and, if not, whether she had ratified the payment of her money to her husband. The sections of the answer made no admission in respect to either of these issues. The purpose of the pleader was to set up an independent defense by suggesting that, conceding the plaintiff's contention, which was in other parts of the answer denied, her remedy was against the Fayetteville bank. This was not insisted upon, for the manifest reason that it was not available. If defendant paid out plaintiff's money on a forged check, it could not cast upon her the duty of seeking to recover it from the corporation which received it. It is well settled that a bank is presumed to know the signature of its customers, and if it pays a forged check, it cannot, in the absence of negligence on the part of the depositor, whose check it purports to be, charge the amount to his account. 5 Cyc. 544. We cannot perceive how the admission of a part of the paragraphs and the rejection of the remainder, which contained only conclusions drawn by defendant, could possibly mislead the jury upon the real issues. The defendant's contention in regard to the admission of fragmentary portions of a pleading is correct, but, as we have seen, does not apply to this case. The other exceptions are pointed to his honor's charge. In response to the prayer that if the jury should find that defendant paid the individual check of the plaintiff duly presented to it in the ordinary course of business, it should answer the first issue "Yes." His honor instructed the jury that if the defendant had shown by the greater weight of the evidence that plaintiff signed the check, they should answer the issue "Yes." We think this was a substantial compliance with the prayer and the correct statement of the law; the defendant having admitted the deposit, the burden was upon it to show payment. In response to the prayer that "if the jury shall find from the evidence that the plaintiff, during the month of January, February, or March, 1905, had knowledge that her money, to wit, \$1,200, had been transferred to the National Bank of Fayetteville, and stood upon its books to the credit of J. R. Yarborough, her husband, and she took no steps to have the same transferred to her name or for her use, but acquiesced in said money remaining in her husband's name, that she thereby released the defendant from all liability to her," his honor charged the jury: "If she dealt with the fund—that is, the \$1,200—after it was deposited here in her husband's name, knowing it was in her husband's name, or if with a knowledge that the fund was deposited in the name of her husband she allowed it to remain there in his name for any length of time, and took no steps to have the same placed to her individual credit, these are matters which

the jury may consider in determining whether she ratified the deposit in her husband's name or not; and after considering these, and all evidence bearing on this question, if the jury are satisfied by the greater weight of the evidence that she recognized and adopted the deposit in her husband's name, they will answer the third issue "Yes," and, if not so satisfied, they will answer it "No." We think this a correct response to the prayer. We have examined the other exceptions, and find that his honor substantially, and we think correctly, instructed the jury in response to the phases of the case presented by them. There was evidence to the effect that the plaintiff's husband drew the money, and had it put to his individual credit in the Bank of Fayetteville. Plaintiff testified that she had no knowledge or information in regard to his conduct until February, 1905, when he notified her that he had done so and had abandoned her. She denies positively that she signed the check, or had any knowledge thereof prior to that time. In regard to the alleged ratification, the testimony was conflicting. We think that his honor correctly left the decision of the question to the jury.

Upon an examination of the entire record, we find no error.

ATLANTIC PRODUCT CO. v. DUNN.

(Supreme Court of North Carolina. Oct. 30, 1906.)

LANDLORD AND TENANT—LEASE—OPTION TO RENEW—PURCHASE—EXPIRATION.

Defendant leased certain premises to plaintiff for one year, beginning April 1, 1899, the lease providing that, on the expiration of the term, defendant should be entitled, at its option, to continue the lease for another term of five years, beginning April 1, 1900, at the same rent, with the right and option to have an extension at the same rent at the end of the first term of five years for another period of five years, and that, at any time during the continuance of the lease, plaintiff should have the option to purchase the property at a specified price. Held that, where plaintiff renewed the lease for the first term of five years, but gave no notice of the exercise of its option, either to renew for a second term, or to purchase the property, until after April 1, 1905, the lease and the options expired.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, §§ 290-294.]

Appeal from Superior Court, Craven County; Long, Judge.

Controversy without action between the Atlantic Product Company and William Dunn. From a judgment in favor of the latter, the former appeals. Reversed.

Controversy without action submitted to Long, J. The following are substantially the facts agreed. On March 10, 1899, the defendant leased the premises for one year beginning April 1, 1899, to the plaintiff in consideration of \$125 payable yearly in advance with this further agreement: "The

party of the second part, upon the expiration of the said term of one year, shall have the right at its option to continue this agreement and lease for another full term of five years beginning April 1, 1900, at the same yearly rental i. e. \$125 payable as aforesaid with the right and option to have an extension and continuance hereof at the same yearly rental at the end of said first term of five years for another full term of five years." There was also a further proviso that the plaintiff herein (party of the second part) "at any time during the continuance hereof shall have the right to purchase said leased property in fee simple at the price of \$1,550." The plaintiff, exercising its option, renewed the lease April 1, 1900, for five years. On April 3, 1905, the defendant notified the plaintiff that its lease had "expired April 1, 1905, and, with said expiration, the right of renewal," and inquired if the plaintiff wished to make a new lease, if not he wished it "to give up the property." On April 5th the president of plaintiff company replied that he did not have the lease at hand, but thought it was for 11 years, and had five more years to run. He made no reference to the demand for surrender of the premises, nor any offer to pay rent. On April 26th he offered to continue the lease, but the defendant, while willing to enter into the new lease, declined to renew or extend the terms of the old lease or revive or renew the option to purchase contained in the old lease. On June 24th the agent of the plaintiff offered to pay the rent, but the defendant declined to receive it. The plaintiff continued in possession till August 2, 1905, when the defendant turned the plaintiff's watchman out, and took possession of the property, and still holds the same. On July 15, 1905, the plaintiff offered to pay defendant \$1,550 and all accrued rent upon execution of a fee-simple deed, which offer the defendant refused to accept. The plaintiff did not give the defendant any notice either verbally or in writing that it would exercise the option to continue said lease and agreement before or on April 1, 1905, nor afterwards except as above stated. The court held with defendant. The plaintiff excepted, and appealed.

A. D. Ward, M. de W. Stevenson, and H. C. Whitehurst, for appellant. Guion & Dunn, for appellee.

CLARK, C. J. (after stating the facts). Besides the facts above recited the lease (which is set out in full) also contained the following further agreement: "Should the party of the second part make default herein and fail to perform the agreements entered into herein on its part, or any of them, or fail to pay said rent when the same is due, then and in that case the party of the first part shall have the right to enter said premises and take possession thereof as of his former

estate." If the plaintiff had failed to pay the annual rent in advance, at or before April 1st of any year, the defendant, under the above clause, had the right to enter and take possession. But the defendant is in still better case here, for the five-year lease expired April 1, 1905, by its terms, and the plaintiff not having exercised its "right and option" and made payment of the annual rental on or before that day the lease expired by its own terms and the defendant on April 3d notified him thereof, and demanded possession. The defendant was within his rights in refusing on April 28th to renew the old lease, and subsequently refusing, on June 24th, the tender of rent and, on July 15th, declining to accept \$1,550 purchase money. In *Meroney v. Wright*, 81 N. C. 390, there was simply a stipulation for payment of rent without any provision for re-entry upon default. Here not only was there such provision but the lease expired by its limitation, unless the plaintiff had, on the day of its expiration or before, exercised his option to renew by giving notice and paying one year's rent in advance. This was a condition precedent and, not having been complied with, the lease then and there terminated on April 1, 1905. The option to renew, and the option to purchase must have been exercised during the existence of the contract. *Alston v. Connell*, 140 N. C. 491, 53 S. E. 292; 21 A. & E. Enc. (2d Ed.) 931, and authorities there cited. The tender of rent after the expiration of the lease did not restore the plaintiff's option. *Vanderford v. Foreman*, 129 N. C. 217, 39 S. E. 839. Nor did the fact that plaintiff has made some improvement upon the land entitle plaintiff to the option which he had forfeited by failure to exercise it in time. *Blanchard v. Jackson*, 55 Kan. 239, 37 Pac. 986. Where there is a renting from year to year, remaining in possession is an election to continue and non-payment of rent is merely ground for entry by lessor, if stipulated for. Indeed, in such case, the lessor must give the lessee one month's notice to quit in a lease from year to year. *Revisal of 1905*, § 1984. The authorities cited by plaintiff sustain that proposition. But here the five-year lease expired April 1, 1905, and the plaintiff had a stipulated "right and option" for extension and continuance, and also purchase at the price specified. These options could be exercised by plaintiff only while the lease was in force. Not having exercised the option before the lease expired on April 1st the defendant was not required to acknowledge its renewal afterwards, and the lease not being in force he was not bound to accept the tender either of rent or purchase money thereafter. The defendant having demanded possession April 3d the plaintiff cannot take any advantage of its own wrong in remaining in possession till August 2d when it was turned out by defendant.

No error.

SOLOMAN et al. v. WILMINGTON SEWERAGE CO.

(Supreme Court of North Carolina. Oct. 30, 1905.) 142 N. C. 439

1. SPECIFIC PERFORMANCE—CONTRACT—DURATION—LIMITATION.

A contract between citizens and a public sewerage corporation by which the latter agreed to furnish sewerage service for \$2 and \$4 per year, respectively, dependent on whether the customer paid \$50 or \$25 as an entrance fee for connections, etc., but containing no provision fixing the time for the duration of the contract, could not be specifically enforced as against the corporation, because of uncertainty of duration.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, § 67.]

2. SAME—MUTUALITY OF REMEDY.

Where a contract to furnish sewerage facilities at a specific annual rental did not bind the persons served to continue to pay, but authorized the corporation furnishing such facilities to enforce collection of charges by severing the connection of the defaulting user with the main sewer, there was no mutuality of obligation to continue the service, and hence specific performance could not be decreed against the corporation.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 89-90.]

Appeal from Superior Court, New Hanover County; Webb, Judge.

Suit by B. Solomon and others against the Wilmington Sewerage Company. From a judgment in favor of defendant, complainants appeal. Affirmed.

This action was brought by the plaintiffs for the purpose of restraining the defendant from disconnecting their residences from the main sewer pipe of the defendant company and for specific performance of the contract set out in the complaint. The undisputed facts are that prior to 1902, there were several private companies and systems of sewerage in the city of Wilmington. That defendant company was chartered by an act of the General Assembly of North Carolina (Private Acts 1893, p. 583, c. 382), by which it is permitted, authorized, and empowered to establish a system of sewerage in, under, and through the streets and public lanes, roads, and alleys of the city of Wilmington, and lay all such necessary pipes, conduits, and mains as may be deemed requisite to carry out the provisions of said act under such rules and regulations as may be prescribed by the board of aldermen of said city, and have authority to charge for the use of said sewers such reasonable sums as the board of directors may, from time to time, adopt, and to enforce the collection of such charges by severing the connection of said defaulting user with the main sewer. That permission was duly granted to the said defendant to lay down its pipe, and construct a system of sewerage in the said city. That the plaintiffs are citizens and residents of said city, living along the streets upon which the defendant, pursuant to said authority, laid down its pipes and constructed its sewerage system. That plaintiffs en-

tered into a contract with the said defendant company, the terms of which, as set out in the complaint, are as follows: "That these plaintiffs and a great many other of the citizens of Wilmington, living along the streets and on the alleys upon which, by public authority, the defendant has laid down its pipes and constructed its sewerage system, whose names are not all known to these plaintiffs, and cannot, by reasonable diligence, be ascertained, were desirous of obtaining the benefit of an efficient sewerage system for their respective premises, and at what they regarded as a reasonable cost, and each of the plaintiffs and the others so situated approached the proper officers of the defendant, and made application for connection, and, after some negotiations, the defendant company proposed to these plaintiffs, and for all others for whom this suit is brought, that if they would pay to the defendant the sum of fifty dollars for making the connection between the premises of each and every one of these plaintiffs and the others and the pipes of the defendant, that the defendant would charge each of them so paying the sum of fifty dollars, as an entrance fee, and for the use and service of the sewerage system of the defendant, the sum of two dollars, as an annual fee or rental, and no more; or, alternately, that if persons desiring to connect with and to use their said system, preferred it, they might pay an entrance fee of twenty-five dollars, and an annual rental of four dollars, and no more." That pursuant to said contract the connections were made and plaintiffs have, in all respects, complied with the terms of said contract, paying the annual rental of \$2 per year. That the control of the stock of the defendant company passed into the hands of other persons subject to said contract. That on the 1st day of January, 1903, in disregard and in violation of the contract rights of the plaintiffs, the defendant undertook to raise the rate of annual rental for the use of said system. The jury, upon an issue submitted to them, found for their verdict that the defendant entered into the contract with the plaintiffs as alleged. Under the instruction of the court, they found that notwithstanding such contract defendant had a right to raise the rate of annual rental. The court thereupon rendered the following judgment: "This cause, having been called for trial, and being tried * * * and during the trial the plaintiff's counsel having admitted in open court, for the purposes of this action alone, that the rates charged as set forth in the answer in exhibit B are reasonable and not discriminative, and that the said rates set forth in the answer have been raised from the amount set forth in the complaint to the amount set forth in the answer, as shown in exhibit B, and that a resolution of the defendant company, raising the rates, was promulgated on November 2, 1902, to

go into effect the 1st day of January, 1903; and it being further admitted by the defendant that the plaintiffs continued to pay at the old rates up to the 1st day of January, 1903, and that the present owners of the corporation obtained control thereof some time in the year 1901; and it being further admitted that this suit began on the 1st day of March, 1903, and that the payments made by the plaintiffs under the old rate were paid by them from January 1, 1902, to January 1, 1903, and it being admitted that the following plaintiffs obtained their connection with the defendant company, paying \$50 connection fee, and \$2 annual dues, on the dates mentioned, as follows. * * * It is ordered, adjudged, and decreed by the court that the restraining order heretofore issued in this cause be and the same is hereby dissolved, vacated, and annulled. It is further ordered, adjudged, and decreed by the court that the plaintiffs are not entitled to a perpetual injunction in this cause." The plaintiffs excepted to said judgment and appealed, assigning errors alleged to have been committed in the course of the trial, and in rendering the judgment, all of which, other than those abandoned, are set out in the opinion.

Bellamy & Bellamy and Rountree & Carr, for appellants. E. K. Bryan and John D. Bellamy & Son, for appellee.

CONNOR, J. (after stating the case). Considered from the point of view in which this case was argued by counsel and which we think decisive of the merits of the controversy, much of the testimony and many of the exceptions become immaterial. There is no substantial contradiction in the testimony regarding the terms of the contract. The jury having found it to be as alleged in the complaint we concur with plaintiff that the second issue was unnecessary. The relative rights and duties of the parties under the contract become, in the light of the admissions, questions of law for the decision of the court. The plaintiffs insist that we decided the question when the case was here upon an appeal from the order continuing the injunction to the hearing. We cannot concur in this view. It must be conceded that the writer of that and of this opinion used language calculated to make such an impression. The only question then before the court was whether the defendant should be enjoined, pending the litigation. For the reasons and upon the authorities there set out we held with the plaintiffs' contention. We then said: "Whether the plaintiffs shall be entitled to specific performance of the contract, and for what length of time the contract shall exist and to what extent it might be in the power of the defendant corporation to perform the contract without impairing or destroying its power to perform its duties to the public, or whether the

rates now charged are unreasonable or discriminating, are all questions to be determined upon the facts as they may be found by some competent tribunal upon the final hearing." The effect of an appeal from an order continuing or refusing to grant an interlocutory injunction is discussed in *Carter v. White*, 134 N. C. 466, 46 S. E. 983, 101 Am. St. Rep. 853. The decision of such an appeal is neither an estoppel nor "the law of the case." Its effect upon the rights of the parties to the action in the final hearing is pointed out in the decision in that case. The plaintiffs concede that the contract does not create or vest in them an easement to flow their sewerage through the pipe, because not in writing, nor is it a license to do so.

Plaintiffs' counsel, with his usual frankness, rests his case upon the proposition that his clients have made a valid contract with defendant founded upon a valuable consideration, and that, by reason of the peculiar nature of the subject-matter of the contract, the right acquired under it can only be secured to them by a decree for specific performance and a perpetual injunction against its infringement. That no time being fixed for the life of the contract, it extends to the corporate life of the defendant company. This, the defendant denies, and insists: (1) That no time being fixed during which the \$2 rate was to continue, it is indefinite and therefore its specific performance cannot be enforced. (2) That the contract is wanting in mutuality, that defendant only is bound, whereas plaintiffs are under no obligation to use the sewer and pay the \$2 rate. (3) That the defendant company is a public utility, subject to the well-defined duty to serve all persons entitled to its service, at reasonable rates, without discrimination between its customers. If the defendant can sustain either of these propositions, the plaintiffs may not invoke the equitable jurisdiction of the court. There are certain well-defined limitations imposed by the courts upon the right to call for specific performance of contracts. After enumerating several of the requisites essential to the right to demand specific performance, Mr. Bispham says: "The other circumstances, in addition to those already mentioned, which usually influence the discretion of a chancellor in decreeing or refusing specific performance, are that the agreement must be mutual, that its terms must be certain and that its performance by the court must be practicable." Equity, 377. He further says: "It was one of the rules laid down by Lord Rosslyn in *Walpole v. Oxford*, that all agreements in order to be executed in this court must be certain and defined; and the law, as thus stated, is well settled both in England and in this country." If the uncertainty is owing to the default of the defendant or in obedience to the maxim, "*Id certum est quod certum reddi potest*," performance will be de-

creed if the means of ascertaining the contract are at hand. In *Leigh v. Crump*, 36 N. C. 299, Gaston, J., says: "An agreement, to be carried into execution, must be certain, fair, and just in all its parts. Although it will be valid at law, and, if it had been executed by the parties, could not be set aside because of any vice in its nature, yet, if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy." The uncertainty in this contract is in respect to its duration. How long shall the plaintiffs enjoy the right to use the sewer pipe of defendant company? They say: "As long as they please, even to the life of the company, by paying the annual dues." This would extend it 60 years. Private Laws 1893, p. 588, c. 382. Defendants say that as the charge of \$2 a year is a rental, the contract is for but one year, or, at most, from year to year, with a right on its part to put an end to it after reasonable notice. If it be suggested that the right continued for a reasonable term and until, by reason of changed conditions, or, as defendant says, largely increased cost of building and maintaining the sewerage system, it would become harsh and unjust to compel its continuance, we would have no satisfactory guide by which to fix the limit of its duration. If we seek for analogies for guidance, we find but little aid. In contracts for personal service the English rule is that, when no time is fixed, and no stipulation as to payment made, it will be presumed to extend for a year. In this country, when no time is fixed, and no stipulated period of payment made, the contract is terminable at the will of either party. 20 Am. & Eng. Enc. 14. This seems to be the rule adopted by this court in *Edwards v. Railroad Co.*, 121 N. C. 490, 28 S. E. 187. We cannot think that it was the intention of the parties that the contract was to last for 60 years. To put this construction upon it would, when we consider the probable changes in the status of the property and the parties, the growth of the city and enlarged demands upon defendant company, the almost certain exhaustion of the connecting pipes from wear, weather and other causes, be unreasonable. Again, how would it be possible for a court of equity to supervise and enforce the performance of its decree during so long a period? If we do not adopt the plaintiffs' view in respect to the duration of the contract, we have no guide, and if we reject, as equally unreasonable, the defendant's contention that it is limited to one year, we are confronted with the insuperable difficulty that the contract, in regard to one of its essential elements, is uncertain and therefore not capable of specific performance. This view does not involve the proposition that the contract is void for uncertainty. In an action for damages for breach of the contract we presume

that the law would read into it that the right to use the sewer, upon the terms fixed, should continue for a reasonable time, to be settled in view of the character of the contract and all other matters and things pertinent to the inquiry. In this view of the case, we simply hold that, by reason of its uncertainty in respect to time, specific performance will not be decreed.

In regard to the second objection urged by defendant, we find the rule laid down by courts of equity to be that a contract which is not mutual—that is, in which both parties are not and cannot be bound by the decree—will not be specifically enforced. In *Ten Eyck v. Manning*, 52 N. J. Eq. 47, 27 Atl. 900, Van Fleet, V. C., speaking of the right to demand specific performance of contracts, says: "The enforcement or denial of this remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist, or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance," citing *Fry on Spec. Perf.* § 286; *Waterman*, *Spec. Perf.* § 196. In *Beard v. Linthicum*, 1 Md. Ch. 345, it is said that if one of the parties is not bound, or is not able to perform his part of the contract, he cannot call upon the court to compel specific performance by the opposite party. *Duvall v. Myers*, 2 Md. Ch. 401. The principle is well stated in *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 880: "The lack of mutuality, it is claimed, exists in the fact that the covenant gives the complainant the right to repurchase, but does not provide that he must do so. It is laid down, as a general rule, that equity will not specifically enforce the performance of a contract when, from its terms, a right does not arise in favor of each party against the other, and when each party is not entitled to the equitable remedy of specific execution of such obligation against the other contracting party," citing *Pomeroy*, *Spec. Perf.* 162, *Rutland & Co. v. Ripley*, 77 U. S. 339, 19 L. Ed. 955. As stated in the opinions cited and by Mr. Bispham and other authors, there are exceptions to these general rules as when, by the terms of the contract, it is optional with the plaintiff to be bound, and he elects and consents that he will be so bound, as in contracts for the sale of land, he will pay the purchase money, or immediately perform the contract on his part. The contract becomes mutual and, if otherwise free from obligation, will be specifically enforced. There are decided cases, however, which hold that the element of mutuality must enter into the contract at its inception. That if either party could not demand strict performance or maintain an action for damages for breach, specific performance or maintain an action for damages for breach, specific performance will not be decreed. It is said

by the Supreme Court of Arkansas: "What is meant by mutuality of remedy is that the contract must be of such a nature that performance on both sides can be judicially secured." *Shields v. Trammell*, 19 Ark. 51; 28 Am. & Eng. Enc. 82.

In *Rodman v. Robinson*, 134 N. C. 503, 47 S. E. 19, 65 L. R. A. 682, 101 Am. St. Rep. 877, this court held that when a contract was entered into to convey land, the promise to pay the purchase money constituted a valuable consideration to support the promise. This is unquestionably correct. The case was argued and decided largely upon other questions and that which we are discussing was not pressed or considered. There is much contrariety of opinion whether mere options will be specifically enforced. Ours is not the case of an ordinary option. Parties who are not bound ask specific performance of a contract to run 60 years, during which time they may at any moment put an end to it by refusing to pay the rental. We have here several parties suing for themselves and many others not known to them to compel specific performance on the part of the defendant of a contract to run for considerably more than the average life of an adult human being, during all of which period, either by death, sale of the property connected with the sewer, or at the mere will and pleasure of any one or more of them, the contract may be terminated and the defendant be without remedy to compel plaintiffs to continue to use the sewer. The difficulties, which would be encountered in attempting to make or enforce a decree in such a case, are pointed out in *Texas, etc., R. R. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385. Plaintiffs urge upon our attention the case of *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776. The objection made to the decree in that case was that by reason of change of conditions since the execution of the contract and increased value of the privilege conferred to maintain the wires upon the poles of the plaintiff company, specific performance would be harsh and inequitable. The court held that in ascertaining the value of the privilege it would look to the conditions existing at the time of making the contract and that no such change in conditions was shown to deprive the defendant of the right to have strict performance. The general principles governing the courts in such cases were conceded. The facts were peculiar and in many respects distinguishable from those before us. *Fuller*, C. J., and *Brewer*, J., dissented from the decision in that case. The last objection urged by defendant against the relief demanded presents interesting and important questions. How far contracts of this character may be made by corporations owing a duty to serve the public at reasonable rates and without discrimination, is an interesting question. Whether such contracts are void, as contrary to public policy, or become unenforceable

when it is shown that their enforcement will disable the corporation from serving the public, is also interesting. We are not prepared, and it is not necessary for us to do so, to decide the question. The authorities cited by defendant sustain its contention that the contract is made subject to the limitations imposed by the charter, and that whatever rights plaintiffs acquired are subject to such provisions. *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, 30 L. Ed. 176; *Cent. Trans. Co. v. Pull. Pal. Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55. It seems well settled that a public corporation or a private one owing the duty to serve the public charging reasonable and equal rates, cannot contract away its power to discharge such duty. The principle has been applied by this court to County Coms. in *Glenn v. Coms.*, 139 N. C. 412, 52 S. E. 58, and to Town Coms. in *Edwards v. Goldsboro*, 141 N. C. —, 53 S. E. 652. In the opinion of Mr. Justice Walker in the last case, authorities are cited applying it to railroad companies. That gas and water companies come within the rule is well settled. *Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Williams v. Mutual Gas Co.*, 52 Mich. 499, 18 N. W. 236, 50 Am. Rep. 266. The same reasons apply to sewerage companies. We do not understand the plaintiffs to controvert this proposition. Plaintiffs admit that the advanced rates are reasonable and not discriminative. Defendant makes no allegations, in its answer, which, if true, would seem to show that if compelled to serve plaintiffs at the contract rate, it would be unable to serve other citizens of Wilmington at what is conceded to be a reasonable rate. No facts, however, in this respect are found or admitted, hence, we may not consider the allegations in this connection. We place our conclusion upon the ground that the contract is uncertain in regard to its duration, and that there is an absence of mutuality in the obligation. We incline to the opinion that if we were to accept the plaintiffs' view that it gave them the right to use the sewer at the contract rate for 60 years, in view of the character of the contract, its subject-matter, and defendant's duty to render equal service at equal rates to all of the citizens of Wilmington, the contract would be unreasonable, and therefore plaintiffs would not be entitled to the decree demanded.

Upon an examination of the entire record we concur with his honor, and the judgment must be affirmed.

EAST LAKE LUMBER CO. v. EAST COAST CEDAR CO. et al.

(Supreme Court of North Carolina. Oct. 23, 1903.)

1. INJUNCTION — JURISDICTION — INJURIES TO REAL PROPERTY — TITLE.

In order to justify an injunction to restrain injuries to property, plaintiff's title must either

be admitted, must be manifestly good, or must have been established by a legal adjudication, unless such relief is required pending an action to establish such title, and the threatened injury must be of such a peculiar nature as to cause irreparable damage.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 8, 14.]

2. SAME—TRESPASS—CUTTING TIMBER.

Where, in trespass for the cutting of timber, defendants acted in good faith in all respects, and had prima facie title to three tracts of land in controversy, and plaintiff made no claim of title to such tracts, or either of them, it was error for the court to include them in an injunction restraining defendants from cutting timber on a large body of land claimed by plaintiffs, with certain designated exceptions.

3. DEEDS—DESCRIPTION—EXCEPTIONS.

A party claiming land to be within an exception in a patent has the burden of proving such fact.

4. PUBLIC LANDS — PATENT — DESCRIPTION — CERTAINTY.

A patent to state land described the same as containing 100,000 acres, and contained an exception of land "within which bounds there hath been heretofore granted 22,633 acres," and is now surveyed and to be granted to P. 9,600 acres, which begins at J's northeast corner of 2,000 acre grant on Mill Tail and runs south and east for complement." *Held*, that such exception was not invalid for uncertainty of identification.

Appeal from Superior Court, Dare County; Neal, Judge.

Suit by the East Lake Lumber Company against the East Coast Cedar Company and others. From an order granting an injunction pendente lite, defendants appeal. Reversed in part.

Civil action in the superior court of Dare county, heard before Neal, J., at Chambers, on motion for an injunction. The plaintiff brought the action to restrain the defendants from trespassing on the land described in the complaint by cutting and removing timber therefrom, some of the defendants having a large plant and being engaged extensively in the timber business. The court granted an injunction to the hearing, and the defendants appealed.

The plaintiff claimed to be the owner of a large body of land in Dare county, which was granted to John Gray Blount, September 7, 1795, and said to contain 100,000 acres, according to the quantity given in the grant, but in fact a much larger acreage, that is, about 167,500 acres. The grant is said to embrace all of the county of Dare, except Roanoke, and perhaps Durant Islands and the Banks. It contains an exception as to senior grants and entries which is thus stated in the grant: "Within which bounds there hath been heretofore granted 22,633 acres, and is now surveyed and to be granted to Mr. Geo. Pollock, 9,600 acres of which begins at Samuel Jackson's northeast corner of 2,000 acres grant on Mill Tail and runs south and east for complement." As the context shows that the word "of" was evidently inserted in the copy by mistake, we have compared it with the original in the office of

the Secretary of State and find this to be so. A correct copy is set forth in *Manufacturing Co. v. Frey*, 112 N. C., at page 159, 16 S. E., at page 902. The word "of" should be stricken out and the comma should be placed after the word "acres" and before the word "which" instead of after the word "Pollock" and before the figures "9,600," so that the exception when properly quoted will read: "Within which bounds there hath been heretofore granted 22,633 acres, and is now surveyed and to be granted to Mr. Geo. Pollock 9,600 acres, which begin at Samuel Jackson's northeast corner of 2,000 acres grant on Mill Tail and runs south and east for complement." The plaintiff asserted title to the entire body of land covered by the said grant, with which it claimed to have connected itself by meane conveyances. The defendants denied they had committed any trespass on land alleged to be owned by the plaintiff, and contended here that the plaintiff had not shown any such trespass by the proof and further, they averred that they have cut no timber except on land which is either excepted in the Blount grant, under which the plaintiff claims, or the title to which, as being in the defendants, or those under whom they claim, the plaintiff is estopped to deny, the title to the said lands having been fully adjudicated, and, as to some of them, the location fixed, in judicial proceedings by which the plaintiff is in law bound and concluded. The two defendant companies disclaim any title to the land in dispute, and deny that they have cut any timber on the same or on any land of the plaintiff, or that they have ever authorized any one else to do so, but aver that they have not recently been engaged in the business of cutting timber in Dare county. The plaintiff alleges that all of the defendants are operating under the name of the Buffalo City Mills, Incorporated, and have changed their business name from time to time for the purpose of defeating the process of the court and thereby escaping liability for their unlawful trespasses. This is denied by the defendants and the countercharge made that the plaintiff is an insolvent, foreign corporation, and a land speculator; that the title to the land claimed by it is radically defective and its boundaries have not been shown; and that the land claimed to be embraced by its outer lines is occupied by hundreds of people whose titles and right of possession are undisputed and unassailable. The defendant sets forth circumstantially its title to the tracts of land upon which it has cut timber. As to the McRae tract of 5,080 acres and the Blount-Rodman tract of 5,000 acres, they allege that the plaintiff is estopped by certain judicial proceedings to deny the title of those under whom the defendants claim and justify their acts, which are alleged to be trespasses, and the defendants deduce their title to these tracts from the state, by showing grants duly issued

for the same, and judicial proceedings and meane conveyances, which put the said title in the Buffalo City Mills, Inc., Andrew Brown, and A. J. Brown, respectively, it being the title under which A. J. Brown claims and his codefendants so justify. As to the other land, known in the case as the "Pollock tract," the defendants introduced the record of a suit in equity pending in the United States Circuit Court, between the plaintiff and the Buffalo City Mills, Incorporated, and referred specially to the third section of the complainant's bill, in which it is admitted that the said tract of land is not covered by the John Gray Blount patent, but is excepted therefrom, the specific admission being that the exception in that grant, heretofore mentioned, comprises 22,633 acres previously granted and the Pollock survey of 9,600 acres for which a grant was to be issued and was in fact afterwards issued to George Pollock upon his entry and survey. This conforms the description of the exception in the Blount grant to what we have said is the correct one. The defendants then show that Pollock's title was thereafter acquired by A. J. Brown under whom the other defendants, except the two corporations, justify. The plaintiff admitted in this case, that it did not own either the McRae or the Blount-Rodman tract, nor does the plaintiff apparently lay any valid claim to the Pollock land, 3,000 acres of which it admits has been properly located, though it denies, perhaps, that there has been any correct location of the remainder of that tract or of the McRae and Blount-Rodman tracts. It appears that the grant for the last-named tract, which was issued September 5, 1795, antedates the John Gray Blount patent, issued September 7, 1795, and the defendants rely on this fact, in addition to the estoppel. There was much testimony taken as to the true location of these three several tracts, the defendants alleging that they had been correctly located, and exhibiting carefully prepared maps showing the lines and boundaries, while the plaintiff insisted that they had not been identified by any competent and sufficient testimony, though apparently it does not profess to know, or to be able to state, where the metes and bounds would be with reference to the lines of the John Gray Blount patent, if they were surveyed and marked on the ground. They simply deny the defendant's location. There was also considerable testimony taken as to the locus in quo or place in which the cutting of the timber was done. The defendant contended that, according to the evidence offered by the plaintiff, the timber alleged to have been cut was standing on the McRae, the Hunning, the Belangia, and the Blount-Rodman tracts, the land lying north of the McRae tract on which the plaintiff alleges there was cutting of timber, being the Belangia tract and that on the east, the Blount-Rodman tract. The plaintiff introduced the record in

the case of the East Coast Cedar Co. v. People's Bank of Buffalo, it being a suit for partition, the object of this proof being to estop the defendants (by the decree declaring the parties to be tenants in common) from denying the title of the plaintiff to the land covered by the Blount patent, the assignors of the respective parties to this action having been parties to that suit. The insolvency of the defendant is alleged in the complaint but denied in the answer. The court enjoined the defendants from cutting trees, logs, and timber on, or removing them from, the premises described in the complaint, being the lands covered by the Blount grant, and enjoined both the plaintiff and the defendant from cutting any timber on the lands described in the McRae, Pollock, or Blount-Rodman patents until the true location thereof is established by surveys made under its orders, and from this order the appeal of the defendant was taken to this court.

Aydlett & Ehringhaus and F. H. Busbee & Son, for appellants. Pruden & Pruden and Shepherd & Shepherd, for appellee.

WALKER, J. (after stating the case). As a general rule a court of equity did not formerly exercise its jurisdiction so as to enjoin offenses against the public or civil trespasses. The rule as to the former seems to have been without exception (Paul v. Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902) but, as to the latter, and after much hesitation, it finally assumed jurisdiction for the prevention of torts or injuries to property by means of an injunction, under certain safeguards and restrictions, and two conditions were required to concur before it would thus interfere in those cases, namely, the plaintiff's title must have been admitted or manifestly appear to be good, or it must have been established by a legal adjudication, unless the complainant was attempting to establish it by an action at law and needed protection during its pendency, and secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage, as, for instance, in the case of the destruction of shade trees or of any other wrongful invasion of property which, by reason of the character of the property or the form of the injury, rendered the wrong incapable of being atoned for by compensation in money, such as torts committed on property and things having a value distinct from their intrinsic worth, for instance, a pretium affectionis though not a merely imaginary value. It was held in England that the destruction of timber trees would be enjoined because it was thought to be destructive waste which impaired the substance of the land—an injury to the freehold—but the settled doctrine of this court was that the mischief wrought by such a trespass was not irreparable in itself, and did not become so unless it was shown that the trespasser

was insolvent. Courts of equity could not conveniently, on account of their peculiar constitution, try the title to land, and hence the necessity for having the title established as one of the essential prerequisites to the exercise of its jurisdiction, and it would not proceed unless it further appeared that adequate redress could not be had at law or the legal remedy would be ineffectual, so that the courts, proceeding according to the course of the common law, could not meet the requirements of justice. The principle upon which courts of equity took cognizance of such cases and administered the right through its remedial process of injunction, with the limitations thereof made necessary by practice and experience, has been clearly settled by the decisions of this court. *Guase v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728; *Irwin v. Davidson*, 38 N. C. 311; *Thompson v. Williams*, 54 N. C. 176; *Lyerly v. Wheeler*, 45 N. C. 267, 59 Am. Dec. 596; *Bogey v. Shute*, 57 N. C. 174; *Thompson v. McNair*, 62 N. C. 121; *Newton v. Brown*, 134 N. C. 439, 46 S. E. 994; *Roper Lumber Co. v. Wallace*, 93 N. C. 22; *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19. The usual method of showing irreparable damage, when the trespass was the cutting of timber trees, was by alleging and proving insolvency. But by Acts 1885, p. 664, c. 401, it was provided that in an application for an injunction, it shall not be necessary to allege insolvency when the trespass is continuous in its nature or consists in cutting timber trees. Revisal 1905, § 807. Act 1901, p. 900, c. 666, provided that when the judge finds it to be a fact that the contention on both sides, as to the title to the land and the right to cut the timber thereon, is bona fide and is based upon evidence of facts constituting a prima facie title, neither party shall be permitted during the pendency of the action to cut the trees, without the consent of both, until the title is regularly determined. Revisal 1905, § 808. But if it is found that the contention of either party is in good faith and is based upon a prima facie title, and the court is further satisfied that the contention of the other party is not of that character, it may allow the former to cut the trees upon giving bond to secure the probable damage, as required by law. Revisal 1905, § 809. We believe this exhibits, in a general way, the course of decision and legislation upon the subject which has at this time become an exceedingly important one in view of the ever-increasing and expanding business of cutting timber trees in our forests for the purpose of sale and manufacture. It would appear that the growth of the timber industry in the state was the cause of the legislation in the recent past, which was enacted, not only to protect our forests against depredations and consequent useless denudation, which is a most wholesome policy, but with the further object of preventing unlaw-

ful invasions of lands for the purpose of cutting timber thereon, in favor of the land-owners of the state, who might have found little or no protection in the law as it existed at the time of these radical changes. We should construe and enforce these laws so as to execute this intention, but at the same time the principles of the former system which remain should also be allowed their full operation.

Let us now examine this case in the light of what we have already said. Under the act of 1885, and even before its passage, it was held that the court would not interfere with the cutting of timber if there was no irreparable damage, in its strictly technical sense, and the plaintiff could be compensated in damages, and therefore a bond was required, instead of issuing an injunction, and a receiver was appointed to ascertain and report the quantity and value of the timber cut by the defendant. Notwithstanding the act of 1885 this court was still averse to stopping important enterprises by injunction if the plaintiff could otherwise be secured against loss, and in such a case it directed a bond to be given and a receiver to keep the accounts. *Roper Lumber Co. v. Wallace*, supra; *Horton v. White*, 84 N. C. 297; *Lewis v. Lumber Co.*, supra. This procedure, as we have seen, is forbidden by Act 1901, p. 900, c. 686, without the consent of the parties, where the dispute is bona fide on both sides and founded upon titles prima facie good, and only permitted when one of the parties is at fault and the other not. *Johnson v. Duvall*, 135 N. C. 642, 47 S. E. 611. In our case, the court did not proceed altogether under the statutes above enumerated, but found as facts that this is an action to try the title to land, which is chiefly valuable for its timber; that the contention of the defendants is not made in good faith nor is it based on evidence sufficient to constitute a title prima facie good; and that the plaintiff's contention is bona fide and its evidence shows a prima facie title to the land in dispute. The defendants, upon this finding, are enjoined from cutting any timber upon the McRae, Pollock, and Blount-Rodman tracts of land until the true location of those tracts is established by surveys to be made under the order of the court. We are unable to agree with the learned judge, for we do not think the order of injunction can be sustained in law by the case as made in the record. In the present state of the proof, however it may be varied when fully developed by cross-examination at the trial, it can hardly be questioned that the defendants have exhibited a perfect paper title to the three tracts named in the order, and in our judgment they have adduced testimony, oral and documentary, which, at this stage of the case, is reasonably sufficient and satisfactory to show the location of the land included within the boundaries of those three tracts. It is in both respects, at least prima facie,

a good title which they have shown. Indeed, the paper title being without any apparent flaw, we do not see how, under the circumstances, and where no order of survey has been made by the court, they could have been more definite and explicit in their proof. They have offered evidence of surveys and diagrams of the land, showing the situation of them with reference to the land described in the John Gray Blount grant, as it is alleged to be located, and the plaintiff attempted to meet this proof and overcome it to the extent of convicting the defendants of bad faith by merely asserting, and offering testimony exceedingly general in its character to show, that the location is not correct, but without undertaking to inform the court where the proper one should be with reference to the larger body of land covered by the patent under which they claim. We cannot believe that the law as it formerly was, nor as it now is under recent statutes, contemplated that one of the parties should have an advantage over his adversary upon such a showing. As far as we are able to see, the defendants have acted in apparent good faith in cutting the timber and in defending this suit, and they have presented proof which shows prima facie that they have title to those three tracts. The finding of facts by the court must be set aside, and the contrary finding is made by us, namely, that the defendant has acted, or is acting, in good faith in all respects, and has prima facie a title to the said three tracts of land. While it is true the order for the injunction is not confined to the three tracts we have named, but extends to all the land embraced by the Blount patent, it nevertheless appears that the plaintiff makes no claim to them or either of them. Why should the defendants, at the instance of the plaintiff be enjoined from trespassing on lands which do not belong to the plaintiff and to which it makes no claim, as the brief of counsel and the argument before us show. The court having also enjoined the defendants from cutting timber on any land within the external boundaries of the Blount patent and outside of the boundaries of the three tracts to which the defendants assert title, the defendants will have to cut timber, under our decision, if at all, at the risk of violating the order of the court and should, therefore, be quite sure that the lands claimed by them are properly located under their paper title. As it now appears, whatever may have been intended, the defendants have in part been enjoined from cutting timber on land which belongs to them, and which of course the plaintiff has no right or equity to protect by injunction. We are not aware of any principle requiring the owner of land to stop using it in the ordinary way, until it has been located, and no authority sustaining the validity of an order to that effect was cited to us.

We have not discussed the many other

questions argued before us and presented in the elaborate briefs, because, in view of the admissions and the facts appearing in the case, we do not find it necessary to do so. It has been assumed, and it so appears at present, that the plaintiff is the owner of the title alleged to have been derived from the Blount patent. The questions so ably and learnedly considered in the brief of plaintiff's counsel as to *lis pendens*, *res judicata*, and the validity of the deed to the plaintiff which is questioned by the defendant, and other controverted matters, need not be considered at this stage of the case, and the same may be said of the other questions debated by counsel. Both parties seem to have acted in good faith, the plaintiff, as to the claim under the Blount patent, and the defendants as to their claim of the three tracts, named in the order. As to the exception in the Blount grant, it may now be taken as settled law that a party claiming land to be within an exception must take the burden of proving it. *Gudger v. Hensley*, 82 N. C. 481; *McCormick v. Monroe*, 46 N. C. 13; *King v. Wells*, 94 N. C. 344. The reference in an exception to lands previously entered or granted is sufficient to let in evidence of identification under the maxim "*Id certum est quod certum reddi potest.*" *Brown v. Rickard*, 107 N. C. 639, 12 S. E. 570; *Gudger v. Hensley*, 82 N. C. 481; *McCormick v. Monroe*, 46 N. C. 13; *Melton v. Monday*, 64 N. C. 295; *Scott v. Elkins*, 83 N. C. 424; *Midgett v. Wharton*, 102 N. C. 14, 8 S. E. 778; *King v. Wells*, 94 N. C. 344 and *Mfg. Co. v. Frey*, 112 N. C. 158, 16 S. E. 902, which relates to this very grant. The exception of a definite number of acres without any description or reference by which to locate them, is of course void for uncertainty, as the reservation of 5,000 acres out of a larger body of land granted. *Waugh v. Richardson*, 30 N. C. 470; *McCormick v. Monroe*, *supra*; *Robeson v. Lewis*, 64 N. C. 734. But these questions have now become immaterial and we refer to them merely to show that they have not been overlooked, as they were strenuously pressed upon our attention. The Pollock grant is of course within the exception; the Rodman grant also antedates the Blount patent, and the title to the McRae tract is shown by proof sufficient to vest the title in the defendants apart from any consideration of the exception or of plaintiff's title under the Blount patent. We should add that since we have shown, in the statement of the case, the correct wording of the exception in the Blount patent, there can be no doubt that, under the cases we have cited, it is sufficiently certain to exclude the lands therein described from the operation of the grant. We do not pass upon the merits of this controversy and could not do so when considering an interlocutory order for an injunction to the hearing. The truth of the matter cannot now be known, as a great deal of the evidence is merely *ex parte* and has

not been subjected to those tests ordinarily required to elicit the truth. What we have said, therefore, should not be used to the prejudice of either party in the further investigation of the case. It is applicable only to the particular question now being decided, and does not relate to the merits as they may finally be disclosed.

The finding and order of the court below as to the McRae, Pollock, and Blount-Rodman tracts of land was erroneous, and is therefore reversed, and as to those tracts the injunction will be dissolved, as to both parties. In other respects it will remain in force. One half of the costs of this court will be paid by the plaintiff and the other half by the defendants.

Error.

PHOENIX FURNITURE CO. v. JAUDON. (Supreme Court of South Carolina. Sept. 20, 1906.)

1. REPLEVIN—VERDICT—SUFFICIENCY—DEFINITENESS.

In an action to recover the furniture of a barber shop, including four barber chairs, "all of the value of \$59.70," a verdict in favor of plaintiff "for three barber chairs or \$59.70" is not so indefinite that judgment thereon cannot be enforced.

2. APPEAL—REVIEW—HARMLESS ERROR.

In claim and delivery, defendant cannot complain of a verdict for plaintiff for a portion of the property sought to be replevied or a sum equal in value to the whole of the property as described in the complaint.

Appeal from Common Pleas Circuit Court of Charleston County; Memminger, Judge.

Action by the Phoenix Furniture Company against J. C. Jaudon. Judgment for plaintiff, and defendant appeals. Affirmed.

Legare & Holman, for appellant. Mordecai & Gadsden, for respondent.

WOODS, J. In this action of claim and delivery, the property is thus described in the complaint: "One (1) mirror; four (4) mirrors; two (2) 18x18 oak tables; four (4) 24x24 oak tables; one dozen cane seat oak chairs; four (4) barber chairs; one (1) boot black chair; four (4) sets Imperial bottles; four (4) neck dusters; one (1) oak book shelf; one book case; five (5) oak dressing cases, with French plate mirrors; one (1) antique mug case; one (1) Columbia oak barber's chair, D. K. maroon plush; one (1) hat rack, and one lounge; all of the value of \$59.70." The jury found a verdict in favor of the plaintiff "for three barber's chairs, or \$59.70." The defendant moved for a new trial on these grounds: "First. Because the identity of the property found for the plaintiff is not sufficiently defined so as to ascertain its identity, in order that the same may be delivered by the sheriff, under the verdict and judgment herein, and the same is therefore null and void. Second. Because the value of the whole property described in the

complaint, having been fixed by the plaintiff at \$59.70, the jury could not find the value of a part of the property to be equal to that of the whole." The motion was refused and the defendant appeals.

The case is not free from difficulty; but on the whole we think the verdict may be sustained. In *Bardin v. Drafts*, 10 S. C. 493, 497, the verdict was: "We find for the defendant the return of the property or \$507.95." In holding this to be a sufficient compliance with the statute, the court says: "Every reasonable presumption must be made in favor of the verdict, and that would render it necessary to construe it as conformable to the requirements of the law where such construction is possible. We consider that the jury have found the value of the property, and therefore the first ground of appeal is insufficient." A verdict should not be set aside as too indefinite if in itself or taken in connection with the pleadings it so identifies the property that a judgment based on it could be enforced with reasonable certainty. All the cases in this state and those we have examined in other jurisdictions were decided by this test. *Bardin v. Drafts*; *Eason v. Miller*, 18 S. C. 381; *Lockhart v. Little*, 30 S. C. 326, 9 S. E. 511; *Finley v. Cudd*, 42 S. C. 127, 20 S. E. 32; *Bosard v. Vaughn*, 68 S. C. 96, 46 S. E. 523.

Applying the same test here, we think "the three barber's chairs" referred to in this verdict may be sufficiently identified. The description of the property set forth in the complaint makes it clear that the plaintiff was claiming from the defendant the contents of a barber shop, and the number of the several articles and the particular description of some of them would distinguish this shop equipment from any other that might be in the possession of the defendant. But the complaint calls for "four barber's chairs" and "one Columbia oak barber's chair"; and the question is now, how are the "three barber's chairs" mentioned in the verdict to be identified and taken from the five? The Columbia oak barber's chair may be eliminated on the supposition. If that had been meant, it would have been designated in the verdict as in the complaint. There is nothing in the record to indicate that any of the remaining four chairs could be distinguished by description from the others. It might well be that the defendant had in his possession three barber's chairs, the property of the plaintiff, precisely like one of his own. This circumstance should not preclude the plaintiff from recovering his three chairs; for, if none of the four could be distinguished from the others, it could make no possible difference which three should be delivered to the plaintiff. Any other conclusion would sacrifice the spirit to the letter. The law does not exact the impossible, and where, from the nature of the property, identification is difficult, all that one who holds it unlawfully can

require is the best identification to be reasonably expected. It would be impossible to identify 50 bushels of corn of plaintiff placed by defendant on a pile of his own, or 1,000 bushels of plaintiff's wheat in defendant's elevator, yet a verdict for so much corn or wheat where the complaint indicated the mass of which it was a part would be sufficient. If one wrongfully takes 10 bales of cotton of another and places it with 10 bales of his own of similar or even unknown grade, surely it could not be contended that, because the converted cotton could not be distinguished from the other 10 bales, the owner must be the thief. If the four chairs were not alike and were capable of separate description, then it was the duty of the defendant to move to have the description in the complaint made more definite and certain. The verdict is not fatally defective in this respect.

The jury found the value of the chairs to be \$59.70, which was stated in the complaint to be the value of all the property sued for; and the defendant argues the verdict cannot stand because a part cannot be equal to the whole. The evidence is not before us, but it may be the plaintiff was not concerned to state the full value of the property in the complaint, having only a special property and a right to possession, for example, the title and right to possession of a mortgagee after condition broken in order to collect a mortgage debt of \$59.70, and in that case, while the jury could not assess the value of the whole property as described in the complaint at more than \$59.70, the defendant could not complain that the verdict was for only a part of the property assessed at its real value, not exceeding \$59.70, the value of the whole, as given in the complaint.

It is the judgment of this court that the judgment of the circuit court be affirmed.

BARRINEAU v. STEVENS.

(Supreme Court of South Carolina. Sept. 27, 1906.)

TAXATION—TAX SALES—VALIDITY.

Civ. Code, 1902, § 423, relating to tax sales provides that the sheriff shall take exclusive possession of so much property as may be necessary to raise the sum named, and sell the same. *Held*, that a deed under a tax sale, after levy by a constable who put his agent in possession and who had not been regularly appointed as a deputy sheriff, conveyed no title.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 1323, 1470-1473.]

Appeal from Common Pleas Circuit Court of Berkeley County; Purdy, Judge.

Action by J. A. Barrineau against D. F. Stevens. Judgment for plaintiff, and defendant appeals. Affirmed.

R. W. Haynes, for appellant. Lewis G. Fultz, for respondent.

WOODS, J. The plaintiff, J. A. Barrineau, brings this action to recover possession of the tract of land described in the complaint, alleging his own title and right to possession and the actual possession of the defendant under an invalid tax title. The two grounds on which the tax title is assailed are: (1) That the purchase was made by the defendant at the tax sale while he was the agent of the plaintiff, having funds in his hands adequate to pay the taxes given to him by the plaintiff for that purpose; and (2) that the sheriff, did not before the sale "seize and take exclusive possession" of the land, as required by the statute. The case was referred by consent to the master, who reported against the plaintiff on both these issues, held the tax title to be good, and recommended that the complaint be dismissed. On hearing the exceptions to the master's report, the circuit judge, without passing on the issue of fact as to the agency of defendant, held, after reciting the facts connected with the attempted levy and sale, the tax title invalid on the ground that "it does not appear that the sheriff ever took possession of the land or ever levied upon it."

The defendant appeals, and by his second and fourth exceptions submits that, the tax deed being regular on its face, the presumption was that the sheriff did all that was required by law, and it was not necessary that it should affirmatively appear that the sheriff took possession of the land before the levy. It is true, the defendant might have introduced his tax title and relied on the presumption in its favor, thus throwing the burden on the plaintiff to show noncompliance with the law. *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517. But the defendant himself proved the manner in which the levy was made, and it was on his evidence that the tax title was assailed; the circuit decree turning on this extract from his testimony: "Q. What official capacity did you hold in the year 1901? A. I was constable for J. R. Brown. Q. Did you collect any tax executions for the sheriff? A. I did. I know the piece of land described in the complaint, and I levied on that land for the sheriff and put a colored fellow, by name of Clinton, in charge of it. The land was afterwards sold by the sheriff at the courthouse at Monck's Corner, S. C., and I became the purchaser." Section 423 of the Civil Code of 1902 provides, as to tax sales: "Under and by virtue of said warrant or execution, the sheriff shall seize and take exclusive possession of so much of the defaulting taxpayer's estate, real or personal, or both, as may be necessary to raise the sum of money named therein and the charges thereon, and after due advertisement, sell the same," etc. *Dickson v. Burchmyer*, 67 S. C. 528, 46 S. E. 343, holds failure to comply with this requirement fatal to a tax title. In this case, instead of the seizing and taking of exclusive possession by the

sheriff, or his regularly appointed deputy, required by the statute, under the tax execution, the defendant, who was nothing more than a magistrate's constable, undertook to act for the sheriff in seizing and taking possession of the property. It is not pretended the defendant was a regular deputy of the sheriff, appointed and qualified under sections 830 and 831 of Civil Code of 1902; but the effort is made to sustain his authority under section 832, which reads: "The sheriff, without seeking the approval of the circuit judge, may appoint special deputies, as the exigency of his business may require, for the service of process in civil and criminal proceedings only; and for their conduct he shall be responsible." We are not called on to determine what is meant by the expression "process in civil and criminal proceedings only," for there is not only a lack of evidence of any appointment as a special deputy under this statute, but the defendant's testimony clearly means he was collecting tax executions, and undertook to levy on and take possession of this land as a magistrate's constable. The tax sale was, for this reason, ineffectual to confer title on the defendant.

The circuit judge held, further, that, if the defendant had authority to act for the sheriff, then his purchase was illegal and his title invalid under section 864 of the Civil Code of 1902, which provides: "No sheriff or deputy sheriff shall be concerned or interested, directly or indirectly, in the purchase of any property sold by either of them officially; and if such sheriff or deputy shall be concerned or interested in any such purchase at any such sale, made by either of them, he shall, on conviction thereof, be deprived of his office, and shall be liable to be fined and imprisoned at the discretion of the court; and such purchase shall be null and void." But this objection will not be discussed here, because it was not mentioned in the complaint as one of the vices in the sale, and because its consideration is not necessary to the decision of the case.

It is the judgment of this court that the judgment of the circuit court be affirmed.

MILLER et al. v. SAXTON.

(Supreme Court of South Carolina. Sept. 25, 1900.)

1. TRUSTS — CONSTRUCTIVE TRUSTS — JOINT PURCHASE OF LAND.

Where an owner of land sold it, giving a bond for the title, and the purchaser with consent of the owner assigned the bond to a third person, who paid a part of the price and afterwards agreed with another that, if he would pay the balance, they would divide the land in proportion to what each paid, and the assignee of the original vendee moved away and the person with whom he had agreed to divide the land went into possession, paid the balance of the price, and took a deed to the land, and afterwards conveyed to his wife, who knew all the facts, there was a resulting trust in favor of the heirs of the person moving away.

2. SAME—ENFORCEMENT—EVIDENCE—PURCHASE PRICE—PAROL EVIDENCE.

In an action to enforce a trust in lands under an agreement for a joint purchase, the payment of a part of the purchase price by plaintiff may be shown by parol.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 159.]

3. LIMITATION OF ACTIONS—CONSTRUCTIVE TRUSTS—ENFORCEMENT.

Where a person taking title to land, part of the price of which had been paid by another, recognizes his rights, limitations do not run against the person paying such portion of the price.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Limitation of Actions, §§ 500-503.]

4. TRUSTS—ENFORCEMENT—LACHES.

Where there had been no settlement between a trustee and a beneficiary, a claim by the beneficiary is not barred by laches.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, §§ 571-573.]

Appeal from Common Pleas Circuit Court of Spartanburg County; W. C. Benet, Special Judge.

Action by Mintie Miller and others against Jane Saxton. Decree for plaintiffs, and defendant appeals. Affirmed.

Ralph K. Carson, for appellant. Nichols & Jones, for respondents.

POPE, C. J. The plaintiffs by their complaint allege: That W. T. West contracted to buy from Dr. J. P. Miller, at the price of \$500, 51 acres of land in Spartanburg county. A bond for title was made by Dr. Miller to the said W. T. West for said tract of land. The said W. T. West assigned the said bond for title to one Wylie Miller, with the knowledge and consent of said J. P. Miller, the title to be made to him upon the payment of said \$500. That under said bond for title said Wylie Miller went into possession of said land, improved the same, and paid in cash thereon the sum of \$300. The said Wylie Miller, being unable to pay for said land alone, entered into a contract with Allen Saxton that, if he would pay the remaining \$200 of the purchase money, he should be entitled to receive a part of the land in proportion to what each had paid thereon. That the said Allen Saxton paid the said balance on the land and took title from J. P. Miller to the whole tract in his own name on December 4, 1877, which was recorded on the 20th December, 1877, for the consideration of \$250, as recited in the deed. That on the 13th September, 1883, the said Allen Saxton conveyed to his wife, Jane Saxton, said lands, she having full knowledge of the above facts, for the sum of \$1, and she has been in possession of the same, enjoying the rents and profits therefrom from the date of the said deed to her. That said rents and profits are worth the sum of \$75 per year. That the share of the said land belonging to the plaintiffs is three-fifths thereof, and the share belonging to the defendant is two-fifths thereof. That Wylie Miller died intestate on the

— day of —, 18—, leaving as his heirs at law the following persons: Mintie Miller, his widow, Mary Miller, Leverett Miller, Flemmons Miller, Hattie Miller, and Maggie Miller, his children. That the said Mintie Miller and the children (as above) bring suit as plaintiffs to recover their interest in the said tract of land, and the children, being under the age of 21 years, appear herein by their mother, Mintie Miller, as their guardian ad litem, by an order passed by the probate court of Spartanburg county on the 12th of January, 1899. That the plaintiffs ask judgment that a trust be declared in the said lands in their favor to the extent of three-fifths thereof, and that the land be partitioned by a sale of the premises. That the defendant be required to account for the rents and profits from said land, and that the proceeds arising from such sale and the said rents and profits be divided between the parties hereto in proportion to their interests as above set out, and for such other and further relief as may be just and equitable.

The defendant denies all the allegations of the plaintiff's complaint, but admits that her husband, Allen Saxton, conveyed the premises to her by deed on the 18th of September, 1883, and that her deed was duly spread upon the record of the county of Spartanburg on September 13, 1883, for a consideration of \$1. The defendant further alleges that neither the plaintiffs nor their ancestors, predecessors, or grantors were seised or possessed of premises described in the complaint, or any part thereof, within 20 years before the commencement of this action, which was begun on the 30th January, 1899, but that the defendant, her ancestors, predecessors, and grantors have held and possessed said premises adversely to the pretended title of the plaintiff for 20 years past before the commencement of this action, under a claim of title in fee exclusive of any other right; that the defendant has been in actual, open, and notorious possession of the premises, holding the same adversely to the pretended title of the plaintiffs and all other persons, for more than 10 years before the commencement of a title in fee, exclusive of any other right; that, if the said Wylie Miller or those claiming under him ever had any interest in the premises, they are barred by his laches from asserting any claim of the title thereto. The defendant prays judgment that the complaint be dismissed, with costs, and for such other relief as may be just.

By an order of his honor, Judge Ernest Gary, dated May 8, 1899, the above cause was referred to the master of Spartanburg county to take testimony and report the findings of fact and the conclusions of law. From the testimony taken by said master, it appears that Jane Saxton, the defendant, says that she knew that Wylie Miller had a part interest in this land, but did not know

what interest that was; that she had never paid any one rent for said land; that she had not heard of Wylie Miller for several years; and that he had not lived there, but left the same year she and her husband moved on said land. She admits that, when Wylie's wife told the witness that she and her children had a half interest in the land, she never denied it. E. L. Miller stated that he was a son of Dr. J. P. Miller and knew this land, and that it belonged to his father, and that his father gave Mr. West a bond for title to it, but does not know where it is, and has searched for it; that he was present when the land was surveyed, but the surveyor is now dead—his recollection is that Mr. West went into the immediate possession after the execution of the bond for title—that his father made a deed of it to Allen Saxton, and when the title was executed Wylie Miller was not in this part of the country. He thought this land would be worth \$2 an acre standing rent a year. T. D. Jarrett says he was present and saw Wylie Miller pay to Mr. West \$200 on this land in dispute, and Mr. West called his attention to the payment. He thinks it was in 1874 or 1875. W. T. West said: That he bought this land from Dr. J. P. Miller, who gave him a bond for the title. He paid him \$200 on it at one time. That he paid him \$285 at one time, which notes were introduced in testimony. Witness is not now in possession of the bond and cannot be positive of what he did with it, but his recollection is that he transferred it to Wylie Miller, to whom he sold the land. He was to give him \$500 for it. That he paid him \$270 of that amount. He gave him \$200 in the fall after they had traded in the spring of '73 or '74. He took that money and paid two of the notes he had given to Dr. Miller for the land, a week at least after he had received the money from Wylie Miller. The witness does not remember seeing Wylie working the place but one time, and he was then chopping. Allen Saxton told witness about midnight after Wylie had got into a scrape, that Wylie had arranged with him for Allen to finish paying for the land, if witness would accept the money from Allen. They were to divide the land. Witness agreed to that arrangement, and said he did not care who paid him his money so he got it. Witness feels sure that at least \$130 to \$150 of the money he paid to Dr. Miller was the money he got from Wylie Miller. On the cross-examination, witness said of his own knowledge he did not know who paid to Dr. Miller the balance of the money. Allen Saxton and another paid him something like \$200 after that on this place. The \$80 that was paid to him by Tanner the witness credited on the paper given him by Wylie Miller. The defendant asked him how much money Allen had paid, and witness told her that it was less than \$200. She told the witness that the agreement was that,

when it was paid for, they were to divide it in half. Isaac Shaver said that Wylie got into a difficulty the fall he rented the land to Saxton, and Wylie told Allen that he would pay half the money, and, if Allen paid half, he was to get half, and whichever paid most money was to get most land. Mintie Miller testified that Wylie first rented the land to Allen. She heard the conversation. She heard them agree that Allen was to finish paying for the land, and they were to divide according to what each paid, and the division was to be after it was paid for. This agreement was shortly before Wylie left the country, which agreement was made while Jane Saxton was present. Witness heard Allen, after Wylie came back, tell Wylie that he had not finished paying for the place. Jane Saxton was present. Allen at that time said he would divide it as the contract required. Wylie was absent from the country four or five years. He had spells and did not work much. He did not attend to any business for 20 years. He died in Pickens, S. C. Jane Saxton told the witness that they would carry out the agreement that Wylie and Allen had made as if they were both alive. This she subsequently declined to do. Other testimony was given of not very material consequence.

After hearing the testimony, the master filed his report on the 26th of June, 1903, in which he held that the doctrine of resulting trust is applicable where two or more persons pay the purchase money jointly, but the purchase is taken in the name of one of them; the shares being apportioned by the money advanced by each. This being a trust resulting by operation of law, parol testimony is admissible to prove by whom the payments were actually made, and such evidence was admitted in this case. The master holds that in his judgment the evidence of the part payment by Wylie Miller is clear, full, and satisfactory, and he is bound to conclude that, when Allen Saxton entered upon the land under the deed from Dr. Miller, he, Allen, held it subject to a resulting trust in favor of Wylie Miller in proportion to what Miller had paid, that Jane Saxton knew of the circumstances under which the land was conveyed to her husband, and that she took a conveyance from him with full knowledge of the resulting trust in favor of Wylie Miller. He also found from the testimony that Jane Saxton did so hold the property and that she recognized the rights of Wylie Miller therein, and, after his death, those of his wife and children, that Wylie Miller paid part of the purchase price of the land and that a resulting trust in his favor was thereby obtained, and that the same has not been destroyed. He also held that the contention of the defendant as to laches and adverse possession could not be sustained. He held that the testimony as to the accounting for rents and profits is not as clear as he would wish, but

after a careful consideration he had reached the conclusion that the plaintiffs and defendant owned the land in equal parts—the plaintiffs one half and the defendant the other half. He was unable to arrive at any satisfactory conclusion of the rents and profits, owing to the fact that he does not know how much of the land has been in continuous cultivation, how much has been cleared, to what extent the premises have been improved by the defendant, nor what amount has been paid for taxes. He therefore recommended that the land be sold for partition, and that the proceeds of the sale be divided so that one half shall go to the plaintiffs and the other half to the defendant. Both parties excepted to this report. The whole case came on to be tried before Judge Benet on July 1, 1904, who ordered and decreed that the report of the master be confirmed and made the judgment of the circuit court.

From this decree the defendant excepted upon 12 grounds of appeal, which we will consider in their order.

"(1) In finding as a matter of fact that the proof was clear and convincing that a part of the consideration for the conveyance of the land to Allen Saxton by J. P. Miller was money paid by Wylie Miller." It seems to us that the deed from Dr. Miller to Allen Saxton itself furnishes some testimony that Allen Saxton only paid one-half the purchase money. The testimony in the case shows that Dr. Miller specifically states that Allen Saxton paid \$250 as a consideration for the deed for the whole tract of land. Every witness who spoke on this subject testified that \$500 was the purchase price of the 51 acres of land. Mr. West, who first purchased the land, states that \$500 was the purchase price, and that such amount was entered in the bond for titles. It is well for all parties here contesting that although they are now unable to produce the bond for title, the same having been lost or mislaid, yet it was in writing, signed by Dr. Miller to Mr. West, and by Mr. West assigned to Wylie Miller. It would have been much easier to solve this question had the paper not been lost or mislaid, yet, when testimony is admitted without objection establishing the existence of such paper, it relieves much of our perplexity. The witness Mr. W. T. West is direct and explicit on these points. J. P. Miller could only legally by his deed convey this land to Allen Saxton upon proof that Wylie Miller had paid a large part of the purchase money. The deed should have been made to Allen Saxton, because Dr. Miller had received the whole purchase money, and as he knew under an arrangement with Mr. West, Wylie Miller, and Allen Saxton. This ground of appeal must be overruled.

"(2) In finding that the defendant recognized the rights of Wylie Miller and those

of his wife and children to an interest in the property." We do not think that the circuit judge erred, as is herein suggested, for Allen Saxton always admitted when questioned by competent witnesses that he and Wylie Miller were acting together for the purchase of this land. The only time that he failed to answer up to the full requirements of manhood was when he by a deed of conveyance transferred this land to his wife in fee simple. This was done, however, in 1883. This exception must be overruled.

"(3) In holding and ruling that if it was shown that any part of the purchase money of the land was paid by Wylie Miller that the burden would then be upon Allen Saxton to show by sufficient evidence that there was no resulting trust." The language of this exception does not correctly set forth the finding by the master. This is the language of his report: "If it has been shown that the purchase money was paid in part by Wylie Miller, then the burden would be upon Allen Saxton to show, by sufficient evidence, that it was intended that he should take the land absolutely himself, and not by way of resulting trust for Wylie Miller. This being a trust resulting by operation of law, parol evidence is admissible to prove by whom the payments were actually made, and such evidence was admitted in this case." In the leading case of *Bothsford v. Burr*, 2 Johns. Ch. (N. Y.) 408, Chancellor Kent says: "If A. purchases an estate with his own money and takes the deed in the name of B., a trust results for A. because he paid the money. The whole foundation of the trust is the payment of the money." *Willis v. Willis*, 2 Atk. 71. If, therefore, the party who sets up a resulting trust made no payment, he cannot be permitted to show by parol proof that the purchase was made for his benefit or on his account." This is illustrated by our case of *Ex parte Trenchholm*, 19 S. C. 134, which holds, amongst other things, that a subsequent advance of money to the purchaser after the purchase is complete and ended cannot support the case of a resulting trust. The payment must be clearly proved. *Willis v. Willis*, supra. To the same point, in *Boyd v. McLean*, 1 Johns. Ch. (N. Y.) 590, it is held that the payment by the cestui que trust must be clearly proved. To the same effect is 4 Kent, 305. In *Olcott v. Bynum*, 17 Wall. 59, 21 L. Ed. 570, it is held that such a trust, if at all, must arise at the time the purchase is made. In our own case of *Taylor v. Mayrant*, 4 Desaus. 516, a resulting trust does not arise by construction. It must be grounded on plain proof of the application of the fund of the party for whom it is raised. All the payments here made in the proof offered by Mintie Miller were made prior to Allen Saxton's connection with the case and before a deed was made by Miller to the said Saxton. There is no effort here

to prove a constructive trust. The intention of all the parties, to wit, Dr. Miller, W. T. West, Wylie Miller, and Allen Saxton, was the purchase of the 51 acres of land from Dr. Miller. Allen Saxton only paid \$250 of said sum of \$500. Wylie Miller, by the proofs, certainly paid \$270 of the purchase money. We hold, therefore, that there was no error in the circuit judge, as here complained.

"(4) In holding that, when Allen Saxton took the deed from J. P. Miller, he took the title subject to a resulting trust in favor of Wylie Miller." There was no error in the circuit judge as there pointed out, for reasons just given in disposing of the third exception.

"(5) In holding that Jane Saxton knew of the resulting trust in favor of Wylie Miller and took the land subject to the trust." It was in direct proof that Jane Saxton, the defendant, knew the circumstances under which her husband, Allen Saxton, received this land. There was no error in the circuit judge, as here complained of.

"(6) In holding that the statute of limitations did not apply to a resulting trust." So far as the alleged error of the circuit judge, when he held that the statute of limitations did not apply to a resulting trust is concerned, we hold that the plaintiff had made admissions which bind her in the deed she received from Allen Saxton to hold the same for the benefit of the plaintiffs. No holding by the defendant was ever made, so far as the proofs were concerned, adverse to the plaintiffs until about two years before this suit was begun. At all other times Allen Saxton in his lifetime, and the defendant, Jane Saxton, since his deed to her in 1883, have admitted that the land was holden by them not adversely to the plaintiffs, but virtually as in trust for them. There must be an adverse holding by a trustee to set the statute of limitation in operation. We therefore overrule this exception.

"(8) In not holding that, when the deed from J. P. Miller to Allen Saxton was recorded, it was evidence of adverse holding, and that the statute ran against Wylie Miller and his heirs at law from that date." We take it that the circuit judge held as demanded in this exception because the proofs were required and were furnished that Wylie Miller in his lifetime, and since his death his widow and children, have assumed the burden of proof of the title and have established their title by the preponderance of evidence. This exception is overruled.

"(9) In not holding that this defendant had been in open, notorious, and adverse possession of the land in dispute for more than 10 years, and that the rights of the plaintiffs, and those under whom they claim, had not accrued within 10 years prior to the commencement of this action." We cannot hold that the circuit judge should have held that the defendant has been in the open, notori-

ous, and adverse possession of the land in dispute for more than 10 years, and that the rights of the plaintiffs and those under whom they claim had not accrued within 10 years prior to this suit, for such was not the case, according to the proofs adduced. This exception is overruled.

"(10) In not holding that if Wylie Miller and those claiming under him ever had any interest in the land that their claim is stale, and they are now debarred by their laches from asserting the same." There has been unusual delay in the assertion of the rights of the plaintiffs. If there had been the slightest effort by the defendant to establish any settlement between Allen Saxton and Wylie Miller, by which settlement all claims by Wylie Miller upon Allen Saxton for his interest in the lands had been settled, a difficulty would have been presented and the staleness might have been relied upon, but such is not true in the case before us. We therefore overrule this exception.

"(11) In not finding that the defendant was the owner in fee of the premises in dispute, and that the complaint should be dismissed." In view of our previous holdings of law and fact in this case, it was no error to refuse to find that the defendant was the owner in fee of the premises in dispute. The master and the circuit judge have passed upon all questions of fact. They have held adversely to the defendant. We will not now interfere.

"(12) In not holding that the defendant and those under whom she claimed had been in open, notorious, and adverse possession of the land under a deed, duly recorded, for more than 20 years prior to the commencement of this action. Because his honor, the circuit judge, erred, * * * second, in not ruling and holding that a resulting trust could only be shown by evidence that was full, clear, and convincing, and in not finding that the evidence in this case was vague, indefinite, and doubtful; third, in not holding that, in order to establish a resulting trust in favor of the plaintiff, it must be shown by clear and convincing proof that a part of the purchase money was actually paid by Wylie Miller to J. P. Miller; fourth, in not finding that there was no testimony to show that Allen Saxton paid for the land in controversy with the money of Wylie Miller, or that Wylie Miller ever paid any money to J. P. Miller; fifth, in not finding that the plaintiffs' claim was stale and barred by laches; sixth, in not finding that if a trust resulted in favor of Wylie Miller when the deed to Allen Saxton was executed by J. P. Miller that the statute of limitations began to run from that date; seventh, in not finding that even if Allen Saxton held the land, or any part thereof, as trustee for Wylie Miller, that the conveyance of the land to Jane Saxton was a disclaimer of the trust, and notice of adverse holding by Jane Saxton, the de-

pendant, and that the statute of limitations ran from that date; eighth, in not finding that the defendant was the owner in fee of the premises in dispute and dismissing the complaint."

For the reasons advanced in disposing of these points referring to the master's report, we overrule all these eight grounds of objection.

It is the judgment of this court that the judgment of the circuit court be affirmed.

ARMOUR & CO. v. ROSS.

(Supreme Court of South Carolina, Sept. 18, 1906.)

1. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to evidence which assumes facts in dispute under the pleadings is properly overruled.

2. APPEAL—HARMLESS ERROR.

Admission of irrelevant evidence which is not prejudicial is harmless error.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153, 4154.]

3. TRIAL—OBJECTIONS TO EVIDENCE.

An objection to evidence as irrelevant is properly overruled, where the objection failed to specify the ground thereof.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 199.]

4. PRINCIPAL AND AGENT — UNAUTHORIZED SALE OF PRINCIPAL'S PROPERTY.

Under Civ. Code 1902, § 2655, an agreement to sell goods for another as agent, title to remain in the principal until sold, must be recorded in order to be valid against subsequent purchasers.

5. TRIAL—CONFLICTING INSTRUCTIONS.

An instruction that if plaintiff delivered certain property to an agent, reserving an interest, and failed to have the written contract to that effect recorded, such agreement would be void as against subsequent creditors of the agent for value and without notice, is not in conflict with an instruction that, if the plaintiff shipped the goods to his agent as consignee, then nothing that he could say or do would enable defendant to take a good title to the property against plaintiff, if the property was taken for an antecedent debt.

6. CHATTEL MORTGAGES—PROPERTY COVERED.

A chattel mortgage of all household goods, all office furniture, and all stock of merchandise does not cover merchandise thereafter acquired.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Chattel Mortgages, §§ 208, 209.]

Appeal from Common Pleas Circuit Court of Cherokee County; Klugh, Judge.

Action by Armour & Co. against M. L. Ross and others. Verdict for defendants, and plaintiff appeals. Reversed and remanded.

J. C. Jeffries, for appellant. Butler & Osborne, for respondent.

GARY, A. J. This is an action to recover the value of goods alleged to have been converted by the defendants to their own use. The complaint alleges that at the time hereinafter mentioned the plaintiff was the

owner of a quantity of bacon and lard, of the value of \$1,353.41; that at said time the property was in possession of the defendant St. John Butler as plaintiff's agent, and was in his hands upon consignment; that on or about the 20th of August, 1901, the defendants, knowing that the plaintiff was owner of said property, and in order to pay an old debt due from the defendant St. John Butler to his codefendants, H. L. Ross and W. A. Turner, unlawfully and wrongfully converted the same to their own use, and placed it out of the possession of said agent, who thereupon left the state; and that the defendants Ross and Turner detained and concealed said property from the plaintiff for the purpose of appropriating it to their own use. The defendants Ross and Turner denied the allegations of the complaint, and set up as a defense that they were purchasers for valuable consideration without notice. The jury rendered a verdict in favor of the defendants, and the plaintiff appealed.

1. The first assignment of error is because his honor, the presiding judge, permitted the defendants to introduce in evidence a mortgage purporting on its face to have been executed by St. John Butler in favor of the defendant Ross on the 7th of February, 1901, covering all his household and office furniture, and stock of merchandise, to secure the payment of a note in the sum of \$535, payable 60 days after date. The ground of objection was that Ross "had no right to take a mortgage given by the agent of Armour & Co. over the property of Armour & Co." The objection was properly overruled, because it assumed facts that were in dispute under the pleadings.

2. The testimony, however, was admissible on the ground that the mortgage formed a part of the transaction, upon which the defendants relied to sustain their plea of purchaser for value without notice. But, in any event, even if the testimony was irrelevant, it was not prejudicial.

3. All the other exceptions relative to the introduction of testimony must likewise be overruled, for the reason that the appellant either objected on the ground of irrelevancy, or failed to specify the ground of objection. Permitting the introduction of irrelevant testimony cannot be successfully assigned as error, unless there was an abuse of discretion on the part of the presiding judge, which was not made to appear in this case. The seventh exception was not argued by the appellant, and the court deems it only necessary to state that it cannot be sustained.

4. The eighth exception is as follows: "Because his honor erred in charging the jury as follows: 'If you should find from the evidence in this case that this property was consigned to St. John Butler upon some secret trust or arrangement between himself and these plaintiffs, and that defendants had no knowledge of it, and did not know of facts,

or had no notice of facts, sufficient to put them on inquiry about it, which inquiry would lead to discovery of the fact that Butler was not the owner of the property, but simply agent of the plaintiff, if that is established by the evidence, then that would not entitle plaintiff to recover—the error complained of being (a) that this charge was not responsive to any of the evidence in the case; (b) that St. John Butler was the mere consignee of the plaintiff, and committed a breach of trust of their property, and it did not make any difference whether defendants knew of such contract or not, whether they took the property in good faith or not, still plaintiff would not be prevented from recovering its property or the value thereof, which had been disposed of by its agent, by such breach of trust.” Assignment of error “(a)” cannot be sustained, as the charge was responsive to the issues made by the pleadings. Assignment of error “(b)” must, also, be overruled for the following reasons: The plaintiff introduced in evidence an instrument of writing dated June, 1889, directed to St. John Butler, signed by Armour & Co., and containing, among others, the following provisions: “Upon your acceptance in writing indorsed hereon, you are constituted our broker and commission merchant at Gaffney, S. C., to sell provisions and products, as we may offer through or consign to you, or to your care for that purpose, upon the following conditions: 1. The title of all goods is to remain in us until sold by you, in accordance with the terms fixed by us, and when sold, the proceeds of sale shall at all times be the property of Armour & Co., and you shall any time deliver any or all unsold goods to whomsoever Armour & Co. may authorize to receive them.” St. John Butler accepted the terms of the proposed contract. Section 2855 of the Code of Laws of 1902 is as follows: “Every agreement between the vendor and vendee, ballor or bailee of personal property, whereof the vendor or ballor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors or purchasers for valuable consideration without notice, unless the same be reduced to writing in the manner now provided by law, for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, inn keepers, or any other persons letting or hiring property for a temporary use, or depositing such property for the purpose of having repairs or work or labor done thereon.” The charge was in accordance with the provisions of said section. There is a mistake in setting out the charge in the ninth exception. It must, however, be overruled, as it raises practically the same question as that presented by the eighth exception.

5. The tenth exception assigns error in charging certain requests of the plaintiff, and others of the defendant, on the ground

that they were in conflict. The requests of the defendants state substantially the same proposition, while those of the plaintiffs are practically the same. We will therefore reproduce one of the defendants' and one of the plaintiffs' requests. Defendants' request: “If the plaintiff delivered the property in question to St. John Butler for other than temporary use as bailee, reserving to himself any interest in the same, and the plaintiff failed to have a written contract to that effect recorded in the office of the clerk of the court for Cherokee county, then such agreement between plaintiff and St. John Butler is null and void as against M. L. Ross and W. A. Turner, if they were subsequent creditors or purchasers for valuable consideration and without notice of such interest in plaintiff, and the verdict must be in favor of the said Ross and Turner.” Plaintiff's request: “I charge you that if St. John Butler was the agent of the plaintiff, and the plaintiff shipped him the goods described in the complaint for sale as consignee, then nothing that he could say or do would enable the defendant M. L. Ross to have a good title to the property against plaintiff, if same was taken for an antecedent debt which the said St. John Butler owed M. L. Ross.” There is no conflict between the defendants' and the plaintiff's requests, as the former states the general principle correctly touching the defense of purchaser for value without notice, while the latter recognizes the well-settled doctrine in this state that antecedent indebtedness is not a sufficient consideration to support said defense.

6. The eleventh exception assigns error in refusing the motion for a new trial, on the ground that “all the evidence showed that the defendants were not purchasers or creditors for value, and as a matter of law, his honor should have set aside the verdict and granted a new trial.” Ordinarily the defense of purchaser for valuable consideration without notice is equitable in its nature, and the findings of fact thereon by the circuit court may be reviewed on appeal. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927. When, however, the question of notice arises under the recording act, a legal issue is presented and the findings of fact in the circuit court cannot be made the basis of an appeal to the Supreme Court, unless they are wholly unsupported by the testimony, in which case a question of law is presented. *Gregory v. Ducker*, 31 S. C. 141, 9 S. E. 780; *Hodges v. Kohn*, 67 S. C. 69, 45 S. E. 102. The question, therefore, to be considered in this case is whether there was any testimony whatever tending to sustain such defense. There is testimony to the effect that the defendants were purchasers, and that they did not have notice of the agreement hereinbefore mentioned between the plaintiff and Butler, but the defendants failed to introduce any testimony whatever tending to show that there was such consideration as equity recognizes

in support of their defense. On the contrary, the testimony of the defendant Ross was to the effect that the sale of the articles to him by Butler was based upon the consideration of past indebtedness, which is not sufficient to sustain said defense. (Quite a different question would be presented, if the appeal involved the construction of section 2456 of the Code of Laws of 1902, as that section was amended in 1899 by adding the words, "whether simple contract creditors or alien creditors.") *Marsh v. Ramsay*, 57 S. C. 121, 35 S. E. 483. Nor does the fact that Butler executed the mortgage show that the defendant Ross had right thereunder to take possession of said property. The description of the property is as follows: "All household furniture, all office furniture, and all my stock of merchandise." No mention is made of property thereafter to be acquired. The mortgage was executed on the 7th of February, 1901, and there is no testimony whatever that the articles in dispute were a part of the stock of goods on hand at that time. On the contrary, Ross testified that the said property was not received until about the 8th or 9th of June, 1901, and that the sale took place on the 20th of August, 1901. A mortgage may be drawn so as to cover additions thereafter made to the stock of merchandise; but goods added to the stock will not be subject to the lien of the mortgage, unless the description of the property manifests an intention to include the articles subsequently added to the stock. *Moore v. Bynum*, 10 S. C. 452, 30 Am. Rep. 58; *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724; *Hirshkind v. Israel*, 18 S. C. 157; *Acker v. Rowan*, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705; *Perkins v. Bank*, 43 S. C. 39, 20 S. E. 759; *Fidelity & Deposit Co. v. Sturtevant Co.* (Miss.) 38 South. 783; *Cunningham v. Alryan Woolen Mills* (N. J. Ch.) 61 Atl. 372; *Tolerton & Stetson Co. v. First Nat. Bank* (Neb.) 88 N. W. 865; *Godfrey & Sons Co. v. Citizens' Nat. Bank* (Neb.) 90 N. W. 239; *Stubblefield v. Snyderacker* (Ill.) 52 N. E. 742; *Wilson v. Selbert* (Ky.) 8 Am. Law Reg. (N. S.) 608, 76 Am. Dec. 728, note. Such intention does not appear in this case.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

POPE, C. J., concurs.

WOODS, J. (concurring). I concur generally in the views of Mr. Justice GARY, except that I express no opinion as to whether section 2655 of the Civil Code of 1902 applies to transactions between those sustaining such relationship as existed here between Armour & Co. and St. John Butler. The contract between these parties was held by the circuit judge to establish between them the relation of bailor and bailee, requiring record as against subsequent creditors

and purchasers without notice, and the same view is taken in the opinion of Mr. Justice GARY. If this view is incorrect and the statute is inapplicable, it would follow for a greater reason that the defendants had wrongfully converted the property of the plaintiffs. Hence, whether the statute does or does not apply, the result in this case is the same. Whether goods placed in the hands of an agent in such circumstances as here appear may be treated by subsequent creditors and purchasers as the property of the agent, unless a written contract with the principal is recorded, as required by section 2655, is a nice and important question, upon which, it seems to me, an opinion should not be expressed until a case arises in which it is necessarily involved.

Without criticism of the course pursued in this or any other cause, I wish to suggest that, when counsel intend to make the point that there is no evidence to support the claim of the plaintiff or the defense of the defendant, the best practice is to make a motion to direct a verdict, if a motion for a nonsuit is inappropriate, rather than wait to move for a new trial after a verdict has been rendered. This course would not only promote the interests of litigants, but save much time and labor in the public interest.

GRIFFIN et al. v. GRIFFIN.

(Supreme Court of South Carolina. Sept. 26, 1908.)

1. SUBROGATION—VOID FORECLOSURE SALE—RIGHTS OF PURCHASER.

A purchaser on foreclosure sale gave a deed, believing his title to be good, which his grantee took in good faith, but the sale under the power of sale was void because the deed was executed by the mortgagee in his own name, and not as attorney of the mortgagor. *Held*, that the grantee was subrogated to the rights of the mortgagee to the amount of the purchase money paid by him.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Subrogation, §§ 41, 42.]

2. SAME — OPERATION AND EFFECT — VOID FORECLOSURE SALE—CREDITS ON DEBT.

Where a foreclosure under a power of sale in a mortgage was void because of defects in the deed of sale, and the purchaser was subrogated to the mortgagee's rights, the mortgagor or those claiming under him are entitled to have the mortgage debt credited with the amount of the bid at the sale.

Appeal from Common Pleas Circuit Court of Clarendon County; Leroy F. Youmans, Special Judge.

Action by Samuel W. Griffin against Joseph D. Griffin and others. From an order overruling a demurrer to the complaint, defendants appeal. Affirmed.

Wilson & Du Rant, for appellants. Joseph F. Rhame and W. C. Davis, for respondent.

WOODS, J. This appeal is from an order overruling a demurrer to the complaint. The complaint alleged in substance that on Feb-

ruary 4, 1884, Moses Levi undertook to sell at public auction six-elevenths of the land therein described under the power contained in a mortgage given to him by the defendant Joseph D. Griffin, and under this attempted sale subsequently executed to Ferdinand Levi, who was the highest bidder at the sale, what purported to be a deed of conveyance for the consideration of \$650, but that no title really passed, for the reason that the deed was executed by Moses Levi in his own name, instead of in the name of the mortgagor; that on February 14, 1891, Ferdinand Levi undertook to convey the same interest in the land to Moses Levi, for the consideration of \$650, and that thereafter, on July 16, 1891, Moses Levi conveyed by deed to the plaintiff, for the consideration of \$1,000, all his right, title, interest in the land, embracing not only the six shares covered by the attempted sale under the mortgage, but other shares subsequently acquired; that plaintiff "purchased the said premises from the said Moses Levi under the honest belief that by the sale thereof to him he would be vested with a perfect legal title thereto"; that Moses Levi died on the 26th day of January, 1899, and David Levi and Abe Levi are executors of his will; and that there is due and unpaid on the mortgage the sum of \$2,585, with interest from January 16, 1883, at the rate of 10 per cent. per annum. Under these allegations the plaintiff asks to be subrogated to the rights of Moses Levi and Ferdinand Levi to the extent of the sum of \$1,000 paid by him for the land, and interest thereon, and that he have judgment of foreclosure for that amount.

A demurrer to the original complaint in the cause was sustained by this court (70 S. C. 220, 49 S. E. 561), but as a result of the views expressed in the former opinion the plaintiff amended in two important particulars: The personal representatives of the deceased mortgagee have been made parties defendant, and the allegation has been made that the plaintiff bought from Moses Levi under the belief that he was obtaining a good title. The executors of Moses Levi have made no objection to the sufficiency of the complaint, and in making them parties the plaintiff has brought before the court all who can possibly have any interest in the mortgage. The interest in the cause of the mortgagor, Joseph M. Griffin, and those who claim under him, is necessarily confined to the validity and amount of the mortgage as a present lien on the land. They are not concerned with the question whether the plaintiff is entitled to be subrogated to the rights of Moses Levi, mortgagee, for any defense they may have against the original mortgagor would be effectual against his assignee or one subrogated to his rights. The executors of the mortgagee being before the court, any judgment rendered with respect to the interest in the mortgage claimed by

the plaintiff must forever preclude them from further demands against the defendants based on the mortgage to the extent of the amount thereof that may be adjudged to belong to the plaintiff.

But, waiving this, the allegations of the complaint, if true, entitle the plaintiff to subrogation in any view that can be taken. It is not necessary to the plaintiff's right of subrogation to allege and prove that either Ferdinand Levi or Moses Levi honestly believed the sale to be valid and the title made under it good; for, the deeds being actually ineffectual to convey the title, the mortgage was not discharged by it, and when the plaintiff paid his money and took the deed from the mortgagee, not as a speculative volunteer, but in good faith, believing his title to be good, he was entitled to have from the mortgagee the benefit of the mortgage to the extent of the purchase money paid by him. On this point the case of *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677, is conclusive. The correlative equity of the mortgagor and those holding under him is to have credit on the mortgage debt for at least \$650, the amount of the original bid, as the proceeds of the sale of the land, even if at the resale now demanded the land should bring less than that sum, for the reason that the mortgagor was in no way responsible for the failure to pass a good title by the deeds made under the former auction sale.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Sept. 18, 1906.)

1. TELEGRAPHS—FAILURE TO DELIVER TELEGRAM.

In an action for failing to deliver a telegram, plaintiff can show that defendant had notice from him of the purpose of the message from its terms, in connection with information given by him to its agent.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 62.]

2. APPEAL—HARMLESS ERROR.

Admission of evidence wholly irrelevant, but not prejudicial, is not ground for reversal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153, 4154.]

3. TELEGRAPHS—FAILURE TO DELIVER TELEGRAM.

In an action for failure to deliver a telegram, evidence that the message was promptly transmitted to defendant's office at the place named, but could not be delivered over a telephone as directed because of a defect in the line, shows no wanton disregard by defendant of its duty.

4. SAME—DAMAGES.

In an action for failure to deliver a telegram, that plaintiff remained in a livery stable for four hours exposed to the cold was not the actual result of such failure, and the only recovery should be for the cost of the message

and conveyance which plaintiff was compelled to hire because of the nondelivery.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 64, 67.]

Appeal from Common Pleas Circuit Court of Union County; Klugh, Judge.

Action by William W. Jones against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Reversed.

Geo. H. Ferrons, Evans & Finley, and J. A. Sawyer, for appellant. De Pass & De Pass and Stanyarne Wilson, for respondent.

JONES, J. The plaintiff, living at Whitmire, in Newberry county, S. C., on the morning of February 17, 1904, received a telegraphic message from his father, living at Lockhart Mills, in Union county, announcing the death of plaintiff's brother-in-law, burial next day, with request to come at once. About 12:30 o'clock that day plaintiff, in reply to said message, filed with defendant at Whitmire, to be transmitted to his father at Lockhart Mills, a message in these words: "Meet me at Union this p. m." Plaintiff, within 30 or 45 minutes thereafter, left Whitmire, traveling in a hired conveyance to Union, a distance of 18 miles, expecting that his father would meet him at Union with his own conveyance to carry him to Lockhart Mills, a distance of 14 miles. Plaintiff arrived at Union at 4 o'clock p. m. and remained there until 8 o'clock p. m., expecting his father. He then called up his father at Lockhart Mills over the phone, ascertained that the message had not been delivered, arranged with his father to meet him halfway, procured a conveyance at Union at a cost of \$3.50, proceeded towards Lockhart Mills, was met by his father with a conveyance about halfway, and arrived at Lockhart Mills at 12 o'clock that night. There had been a sleet on the night of the 16th of February, the weather was very cold all next day, and grew colder as the evening advanced. The plaintiff brought this action for damages for alleged negligent and willful failure to deliver the message to his father, alleging as elements of damages that he was thereby compelled to wait at a disagreeable livery and horse stable in the town of Union about four hours on a bitter cold evening, that he was compelled to hire a vehicle and travel over rough road in the cold bitter night to Lockhart Mills, and that he suffered great mental anguish because of defendant's conduct. The jury rendered a verdict for plaintiff in the sum of \$250.

1. The defendant's first exception alleges error in allowing the plaintiff, over objection, to testify that, when he delivered the message to the agent at Whitmire, he told the agent, substantially, that his wife's brother was dead, that the burial was next day, that he had to go that night, could not make it

by train, and wanted that message sent to his father to meet him at Union with conveyance. The appellant does not dispute the general rule that it is competent to show that a telegraph company had notice of the importance and purposes of a message, either from the face of the message or from information had or given at the filing of the same; but the point now made is that the testimony was not competent in this instance because of the decision on the former appeal in this case (70 S. C. 540, 50 S. E. 198), holding that it was proper to strike out of the complaint an allegation "that said message was written by said agent for plaintiff, who told the said agent that he wanted the message to tell his father to meet himself and wife that evening with turnout at Union," and that, with this allegation stricken out, there was no allegation in the complaint to which the testimony was relevant. An examination of the opinion, in 70 S. C. 540, 50 S. E. 198, will show that the purpose of the defendant and the court was to strike from the complaint all allegations therein tending to connect plaintiff's wife and baby with the message. To have done otherwise would have permitted plaintiff to contradict the terms of the message which he alleged that he delivered to defendant. It is not the intention or effect of that decision to prevent the plaintiff from showing, so far as she was concerned, that defendant had notice of the purposes of the message from its terms, in connection with the information conveyed to defendant's agent. The ruling of the circuit court was therefore correct.

2. The second exception being withdrawn, we notice the third exception, which relates to the relevancy of certain testimony as to the relative merits of the Bell and Bedford telephone systems. The testimony was wholly irrelevant to any issue raised by the pleadings, but, as we fail to see wherein any harm could have resulted to defendant, there is no ground for reversal upon this exception.

3. Appellant's main reliance is upon the exception which assigns error in refusing defendant's request to charge the jury that there is no evidence of willful wrong, and that they could not find a verdict for punitive damages. It is now well settled that it is error of law to refuse to so charge, when requested, if there is no evidence of willfulness. *Machen v. Telegraph Co.*, 72 S. C. 257, 51 S. E. 697; *Murray v. Tel. Co.*, 74 S. C. 68, 54 S. E. 209. The testimony for plaintiff merely showed a failure to deliver the message, and failure to notify plaintiff of nondelivery. It appears that there were two ways of transmitting a message from Whitmire to Lockhart Mills; one by way of Charlotte to Sharon, and thence by Bedford telephone to Lockhart Mills, the other by way of Spartanburg or Atlanta to Lockhart Junction, and thence by Bell telephone to Lockhart Mills. The message received by plain-

tiff from his father went by way of Lockhart Junction. The defendant promptly transmitted the message in question to Sharon, and made several efforts to telephone through, but failed to do so, because the telephone line was down, probably because of the sleet the night before. The Sharon agent then sent service message to the sending office, notifying of inability to deliver over telephone, and sent message by next mail to Lockhart Mills. The defendant could not have notified the plaintiff at Whitmire of the nondelivery of the message, as plaintiff had left Whitmire for Union before the return service message was received, and there was no allegation or evidence that defendant contracted to transmit such notice to plaintiff at Union. It may be suggested that there was some evidence of willful wrong in not trying to deliver by way of Lockhart Junction, since a message had that morning successfully come to plaintiff that way, to the knowledge of defendant; but, on the other hand, there was undisputed evidence that it was usual to deliver messages to Lockhart Mills by way of Sharon over the Bedford telephone, which is ordinarily a good line, and there was no allegation or evidence that defendant contracted to deliver the message over the Bell telephone from Lockhart Junction. After careful consideration, we find that there was no evidence whatever that defendant wantonly or willfully disregarded its duty to plaintiff. The fourth exception is therefore sustained.

The fifth exception charges error in refusing to grant the motion for a new trial based upon three grounds: (1) There was no allegation and no evidence that defendant had notice of any special damages that would result from failure to deliver said telegram; (2) there was no evidence of any damages sustained as the direct and proximate result of defendant's failure to deliver said telegram; (3) there was no evidence to support the verdict. The following testimony of plaintiff appears at folio 46 of the case: "Q. Tell us just what you did tell the agent, give us your words. A. I told him I wanted to send a message to J. J. Jones at Lockhart, and he said, 'All right; what for?' And I told him I received one a few minutes ago from my father that my wife's brother was dead, and I wanted to go, but couldn't get to Lockhart without hiring another turnout at Union, and I said he has got a turnout at Lockhart, and it won't cost him anything, and I wanted him to meet me there, and he said, 'All right, 25 cents,' and I gave him a quarter and walked out." It is apparent

from the above that there was evidence that defendant had notice that the purpose of the message was (1) to enable plaintiff to reach Lockhart Mills that evening because of the death, and of the funeral next day, of his wife's brother, and (2) to avoid the expense of hiring a conveyance at Union. Since plaintiff reached Lockhart Mills in time for the burial, there was and could be no claim for mental anguish damages on that account, and there is no allegation in the complaint of any mental suffering resulting from the four hours' delay in being with his dead brother. Hence we may eliminate from the case mental anguish as a proper element of damages. The plaintiff's remaining in a disagreeable livery stable for four hours on a cold day was not such a result as could have been within the contemplation of the parties, or such as should have been reasonably anticipated by the defendant from a failure to deliver the telegram, but was the result of plaintiff's choice to remain there instead of seeking a more comfortable place or pursuing his journey in a hired conveyance. Likewise his exposure to the cold and his suffering therefrom, beyond what he would have endured in any event, even had his father met him as expected, was the result of his failure to hire the conveyance, ready at hand at any moment, and setting out on his journey with reasonable promptness, after knowledge that his father's conveyance had not arrived. The plaintiff had the means to procure another conveyance, as shown by the fact that he did finally hire one, and he was aware of the inclemency of the weather and the near approach of night and the considerations that made him wish to reach Lockhart Mills as soon as possible. The law requires one who is affected by the negligence of another to use ordinary care to avert or minimize the harmful consequences. 27 Ency. Law, 1033; *Willis v. Tel. Co.*, 69 S. C. 539, 48 S. E. 538, 104 Am. St. Rep. 828. So that, conceding that the jury found the defendant negligent in failing to deliver the message, there was no foundation in the evidence for holding defendant liable for a sum greater than the cost of the telegram and the expense incurred by plaintiff in hiring a conveyance as the natural and proximate result of the failure to deliver the telegram, and within the contemplation of the parties.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

GARY, A. J., concurs in the result.

SPENCER v. MAHON et al.

(Supreme Court of South Carolina. Sept. 24, 1906.)

1. MUNICIPAL CORPORATIONS — CONTROL OF STREETS—OBSTRUCTIONS.

A city has no right to grant a license to conduct a business in the streets, in a small shop on wheels, which has not been moved for months.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1461-1463.]

2. SAME—REVOCATION OF LICENSE.

Where a person accepts from the mayor a license to conduct a business on the streets, revocable at the will of the city council, he takes subject to the continuation of the consent of the council to such use of the streets.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1482.]

3. INJUNCTION—REVOCATION OF LICENSE.

Where a license has already expired by its limitation, the court cannot enjoin the revocation thereof.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 20.]

Appeal from Common Pleas Circuit Court of Greenville County; Dantzier, Judge.

Action by Charles E. Spencer against G. H. Mahon and T. L. Becknell. From an order refusing a temporary injunction, plaintiff appeals. Affirmed.

J. J. McSwain, for appellant. Wm. G. Sirrine, for respondents.

WOODS, J. On March 9, 1905, the plaintiff obtained from the clerk of the city council of Greenville by direction of the mayor a license in the following words: "(Revocable at will of the council.) City of Greenville. Receipt for special taxes. Received of Chas. E. Spencer five dollars, being the special license tax for one year on—Business as Cold Lunches, ending March 1, 1906. Paid March 9, 1905. W. B. McDaniel, Clerk of Council." The plaintiff alleges under this license he was authorized to conduct a business in what he designates a "moving café," which he describes as "being a small room resting on wheels, and which may be easily drawn from one place to another and used in some convenient station in or by the streets." The business was conducted mainly, if not entirely, at the intersection of Main and Washington streets, along which much city traffic passed. In October the mayor, through the chief of police, required the plaintiff to remove the "moving café" from the street, and subsequently, on November 7, 1905, the city council undertook to revoke the license. Thereupon, on November 8, 1905, this action was brought against the mayor and chief of police, asking that they be enjoined "from interfering with the plaintiff or his business under said license so long as plaintiff conducts same in an orderly and peaceable

manner." The circuit judge, after hearing the return of the defendants, several affidavits as to the reasons which influenced the city council in revoking the license and an affidavit of the plaintiff in reply, denied the application for injunction, and the plaintiff appeals.

In their returns the defendants, among other things, aver that when the license was issued it was contemplated that the "moving café" would be a small affair to be frequently moved about so as to avoid complaint; whereas, the plaintiff has actually fitted up a small store with electric lights, and has conducted a large business for six months on Washington street at its intersection with Main street, where there is a great volume of traffic; and that the store and business constitute a serious obstruction to the use of the street. The defendant, in his reply, alleges that the mayor well knew the character of the business when the license was issued, and he denies that it was an obstruction to the street; but he does not deny defendants' allegations that he had been doing a large business in what is practically a store or shop, though mounted on wheels, which had not been moved for six months, in an important public street of a city containing about 20,000 inhabitants. These indisputed facts are decisive of the case. We do not consider in detail the limitations upon the power of a city council to revoke an ordinary license to a merchant or a restaurant keeper doing business on his own premises in the ordinary way, for this case is entirely different.

1. The streets of a city are for passage and travel, and a city council has no power unless authorized by statute to devote them to any purpose which would interfere with this public use; for a city council cannot license a public nuisance. "The king cannot license the erection or commission of a nuisance; nor in this country can a municipal corporation do so by virtue of any implied or general powers. A building or other structure of a like nature, erected upon the street without the sanction of the Legislature, is a nuisance, and the local corporate authorities of a place cannot give a valid permission thus to occupy streets without express power to this end conferred upon them by charter or statute." 2 Dillon's Municipal Corporations, § 660. The plaintiff, it is true, denies that he has obstructed the street, but it is impossible that such an establishment as he maintained should not constitute an obstruction when placed on one of the main thoroughfares of a city. As the council could confer no right to such use of the street, the plaintiff could not acquire under a city license a right to such use justifying the interference of a court in his behalf. But, assuming that the city council could and did by license authorize such use by the plaintiff of the public street in his business,

as expressed in the license, of selling "cold lunches." this could not avail him. Under this view the plaintiff would have (1) the right, along with other restaurant keepers, of selling cold lunches; and (2) the special right to maintain his restaurant on the street. It may be the council could not refuse the general license to sell cold lunches upon payment of the regular fee or revoke such license except for cause; but the special right to the use of the street, if it existed at all, depended on the permission of the council granted under their general power of supervision of streets, and hence when the plaintiff accepted a license contemplating the special privilege of using the streets, which on its face provided it would be revocable at will of the council, he took the risk of continuation of consent of such use of the street. There were several issues of fact between the parties, made by the allegations of the returns, but we have considered only the facts that are beyond dispute, and on these the judgment must be affirmed.

2. But, even if the circuit judge had been in error, this court cannot now make any order that would avail the plaintiff. He rests his right to conduct his business and his claim to relief altogether on the license which was granted on March 9, 1905, and which expired by its own terms on March 1, 1906. The cause was heard in this court on May 22, 1906, when the plaintiff had already been prohibited from conducting his business for the entire period covered by the license. The court cannot enjoin an act already committed, and in this case it is obvious there is no way to restore plaintiff to his former status by mandatory injunction. 1 High on Injunctions, § 22. The same principle was applied to an application for prohibition in *State ex rel. Hamer v. Stackhouse*, 14 S. C. 427, and to an appeal by the state from an order quashing a panel of petit jurors, in *State v. Henderson*, 73 S. C. 201, 53 S. E. 170.

It is the judgment of this court that the judgment of the circuit court be affirmed.

HAGINS v. AETNA LIFE INS. CO.

(Supreme Court of South Carolina. Sept. 24, 1906.)

1. APPEAL—OBJECTIONS IN TRIAL COURT—NECESSITY OF SPECIFIC OBJECTION.

An exception based on a ruling as to the admission of evidence, where the case showed that it was merely objected to without stating the objection, will not be considered.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1141; vol. 46, Cent. Dig. Trial, §§ 194, 195.]

2. INSURANCE—AUTHORITY OF AGENT—PAYMENT OF PREMIUMS—TIME—CHANGE.

Where an insurance agent has authority to issue policies, his act, in changing the date of payment of premiums by indorsing on an envelope in which the policy is delivered a date different from that in the policy and in the order given by insured on his employer to pay the premium out of his wages, is binding on the insurance company.

Appeal from Common Pleas Circuit Court of Cherokee County; Klugh, Judge.

Action by Lucy Hagins against the Aetna Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Carlisle & Carlisle, for appellant. G. W. Speer and W. S. Hall, for respondent.

POPE, C. J. Lucy Hagins brought her action to recover the sum of \$1,000 upon a policy of insurance issued by the defendant to J. R. Hagins, her husband, for the benefit of the plaintiff. The policy was issued August 20, 1903, and the insured was killed in a railroad accident October 28, 1903. These facts were set out in the complaint, that all the terms and conditions of the policy had been complied with. A judgment for \$1,000, with interest from October 28, 1903, was demanded. The answer admitted the execution of the policy and the death of J. R. Hagins, but it alleged that the policy sued on was null and void, and not in force at the time of the action, for the reason that no premium on said policy had ever been paid by J. R. Hagins, and that said premium had never been earned, and hence contended, under the terms of the policy, no recovery could be had. The action came on for trial before his honor, Judge Klugh, and a jury. Both sides introduced testimony, and after the charge of his honor, the jury rendered a verdict for the plaintiff for \$1,140. A motion for a new trial was made, on the ground that the verdict of the jury was wrong in amount, in that the jury did not credit the amount of unpaid premiums that should have been credited according to the terms of the policy. This motion was granted by his honor upon the condition that the verdict should be credited with the sum of \$20, with interest from October 28, 1905. Accordingly, judgment was entered for \$1,117.20, instead of \$1,140.

After the entry of judgment upon the

amended verdict, the defendant appealed upon five grounds, which we will now consider in their order. We add, that this case has been before this court before (72 S. C. 216, 51 S. E. 683), where a new trial was granted.

1. "Because his honor erred in admitting in evidence the envelope in which the policy was sent to Hagins, and the indorsements, such indorsements being no part of the contract, and it having been shown that the agent that made them had no authority to do so." It is true, the defendant objected to the introduction of the envelope, upon which was entered in the handwriting of the agent of the defendant who issued the policy, the following words: "Payable from wages earned in months of \$5.00 October, \$5.00 November, \$5.00 December, \$5.00 in January—total \$20.00;" but no grounds of objection were made by said defendant. All he did was to say: "I object." Nothing else is shown in the "case." This court has held, in many cases, that it will not consider an exception based on the ruling of the presiding judge as to the admission of testimony where the case shows that it was merely objected to without stating the objection. *Allen v. Cooley*, 53 S. C. 77, 30 S. E. 721; *Norris v. Chinkscales*, 59 S. C. 232, 37 S. E. 821; and many other cases of similar import. Besides, the circuit judge overruled a motion for a new trial upon this ground, and no exception has been taken on that account. This exception is overruled.

2, 3, 4. "Because his honor erred in charging the jury as follows: 'If you find that the insurance company entered into a contract by which he was to pay the first premium in September, and afterwards modified that contract by allowing him to pay the first premium in October,' etc., the error being that there was no such modification whatever shown, nor was there any evidence whatever to that effect, except the indorsements on the back of the envelope, which, if competent evidence, could not have been sufficient to change the writing contract entered into by the parties hereto. Because his honor erred in charging the jury as follows: 'If you should find that the insurance company modified that agreement so that the first premium was to be paid out of the earnings for October,' etc., the error being the same as in the preceding exception. Because his honor erred in charging plaintiff's thirteenth request to charge, for the same reasons that error was made as stated in above exceptions." To understand the error here complained of, it should be stated that in the body of the policy, in print, it was stated that the insured had agreed to pay \$5 of his wages for the month of September, 1903; \$5 of his wages for the month of October, 1903; \$5 of his wages for the month of November, 1903; and \$5 of his wages for the month of December, 1903; and in the order upon the railroad the deceased, J. R. Hagins, had given an order

corresponding with the months just announced, but it was in writing, signed by T. J. Maupin, special agent, and it was the said T. J. Maupin who in his own handwriting, as special agent of the defendant, upon the envelope covering the said policy, used the words we have heretofore quoted, stating that the wages earned in the months of October, November, December, and January, each for \$5, should be substituted for the months of September, October, November, and December, as printed in the policy. Such being the case, we hold that the agent issuing the policy for the defendant thereby bound his principal to recognize the modifications of the policy made by him. In *Wilson v. Commercial Union Assurance Co.*, 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700, where this court was considering the acts of an agent, an insurance company was held liable for the acts of such agent. In the case at bar, T. J. Maupin, as the agent of the defendant, in his name as special agent, issued the policy in question, and it was this same agent who wrote upon the policy the modification of the language of the policy itself. Surely no greater power could be ascribed to such an agent. The defendant itself furnished this agent, and held him out to the world as possessing the powers requisite to issue a valid policy. The fact of agency is one of proof

and its solution is devolved upon the jury. The jury has found that Maupin was defendant's agent. It was admitted before the jury that Maupin made the change in the policy. It follows that the defendant is responsible for Maupin's conduct as its agent. These exceptions are overruled.

5. "Because his honor erred in charging as follows: 'The life of the policy is good during the life of the order given for the payment of the premium,' the error being that the policy might be forfeited through the fault of the insured and the premiums might still have been due the company, and for the further reason that said charge is not responsive to any of the issues herein and tends to confuse the jury." No error was committed here. The judge was confining his charge to the question presented by the case itself. He was not passing upon abstract questions as to how the policy might be forfeited, but it was as to whether the policy had been forfeited by the changes made by the defendant's own agent; therefore, it might well be said by him that the life of the policy is good during the life of the order given for the payment of the premium. We must overrule this exception.

It is the judgment of this court, that the judgment of the circuit court be, and the same is hereby, affirmed.

Ex parte CANNON.

(Supreme Court of South Carolina. Sept. 19, 1906.)

1. REFERENCE — WHEN GRANTED — HABEAS CORPUS.

In habeas corpus proceedings the court usually tries a case on the pleadings and affidavits in a summary manner, and respondent cannot demand reference as matter of right.

2. APPEAL—REVIEW—REFUSAL OF CONTINUANCE.

Where a wife brought habeas corpus against the brother of her husband who had charge of minor children under instructions from the husband to keep them from the wife, a motion for continuance on account of the absence of the husband, a nonresident, is addressed to the discretion of the court and will not be reviewed unless abused.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3837.]

3. CONTINUANCE—ABSENCE OF EVIDENCE.

In habeas corpus proceedings to obtain custody of minor children, it is not error to refuse an extension of time in order to procure a certified copy of a foreign judgment which the return does not allege is in existence, or that petitioner was a party thereto, and where there is no assurance that the record could be procured in a short time.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Continuance, §§ 58–67.]

4. APPEAL—FINDINGS OF FACT—REVIEW.

Findings of fact by the trial court on an application for writ of habeas corpus for possession of children, are not reviewable on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3955–3969.]

5. HABEAS CORPUS—CUSTODY OF CHILDREN—EVIDENCE.

In habeas corpus to obtain possession of minor children, left by a father in charge of his brother, evidence held to sustain a judgment for delivery of the children to their mother.

Appeal from Common Pleas Circuit Court of Laurens County; Memminger, Judge.

Petition of Emma F. Cannon against J. P. Cannon for writ of habeas corpus for possession of minor children. From an order granting the writ, respondent appeals. Affirmed.

Simpson, Cooper & Rabb, for appellant. W. R. Richey, for respondent.

JONES, J. This was an application on the part of the petitioner, Emma F. Cannon, for writ of habeas corpus to get possession of her children named in the petition, who, she alleged, were unlawfully detained from her by J. P. Cannon. The writ was signed by his honor, R. W. Memminger, Circuit Judge, on September 22, 1905, and was served on J. P. Cannon on the morning of the same day about 10 o'clock, and commanded him to have the bodies of said children, together with the time and cause of detention, before him at the city of Laurens, in Laurens county, S. C., in the court house, at 12:30 o'clock p. m., on the said 22d day of September, 1905. J. P. Cannon made return as follows: "(1) That the petitioner and J. B. Cannon were married, as alleged in the petition, and that

the respondent now has the custody of J. Barnwell Cannon and Janie R. Cannon, infant children of J. B. Cannon and the petitioner above named; that J. B. Cannon is brother to the respondent, J. P. Cannon, and that he brought the above-named children from the state of Georgia, where he was then residing and is now residing, to Laurens county, state of South Carolina, to the respondent, the said J. P. Cannon, on the 15th day of July, 1905, and placed the said children in the custody of the said respondent, with the request and instruction that this respondent take charge of said children and keep same for him until he, himself, came for them. He further stated to the respondent that the court of the state of Georgia had given to him the custody of the said children in some proceedings instituted therein in reference to the custody of the said children, the nature of which he did not fully explain to this respondent; and that it was very likely that the petitioner herein would come to South Carolina and demand of the respondent the possession and custody of the children, but for this respondent not to deliver said children to the petitioner under any circumstances, as the courts had given him possession of the children, and he did not want the petitioner to have anything to do with the children whatever, and he has not received any instructions from his brother to the contrary, and, upon information, he denies that the petitioner is legally entitled to the custody of the said children." Upon filing his return to the petition and writ, J. P. Cannon, through his attorneys, moved the circuit court for an order referring the questions raised by petition and return to a special referee to take testimony thereon and report the same to the court or to hear and determine all the issues involved, and that the hearing on the petition and writ be continued for that purpose. This motion was refused by the circuit judge, and thereupon the attorneys for J. P. Cannon moved that a further hearing of the matter be postponed until they could communicate with J. B. Cannon, father of the children, and until they could procure a certified record of the proceedings in the court of Georgia giving the custody of the children in question to their father, the said J. B. Cannon, and which was set out in the return of J. P. Cannon to the writ. This request and motion was refused by the circuit judge, and, after hearing the petition and return, he passed an order requiring that the custody of the children be delivered to the petitioner.

1. The first exception charges error in not granting a reference to take testimony on the issues raised. This exception cannot be sustained. In habeas corpus proceedings it is usual for the court to try all the issues of law and fact upon the petition, return, and supporting affidavits in as summary manner as the circumstances will permit. A case

may arise in which the court might see fit to use that method in obtaining evidence, but the respondent in habeas corpus proceedings cannot demand a reference as matter of right.

2. The second exception alleges error in not postponing the hearing until the father of the children could be notified and have an opportunity to be heard. The writ was not issued against the father, J. B. Cannon, but against his brother, J. P. Cannon, who had actual custody of the children. The father was a resident of Georgia and, therefore, not within the jurisdiction of the court. The motion was really a motion for continuance on account of the absence of a non-resident witness. Such motions are addressed to the discretion of the court, and will not be reviewed except in a clear case of abuse of discretion. *State v. Murphy*, 48 S. C. 5, 25 S. E. 43.

3. Under the sixth exception, it is further contended that Judge Memminger should have allowed appellant time to procure certified copies of the judgment of the Georgia court giving the custody of the children to the father. We are impressed that the proceedings before Judge Memminger were quite summary, and it may be that possibly some more time might have been extended to appellant in procuring evidence without impairing the efficiency of habeas corpus as a speedy remedy to relieve persons from illegal custody, yet we cannot overlook the fact that the circuit judge had no power to compel the production of a certified copy of the judgment of the Georgia court, and that so far as the record shows, there was no certain assurance that such foreign record would be produced in a short time, nor was there any certainty that the alleged Georgia judgment in any wise affected the right of the petitioner as mother of the children. It will be observed that J. P. Cannon's return does not allege specifically that there existed a judgment of the Georgia court awarding the custody of the children to their father as against the petitioner, their mother, or that the petitioner was in any wise a party to said proceedings. These circumstances, and possibly others, may have influenced the court to proceed with the trial, and we cannot say that there was any abuse of discretion in not postponing the trial.

It is argued under the seventh exception that full faith and credit was not given to the judgment of the court of Georgia in violation of article 4, § 1, federal Const. It is manifest, however, that no such question can arise upon the record, as the court did not have before it for consideration any judgment of a sister state.

Under the remaining exceptions, the contention is made that J. B. Cannon, the father, has the right to the custody of his infant children; that the decree of the court of

Georgia had also given him the custody of the children; and that, the father having placed his children in the custody of J. P. Cannon, the latter's custody of the children was legal. It is argued that the return set up the Georgia judgment as awarding the custody of the children to the father, and that the facts stated in the return untraversed must be accepted as true. We have already called attention to the allegations of the return. There is no allegation therein alleging the existence of a judgment in Georgia awarding the children to their father as against their mother, the allegation only goes to the effect that when J. B. Cannon delivered the children to J. P. Cannon, he said there was a judgment awarding the children to him. On demurrer to the return for insufficiency, or motion for judgment notwithstanding the return, the court would be bound to hold that no judgment of the Georgia court binding on petitioner was sufficiently pleaded.

4. As decided in the case of *Ex parte Reed*, 19 S. C. 604, an application for possession of children under writ of a habeas corpus is a proceeding on the law side of the court, and the findings of fact by the circuit judge in such cases are decisive. While the circuit court has made no specific findings of fact in this case, we cannot, under the circumstances, assume the existence of a Georgia judgment awarding the children to the father as against the mother, and, therefore, this alleged fact must go out of consideration.

5. We have, then, to consider whether the circuit judge committed error of law or abuse of discretion in awarding the children to the custody of their mother as against a person who became their custodian at the request of the father. There is no claim or evidence that the mother is unfit to be the custodian of her children, one a boy seven years old, the other a girl five years old. There is no suggestion that their custody should remain as placed by the father in view of the welfare of the children from considerations of their health, education, training, or otherwise. There is evidence tending to show that there was some trouble between the petitioner and her husband, J. B. Cannon, in Georgia, about the 12th of July, 1905; that soon thereafter the husband brought the children into South Carolina and placed them in the custody of his brother, with instructions not to deliver them to their mother, who would likely demand them; but there was further evidence tending to show a reconciliation between petitioner and her husband; that he had promised that she should go to Laurens, S. C., for her children as soon as he received his monthly pay and could spare the money; that, yearning to see her children, the mother had procured the necessary money from her brothers and had come to Laurens and de-

manded her children of J. P. Cannon, and that he refused to comply. Under the circumstances, it cannot be said that the circuit judge abused his discretion in delivering these little children to their mother and natural guardian as against J. P. Cannon. The issue as presented to the circuit judge, was not between the father and mother, in which a court, considering the welfare of the children as a matter of prime importance, should recognize the paramount right of the father to the custody of his children even as against their mother, but the issue as presented was the mother and a third person, to whom the father had yielded custody, apparently for the sole purpose of preventing the mother from exercising her right as natural guardian. The paramount right of the father to the custody of his child may be recognized when it is consistent with the welfare of the child, but the right of the father is not so paramount as that he may arbitrarily or capriciously yield their custody to another with the intent to deprive a mother of her rights as such.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

MOORE v. STATE.

(Supreme Court of Georgia. Aug. 9, 1906.)

1. CRIMINAL LAW—JUDICIAL NOTICE—ORGANIZATION OF COUNTIES—INTOXICATING LIQUORS—ILLEGAL SALE.

Judicial cognizance is to be taken by the courts that the territory now embraced in the county of Crisp was, before the creation of that county, within the boundaries of Dooly county, wherein the sale of intoxicating liquors was prohibited by law. Under the express provisions of the act of 1905 (Acts 1905, p. 46) authorizing the organization of new counties, the local prohibition law prevailing in Dooly county immediately became of full force and effect in the county of Crisp, and has since its creation undergone no change.

(a) The constitutionality of a statute cannot be for the first time questioned in the Supreme Court.

(b) A person illegally selling intoxicating liquor in a county where the selling thereof is altogether prohibited cannot properly be indicted for the statutory offense of selling liquor without a license.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2620; vol. 14, Cent. Dig. Criminal Law, § 705; vol. 20, Cent. Dig. Evidence, § 12; vol. 29, Cent. Dig. Intoxicating Liquors, § 35.]

2. INTOXICATING LIQUORS—SALE—PLACE.

Under the agreed statement of facts upon which this case was tried, the accused could not lawfully be convicted of a violation of Pen. Code 1895, § 428, which, as amended by the act of December 9, 1897 (Acts 1897, p. 39), declares that, "if any person shall sell, contract to sell, take orders for, or solicit, personally or by agent, the sale of spirituous, malt, or intoxicating liquors, in any county * * * where the sale of such liquors is prohibited by law, high license or otherwise, he shall be guilty of a misdemeanor."

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Intoxicating Liquors, § 162.]

(Syllabus by the Court.)

Error from Superior Court, Crisp County; Z. A. Littlejohn, Judge.

E. H. Moore was convicted of an illegal sale of liquor, and brings error. Reversed.

The plaintiff in error was arraigned under an indictment which contained two counts; the first charging that on February 2, 1906, he did unlawfully, "by himself and agent, sell, contract to sell, and take orders for the sale of spirituous and intoxicating liquors" in the county of Crisp, and the second count charging that he did, on the date aforesaid, "unlawfully sell whisky and other spirituous liquors by retail without having first taken out a license from the authorities authorized by law to issue license for the sale of such liquors in said county." The accused demurred to the indictment, but his demurrer was overruled. He also filed a special plea, in which he averred that the sale of whisky and other intoxicating liquors in Crisp county was not prohibited by law, and that the provisions of the general local option law had never been adopted in that county. This plea was stricken on demurrer, and the case went to trial upon the following agreed statement of facts: "Defendant is a retail liquor dealer, whose place of business is located at De Soto, Sumter county, Ga., and is a regular out-of-town subscriber to the Cordele Exchange to the Southern Bell Telephone Company, having a line from such exchange to his place of business in De Soto, which entitles the public, including all subscribers to the Cordele Exchange, to the use of such telephone. At Coney, a point in Crisp county between Cordele and De Soto, there is a telephone cut into the line, for which defendant also pays, and at this point, or at any point which is reached by the Cordele Exchange, the public has, within the past two years before the finding of this bill, telephoned orders for whisky to defendant, and such message cost the public nothing. At this 'phone at Coney, Crisp county, persons do and have for two years telephoned said De Soto house orders for whisky, and the whisky was shipped to them in this county, based upon such orders. Likewise, at any telephone of the Cordele Exchange, persons do and have during the two years prior to this bill of indictment telephoned and called the house at De Soto, and ordered whisky without any extra charge for telephone service." A verdict of guilty was returned. The accused made a motion for a new trial, based on the grounds that the verdict was contrary to law and the evidence. Exception is taken to the overruling of this motion, as well as to the overruling of the demurrer to the indictment and the striking of defendant's special plea.

J. T. Hill and Jas. Taylor, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

EVANS, J. (after stating the facts). 1. It is a matter of which judicial cognizance may

be taken that the territory now embraced within the boundaries of Crisp county was, upon the creation of that county, laid off from the county of Dooly, wherein the sale of liquor was prohibited by law. The act under which the county of Crisp was organized expressly provided that "all local laws and general laws having local application [then] in force within any territory included within the limits of any new county [should] be in full force and effect within such territory included within the limits of such new county; provided that where by the general laws of this state provision is made for any of said laws going into effect in any county by an election to be held, that an election may be held in said new county at any time after its creation for the purpose of putting said local laws into effect, notwithstanding the provision of any general law requiring the lapse of any specified time after the last election on the subject." Acts 1905, p. 50, § 15. In the brief of counsel for the plaintiff in error the contention is made that "the Legislature had no authority to so transfer a local prohibition law or a local option law," and that the above-quoted provisions of the act of 1905 contravene article 1, § 4, par. 1, of the Constitution, declaring that laws of a general nature shall have uniform operation, etc. But, as the constitutionality of that act does not appear to have been assailed in the court below, we cannot undertake to pass upon the constitutional question thus sought to be raised for the first time in this court. *State v. Henderson*, 120 Ga. 781, 48 S. E. 334 (7). Treating the act of 1905 as valid and operative, in so far as it undertook to provide that local laws should remain in force over the territory taken from one county for the purpose of creating a new county, it is evident that there could be no legal sale of liquor in Crisp county, after the territory embraced therein was taken from Dooly county, until there was a change effected in the prohibitory liquor law, which was inherited from that county by the county of Crisp. The accused concedes that no change has been effected by any election held under the provisions of the general local option liquor law since the formation of Crisp county. It follows that there is no merit in his contention, presented by demurrer and also by special plea, that the indictment did not charge any penal offense, for the reason that it was not unlawful to sell or solicit orders for liquor in Crisp county. The first count in the indictment was good. The second count was, however, open to the objection urged against it by special demurrer, viz., that, the county of Crisp "being dry" and there being no one authorized by law to grant a license for the sale of liquor therein, the statutory offense of selling liquor without a license could not be committed in that county. *Brown v. State*, 104 Ga. 525, 30 S. E. 837.

2. Under the agreed statement of facts, the defendant did not sell intoxicating liquor in the county of Crisp. The defendant only filled orders transmitted to him at his place of business in Sumter county, where he was conducting a barroom under license. It does not appear from the statement of facts how the liquor was to be transported to the purchaser in Crisp county. Presumably the delivery was to be made at the place where the order was received, which was in Sumter county; for the law will not presume an illegal delivery, if the contrary presumption may be indulged from the facts. *Dunn v. State*, 82 Ga. 30, 8 S. E. 806, 3 L. R. A. 199. The transaction between the buyer and the seller was over the telephone, the purchaser was in Crisp county, and the retailer was in Sumter county. The medium of communication was the telephone, and the telephone company was the agent of the sender of the order (the purchaser), and not the agent of the sendee of the message (the liquor dealer), who, though one of the company's regular subscribers, did not undertake to procure orders for liquor in Crisp county by using the telephone for the purpose of soliciting orders from persons residing in that county. *W. U. Tel. Co. v. Shotter*, 71 Ga. 760; *W. U. Tel. Co. v. Lumber Co.*, 114 Ga. 576, 40 S. E. 815, 88 Am. St. Rep. 36. Had the purchaser made use of the postal service, instead of the means of communication afforded by the telephone company, it could hardly have been insisted that the contract of sale was made in Crisp county, instead of the county of the residence of the seller, where he received and accepted the order transmitted by mail. Under the facts presented, we think it clear that the defendant neither sold nor contracted to sell liquor in the county of Crisp. Did the defendant in that county "take orders for, or solicit, personally or by agent, the sale of spirituous" or other intoxicating liquors, in violation of Pen. Code 1895, § 423, as amended by the act of 1897? He did not go to the county of Crisp for the purpose of accepting orders from persons who might know he had whiskey to sell in Sumter county, but remained at home. When a customer in Crisp county desired to buy whiskey, he would telephone his order to the defendant in Sumter county. So far as appears, the defendant never in person or by agent solicited any order. He did pay the telephone company for the 'phone established at Coney, in Crisp county, which was used by customers, without cost to them, in transmitting their orders for whiskey; but he did not there have any agent who solicited orders or received any orders which he transmitted by 'phone to the defendant. The case therefore differs very materially from that of *Walker v. State*, 122 Ga. 747, 50 S. E. 994, wherein the question arose whether a telephone operator really acted as the agent of the seller or of the purchaser in

transmitting orders for liquor. The most that can be said is that the telephone company furnished an instrumentality, for which the defendant paid, enabling his customers to transmit their own orders for whisky. So far as we are informed, it was lawful for the telephone company to permit the use of its 'phones by the public for the purpose of transmitting orders for liquor, without regard to who paid the required rental; and, if so, the defendant did not violate the law when he paid for a 'phone at Coney to be used by the public for this purpose.

It is insisted by counsel for the state that, by renting this 'phone and placing it at the disposal of the public, the defendant resorted to a bare subterfuge to evade the liquor laws, and held out a constant invitation to the public to transmit him orders for whisky. It is doubtless true that the business enterprise displayed by the defendant in thus placing himself within easy communication stimulated the transmission of orders for whisky by his customers; but we cannot assent to the assertion of the state's counsel that "the telephone furnished and paid for by defendant is the agent of the seller to receive orders for whisky, just as much so as a man standing in its place would be." The statute under consideration makes penal the solicitation of orders for intoxicating liquors by any person, either "personally or by agent," but does not prohibit the furnishing of inanimate agencies or instrumentalities which may serve the convenience of persons who desire to exercise their right under the law as now framed to send by mail, by telegraph, by telephone, or by private messenger, from time to time, orders for liquors to be lawfully sold by dealers in counties where they have a license to sell, delivery there to be made to such

agent, natural or artificial, as the purchasers may nominate. More legislation is required to break up the practice complained of by the state's counsel in this case.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

PARKER v. STATE.

(Supreme Court of Georgia. Aug. 13, 1906.)

1. CRIMINAL LAW—EVIDENCE—JUDICIAL NOTICE—COUNTY BOUNDARIES—INTOXICATING LIQUORS—PROHIBITION LAW.

"Judicial cognizance is to be taken by the courts that the territory now embraced in the county of Crisp was, before the creation of that county, within the boundaries of Dooly county, wherein the sale of intoxicating liquors was prohibited by law. Under the express provisions of the act of 1905 (Acts 1905, p. 46) authorizing the organization of new counties, the local prohibition law prevailing in Dooly county immediately became of full force and effect in the county of Crisp, and has since its creation undergone no change." *Moore v. State* (Ga.) 55 S. E. 827.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 700-705; vol. 20, Cent. Dig. Evidence, §§ 12, 31.]

2. SAME—EVIDENCE.

The foregoing is controlling of the legal questions involved in this case. The evidence amply sustained the verdict, and the court below did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Crisp County; Z. A. Littlejohn, Judge.

O. B. Parker was convicted of crime, and brings error. Affirmed.

Crum & Jones, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

**DELAWARE INS. CO. v. PENNSYLVANIA
FIRE INS. CO.**

(Supreme Court of Georgia. Aug. 17, 1906.)

1. FRAUDS, STATUTE OF—PLEADING IN ANTICIPATION OF DEFENSE.

Where a suit is brought for damages growing out of a breach of a contract required to be in writing by the statute of frauds, the petition is not demurrable on the ground that it does not state whether the contract was in writing or not.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 353.]

2. REFORMATION OF INSTRUMENTS—PLEADING—SETTING OUT INSTRUMENT.

But where a proceeding is brought for the purpose of reforming a written contract, the instrument which is sought to be reformed should be set forth in the petition, or attached thereto as an exhibit, so that from it and the allegations it may clearly appear that it does not conform to the real contract made by the parties. The petition should also show the particular mistake, or the fraud and mistake complained of, and how it occurred.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Reformation of Instruments, § 142.]

3. SAME—ENFORCEMENT IN SUIT TO REFORM INSTRUMENT.

Where a petition seeks to reform a written instrument as a contract between the parties, and also to enforce it, the allegations must be sufficient for both purposes.

4. INSURANCE—FIRE INSURANCE—WRITTEN CONTRACT—NECESSITY AND SUFFICIENCY OF SIGNATURE.

Under the statute of this state a contract of fire insurance must be in writing and signed by the insurer, or some person authorized to sign for it.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 204, 205, 211, 212.]

5. SAME—MODE OF SIGNING.

The usual and proper place for the signature is at the end of the matter which it attests. But, in strict law, it will suffice if, with the intent to constitute a signing, it is inserted in the writing at another place.

6. SAME—REINSURANCE—SIGNATURE TO CONTRACT—PLEADING.

Where a petition alleged that the defendant insurance company reinsured the plaintiff company in a certain amount upon a risk which the latter had taken; that a copy of the written contract of reinsurance was attached as an exhibit to the petition; that the defendant executed and delivered to the plaintiff such paper as and for a written contract of insurance, and that it was so received by the plaintiff and the premium due thereon paid; and where the paper so exhibited commenced with the name of the defendant and its general agent, and proceeded "do reinsure" the plaintiff, etc., the allegation was sufficient to withstand a ground of demurer to the effect that it did not appear that the paper was signed.

7. SAME.

Where it was alleged that an insurance company reinsured its risks with another company, and notified the insured that if policies of the insurer should require approval of transfers or other indorsements, the insurer should make report to the reinsuring company; and that, in pursuance of this, application was made to the reinsuring company for a vacancy permit, which was granted and signed by the reinsuring company, containing the words, "attached to and forming part of policy No. 4264 of the Delaware Insurance Co." (the insurer), this was an acknowledgment of the policy of the number stat-

ed, and the signature to such permit would supply the lack of signing that policy, if it was unsigned. But a permit in the terms mentioned was not sufficient to operate as an acknowledgment of or signature to another paper, if it did not appear to be the policy referred to.

8. ESTOPPEL IN PAIS—RELIANCE ON ACTS—INJURY TO PERSON SETTING UP ESTOPPEL.

A plea of estoppel in pais, which did not allege that the defendant has misled the plaintiff, or that the latter had relied on any representation or conduct on the part of the former, and had changed its status or done or omitted to do anything by reason of any such representations or conduct, but merely alleged that if the defendant had claimed that the contract of insurance had expired, the plaintiff would have been informed of the claim, and could have either caused the contract of insurance to be duly corrected, or in case of dispute or delay concerning it could have protected itself by other insurance, was demurrable.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Pennsylvania Fire Insurance Company against the Delaware Insurance Company. Defendant's demurrers to the complaint were overruled, and it brings error. Reversed.

The Pennsylvania Fire Insurance Company brought suit against the Delaware Insurance Company, alleging in brief as follows: On or about May 9, 1900, the plaintiff issued its policy of insurance, whereby it insured certain property of one Stenzel, for the term of three years from May 9, 1900, in the sum of \$8,000; and on or about the same date the Delaware Insurance Company, through its agency in the city of Atlanta, reinsured the plaintiff in the sum of \$2,500 upon its liability under the policy issued to Stenzel. "By error of the scrivener who drew out the writing evidencing said contract, the term of said insurance was given as one year, and the date of expiration as May 9th, 1901, although the premium charged and received was for three (3) years and the term of expiration was May 9th, 1903. * * * The Delaware Insurance Company was one of the regular reinsurers of the said Pennsylvania Fire Insurance Company, and that by contract and agreement it reinsured said company at the same rates at which the said company, your petitioner, effected the original insurance upon which it was so reinsured, and that in this case the rate of insurance charged the said Stenzel for the term of three (3) years from May 9, 1900, to May 9, 1903, was ninety (90) cents per thousand [amended so as to read per hundred], and that the rate charged by said Delaware Insurance Company, and collected by it upon the twenty-five hundred (\$2,500) dollars of reinsurance, was ninety cents per thousand or twenty-two and 50/100 (\$22.50) dollars, which was duly paid to and received by said Delaware Insurance Company, and no part of which has been repaid."

The Delaware Insurance Company after this time ceased doing business in the state

of Georgia, and made a contract with the Westchester Fire Insurance Company by which the latter reinsured the risks of the former, and the Delaware Insurance Company so notified plaintiff, and advised it, if the policies of the defendant should require approval of transfer or other indorsement, to make report thereof to the Westchester Fire Insurance Company, giving its address. In pursuance of this direction, on May 31, 1901, plaintiff notified the Westchester Fire Insurance Company of a permission for the premises of Stenzel, so insured and reinsured, to remain vacant for a period of 30 days, and on June 17, 1901, the last-named company recognized the contract of reinsurance between the plaintiff and the defendant as being in existence, and issued a vacancy permit in the following words: "Permission for premises herein named to remain vacant for a period of thirty days from date hereof. Attached to and forming part of policy No. 4264 of the Delaware Insurance Company. (Westchester). Atlanta, Ga. 6-17-01. Westchester Fire Insurance Co. Jno. H. Kelly, Asst. Sect." At the time of the application for this permission, and when it was granted, more than a year had elapsed from the date of the issuance of the policy of reinsurance, and by this action the defendant, through its authorized agent, the Westchester Fire Insurance Company, recognized the contract of insurance as having been made and effected, and as being in existence, and of full force. If, instead of making the indorsement mentioned, granting permission and recognizing the contract of insurance as being of full force and effect on June 17, 1901, the defendant had asserted that the contract was for the term of one year only, and that it had then expired, "this petitioner would have been informed of the claim of defendant, and could have either caused said contract of insurance to be duly corrected, or, in case of dispute or delay concerning the same, could have protected itself by other insurance. But that, by reason of said granting of said permission on said date, this petitioner was confirmed in the belief that said contract of insurance was for three (3) years, and was of force on said 17th day of June, 1901." On June 20th, upon receiving the vacancy permit and attaching it to the contract of insurance, plaintiff perceived that the date of expiration had been stated as May 9, 1901, and that the term was said to be for one year instead of for three years. On June 20, it notified the Westchester Company of the mistake, and that the reinsurance premium had been calculated and paid for three years, "and asked that they have the correct expiration and terms stated." The Westchester Company advised plaintiff that this matter would have to be taken up directly with the Delaware Company, and on June 24th plaintiff advised the latter company of the mistake, and asked that the nec-

essary correction be made. Plaintiff is informed that the defendant notified the Westchester Company that the term was for three years, and that it had received the full premium, and having reinsured with the Westchester Company for the term of one year only, the defendant remitted the balance of the premium for the additional term of two years, thus recognizing the existence of the contract of insurance for three years. On June 27, 1901, the premises were destroyed by fire. The owner sued the present plaintiff upon its policy, and obtained judgment. Plaintiff also incurred certain necessary expenses in making this defense. It made proof of loss to the defendant, but the latter denied liability. It was prayed that the contract be adjudged to be valid and binding; that it be reformed so as to be for the term of three years instead of for one year; that the plaintiff have judgment; and for general relief.

The prayer exhibited as being the contract of insurance was as follows: "Southern Department. The Delaware Insurance Company of Philadelphia. Amt. Insd. \$2,500. Rate 90¢ Premium \$22.50 W. E. Chapin, Manager. Agency #2 C. Atlanta, Ga. Entry No. 4264. Do reinsure Pennsylvania Fire Ins. Co., of Philadelphia, Pa., in the sum of twenty-five hundred dollars, for the term of one year, from May 9th, 1900, to May 9, 1901. May reference. Page No. 398, Block No. 49. On \$2,500 of their liability as insurers under their special policy No. 1608, issued to H. Stenzel for \$8,000, and covering as follows, viz.: [A full description of the property follows.] It is hereby understood and agreed that such reinsurance is a pro rata part of each and every item insured by the policy of the reinsured company, and subject to the same risks, valuations, condition, and mode of settlement as may be taken or assumed by said company; it being expressly agreed, however, that notice of any change in the risk, or additional privileges granted, shall be at once given to this company. Loss, if any, payable at the same time and in the same manner and pro rata with the amount paid by said company," etc.

Over objection an amendment of the petition was allowed, which alleged substantially as follows: "The paper attached to the declaration, and which is set out above, was made by the Delaware Insurance Company, and delivered to the Pennsylvania Fire Insurance Company as and for a written contract of reinsurance of twenty-five hundred dollars of the liability of the plaintiff as insurer under its policy, and the paper was received by the plaintiff as such policy of reinsurance, and it paid to the defendant twenty-two and 50/100 dollars as premium due and charged upon such policy. By reason of the facts alleged in the declaration the defendant recognized that on the 9th day of May, 1900, it made and effected a

contract of insurance as in the declaration set forth, and that said defendant company thereupon became and was and is estopped from denying that it had entered into such contract of insurance, or that said 'Exhibit A' is not a valid and binding contract of reinsurance between it and your petitioner." It was also alleged that estoppel arose from the facts alleged in the original petition. The defendant filed both a general and a special demurrer. It was overruled, and the defendant excepted.

Burton Smith, for plaintiff in error. King, Spalding & Little, for defendant in error.

LUMPKIN, J. (after stating the facts). 1-3. In a suit for damages growing out of a breach of a contract required by the statute of frauds to be in writing, the petition is not demurrable on the ground that it does not state whether the contract was in writing or not. *Draper, Moore & Co. v. Macon Dry Goods Co.*, 103 Ga. 661, 30 S. E. 566, 68 Am. St. Rep. 143; *Bluthenthal & Bickart v. Moore*, 106 Ga. 424, 32 S. E. 344; *Taliaferro v. Smiley*, 112 Ga. 62, 37 S. E. 106. Where a proceeding is brought for the purpose of reforming a written contract, "the instrument which is sought to be reformed should be set forth in the bill, so that from it and the allegations in the bill of complaint it may clearly appear that it does not conform to the real contract made by the parties. The bill should also show the particular mistake or the fraud and mistake complained of and how it occurred." *Van Zile's Eq. Pl. & Pr.* § 419. "It is not sufficient to allege that it was the intention of the parties to make an instrument that would accomplish a certain object, and ask the court to make a writing that will accomplish that object." 18 *Enc. Pl. & Pr.* 824; *Wall v. Arlington*, 13 Ga. 88, 92; *Marshall v. Drawhorn*, 27 Ga. 275; *Ligon's Adm'rs v. Rogers*, 12 Ga. 286; *Smith v. Brooks*, 65 Ga. 356; *Bell v. Americus Railroad*, 76 Ga. 755. If a clause which the petitioner claims should have been inserted in the contract is not one which the parties agreed on and omitted through mistake, but merely one which ought as a matter of propriety to be inserted, a court of chancery will not interfere; it not being within its province to make or ameliorate contracts for parties." *Thompsonville Co. v. Osgood*, 26 Conn. 16; 2 *Estes Pl.* (4th Ed.) § 2806. In this state relief may be sought in the same petition by having a written contract reformed, and also enforcing it. *Fleming v. Fire Ass'n*, 76 Ga. 678. In order to accomplish this result, however, the petition must be adequate for both purposes: First, to reform the instrument; second, to obtain judgment on it. Here it is sought to reform the alleged contract so as to make the term of insurance three years instead of one. Fairly

construed, the petition alleged that the paper attached was the written contract sought to be corrected and enforced. It was alleged that the defendant was one of the regular insurers of the plaintiff, and by contract and agreement reinsured the plaintiff at the same rates at which the latter effected original insurance; that in this instance the rate charged the property owner for three years was 90 cents on each \$100 of value; that the plaintiff reinsured a part of the risk with the defendant and paid to it a premium at the same rate, and that, by error of the scrivener who drew up the writing evidencing the contract, the term was written as one year instead of three years. But it was not alleged that the defendant knew what rate was charged for the original insurance, or that it received the premium as being for three years' insurance; or that the parties ever agreed or intended that the contract should be so written, or instructed the scrivener to that effect; or how the alleged mistake came to be made; or why the plaintiff failed to know the terms of its contract until it had expired. The allegations of the petition were insufficient for the purpose of reformation, and were demurrable.

4. At common law contracts of insurance were not required to be in writing, and generally, in the absence of any statutory or other positive provision, a parol contract of that character will be valid. 1 *Cooley's Briefs on Insurance*, 364; 1 *May on Insurance* (4th Ed.) § 14. It has been held in Louisiana (*Egan v. Firemans' Ins. Co.*, 27 La. Ann. 368) that a contract of reinsurance must be in writing, as being the promise to pay the debt of another; but the statement is made without any reasoning or authority, and it has been elsewhere ruled that an agreement of reinsurance is not within the statute of frauds. 1 *May on Insurance* (4th Ed.) § 12 A; *Bartlett v. Fireman's Ins. Co.*, 77 Iowa, 155, 41 N. W. 601; *Com. Mut. Mar. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318, 15 L. Ed. 636. By the Civ. Code, 1895, § 2089, on the subject of fire insurance, it is declared that "such contract, to be binding, must be in writing." The defendant contends that this section contemplates that the contract of insurance must be signed. The plaintiff denies this; but insists that, if it be true, the contract under consideration was sufficiently signed to be binding. Without stopping to refer to the distinction before formal and simple contracts, which is less regarded in modern times than formerly, with reference to the point now before us, simple contracts may be considered under three heads: (1) Contracts which are in writing, but which are neither required to be in writing, nor to be proved by writing; (2) contracts which are not required to be in writing, but which must be proved by writing; (3) contracts which must be in writing. As to the first

class it has been held that at common law if the parties intend for such a contract to take effect without signing, and agree upon and adopt the written paper as being or containing the contract, this will suffice. In *Bishop on Contracts*, § 342, it is said: "The common and appropriate method of attesting a writing is to sign it. But, in general, a mere oral consent to what has been written out for a contract will, at the common law, suffice." See, also, *Leake on Contracts*, 184. As illustrations, instances are given where one party signs a contract and the other acquiesces in it, as a bill of lading accepted by the shipper, and the like. In the discussion of this class of contracts, the Supreme Court of Maine, in *Miss. etc., Co. v. Swift*, 88 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545, makes the following concise statement: "Upon the question whether the signing a written draft of the terms is essential to the completion of a contract, Held: If the written draft is viewed by parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiations, there is no contract until the written draft is finally signed." 1 *Beach, Mod. Law Con.* § 3. In *Kidd v. Huff*, 105 Ga. 209, 31 S. E. 430, it was said that "a written instrument, although not signed, will, if orally assented to by the parties, constitute the agreement. Such instruments, however, will not be admissible in evidence until it is shown, *prima facie*, that the terms were assented to." In that case what purported to be a consent verdict and decree was held to be inoperative as a judgment binding upon the parties on account of want of jurisdiction in the court, or for other valid reason. It was set up by plea, however, that it had been agreed upon by the parties and carried into effect, and that the fund arising from it had been distributed among the parties, who received their share with knowledge of the fact. When offered in evidence, the verdict and decree were objected to, because defendant had not proved that plaintiffs had assented to it. This court held that it was inadmissible for the reason stated. The language quoted above was used in discussing the plea which set up the agreement to the decree and the action under it. It will be perceived that this was not a contract which was required to be in writing, nor did the case involve the enforcement of an executory contract, but included both the agreement and the action taken in reliance upon it. Compare *Houston v. Polk*, 124 Ga. 103, 110, 52 S. E. 83. It is quite clear that if it is contemplated by the parties that the contract shall be signed in order to consummate it, it will not be binding until so signed. But a somewhat informal or preliminary contract may be made binding, although it

may be contemplated that the agreement will be put in more formal shape. See, on this subject, *Lynn v. Burgoyne*, 52 Ky. (13 B. Mon.) 400; contrast *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 845, 15 Am. Rep. 612; *Kelly v. Com. Ins. Co.*, 10 Bosw. (N. Y.) 82; *Arnold v. Scharbauer* (C. C.) 116 Fed. 492; *Vastblinder v. Metcalf*, 3 Ala. 100; *Keating v. Nelson*, 38 Ill. App. 357; *Lewis v. Crow*, 69 Ind. 434; *Thomas v. Caldwell*, 50 Ill. 138; *Waggeman v. Bracken*, 52 Ill. 468; *Wetenkamp v. Billigh*, 27 Ill. App. 585; *Fish v. Johnson*, 18 La. Ann. 29; *Ayers v. Herring* (Tex. Civ. App.) 32 S. W. 1090; *Lathrop v. Bramhall*, 64 N. Y. 366; *Painter v. Mauldin*, 119 Ala. 88, 24 South. 769, 72 Am. St. Rep. 902; *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496.

The second class of cases to which reference was made above consists principally if not entirely of those which fall within the statute of frauds. (The difference in verbiage between the fourth and seventeenth sections need not be mentioned.) In *Townsend v. Hargraves*, 118 Mass. 325, the court said: "The purpose of this celebrated enactment as declared in the preamble, and gathered from its provisions, is to prevent fraud and falsehood by requiring a party who seeks to enforce an oral contract in the court to produce as additional evidence some written memorandum signed by the party sought to be charged, or prove some act confirmatory of the contract relied on. It does not prohibit such contract. It does not declare that it shall be void or illegal unless certain formalities are observed. If executed, the effect of its performance on the rights of the parties is not changed, and the consideration may be recovered." The great object was to require as evidence of the contract some memorandum of the agreement in writing, signed by the party or parties to be charged. *Barry v. Coombe*, 1 Pet. (U. S.) 651, 7 L. Ed. 295; *McConnell v. Brillhart*, 17 Ill. 860, 65 Am. Dec. 661; *Obear v. First Nat. Bank*, 97 Ga. 590-592, 25 S. E. 335, 33 L. R. A. 334. The statute as adopted into our Code differs somewhat in language from the original statute of frauds; but how much such changes in expression are to be treated as material or altering the construction is not here involved. See *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 333, 62 Am. St. Rep. 345; *Townsend v. Hargraves*, 118 Mass. 325. As to what signing will meet the requirement of the statute of frauds more will be said presently.

The third class of contracts referred to are those which must be in writing, as already stated, the statute of this state requires, not merely that there should be some written memorandum as evidence of a contract of fire insurance, but that such a contract to be binding must be in writing. While, as shown above, there is high authority for holding that "a written instrument,

although not signed by the parties, will, if orally assented to by them, constitute the agreement between them," it must be confessed that it seems to the writer somewhat anomalous to hold that an instrument can strictly be called a "written contract" which is entirely unsigned. One would naturally expect, when an instrument is claimed to be a written contract, to find that fact apparent on the face of the paper itself. The signature evidences the agreement of the parties to be bound by the instrument, and it sounds somewhat inconsistent to speak of a written contract which must be proved to be an agreement at all, by a resort to parol evidence. Promissory notes must be signed; but it is claimed that they stand on a different basis. It may be that a proposition in writing by one party (referred to as "the party to be charged"), which is orally accepted by the other, will answer the demands of the statute of frauds. *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Ex'rs of Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Brandon Mfg. Co. v. Morse*, 48 Vt. 322; *Browne, Stat. Frauds*, § 365; *Reuss v. Picksley*, L. R. 1 Exch. 342. But without discussing decisions which seem now to be well settled, it is sufficient to hold that under our statute it is contemplated that the whole contract of insurance shall be in writing, and that it shall be signed by the insurer. In *Planters' Ass'n v. De Loach*, 113 Ga. 802, 39 S. E. 466, it was said: "A writing in the form of a policy of fire insurance will not constitute a valid contract of insurance, when it is not, at the time the contract therein purports to go into effect, executed by one authorized to execute contracts in behalf of the alleged insurer." In the opinion (page 808 of 113 Ga., page 468 of 39 S. E.) it was said: "The writing relied on to make the contract of insurance not having been signed by any one authorized by the association to execute contracts in its behalf at the time it is claimed that the contract was entered into, the court erred in not excluding the paper from evidence." There a former president had signed a number of blanks as a matter of convenience to himself, and after his term of office had expired, an agent delivered one of these policies; but the association declined to treat the holder of the policy as a member, or to recognize such delivery by its agent. See, also, *Peoria Ins. Co. v. Walser*, 22 Ind. 73; *Water Com'rs v. Brown*, 32 N. J. Law, 504.

Section 2089 of the Civil Code of 1895, which requires the contract of fire insurance to be in writing in order to be binding, was codified in the original Code, which went into effect in 1863. Code 1863, § 2744. In 1893 an act was passed providing for the granting of charters to insurance companies in this state, their organization, and the conduct of business by them. This act is now codified. Civ. Code 1895, §§ 2007 et seq. In sec-

tion 2022 it is provided that "no policy or other contract of said corporation shall be binding except it be signed by the president or vice-president and secretary or assistant secretary of the company." While this law is applicable only to companies chartered under the act, yet it serves to indicate the legislative policy that insurance contracts should be in writing and signed. The case of *Clark, Rosser & Co. v. Brand & Hammons*, 62 Ga. 23, was cited by counsel for the plaintiff; but no question was raised or determined there as to the necessity for signing. It was held that an entry by warehousemen on their books in these words: "Two hundred B/C., [W] insured to-day, p. v. o. Mr. H., @ 15c. from date," unsigned, and with no premium paid, was not sufficient. *Bleckley, J.*, said: "Without scrutinizing it for other defects, it is fatally deficient in not specifying the period of time during which the insurance was to run." In *Mitchell v. Universal Life Ins. Co.*, 54 Ga. 289, it was held that "a contract required by law to be in writing cannot be shown to have been altered by parol after its execution." In that case the distinction was recognized between a simple contract in writing and one which is required by law to be in writing. This was again recognized in *Simonton v. Liverpool Ins. Co.*, 51 Ga. 76. In *Vidvard v. Cushman*, 35 Hun (N. Y.) 18, it was held that where, after the execution of a lease in writing, a clause was inserted in it by the lessors, in the presence and with the consent of the lessee, such insertion modified the original contract, and it was not necessary that the lease should be again signed or re-executed. In the case of *Simonton v. Liverpool Ins. Co.*, supra, the court treated a permission for the removal of property from one store to another as being in the nature of a new insurance contract. Whether this was a proper view, or whether a provision for a forfeiture of the policy upon removal of the property may be waived by parol, if the agent has authority, is not involved in this case. See *Carrugi v. Atlantic Fire Ins. Co.*, 40 Ga. 135, 2 Am. Rep. 567; *City Fire Ins. Co. v. Carrugi*, 41 Ga. 600; *Western Assurance Co. v. Williams*, 94 Ga. 128, 21 S. E. 370; *Morris v. Orient Ins. Co.*, 106 Ga. 472, 33 S. E. 430; *Lippman v. Aetna Ins. Co.*, 108 Ga. 391, 33 S. E. 879, 75 Am. St. Rep. 62.

5, 6. If, under the statute of this state, a contract of insurance is required to be in writing and signed by the insurer or on its behalf, did the allegations of the petition show a sufficient signature? On this question there is an analogy between the law touching contracts of insurance and the statute of frauds which requires that there shall be a memorandum in writing signed by the party to be charged. Under that statute a signing was necessary. It has frequently been held, however, that signing, whether in

the caption or body or at the end of the instrument, will suffice, but that it must be signed with intent to enter into it. See, *Barry v. Coombe*, 1 Pet. (U. S.) 640, 7 L. Ed. 295; *McConnell v. Brillhart*, 17 Ill. 354, 65 Am. Dec. 601; *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737; *Merritt v. Clason*, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286; *Noe v. Hodges*, 22 Tenn. 162; *Browne*, Stat. Fr. (5th Ed.) § 357. A printed signature will also answer the requirements of the statute of frauds, if there be sufficient evidence of its adoption as such by the party to be charged. *Browne*, Stat. Fr. § 356. In *Bishop on Contracts*, § 844, it is said: "The usual and proper place for the signature is at the foot of the matter which it attests. But, in strict law, it will suffice if, with the intent to constitute a signing, it is inserted in the writing at any other place." *Donnell Mfg. Co. v. Repass*, 75 Mo. App. 420. The petition alleged that the defendant executed and delivered to the plaintiff the paper attached to the petition as and for a written contract of reinsurance, and that it was so received by the plaintiff, and it paid the premium due thereon. The paper commences with the name of the defendant and its general agent, and proceeds "do re-insure" the plaintiff, etc. If it was intended and delivered as a written contract, this would suffice, although the name may have appeared at the top instead of being subscribed. The allegation on this subject was sufficient to withstand the ground of the demurrer in so far as it attacks the paper as apparently unsigned. *Browne*, Stat. Fr. § 356, and citations.

7. Did the signature of the Westchester Fire Insurance Company to the vacancy permit, granted after the time when the alleged contract of the Delaware Company had expired according to its terms, operate as a signature to the paper pleaded as a contract of insurance so as to make it a valid contract under the statute, if it were not so before? Again looking to decisions under the statute of frauds, it has been held that it is not required that all the terms of the contract should be agreed to or written down at one and the same time, nor on one and the same piece of paper, provided the contents of the signed paper makes such reference to the other paper or papers as to enable the court to construe them all together as containing all the terms of the bargain. *North v. Mendel*, 73 Ga. 400, 54 Am. Rep. 879; *Turner v. Lorillard Co.*, 100 Ga. 645, 650, 28 S. E. 383, 62 Am. St. Rep. 345. (2) The permit signed by the Westchester Company contained the words, "attached to, and forming part of policy No. 4264 of the Delaware Ins. Co." If the Westchester Company was shown by the allegations to be the agent of the Delaware Company, this permit sufficiently referred to the policy of the number stated, and the signature would supply the lack of

signing that policy, if it appeared that in fact there was such a written policy. It is contended by the defendant that the Westchester Fire Insurance Company was not the agent of the defendant, and that its signature could not bind the defendant. The petition, however, alleged that the defendant ceased doing business in the state of Georgia, and reinsured its risks in the Westchester Company; and that it so notified the plaintiff, and advised it, if policies of the defendant should require approval of transfers or other indorsements, that the plaintiff should make report thereof to the Westchester Company, giving its address; that, in pursuance of this, application was made to the Westchester Company, and the vacancy permit was signed and delivered. While the allegations do not state that authority was specifically given to sign the particular permit involved, we think it does allege that the defendant referred the plaintiff to the Westchester Company to obtain necessary indorsements on its policies; and if this was such an indorsement, no reason is apparent why it would not fall within that authority. See, on this subject, *Browne on Statute of Frauds*, § 370. The nature of the authority is not questioned, but only whether there was an agency.

8. In so far as the allegations in regard to the reinsurance and the obtaining of the vacancy permit are relied on to work an estoppel, they are insufficient. It is not alleged that the defendant misled the plaintiff, or that the latter relied on any representation or conduct on the part of the former, and changed its status, or in fact, did or omitted to do anything by reason of such conduct. It is alleged that if the defendant had not recognized the contract of insurance as being in force after the lapse of one year from its issuance, but had asserted that it had expired, "this petitioner would have been informed of the claim of defendant, and could have either caused said contract of insurance to be duly corrected, or, in case of dispute or delay concerning the same, could have protected itself by other re-insurance. But by reason of said granting of said permission on said date, this petitioner was confirmed in its belief that said contract of insurance was for three (3) years, and was of force on said 17th day of June, 1901." It will be seen at once that this allegation states what the plaintiff could have done, but does not allege that it either did anything or failed to do anything in reliance on any conduct or representations on the part of the defendant. From the foregoing discussion it is apparent that the judge of the trial court erred in overruling some of the grounds of the demurrer. As to others there was no error.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

**RICH & BROS. v. FIDELITY & DEPOSIT
CO. OF MARYLAND.**

(Supreme Court of Georgia. Aug. 13, 1906.)

**1. GUARDIAN AND WARD—BOND—LIABILITY
OF SURETIES.**

This case is controlled by the case of Fidelity Co. v. Rich, 50 S. E. 338, 122 Ga. 506, except as to the question of estoppel.

2. SAME—JUDGMENT—RES JUDICATA—ESTOPPEL.

The plaintiffs obtained a judgment against a guardian upon an open account, which was not properly a liability of the ward's estate, and the refusal to pay which did not (under the decision above referred to) constitute a breach of the bond. After that decision another suit was brought for the same cause of action, with the additional allegations that the guardian had received the proceeds of a life insurance policy in which the wards had an interest; that the surety filed a petition to the ordinary, alleging that the guardian had mismanaged the estate and violated the law, and seeking to be relieved from the bond; that the plaintiffs as creditors objected to the discharge of the surety; that in answer to the rule nisi the guardian filed final returns, in which she included the amounts due to the plaintiffs; that the surety knew of this and was a party to the crediting of such sums in the final returns; that the sole purpose was to relieve it as surety on the bond; and that if such amounts had not been allowed in the returns as constituting a part of the expenditures of the guardian, they would now be in the hands of the guardian to liquidate petitioner's claim. It did not appear that the surety was charged. *Held*: (1) That this did not operate as an estoppel by judgment on the surety, because the allowance of the returns was not a judgment in a proceeding to which the surety and the present plaintiffs were parties, although the making of the return by the

guardian may have resulted from a proceeding on the part of the surety to obtain a discharge from the bond; (2) the statements in the return of the guardian were not solemn admissions in judicio by the surety, although the latter may have instigated or approved them, and they may have been for its benefit; (3) considered as an estoppel by admission or in pais, no action on the part of the creditors in reliance upon such statements appears, and no injury resulting to them; (4) whether or not the making of such a return and the participation therein by the surety operated as a fraud upon the wards or would furnish any basis for action by them, relatively to the creditors now suing, a return claiming that such items were proper to be allowed to the guardian, and the obtaining of the approval of the return, although participated in by the surety, would not render it liable to such creditors for the amount of their claim, if in fact it had not been paid, and was not one, the refusal to pay which would in law make the surety liable on the bond.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Guardian and Ward, § 621; vol. 19, Cent. Dig. Estoppel, §§ 8, 142.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Rich & Bros. against the Fidelity & Deposit Company of Maryland. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. E. & L. F. McClelland, for plaintiffs in error. Rosser & Brandon, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, C. J., absent.

MARION COUNTY LUMBER CO. v.
TILGHMAN LUMBER CO.(Supreme Court of South Carolina. Sept. 19,
1906.)

INJUNCTION—LOCATION OF LOGGING ROAD.

Plaintiff sued to restrain defendant from locating a right of way over land on which plaintiff had a senior right to locate a right of way for the purpose of operating a logging railroad. *Held*, that plaintiff was not entitled to such injunction until it had located its way, but was entitled to enjoin the defendant from using a certain class of locomotives on such road in order to preserve plaintiff's timber from danger of fire.

Appeal from Common Pleas Circuit Court of Marion County; Gary, Judge.

Action by the Marion County Lumber Company against the Tilghman Lumber Company. From an order dissolving a temporary injunction, plaintiff appeals. Reversed.

M. C. Woods, for appellant. Montgomery & Lide and Willcox & Willcox, for respondent.

JONES, J. The Marion County Lumber Company, a corporation under the laws of this state, brought this action to enjoin the Tilghman Lumber Company, a corporation under the laws of Virginia, from operating a logging railroad across certain lands in Marion county. A temporary injunction was granted by Judge Ernest Gary, October 4, 1905, but the same was dissolved by his order of October 18, 1905, "without prejudice to plaintiff to apply for an injunction pendente lite, if at any time it is hindered, impeded, or inconvenienced in the exercise of its alleged exclusive right of way heretofore acquired by the defendant, its agents or servants," from which order plaintiff appeals.

Ordinarily, interlocutory injunctions are not a matter of right, but of grace, resting in the sound discretion of the judge. *Pelzer, Rodgers & Co. v. Hughes*, 27 S. C. 415, 3 S. E. 781. But, when the sole purpose of an action is for an injunction, and a temporary injunction is essential to the assertion and preservation of a legal right, if established, as alleged in the complaint, it would be error of law to refuse or set aside a temporary injunction. *Alderman v. Wilson*, 69 S. C. 159, 48 S. E. 85, and cases cited therein. This, however, does not mean that a right to a temporary injunction pendente lite follows automatically if the complaint states a cause of action for injunction. The court should consider the showing made in opposition thereto and must determine in view of all the circumstances, subject to review by this court, whether the injunction is reasonably essential to protect the legal right of plaintiff pending the litigation, as was done in *Northrop v. Simpson*, 69 S. C. 554, 48 S. E. 613. We proceed to consider the appeal in the light of these rules.

The plaintiff having succeeded to the rights

of the Cape Fear Lumber Company, bases its claim under a deed from owners, dated May 30, 1898, conveying to the Cape Fear Lumber Company "all of the short straw pine timber, all the cypress timber, and all the poplar timber, except timber measuring 12 inches in diameter and less at the stump end," on the described tract of 950 acres in Marion county, known as the "Phil Dew Land," with "exclusive rights of way over said land and rights of ingress and egress for men, teams, vehicles, and engines at any and all times, and the right of way and right to build, construct, and operate a railroad across the land, etc." Subsequent to this the defendant company took deed from the owners conveying "an exclusive right of way not to exceed eighteen feet wide upon and across" the said tract of land, with privilege "to build, construct, and operate a railroad, logging road, tramway, or cart or wagon way upon said right of way, also the right and privilege to use all such small timber, except pine trees fourteen inches and above at stump, and brush and earth from said right of way as may in the judgment of said Tilghman Lumber Company be required to build, construct, and maintain the aforesaid railroad, logging road," etc. The defendant by its answer admits that it entered upon the said tract in September, 1905, cut out a right of way over and across the same, constructed in part a logging railroad thereon, and has distributed ties along such right of way for the purpose and with the intention of operating a steam logging railroad thereon.

Assuming that plaintiff establishes its alleged senior easement, then it is obvious that it is the owner of the dominant estate in the land described, with which neither the owners of the said land nor their subsequent grantees can materially interfere. It is true the owners retained the soil and certain timber, but by their grant to plaintiff they must be held during the continuance of the easement to have abandoned every use of the land except such as might be made consistent with the reasonable enjoyment of the easement granted. *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442, 7 L. R. A. 226, 16 Am. St. Rep. 808; 2 Wash. on Easements (3d Ed.) 258; 14 Cyc. 1208. The defendant cannot acquire under its junior grant any greater right than the owner of the servient estate had. The plaintiff's deed was duly recorded, and it is charged that the defendant, before purchasing, had actual notice of plaintiff's rights.

In so far as plaintiff seeks the aid of equity to protect its rights of way in said tract of land, we cannot say that the circuit judge erred in dissolving the temporary injunction at this time. It appears that plaintiff has not definitely located any right of way. The general rule is that equity will not interfere to protect an unlocated or indefinite right of way. *Goldsboro Lumber Co. v. Hines* (N. C.) 35 S. E. 458; *Fox v. Pierce*, 50 Mich. 500,

15 N. W. 880. The right of way which was protected in *Wilson v. Alderman*, 69 S. C. 176, 48 S. E. 81, *Alderman v. Wilson*, 69 S. C. 156, 48 S. E. 85, and *Alderman v. Wilson*, 71 S. C. 64, 50 S. E. 643, was staked out. Undoubtedly, plaintiff, if senior grantee, as alleged, would have paramount right of ingress and egress for the removal of every tree of the stated dimension, wherever located on the tract described, which could not rightfully be interfered with by any subsequent grantee, but, as stated, equity will not interfere to protect mere unlocated rights of way. It is claimed, however, that the operation of a steam logging railroad by defendant across said tract would subject plaintiff's property right in the trees to greater danger of destruction from fire communicated by the locomotives. It is alleged that the logging locomotive employed by defendant constantly emits sparks and scatters fire, and that said timber is for the most part pine woods with thick undergrowth and will be liable to fire at any time from the engine of defendant, and that such fire would destroy valuable timber trees of special and peculiar value to plaintiff, now making preparations to manufacture lumber on an extensive scale, and several affidavits were submitted in behalf of plaintiff to show the liability of the timber to be destroyed by fire resulting from the operation of a steam locomotive through it on an 18-foot right of way.

It is not the intention or province of this court now to discuss or decide any question of fact involved in this case in advance of the hearing upon the merits, but we are impressed that plaintiff made at least such a prima facie showing of threatened danger to its property rights in the trees as entitles it to the preliminary injunction. The threatened injury to plaintiff's property would be of such a repetitious or continuing nature as to render an action at law inadequate and to warrant equitable interference by injunction. *Alderman v. Wilson*, 69 S. C. 160, 48 S. E. 85. This feature of threatened irreparable injury to plaintiff's timber distinguishes the present case from *Goldsboro Lumber Co. v. Hines*, supra, relied upon by respondent, and from *Northrop v. Simpson*, 69 S. C. 554, 48 S. E. 613. If the defendant be allowed to construct and operate the steam logging road through the plaintiff's timber pending the litigation as to the rights of the parties, the injury threatened and apprehended will probably result before the termination of the suit; and, should it be then adjudged that plaintiff is entitled to an injunction, the remedy would be of little or no avail. Hence the prima facie case presented is one in which there is a necessity to issue temporary injunction to protect the legal right of the plaintiff pending the litigation.

The order of Judge Gary dissolving the temporary injunction is reversed and set aside.

JARRETT v. HIGH POINT TRUNK & BAG CO.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. TRIAL—VERDICT—VACATION—DISCRETION—RECORD—RECITAL.

When a judge sets aside a verdict at the close of a case, he should state in the record whether it is done in the exercise of his discretion or for errors of law.

2. APPEAL—VERDICT—VACATION—DISCRETION—REVIEW.

The exercise of a trial judge's discretion to set aside a verdict will not be reviewed on appeal unless the right is shown to have been exercised arbitrarily, capriciously, or willfully.

3. TRIAL—VERDICT—VACATION—DISCRETION.

Where the trial judge, on the rendition of a verdict, determined that the findings of the jury were conflicting, that the verdict as to the second issue submitted was against the weight of the evidence, and that the damages were insufficient, he properly set aside the verdict and granted a new trial in the exercise of his discretion.

[Ed. Note.—For cases in point, see vol. 46. Cent. Dig. Trial, §§ 802, 803; vol. 37, Cent. Dig. New Trial, § 231.]

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Action by Causey Jarrett, by his next friend, against the High Point Trunk & Bag Company. From an order setting aside a verdict in favor of plaintiff, defendant appeals. Affirmed.

The action was brought to recover damages for injuries alleged to have been caused by the negligence of the defendant while the plaintiff was working in its factory at High Point as its employé. The issues, with the answers of the jury thereto, are as follows: "(1) Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? Ans. Yes. (2) Did the plaintiff by his own negligence contribute to the injury complained of, as alleged in the answer? Ans. Yes. (3) What damage, if any, is the plaintiff entitled to recover? Ans. \$3,000." The following entry was made upon the record of the court below: "It is ordered by the court that the verdict be set aside." Then follows this entry: "The defendant by its attorney appealed this day from the order setting aside the verdict. June 18, 1906." No other entry was made on the record. The defendant tendered a case on appeal and the plaintiff's counsel a countercase. The judge, upon disagreement of counsel, settled the case on appeal, and from it is made the following extract: "Upon the return of the verdict the court of its own motion set aside the verdict in the exercise of its discretion. This discretion was exercised upon the following grounds: (1) The findings on the issues were conflicting, and in the opinion of the court the jury either ignored or did not understand the charge of the court, which was: 'If they answer the second issue "No," they would consider the question of damages and answer the third issue, but, if they an-

swered the second issue "Yes," they need not answer the third issue.' The jury having answered the second issue 'Yes' and the third issue '\$3,000,' the court could not understand the finding of the jury. (2) The court thought the finding on the second issue was against the weight of the evidence, and the damages assessed were not adequate to the injury received by the plaintiff. The defendant insisted that it was entitled to judgment on the verdict, and so moved. The motion was made after the court had directed the verdict to be set aside, but before the verdict and order were recorded. The court, being of the opinion that the verdict should be set aside, declined the defendant's motion, not because it was not in apt time, but because the court felt it to be its duty, in the exercise of a sound discretion, to set aside the verdict. Defendant excepted." The defendant assigned the following errors: (1) The refusal of the court to render judgment in its favor. (2) The order of the court setting aside the verdict. For the purpose of correcting the errors so assigned, this appeal was taken.

J. T. Morehead and King & Kimball, for appellant. W. P. Bynum, Jr., E. J. Justice, and G. S. Ferguson, for appellee.

WALKER, J. (after stating the case). The defendant's counsel contended that the order of the judge setting aside the verdict was improper because there was no apparent error in law committed at the trial, and it is not stated in the record whether or not it was made in the exercise of his judicial discretion, and for this position they rely on the recent decision of this court in *Abernethy v. Yount*, 138 N. C. 337, 50 S. E. 696. It is held in that case that the judge, when he sets aside a verdict, should state whether or not it is done in the exercise of his discretion, and, after mature reflection, we reaffirm that principle, which still commends itself to our judgment as the only safe and fair procedure in such cases. It is so easy to do and so manifestly in the interest of common justice to the party against whom the ruling is made, and, too, it will meet with such favor and cheerful acquiescence on the part of the judges who preside at trials, as we are persuaded to believe, that we can now perceive of no good reason why the rule should be disturbed. The reasons for its adoption have been so well stated by Mr. Justice Connor in the case cited, which now appears to us as conclusive, that we will not undertake any elaboration of them in further vindication of what we there decided. One sufficient ground upon which the rule can well rest is that the defeated party is entitled to know whether he lost by reason of some error in law committed during the trial or merely by the exercise of the judge's discretion, to the end that, in the former case, he may proceed to test the validity of the

ruling, as it involves a matter of law or legal inference, and, in the latter, that he may submit to the ruling and avoid any further useless contest, as it is not a reviewable matter. The discretion of the judge to set aside a verdict is not an arbitrary one to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of preventing what may seem to him an inequitable result. The power is an inherent one and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. *Bird v. Bradburn*, 131 N. C. 495, 42 S. E. 936. Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. "*Discernere per legem quid sit justum.*" *Osborn v. Bank*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204. When applied to a court of justice, said Lord Mansfield, discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge but by a sound and enlightened judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except perhaps, in extreme circumstances, not at all likely to arise, and it is therefore practically unlimited.

In this case the defendant can derive no benefit from the decision in *Abernethy v. Yount*, as the question raised by its exception is not presented on the record alone, but a case on appeal has been settled by the judge upon disagreement of counsel, and it appears therefrom that the judge exercised his discretion in a perfectly proper manner. The findings of the jury, it is true, may not be conflicting, and, in legal effect, they may amount to a verdict for the defendant, as contended by the defendant's counsel, but his honor thought they sufficiently indicated that the jury must have misunderstood the charge or the case, and for that reason, or in some other way, there had been a miscarriage of justice. Besides, he found that the verdict as to the second issue was against the weight of the evidence, and that the damages were insufficient. The order was nothing but the exercise of the legitimate power of the court to set aside a verdict. The discretion confided to the judge, when thus used, is, of course, not reviewable. But, if it could be revised, we can discover nothing reversible in the ruling upon the facts as stated in the record and in the case, treating the latter as supplementing the record entries. The case contains a full statement of the

reasons which induced the action of the court, and we find them amply sufficient to justify the order. Unless we looked into the case on appeal, it would not appear that the defendant ever moved for judgment upon the verdict as rendered, for the record does not show it. One of the most delicate and responsible duties of all those the judge must perform is the use of his discretion in passing upon the rights of litigants when he has no fixed and certain rule for his guidance, but is left, as Judge Gaston once expressed it, "to his own notions of fitness and expediency"; and, while, perhaps, discretion should always be exercised sparingly, and surely not unnecessarily, yet the duty of using it is one the law requires of him, and which he should perform with firmness and without hesitation in all cases where he deems it necessary to execute justice and maintain the right.

No error.

BROADWELL et al. v. MORGAN.

(Supreme Court of North Carolina. Oct. 30, 1900.)

1. PUBLIC LANDS—GRANT—SEAL OF STATE.

The recital in the body of a grant from the state, as recorded, of the affixing of the seal of the state, is sufficient evidence of its regularity, and the registry of the grant is not invalidated because it does not appear of record that a scroll or imitation of the great seal of the state was copied thereon.

2. EVIDENCE—DESCRIPTION OF LAND CONVEYED—DEFINITENESS.

A deed describing the point of beginning, in describing the land conveyed, as "beginning at a pine on the east side of Gum Swamp," is sufficiently definite, so as to render parol evidence admissible to locate the point of beginning.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2116-2122.]

3. BOUNDARIES—ESTABLISHMENT OF CORNERS—EVIDENCE—SUFFICIENCY.

A deed, in describing land, described the boundary as "beginning at a pine on the east side of" a swamp. A witness testified that he had known the land and the beginning corner for 50 years; that he knew where the beginning corner was, and had started surveyors there; that there was nothing there to show the corner but a stub in the ground; that a disinterested person, since deceased, who had lived about half a mile from the place, pointed out the corner; and that the stub was at that point. Surveyors starting at that point had found chopped and blazed pines along the line. Held sufficient to locate the corner.

4. EVIDENCE—DECLARATION AS TO BOUNDARY—ADMISSIBILITY.

The declaration of a person since deceased in regard to the location of a corner is admissible, where he had lived in the vicinity and was disinterested.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1121-1134.]

5. EJECTMENT—PROOF OF TITLE.

Where, in ejectment, plaintiff showed a grant from the state to a third person and conveyances from the latter, and that plaintiff and those under whom he claimed had had actual possession for 7 years, the question whether plaintiff was in possession for 25 years before the commencement of the action was immaterial.

Appeal from Superior Court, Scotland County; Moore, Judge.

Ejectment by W. L. Broadwell and others against Mark Morgan. From a judgment for plaintiffs, defendant appeals. Affirmed.

M. L. John, I. D. Shaw, and E. H. Gibson, for appellant. J. A. Lockhart, for appellee.

BROWN, J. The plaintiff claims title to a certain tract of land described in the complaint and known as "Bill Place." In making out title plaintiff offered in evidence a grant to John MacDonald, dated June 30, 1797, containing 100 acres, described as follows: "Beginning at a pine on the east side of Gum Swamp, and runs north 30 degrees west, 80 poles, to a pine near the log branch; then south 60 degrees west, 200 poles, crossing said swamp, to a corner; then south 30 degrees east, 80 poles, to a corner; then north 60 east, 200 poles, to the beginning." The plaintiff also offered several deeds in his proof of title containing practically the same description. The defendant in apt time objected to the introduction of the grant, because it does not appear of record that it had been properly probated and ordered recorded. Grants and patents issued by the sovereign are proven by the seal and are entitled to enrollment and thereby become public records. Malone on Real Property Trials, p. 154. We do not understand that it is contended there is no seal to the grant or that it was omitted from the registry. But, if it does not appear of record that a scroll or imitation of the great seal of state was copied thereon, that does not invalidate the registry of the grant. The recital in the body of the grant, as recorded, of the affixing of the seal, is sufficient evidence of its regularity. Aycock v. Railroad, 89 N. C. 323.

The defendant further contends that the grant and deeds are void for insufficient description; that "beginning at a pine on the east side of Gum Swamp" is such an indefinite beginning that parol evidence is inadmissible to locate it. For this position the defendant relies on Holmes v. Sapphire Company, 121 N. C. 411, 28 S. E. 545, and Hinchey v. Nichols, 72 N. C. 66. The headnote of the former case seems to support the contention of the defendant, but upon a careful examination of the opinion we find the headnote to be misleading. In that case the beginning corner was at "a large chestnut, runs thence S. 25° W.," etc. It is evident that, if the large chestnut could be located, the entire grant could. While the court says the description in the grant is not as definite as it ought to be, it does not declare it void on that account. The decision is based solely upon the ground that the evidence is insufficient to locate the beginning or other calls of the grant. An examination of the evidence in that case sustains the view of the court, for there seems to have been an utter

failure of testimony tending to prove the beginning corner of the land in controversy. We think the case of *Hinchey v. Nichols* falls far short of supporting defendant's position. In that case the land was described as on a big branch of Luke Lees creek, beginning at or near the path that crosses the branch, on a stake, etc. The court held that the grant was void and could not be located by parol evidence. It is a settled rule of construction in this state that when "stakes" are called for in a deed, with no other added description than course and distance, they are intended by the parties as imaginary points. They are not natural objects, and have no permanency. *Massey v. Bellisle*, 24 N. C. 170; *Mann v. Taylor*, 49 N. C. 272, 69 Am. Dec. 750. A pine is a natural object, and when called for in a deed as a corner or beginning point is understood to be permanent evidence of where the boundary is. We know of no authority, and have been cited to none, which renders the description in *McDonald's* grant void because the pine was not described by marks or other designation. On the other hand, this court has held quite the contrary. In *Allen v. Sallinger*, 108 N. C. 160, 12 S. E. 896, the description in the grant is: "Begins at a pine in Rolach line, thence," etc. In the opinion it is said: "It is needless to cite authority to prove that evidence allunde would have been competent to locate the pine at the beginning."

It is further contended that the beginning of the tract is not proven, and therefore it cannot be located. The witness Alex McIntyre testified that he had known the land in controversy and the beginning corner for 50 years; that he knew where the beginning corner was, and had started surveyors there "a time or two"; that there is nothing there now to show the corner, but a stub in the ground; that Nell Leach, now dead, and an old man at the time, who was disinterested, and who lived about half a mile from the place, pointed out this corner; that the stub is where Leach pointed the corner as the beginning of the boundary. There is evidence that the surveyor started at that point and found chopped and blazed pines along the line. Upon an examination of the plaintiff's evidence, we think it amply sufficient, if believed by the jury, to locate the land. The objection to the declarations of Leach, made long ago to the witness McIntyre, as to the beginning point of the land, cannot be sustained. *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273; *Bland v. Beasley*, 140 N. C. 628, 53 S. E. 443.

The court, in charging the jury, said "there is evidence that plaintiffs were in possession of the land for 25 years or more before the commencement of this action." This is not material. The title being out of the state, as shown by the grant to *MacDonald*, there is ample evidence in the record to go to the

jury that plaintiffs and those under whom they claim acquired title by color and 7 years' actual possession. *Mobley v. Griffin*, 104 N. C. 115, 10 S. E. 142, and cases cited.

We have examined carefully all the exceptions in the record, and find no error.

JOHNSON v. JOHNSON.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. DIVORCE — ANNULMENT OF MARRIAGE — PLEADING—COMPLAINT—VERIFICATION.

A suit by a wife to annul the marriage on the ground that she was of unsound mind at the time of the marriage, is a proceeding for divorce, and the court has no jurisdiction unless the complaint is verified as required in divorce cases.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, §§ 283, 340.]

2. SAME—MOTION TO SET ASIDE DECREE—PARTIES—RIGHT TO INTERVENE.

In a suit by a wife to annul the marriage on the ground that she was of unsound mind at the time of the marriage, a decree was rendered invalidating the marriage, but plaintiff subsequently moved to set aside the decree on the ground that the court had no jurisdiction, and a third person sought to intervene and oppose the motion on the ground that he had purchased land from those whom he was informed and believed had purchased the same from plaintiff. *Held*, that there was no ground for permitting such intervention.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Divorce, § 534.]

Appeal from Superior Court, Chatham County; Moore, Judge.

Suit by Adella V. Johnson against W. Mangum Johnson, to set aside the marriage of the parties, in which a decree was rendered for plaintiff. Motion by plaintiff to set aside the decree, and application by J. A. Dark to be allowed to intervene and oppose the motion. From a judgment denying the application of Dark, and granting plaintiff's motion, Dark appeals. Dismissed.

See 53 S. E. 623, 141 N. C. 91.

Motion to set aside decree, invalidating her marriage to the defendant, made by plaintiff. At the same time, J. A. Dark made application to be allowed to intervene, and oppose said motion. The motion and application were heard by Judge Moore, who denied the application of Dark, and granted the plaintiff's motion, from which judgment the said Dark appealed, and assigns as error, first, that the court erred in refusing the said application to intervene, and second, that the court erred in granting the plaintiff's motion.

H. A. London & Son, R. H. Hayes, and W. D. Siler, for appellant. N. Y. Gulley and R. H. Dixon, for appellee.

BROWN, J. The petitioner, Dark, bases his right to intervene upon the ground that "the affiant is the owner of certain real property, which is a part of the property

described in the complaint in this action, having paid a full and fair price for the same, and taken a deed therefor from H. A. London, W. D. Siler, and R. H. Hayes, who, as he is informed and believes, had purchased the same from the plaintiffs, and that, as such owner, he desires to interplead in this cause, and set up his rights." His honor denied Dark's application to intervene on the hearing of the plaintiff's motion, and then adjudged "that so much of the decree made at May term, 1905, as declares the marriage of Adella V. Johnson and W. Mangum Johnson to be null and void to be set aside, the same being irregular and void, the pleadings not being verified as required by statute, the court had no jurisdiction to make such decree, and the parties are allowed to resume their former relation as husband and wife."

The petitioner, Dark, had no right to be heard upon this motion. Pomeroy, Code Rem. §§ 320 and 321. He was not a party to the action, and cannot be heard on a motion to set aside the decree made by the plaintiff upon the ground that the superior court had acquired no jurisdiction. If it should turn out upon a trial that his title is affected because the court set aside a decree it had no jurisdiction to render, it is his misfortune. This is a proceeding for divorce. *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692. It is so held in this case in the concurring opinion on the former appeal which the writer approves. The affidavit required in divorce cases being jurisdictional, it follows that, in the absence of it, the court was powerless to make the decree, which has therefore been properly set aside. *Hopkins v. Hopkins*, 132 N. C. 22, 43 S. E. 508.

Appeal dismissed.

STATE v. MATTHEWS.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. CRIMINAL LAW—FORMER JEOPARDY.

Where a conviction of murder in the second degree under an indictment charging murder in the first degree, is set aside, accused on a subsequent trial, may be tried for murder in the first degree.

2. INDICTMENT AND INFORMATION—CONVICTION OF LESSER OFFENSE—STATUTORY PROVISIONS.

Under an indictment for murder in the form prescribed by Revisal 1905, § 3245, without setting out the means used, the jury may, under section 3269, providing that on the trial of an indictment, the prisoner may be convicted of a less degree of the crime charged, and section 3271, authorizing the jury to determine whether the crime is murder in the first or second degree, find accused guilty of murder in the second degree.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indictment and Information, § 577-579.]

3. SAME.

Revisal 1905, § 3269, providing that on the trial of an indictment, the accused may be con-

victed of a less degree of the crime charged, and section 3271, providing that the jury shall determine in their verdict whether the crime is murder in the first or second degree, apply to all indictments for murder defined by section 3631, declaring that a murder which shall be perpetrated by means of poison, lying in wait, etc., shall be murder in the first degree.

4. HOMICIDE—DEGREES—BURDEN OF PROOF—PRESUMPTIONS.

The rule that proof of intentional killing with a deadly instrument raises a presumption only of murder in the second degree, casting on the state the burden of proving murder in the first degree, applies only to cases of homicide in which premeditation must be shown, and not to a homicide committed by poison, lying in wait, etc., and as to these, when intentionally done, the law raises the presumption of murder in the first degree.

5. INDICTMENT AND INFORMATION—CONVICTION OF LESSER OFFENSE.

Where, on a trial for murder in the first degree, the evidence showed that the crime was committed by poisoning, so that the law presumed that the killing was murder in the first degree, the jury might, under Revisal 1905, § 3269, providing that on the trial of an indictment, the prisoner may be convicted of the crime charged, or of one of a less degree, and section 3271, providing that the jury must determine whether the crime is murder in the first or second degree, find that accused was guilty of murder in the second degree.

Appeal from Superior Court, Guilford County; Ferguson, Judge.

J. B. Matthews was convicted of murder in the second degree, and he appeals. Affirmed.

Guthrie & Guthrie and Stedman & Cooke, for appellant. The Attorney General and Walter Clark, Jr., for the State.

CLARK, C. J. The prisoner, indicted for the murder of his wife, was convicted of murder in the second degree. His counsel quote as the settled ruling of this court that "upon appeal from a conviction for a lesser offense than that charged in the indictment, a new trial, if granted, must be upon the full charge in the bill," and cite the cases to that effect, beginning with *State v. Stanton*, 23 N. C. 424, and since *State v. Grady*, 83 N. C. 643; *State v. Craine*, 120 N. C. 601, 27 S. E. 72; *State v. Groves*, 121 N. C. 568, 28 S. E. 262; *State v. Freeman*, 122 N. C. 1012, 29 S. E. 94; *State v. Gentry*, 125 N. C. 733, 34 S. E. 706, and say that the prisoner abandons all exceptions for which a new trial may be asked, and "confines his appeal solely to a motion in arrest of judgment for matters appearing of record." The statement of law, as to the rulings of this court is correct. The Supreme Court of the United States, in a very recent case (*Trono v. U. S.*, 199 U. S. 521, 26 Sup. Ct. 121, 50 L. Ed. 292), has reviewed the authorities, and sustained the principle that a new trial in a capital case goes to the whole case, regardless of the former verdict. It is in the election of an appellant to abandon here any exceptions, which, out of abundant caution, he may have taken below, and which, upon reflection, he thinks he should not press in this court. This course has been often suggested and recom-

mended by this court, that counsel should "sift out and abandon those (exceptions) which, on deliberation, they find trivial and untenable. This would aid the court to a just consideration of the appeal by directing its attention to what counsel deem the fatal errors only, which, in the vast majority of cases, can be presented by a very few exceptions." *Pretzfelder v. Insurance Co.*, 123 N. C. 167, 31 S. E. 470, 44 L. R. A. 424.

The record shows simply an indictment for murder in the form prescribed by Revisal 1905, § 3245 (which does not set out the means used), and a verdict thereon of murder in the second degree. Revisal 1905, § 3269, provides: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged or of an attempt to commit a less degree of the same crime." Revisal 1965, § 3271, provides that "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." Upon the record there is an indictment for murder and a conviction of murder in the second degree as authorized by statute. There is no ground in the record on which to base the prisoner's motion to arrest the judgment. The prisoner contends, however, that it appears from the case on appeal and the evidence sent up therein that the indictment was for murder by poisoning, and that, from the nature of the case, this must be murder in the first degree. The "case on appeal" is a part of the transcript on appeal, and is a narrative of such matters which took place at the trial as are pertinent to the exceptions taken. It is no part of the record proper. *Thornton v. Brady*, 100 N. C. 38, 5 S. E. 910 (which has been often approved) defines the "record" as embracing only the summons or indictment, pleadings (in civil cases), verdict, and judgment. But if the indictment had charged "poisoning" as the means by which the prisoner had committed the murder, the motion to arrest the judgment would be no better founded. Revisal 1905, § 3631, enumerates the instances of murder in the first degree as follows: "A murder which shall be perpetrated by means of poison, lying-in-wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed murder in the first degree." The above-cited sections of Revisal 1905, § 3269, authorizing a jury to return a verdict for a lesser degree of any offense on an indictment for a greater, and section 3271, empowering a jury to determine in their verdict whether the prisoner is guilty of murder in the first or second degree, apply equally to all indictments for murder, whether perpetrated by means of poisoning, lying in wait,

imprisonment, starving, torture, or otherwise. In *State v. Freeman*, 122 N. C. 1016, 29 S. E. 94, the court held that the judge erred in telling the jury that, in their discretion, they could return a verdict of murder in either the first or second degree, but should have told them that they should find the prisoner guilty of that degree proved by the evidence (*State v. Covington*, 117 N. C. 834, 23 S. E. 337; *State v. Norwood*, 115 N. C. 791, 20 S. E. 712, 44 Am. St. Rep. 498), and added: "This instruction was erroneous, and not warranted by any decision of this court, but it is an error in favor of the prisoners, and one which cannot be complained of by them." To same effect, *State v. Hunt*, 123 N. C. 586, 38 S. E. 473; *State v. Caldwell*, 129 N. C. 684, 40 S. E. 85; *State v. Locklear*, 118 N. C. 1158, 24 S. E. 410; *State v. Gilchrist*, 113 N. C. 676, 18 S. E. 319 (these last two cases were for murder by lying in wait); and there are others.

At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse, devolved upon the prisoner. The statute dividing murder into two degrees (now Revisal 1905, § 3631) contains no reference to this rule, but this court, in *State v. Fuller*, 114 N. C. 885, 19 S. E. 797, held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the state to aggravate the offense to murder in the first degree, as it was on the prisoner to reduce it. But this applies only to cases of homicide, in which premeditation must be shown, and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment, or torture. As to these, when intentionally done the law still raises the presumption of murder in the first degree, as the prisoner justly contends. But none the less if the jury convict of a less offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. At common law, there might be a conviction of manslaughter on an indictment for homicide by poisoning, and in this case the judge charged: "If, however, at the time he took the dose of morphine, the prisoner had no thought or purpose to take the life of his wife, and, afterwards, while under its influence, he administered the poison with intent to kill her, and at the time, from the effect of such morphine so taken, he was unconscious of the character of the crime he was committing, he would not be guilty of murder in the first degree for want of power to deliberate, and not with premeditation and deliberation, but could not be excused because of the tempo-

rary insanity brought on himself voluntarily, and he would be guilty of murder in the second degree."

There is no exception to this charge and we do not pass upon it, but the jury may have taken that view of the evidence. But whatever the reasoning of the jury, the prisoner has no cause to complain that he was not convicted of the higher offense.

No error.

DAVIS v. EVANS.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. JUSTICES OF THE PEACE—JURISDICTION—TITLE TO LAND—ACTION ON NOTES.

The title to land not being in issue in an action on a note for \$75 given for a part of the purchase price of land, a justice of the peace had jurisdiction of the action.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 88.]

2. EVIDENCE—PAROL EVIDENCE—WRITTEN CONTRACT.

Parol evidence is admissible to show that a note sued on was given for the purchase price of land.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 1925.]

3. VENDOR AND PURCHASER—NOTES FOR PRICE—REQUISITES.

It is not necessary that a note given to a vendor for a part of the price of land should contain a description of the land or refer on its face to the deed.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 366; vol. 7, Cent. Dig. Bills and Notes, § 44.]

Appeal from Superior Court, Granville County; Ferguson, Judge.

Action by S. E. Davis against W. E. Evans, as administrator, etc. From a judgment for plaintiff, defendant appeals. Affirmed.

See 51 S. E. 956.

Action commenced before a justice of the peace and tried on appeal at August term, 1906, of Granville superior court. The court submitted one issue to the jury: "Has the note sued on, or any part thereof, been paid; and, if so what part? Ans. No."

B. S. Royster, for appellant. Graham & Devin, for appellee.

BROWN, J. The plaintiff sued on a note for \$75 alleged to have been given for the purchase money of the land described in a deed executed November 7, 1898, by the plaintiff to the defendant's intestate. The defendant contends: "(1) That under the pleadings and evidence the plaintiff was not entitled to have judgment declared to be for the balance of the purchase money of the tract of land described in said judgment. (2) That there was no evidence before the court that the note sued on was for a balance of the purchase price of the land described in said judgment. (3) That the note contained no description of the land for which it purported to be given in part or in whole of the purchase price. (4) That parol evidence could not be introduced as to the land for which the note was given in part of the purchase price, because there is no sufficient description of the land in said note which could be aided by parol evidence."

The justice of the peace had jurisdiction, as the title to the land was not in issue. It is competent to prove by parol evidence that the note was given for the purchase money of the land. *Buile v. Scott*, 112 N. C. 375, 17 S. E. 160; *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683. It is not necessary that the note should contain a description of the land or refer on its face to the deed. *Durham v. Wilson*, supra. The testimony of the witness Davis tended to prove most conclusively (and it was uncontradicted) that the note sued on was executed at the same time the deed was, and that he wrote and witnessed both the note and the deed, and that the note was given for the unpaid part of the purchase money. Had the defendant demanded it in apt time and tendered an appropriate issue, he had the right to have the question submitted to the jury as to whether or not the note was given for the purchase money of the land described in the deed. *Durham v. Wilson*, supra. The defendant tendered no issues and failed to except to the one submitted, but tried the case solely on the plea of payment.

No error.

FAYETTEVILLE ST. RY. v. ABERDEEN & R. R. CO.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. RAILROADS—RIGHT OF WAY—PRIORITY.

Where grants of two railroad franchises are indefinite as to the exact route to be selected, the prior right will attach to that company first locating its line by defining and marking the route and adopting it by authoritative corporate action.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 127.]

2. SAME—SURVEY.

Where a right of way is clearly defined and is staked out by a company, and the route so marked is adopted by the company, the entry of an engineer and a survey is not necessary to the location as against another company seeking the same right of way.

3. SAME—FILING OF PLAT.

The requirement of Revisal 1905, § 2600, that railroad corporations within a reasonable time file a map and profile of their route and right of way with the Corporation Commission, does not require such a filing as an essential of a completed location of the right of way as against another company.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 121.]

4. SAME—PRIOR LOCATION.

A street railway by a directors' resolution adopted an abandoned railway roadbed as its right of way between two towns, staked out such roadbed, engaged agents to secure the necessary options, some of which were secured, and subsequently, by its directors, ratified and re-adopted the location as staked out. *Held* to constitute a prior location as against a railroad company afterwards surveying a line over the same roadbed and purchasing and condemning part thereof.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 121.]

5. STREET RAILROADS — INCORPORATION — ATTACKING VALIDITY — COLLATERAL ATTACK.

That the capital stock of a street railway company has not been issued, and that no money has been paid thereon, and that no part of the railway is constructed within a town, are matters not open to collateral investigation in injunction proceedings to determine the right of such company to a right of way as against a rival railroad company.

6. STREET RAILWAY — WHAT CONSTITUTES — INTERURBAN RAILWAY — RIGHT OF WAY.

Under Revisal 1905, § 1138, defining a street railway as including a railway operated between points in different municipalities lying near each other, or between the territory contiguous to the home municipality, and providing against an extension of more than 50 miles from the home municipality, it is no objection to the right of a street railway to locate a right of way between two towns that no part of its line has been constructed in any town.

7. STREET RAILROADS — ORGANIZATION — WHEN COMPLETE — ISSUANCE OF STOCK — PAYMENT OF MONEY.

Under Revisal 1905, § 1140, providing that the persons associated shall constitute a corporation from the time of filing a proper certificate, and section 1141, giving the signers of the certificate temporary power as directors, it is no objection to the obtaining of a right of way by a street railway that its capital stock has not been issued and that no money has been paid thereon.

55 S.E.—22½

8. RAILROADS — RIGHT OF WAY — CONDEMNATION — PRIORITY.

A specific right granted by the franchise of a railroad to condemn abandoned rights of way does not authorize it to condemn an abandoned right of way on which there is a prior location by a street railway.

9. SAME.

Where a railroad has no express grant to condemn a right of way already located by a street railway, and no necessity exists for such a proceeding, and such right of way is only sufficient for the laying of one track, the general power of condemnation is insufficient to authorize the condemnation of such right of way.

10. INJUNCTION — GROUND OF RELIEF — ACTUAL VIOLATION OF RIGHT — RIGHT OF WAY.

Injunction will lie to protect a street railway's located right of way from interference by another company which is seeking to acquire the same by purchase and condemnation, and whose engineers are surveying with a view to immediate occupation.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 10-13.]

Appeal from Superior Court, Cumberland County; Council, Judge.

Injunction by the Fayetteville Street Railway Company against the Aberdeen & Rockfish Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Action for permanent injunction to restrain defendant from interfering with a right of way claimed by plaintiff, heard at Lumberton, N. C., 1906, on an order to show cause why the temporary restraining order heretofore granted should not be continued. It seems to have been agreed between the parties that the restraining order should be continued on both parties till their rights should be finally determined, and that the judge should hear the testimony and find the facts to the end that such determination should be had before him at this hearing, and considered and passed upon in the present appeal; and the record states that the judge, on hearing the pleadings, affidavits, proofs, and admissions, found the facts and entered judgment that the plaintiff had acquired no superior rights to defendants to occupy and build a road on the location in dispute, and that the permanent injunction prayed for be refused. From the facts found by the judge, it appears that plaintiff on August 23, 1906, after securing a franchise from the city of Fayetteville to build a street railway, obtained a street railway charter for that purpose from the Secretary of State under the general corporation law, which, among other things, authorizes the construction of branch lines to towns within a radius of 50 miles, and on the same day, after organizing by electing directors and officers, held a directors' meeting, and by formal resolutions adopted as the permanent location of its branch line to the town of Hope Mills, 7 miles distant, the old roadbed of the Cape Fear & Yadkin Valley Railroad between Fayetteville and Hope Mills, which had been

abandoned several years before, and ordered the same to be staked out and a force of hands put to work clearing it; that on August 24, 1906, plaintiff had its adopted location staked out by driving stakes in the center of said abandoned roadbed from a point near Holt Morgan's Mills, the southern suburb of the city of Fayetteville, to a point where the said roadbed should cross the main street of the village of Hope Mills, and on said August 24th plaintiff commenced work at a point near the Holt Morgan Mills, clearing off its adopted location; that on the evening of August 23d plaintiff engaged the services of C. J. Hedgpeth and J. W. Hodges, a justice of the peace, to get options from the owners of land along which its adopted location extended, and on the next day five such options were secured, another on the 27th, and another on the 28th; that a special meeting of the directors of plaintiff was duly called and held on August 27, 1906, at which W. D. McNeill, president of plaintiff, and W. E. Kinley, vice president, made a report that plaintiff had had the said abandoned roadbed, its adopted location, staked out on August 24th, and on that day commenced clearing off the same, and that, further, at said meeting the board of directors, by resolutions approved, ratified and confirmed the action of the company at prior meetings, and readopted the old roadbed, which had been staked out under its direction, as the adopted location of its line between said two towns; that plaintiff was duly organized August 23, 1906, \$60,000 of its capital stock having been subscribed for, and on August 27th had a stockholders' meeting, at which all of the capital stock was represented, stock was assessed at 100 per cent., to be paid as same should be called for by the directors; that on the same day the directors made a call for a sum sufficient to meet present demands of the company, which was paid into the treasury, but no other part of the subscription had been paid in; that plaintiff had done no work whatever in Fayetteville, Hope Mills, or any other incorporated town up to the time of action against it; that such work as had been done by plaintiff was outside of any incorporated town, beginning about a mile from Fayetteville, and, further, that plaintiff had proceeded up to the time of action commenced without procuring a right of way over any of the land along said roadbed from any of the owners, or instituted any condemnation proceedings, and without paying in any part of the capital stock except as heretofore stated; that the bottom of excavations and top of embankments along the line of the abandoned roadbed is wide enough for only one railroad track, and, if the defendants are allowed to interfere with plaintiff's preparation of its right of way, the damage will be irreparable. Plaintiff avers in its complaint, used as an affidavit, that it proposes

to institute all proper proceedings for the ascertainment and payment of damages to the lands over which it has located its road where agreement as to price cannot be had with the owners of the lands; that the defendant, the Aberdeen & Rockfish Railroad Company, is a solvent corporation which began the construction of its road at Aberdeen, N. C., and has completed the same to Hope Mills, has laid down 54 miles of track, with necessary rolling stock, and is operating the said road to that point, and having by its charter, in addition to the general right of condemnation, the right to condemn any abandoned roadbed not now in use; that on July 8, 1904, the defendant, having reached the village of Hope Mills, entered into a contract with the Atlantic Coast Line Railroad Company that it would not then cross the line or build beyond said village towards Fayetteville for a period of five years, there being then no other railroad connection to be acquired by extending its line to Fayetteville; that after plaintiff had adopted and located the line as above stated at different dates, from August 29th to September 8th, the defendant company proceeded to obtain deeds for portions of the abandoned roadbed between Fayetteville and Hope Mills, which said deeds are now on record and registered within the dates above specified; and said defendant company has further instituted condemnation proceedings against other owners of property along said disputed line, the summons in said proceedings bearing date at different times, but all on or after August 30, 1906. And on August 29, 1906, the defendant company had its chief engineer, Jerry Respass, to survey a line over the roadbed in dispute; and defendant avows its intention to acquire and appropriate the said abandoned roadbed by purchase and condemnation for its right of way. In section 11 of the answer the purpose of the claim of the defendant is set forth as follows: "That this defendant regards this abandoned roadbed as open and unused land over which no railroad company or street car company or power company or any other company had any right, dominion, or control other than such rights as might be acquired by due process of law over any other unoccupied, unused, and uncleared real estate, and in good faith, and acting upon such belief, it has proceeded, by the two methods provided by the laws of the state, to acquire title, to wit, by purchase and condemnation, and has been pursuing these two courses in order to secure its right of way." As heretofore stated, his honor dissolved the injunction, held that the plaintiff had acquired no prior right to the defendant to occupy and build the road over the land in dispute, and refused the permanent injunction. To this judgment the plaintiff excepted and appealed.

S. H. MacRae and Sinclair & Dye, for appellant. Rose & Rose, McLean, McLean &

McCormick, and Robinson & Shaw, for appellee.

HOKE, J. (after stating the case). There seems to be no substantial difference between the parties as to any facts material to the controversy, and the principal question presented on this appeal is as to which of these two companies has the better right to appropriate and use the old and abandoned roadbed from Fayetteville to Hope Mills as its right of way. It may be well to note that defendant does not resist the plaintiff's claim in this matter simply by reason of its having purchased certain portions of this old roadbed from some of the owners along the route, but, as shown in section 11 of the answer, the defendant, denying the validity of any claim made by plaintiff, asserts its own intention and right to go on and acquire, by condemnation and purchase, the use of this roadbed for its own right of way. The question, then, is fairly presented as to which of these two claimants has the better right; and on this question the authorities are to the effect that where the grants are indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which first locates the line, and, in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks its route and adopts the same for its permanent location by authoritative corporate action. *Lewis on Eminent Domain*, vol. 2, § 366; *Railway v. Railway*, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220; *Railway v. Railway*, 159 Pa. 331, 28 Atl. 155; *Johnston, Childs, et al., Ex'rs, v. Callery*, 184 Pa. 146, 39 Atl. 73; *Railway v. Blair et al.*, 9 N. J. Eq. 635; *Railway v. Railway (C. C.)* 110 Fed. 879. In *Railway v. Railway*, 159 Pa. 331, 28 Atl. 155, it is held "that the requisites of a valid location of a railroad as to third persons and rival corporations are, first, a preliminary entry by engineers and surveyors who run and mark the lines and report them to the company; second, the adoption of such a line by the board of directors." This entry of engineers and survey is to define and mark the line; and where this is clearly defined, as here, by the existence of an old roadbed, which is entered on and staked out by the agents of the company, and the route so marked is approved and adopted by the directors as its permanent location, in such case a survey by engineers is not of the substance, and should not be considered as essential.

Lewis, Eminent Domain, § 366, criticises the decision of *New Brighton Ry. v. Pittsburgh Ry.*, 105 Pa. 13. In the section referred to this author says: "Where the conflict arises out of rival locations over the same property by companies acting under general powers, that one is entitled to priority which is first in making a completed location over the property, and the relative dates of their

organizations or charters are immaterial." And again, in same section, as pertinent to this question: "The making of a preliminary survey by an engineer of a railroad company, never reported to the company or acted upon, will not prevent another company from locating on the same line." And, further: "Where priority of right has been secured by priority of location, it cannot be defeated by a rival company agreeing with the owners and purchasing the property. The reasoning of *Shiras, J.*, upon this point is so cogent that we cannot do better than quote it: 'It is certainly equitable that a company which, in good faith, surveys and locates a line of railway, and pays the expenses thereof, should have a prior claim for the right of way for at least a reasonable length of time. The company does not perfect its right to the use of the land as against the owner thereof until it has paid the damages, but, as against a railroad company, it may have a prior right and better equity. The right to the use of a right of way is a public, not a private, right. It is, in fact, a grant from the state, and, although the payment of the damages to the owner is a necessary prerequisite, the state may define who shall have the prior right to pay the damages to the owner, and therefore acquire a perfected right to the easement. The owner cannot, by conveying the right of way to A., thereby prevent the state from granting the right to B. All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the state has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest, and also what shall constitute an abandonment of such right. * * * The injustice and injury to private and public rights alike which would arise were it held that after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road or extort a heavy and exorbitant payment from the company first locating its line as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the sheriff for the appointment of commissioners.'" In some of the authorities supporting this position, it is stated as one of the requirements that the route or line, after being surveyed, shall be platted and returned to the general offices of the company, and there approved as stated; and in others that such survey and

plats shall be filed in some public office and there recorded. But this will, no doubt, be found on examination to be on account of some public statute or provision of the charter, and is not an incident of a completed location as a general proposition. There is no such statute with us. By Revisal 1905, § 2600, railroad corporations are required, within a reasonable time after the road is constructed, to file a map and profile of their route and of land condemned for its use with the Corporation Commission. But this is for information deemed necessary to enable that body to deal intelligently with matters within the scope of its duties, and is not required as a part of a correct and completed location. An application of these principles to the facts before us clearly establishes, we think, that the plaintiff has the prior right to the use of the roadbed as a part of its right of way.

After obtaining a charter and organizing under it, this roadbed on August 23d, by resolution of its directors, was formally adopted as its permanent location between Fayetteville and Hope Mills, and direction given to mark and stake the line. On August 24th this was done by the agent of the company appointed for the purpose, report was duly made to the company, and on August 27th this action was likewise, by resolutions of the directors, approved, ratified, and confirmed, and plaintiffs avow their good faith and their intention and ability to go on and condemn the right of way and construct their road pursuant to law. There are various objections urged by defendant against the validity of plaintiff's claim, but none of them, we think, can be sustained.

It is contended that the capital stock has not been issued and that no money has been paid thereon, and that plaintiff, incorporated as a street railway, has built no part of the road as yet in Fayetteville or any other town, but is only proceeding in the country, and on a branch road, before the main road is constructed. These and all such objections, even if valid, could only be made available by direct proceedings instituted by some member of the company for unwarranted or irregular procedure on the part of the officers, or by the state, for abuse or nonuse of its franchise, and are not open to collateral investigation in a case of this character, nor at the instance of defendant. Railroad v. Railway & Lumber Co., 114 N. C. 690, 19 S. E. 646. But these objections are not valid. Plaintiffs have taken out their charter under the general corporation law, as they are authorized to do by section 1138 of the Revisal of 1905, and this section also provides that the term "street railways" includes railways operated by steam or electricity, or any other motive power, used and operated between different points in the same municipality, or between points in municipalities lying near or adjacent to each other, or between the territory lying contiguous to the municipali-

ty in which is the home office of the pany; and such railways may carry an liver freight, etc.; with a proviso that such railway shall operate a line exterior in any direction more than 50 miles from municipality in which the home office is ate, etc. Section 1140 provides that the sons associated shall constitute a corporation from the time of filing a proper certificate the office of the Secretary of State. And tion 1141 provides that until the directors are elected the signers of the certificate shall have the direction of the affairs and organization of the corporation, and may take such steps as are proper to obtain the necessary subscriptions and stock and to perfect organization. [We find no requirement of statute that the stock should be issued or paid up before a valid organization can be effected or corporate action taken.] The plaintiff, therefore, has thus far acted in accordance with law and within its chartered rights and privileges, and the objections referred to are not well taken.

Again, it is claimed by defendant that its charter gives it the specific right to condemn old and abandoned roadbeds; and so it does. And if this route in dispute had remained an old and abandoned roadbed—simply that, and nothing more—defendant would have the undoubted right to acquire and use it. But if plaintiff, as we have held, has established over it a prior right of appropriation, then this old roadbed has changed its complexion. It no longer fills the description of this specific provision of plaintiff's charter. It has, so far as defendant's present claim is concerned, become a part of plaintiff's right of way. Defendant further takes the position that it has the right to condemn this roadbed, including the plaintiff's right of way, under the general powers given in its charter. This position is hardly open to defendant; for, as heretofore stated, defendant is here asserting that plaintiff has no right of way, and seeks to condemn the route as open and unoccupied territory; but, assuming that the allegations and evidence set out in the record present the question, the law is against the defendant's position. It is undoubtedly true that property which has been appropriated to public use, railroad or other, may, under lawful authority and procedure, be condemned and so appropriated to another public use. But where such second appropriation is entirely inconsistent with the first, or practically destroys it, such power can only be exercised by reason of legislative authority given in express terms or by necessary implication. The test as to when this authority will be implied is well stated in the case of *Springfield v. Railroad*, 58 Mass. 63, as follows: "An act of the Legislature which authorizes the construction of a railroad between certain termini, without prescribing its precise course and direction, does not prima facie confer power to lay out the road on and along an existing

ly, but it is competent to the Legislature to grant such authority, either by express words or by necessary implication; and application may result either from the force of the act, or from its being shown, application of the act to the subject; that the railroad cannot, by reason of the act, be laid in any other line." Elsewhere it is further held "that it be a necessity arising from the very nature of things over which the corporation has control, and not a necessity created by the company itself for its own convenience for the sake of economy." This statement of a doctrine will be found supported by weight of well-considered authority. See on Eminent Domain, vol. 1, § 267, c.; *Elliott on Railroads*, vol. 3, § 974; *Springfield v. Railway*, supra; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *In re City of Buffalo*, etc., 68 N. Y. 167; *Pittsburgh Junction v. Railroad*, 122 Pa. 511, 6 Atl. 564, 9 Am. St. Rep. 123. A decision referred to in our own court (*Railroad v. Railroad*, 83 N. C. 490) is in accord with another principle applicable to the subject, "that, while a general grant of power will not ordinarily justify the taking of property already devoted to a public use and applying it to another and different use, a general grant of a power of eminent domain for a particular purpose may be sufficient to authorize such an appropriation as will not essentially injure or interfere with the public use to which the property is already devoted." *Amer. & Eng. Ency.* vol. 10, p. 95. This principle does not in any way conflict with our present ruling, which, as stated, involves the proposition that the application to the second use is entirely inconsistent with, or practically destroys the enjoyment of, the first.

An extract from the North Carolina decision will disclose the principle on which it was based, and show that the opinion in no way conflicts with our present decision. Says the Chief Justice: "It is reasonable, as contended in the argument for the plaintiffs, that land of one such corporation, necessary for the exercise of its franchise and to the discharge of its duties, should not be taken and appropriated by another corporation no more important or useful, unless upon a clear expression of the legislative intent to confer it, and then the act itself would be a declaration that the condemnation was required for the public good. If the present application were to have this effect and seriously injure the business of the plaintiff companies, we would hesitate to hold that the right of way demanded by the defendant could be condemned under the general words found in its charter. But it is entirely otherwise. No real interruption of the plaintiff's business, no interference with the exercise of the franchise conferred in the charter, and, in the opinion of the witnesses, little or no inconvenience to transportation, will result from the construction

of another track by the side of that of the plaintiff's and eight feet or more from it, as proposed to be done by the commissioners. At least such additional track can be laid down, and, if built, will not seriously, if at all, disturb the operations of the plaintiff companies, or their putting down and using a second track when required for an enlarged transportation in the future." 83 N. C. 496.

1. Here, as we have just seen, there is no express grant to condemn the plaintiff's right of way.

2. There is no necessity shown for such action. The defendant, under the general power of condemnation, can readily, at least so far as the testimony shows, obtain another right of way from Hope Mills, its present terminus, to Fayetteville.

3. The evidence further shows that this roadbed is only sufficient to permit the laying of one track, and, if defendant is allowed to condemn and appropriate it, such action will practically destroy the use of this right of way on the part of plaintiff.

We are of opinion, therefore, and so hold, that plaintiff's right to the exclusive use of this roadbed, as against defendant's claim to appropriate it for its own right of way, is clear. And it is equally clear, we think, that the plaintiff is entitled to the injunctive relief as demanded in his complaint. This right to condemn land is a part of the plaintiff's franchise. *Railroad v. Dunbar*, 95 Ill. 571. And it is well settled that courts of equity will protect one in the exercise and enjoyment of a quasi public franchise of this character by process of injunction, where the threatened injury is irreparable or the remedy at law is inadequate. The grounds of this jurisdiction are well set forth in the opinion of Mr. Justice Connor at this term in the case of *Railroad v. Olive*, 55 S. E. 263, citing *Beach*, *Modern Equity Jurisprudence*, § 676. And decisions to like effect in other courts of supreme jurisdiction fully support the doctrine so clearly stated in that opinion. *Railway v. Railway*, 129 Mo. 62, 31 S. W. 451; *Cunningham v. Railroad*, 27 Ga. 499; *Railway v. Railway*, 75 Ill. 113. The case cited for defendant from our own court (*Railroad v. Railroad*, 88 N. C. 79) has no application here. In that case it is stated that the construction forces of the two rival companies were miles apart, and not likely to come in contact for a long time to come. There was no present interference, actual or threatened, with the enjoyment of plaintiff's franchise; and injunction was denied because, on the facts as they appeared, no injury would result by denial of the application. Here the parties are already on the same ground. The defendant is seeking, by purchase and proceedings of condemnation, to acquire the roadbed for its own right of way, which, as we have seen, it has no legal right to do, and its engineers are surveying

the route with a view of presently carrying into effect its avowed and unlawful purpose. It may be well to note that, according to a decision of this court at the present term, in the case of *State v. Wells*, 55 S. E. 210, plaintiff has no right to enter on this land for the purpose of constructing its road until it has acquired the right to do so by agreement with the owners or by paying into court the amount awarded by commissioners appointed in condemnation proceedings duly had. But it has the right, if it proceeds in good faith and without unnecessary and unreasonable delay, to go on and appropriate the land under the methods provided by law, and to be protected in the exercise and enjoyment of its franchise.

There is error in the judgment below, and this will be certified to the end that the injunction against the plaintiff be dissolved, and that defendant be enjoined from further interference with plaintiff's rights as indicated in this opinion.

Reversed.

DAVIS v. WALL.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. TRESPASS—PLEADING—ISSUES AND PROOF.

Where plaintiff in trespass alleged the cutting and removing of timber trees by defendant from plaintiff's land "to his great damage," such allegation was sufficient to entitle plaintiff to recover the value of the timber so removed, together with adequate damages for any injury done to the land in removing it therefrom.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trespas, §§ 85, 86.]

2. JUDGMENT—PLEADING—ISSUES AND PROOF.

An allegation in a complaint for trespass consisting of the cutting and removal of timber from plaintiff's land, that the value of the timber was \$150, and a prayer for relief for the same amount were not essential parts of the complaint, and did not preclude the court from giving any relief appropriate to the complaint, proofs, and findings, without reference to the prayer.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 34-37.]

3. JUDGMENT—ESTOPPEL—PROCESSIONING PROCEEDING.

Where defendant in a proceessioning proceeding did not raise an issue of title in an action for the location of a boundary line, he was estopped by the judgment from denying the boundary thus determined to be the true boundary line, and from thereafter asserting title to any land beyond it.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1296.]

4. APPEAL—GENERAL EXCEPTIONS—EFFECT.

An exception "for errors in the charge" was too general, and cannot be considered on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1620-1630.]

5. APPEAL—RECORD—PREPARATION—RULES—DISMISSAL.

Revisal 1905, § 591, and Supreme Court Rule 27 (53 S. E. vii), provide that the exceptions shall be briefly and clearly stated and numbered. Rules 19 (2) and 21 (140 N. C. 660, 53 S. E. vii) declare that the exceptions relied

on shall be grouped and numbered immediately after the end of the case on appeal, and Rule 19 (3) (140 N. C. 660, 53 S. E. vii) requires an index at the front of the record. *Held* that, where neither of such provisions were complied with, the appeal would be dismissed, as authorized by Rule 20 (53 S. E. vii).

Appeal from Superior Court, Granville County; Ferguson, Judge.

Action by J. D. Davis against W. H. Wall. From a judgment for plaintiff, defendant appeals. Dismissed.

Graham & Devin, for appellee. B. S. Royster, for appellant.

CLARK, C. J. The plaintiff complains for trespass in cutting and removing timber trees from plaintiff's land "to his great damage." Under this allegation plaintiff was entitled to recover the value of the timber so removed "together with adequate damages for any injury done to the land in removing it therefrom." *Gaskins v. Davis*, 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439. Though paragraph 3 of the complaint puts the value of the timber at \$150 and the prayer for relief is for the same amount, the latter is not an essential part of the complaint. *Wright v. Insurance Co.*, 138 N. C. 488, 51 S. E. 55, and the court will give any relief appropriate to the complaint, proofs and findings of the jury, without reference to the prayer for relief. *Moore v. Nowell*, 94 N. C. 265. In *Hammond v. Schiff*, 100 N. C. 161, 6 S. E. 753, where the complaint alleged damages from the falling of a wall, evidence of damage from water used to put out fire caused by the falling wall was held competent, *Smith, C. J.*, saying that the "rule in pleading is not so stringent as to require a special averment of every immediate cause of the injury suffered. The primary and efficient cause of all the injury, however directly produced from fire or water, was the falling wall, and this brought about by undermining the earth near to it, and all the consequences resulting therefrom, are within the compass of the demand for compensating damages."

The boundary line between the plaintiff and defendant had been established in a proceessioning proceeding, and the defendant admitted that he had cut and removed the trees from land lying on the plaintiff's side of said boundary line. It is true that a proceessioning proceeding is for a settlement of a boundary line, title not being involved, but if the defendant therein denies the title of the plaintiff as well as the location of the boundary line, upon the issue of title thus raised, the case would have been transferred to the superior court, at term for trial, and tried as if the action had been originally brought in that court, just as when an issue of title is raised in proceedings in partition. *Smith v. Johnson*, 137 N. C. 43, 49 S. E. 62; *Stanaland v. Rabon*, 140 N. C. 202, 52 S. E. 417. Not having raised

such issue, the defendant is estopped by the judgment in that action from denying the boundary thus determined to be the true line, and from now asserting title to any land beyond it. *Parker v. Taylor*, 133 N. C. 108, 45 S. E. 473. The "broadside" exception "for errors in the charge" cannot be considered on appeal. *Sigmon v. Railroad*, 185 N. C. 184, 47 S. E. 421, where it is said: "It admits of some surprise that an exception in such terms should still appear in any case sent to this court." The plaintiff moves to dismiss because (1) the exceptions are not "briefly and clearly stated and numbered" as required by the statute (Revisal 1905, § 591) and rule 27 of this court (53 S. E. viii); (2) the exceptions relied on are not grouped and numbered immediately after the end of the case on appeal as required by rules 19 (2) and 21 (140 N. C. 660, 53 S. E. vii); (3) the index is not placed at the front of the record as required by rule 19 (3). 140 N. C. 660, 53 S. E. vii. Under rule 20 (53 S. E. vii), one of the alternatives is to dismiss the appeal and the motion is allowed, in the expectation that appellants hereafter will conform to these requirements. *Sigmon v. R. R.*, 135 N. C. 182, 47 S. E. 420, and cases cited. Ordinarily, hereafter such motions will be allowed, upon a failure to comply with the rules of this court, without discussing the merits of the case as we have done in this instance.

Appeal dismissed.

CONNOR and WALKER, JJ., concur in result.

HULL v. TOWN OF ROXBORO.

(Supreme Court of North Carolina. Oct. 30, 1906.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—FAILURE TO PASS—CIVIL LIABILITY.

A municipal corporation is not civilly liable for failure to pass ordinances which, if passed, would preserve the public health or otherwise promote the public good.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1551.]

2. SAME—ENFORCEMENT.

A municipal corporation, having enacted health ordinances under its legislative power, is not civilly liable for any omission to enforce the same or to see that they are properly observed.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, § 1551.]

3. SAME—RIGHTS OF CITIZENS.

Where plaintiff failed to prosecute his neighbor for violation of ordinances regulating the maintenance of hogpens and privies, and failed to take any steps to abate the nuisance caused by his neighbor's pens, etc., he was estopped to claim that his injuries therefrom resulted from the city's failure to enforce such ordinances, etc.

Appeal from Superior Court, Person County; Moore, Judge.

Action by Luther Hull against the town of

Roxboro. From a judgment for plaintiff, defendant appeals. Affirmed.

Plaintiff alleges that defendant is required by its charter to enact and enforce ordinances which may be necessary to preserve the public health and to prevent the existence of nuisances, and that in compliance with this requirement it did pass ordinances for the suppression of nuisances and the protection of public health, which prescribed fines and penalties for their violation, and among others an ordinance providing how pigsties or hogpens and privies, should be erected and kept clean, so as to prevent offensive odors therefrom, which would cause contamination of the air and produce disease, thereby making them a nuisance; that one of the plaintiff's neighbors, living on an adjoining lot, kept his hogpen and privies in a filthy condition, contrary to the provisions of the said ordinances, and that they were so situated with reference to the plaintiff's dwelling, being on a higher level, that the drainage from them was carried upon the plaintiff's premises, and that by reason thereof the health of the plaintiff's wife and of his infant child was seriously impaired, and that he was consequently put to great trouble and expense in their cure; that he requested the mayor and two of the commissioners of the town to notify the board of commissioners of the existing condition of his neighbor's lot, and warned them that it was a menace to the health of his family, but that the defendant failed to enforce the said ordinances and abate the nuisance, though the health officer of the town reported the condition of his neighbor's premises to the board, and they were therefore advised of the situation. The plaintiff then alleges the special damage he has suffered as the result of the alleged wrongful acts and omissions of the defendant, and prays judgment for \$1,500 and costs. The defendant first answered denying the material allegations of the complaint, but at the trial demurred *ore tenus* thereto, upon the ground that no cause of action was stated therein. The court sustained the demurrer and dismissed the action. Plaintiff excepted and appealed.

Manning & Foushee and W. T. Bradsher, for appellant. Wm. D. Merritt, for appellee.

WALKER, J. (after stating the case). The plaintiff seeks in this action to recover damages upon the ground that the defendant has failed to enforce certain ordinances it had enacted for the suppression of nuisances, and he alleges that by reason of this omission of duty he has suffered an injury in the way he describes. The particular grievance of which he complains seems to be that as the defendant had the power under its charter to pass ordinances for the protection of the public health, and did pass such ordinances which were adequate for that purpose, it was bound, through its officers, to insure an

absolute observance of them by the inhabitants of the town, and that a liability arises to any one who is specially damaged whenever such officers fail, even in a passive way, to secure their observance, and that this asserted principle entitles him to compensation for the injury resulting from their inaction. He bases his whole claim upon the theory thus advanced. There is nothing better settled in the law than that the powers and the correlative duties of a municipal corporation are of a twofold character—the one public, that is, governmental and legislative or discretionary; and the other private, that is, absolute and ministerial. In the former case it acts as an agency of the state for the purpose of governing that portion of its people residing within the municipality, but in its corporate and private capacity it acts for itself and for its own benefit and advantage, though the public may derive a common benefit from the due and proper exercise of its powers and the performance of its duties which are ministerial. It is exempt from liability for any injury resulting from a failure to exercise its governmental powers, or for their improper or negligent exercise, but it is amenable to an action for any injury caused by its neglect to perform its ministerial functions, or by an improper or unskillful performance of them. Where it is acting in its governing capacity it is not responsible, because it is then presumed to be in the exercise of a part of the power of the state and therefore under the same immunity. We believe the distinction between the two classes of powers and duties, as we have stated it, is clearly recognized by the authorities, which appear to be quite uniform. *Joyce on Nuisances*, § 354; 2 *Dillon, Mun. Corp.* (4th Ed.) § 949; *McIlhenny v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294. The courts, in enforcing the principle thus established, have held almost with unanimity that a municipal corporation is not civilly liable for the failure to pass ordinances, even though they would, if passed, preserve the public health or otherwise promote the public good. A leading case upon this subject is *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451, which has been cited with approval in many other courts. It is equally well settled that, if the corporation has enacted ordinances under the legislative power granted in its charter, it is not civilly liable for any omission to enforce them or to see that they are properly observed by its citizens or those who may be resident within the corporate limits. 2 *Dillon, Mun. Corp.* § 950; *Hines v. Charlotte*, 72 Mich. 278, 40 N. W. 333, 1 L. R. A. 844; *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532, 9 Am. St. Rep. 837; *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102; *Forsyth v. Atlanta*, 45 Ga. 152, 12 Am. Rep. 576; *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857; *Fifield v. Phoenix*, 36 Pa. 916; *New Orleans v. Abbag-*

nato, 62 Fed. 240, 10 C. C. A. 361, 26 L. R. A. 329; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Brinkmeyer v. Evansville*, 29 Ind. 187; *Moran v. Car Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; *Griffin v. N. Y.*, 9 N. Y. 456, 61 Am. Dec. 700; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120.

A few striking passages selected from those cases and law writers which are among the best authorities will serve to show the steady trend of judicial thought upon this important question; the leading idea being that for a failure in governmental action municipal corporations are responsible only to their corporators or to the power which brought them into being. "A municipal corporation is, for the purposes of its creation, a government possessing to a limited extent sovereign powers, which in their nature are either legislative or judicial, and may be denominated 'governmental' or 'public.' The extent to which it may be proper to exercise such powers, as well as the mode of their exercise by the corporation, within the limits prescribed by the law creating them, are, of necessity, intrusted to the judgment, discretion, and will of the properly constituted authorities to whom they are delegated; and, being public and sovereign in their nature, the corporation is not liable to be sued either for a failure to exercise them or for errors committed in their exercise." *Kistner v. Indianapolis*, 100 Ind. 210. "The [defendant in this case] is a municipal government whose powers are defined and limited by the terms of its charter of incorporation. The exertion of its powers by its constituted authorities in prescribing rules of police and imposing and inflicting penalties for their infraction is but a mode of exerting the power of the government of the state within the limits of the city. It is a government within a government. Still they are the same—the one being the execution of the will of the other within certain established boundaries of power and in a certain locality." *Peck v. Austin*, 22 Tex. 261, 73 Am. Dec. 261. "The town was empowered to legislate in regard to all nuisances, and the omission to provide a remedy against the owner of private property permitting the nuisance, or to execute an ordinance passed to prohibit such a nuisance, and to abate it, is made the foundation of the action. The failure to take legislative action, or to enforce the law when enacted, by entering upon the private estate of the citizen and staying the manner of the execution of the owner's work upon it, gives no cause of action against the city. The failure to exercise that governmental power, whether legislative or judicial, is not within the class of cases or the rule by which the liability of the town is to be determined." *James v. Harodsborg*, 85 Ky. 191, 8 S. W. 135, 7 Am. St. Rep. 589. "The corporation is undoubtedly vested with certain legislative powers, among which is the authority

to restrain swine from running at large in the streets, and they have exercised it by enacting an ordinance to that effect. The idea that, because they may prohibit a nuisance, therefore they must not only pass a prohibitory law, but must also enforce it, at the hazard of being subjected to all damages which may ensue from such nuisance, is certainly novel. The corporation of the city in this respect stands upon the same footing within its own jurisdiction as the state government does in respect to the state at large." *Levy v. City of New York*, 1 Sandf. (N. Y.) 465. "Such an obligation as to the enforcement of laws has never been assumed by our governments, national, state, or municipal. The ordinance in question does not partake of the nature of a contract, but it is a part of the laws passed for the good government of the inhabitants of the city. The city is no more liable for its nonexecution than would be the county, if the ordinance were a state statute and its enforcement left to the county officers and inhabitants. Hence it has often been held that a municipal corporation is not liable in damages for a failure to abate a nuisance existing upon private property, and not created by its agents, though it has the power so to do." *Kiley v. City of Kansas*, 87 Mo. 103, 56 Am. Rep. 443. "The idea that because the city of St. Louis has the right by virtue of its authority to make by-laws and pass ordinances relating to the public safety of its inhabitants, and has exercised that right by passing an ordinance prohibiting structures of a certain character to be built within certain districts therein defined, therefore it must enforce the observance of said ordinances at the hazard of being subject to all damages which may ensue from its violation, is certainly as novel as it is startling." *Harman v. St. Louis*, 137 Mo. 494, 38 S. W. 1102. "When a public nuisance is created by a private citizen in carrying on his business or trade within a city or other municipality, unless the municipality by express license authorizes such business to be carried on at the place and in the manner the same is conducted by such private citizen, the municipality cannot be held responsible for any damage which may result to another citizen from the existence or maintenance of such nuisance." *Hubbell v. Viroqua*, 67 Wis. 343, 30 N. W. 847, 58 Am. Rep. 866.

The great publicist, Judge Cooley, had this to say about the general principle: "As no state does or can undertake to protect its people against incidental injuries resulting from its adopting or failing to adopt any proposed legislative action, so no similar injury resulting from municipal legislative action or nonaction can be made the basis of a legal claim against a municipal corporation. If, therefore, a city temporarily suspends useful legislation, or in any other manner, through the exercise or failure to exercise its political authority, causes incidental in-

jury to individuals, an action will not lie for such injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them, not to be exercised directly and finally, but indirectly and partially, by the retroactive effect of punitive verdicts upon special complaints." *Cooley, Const. Lim.* (7th Ed.) 300. To the same effect is the law stated in 1 *Smith, Mod. Law Mun. Corp.* §§ 269-271, where the liability and nonliability of municipal corporations, in the exercise of their dual powers, are fully and ably discussed by the author, with fine discrimination and the citation of all the controlling authorities. The result is that in its dual capacity a municipal corporation is liable, or not, for injuries resulting from its action or inaction, according as, in the particular case, it is representing the state and exercising its functions of government in the locality assigned to it, which are necessarily legislative, and therefore discretionary, in their character, or is representing its own interests and exercising powers conferred for its own benefit, which are therefore ministerial. The cases decided by this court which have a more or less direct bearing upon the question are *Moffitt v. Asheville*, 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810 (in which *Avery, J.*, clearly states the law in respect to municipal powers and the responsibility for their exercise); *Hill v. Charlotte*, supra; *Lewis v. Raleigh*, 77 N. C. 229; *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482; *Prichard v. Commissioners*, 126 N. C. 908, 36 S. E. 853, 78 Am. St. Rep. 679; *McIlhenny v. Wilmington*, supra; *Levin v. Burlington*, 129 N. C. 184, 39 S. E. 822, 55 L. B. A. 396. The cases of *Bunch v. Edenton*, 90 N. C. 431; *Downs v. High Point*, 115 N. C. 182, 20 S. E. 385; *Threadgill v. Com'rs*, 99 N. C. 352, 6 S. E. 189, and *Williams v. Greenville*, 130 N. C. 93, 40 S. E. 977, 57 L. B. A. 207, furnish examples of the liability of such corporations for the failure to exercise or the improper exercise of ministerial duties imposed by law either expressly or by clear implication, and they distinctly negative the existence of any such liability as that claimed to have arisen in this case. When such corporations are about the government's business, they are not liable, but when about their own they must be careful, for they will be held accountable for nonfeasance or misfeasance in respect thereto in the same manner and to the same extent as a private individual, as they then act in their private capacity. The general rule in reference to the particular question herein involved, therefore, is that where injuries are incidentally committed by the officers or agents of a public corporation, in the exercise of those discretionary or legislative powers which are delegated to them by the Legislature, or when, by reason of any failure to exercise them, the same result follows, the municipal-

ity is wholly free from liability. 1 Beach, Pub. Corp. §§ 258, 752, 773.

Let us now briefly consider the facts of this case in the light of the foregoing principles. Assuming that the nuisance described in the complaint is public in its nature and produced special injury to the plaintiff, or is a private one, it was erected and maintained on private premises, without any license from or consent of the municipality. The city was not bound to enforce the ordinances for the protection of the plaintiff, under the penalty of being responsible to him in damages if they were not obeyed to his injury. Indeed, the ordinances merely inflicted punishment for their infraction, by way of fines or penalties imposed for such violations of them, and did not in terms require the nuisance to be abated. The plaintiff could have prosecuted his neighbor for any breach of the city laws, as well as the city or its officers could have done so. The courts were open to him in all their branches, and his injury, in the eye of the law, has resulted, not from the defendant's supineness, but from his own. If he was injured by an unneighborly and unlawful act, alleged by him to have been committed, he also had, in addition to the right of criminal prosecution, a remedy either preventive by injunction or remedial by abatement. *Eaton's Eq. p. 587, § 289 et seq.; Evans v. Railroad, 96 N. C. 45, 1 S. E. 529; Forsyth v. Atlanta, 45 Ga. 152, 12 Am. Rep. 576.* The law aids the vigilant, not those who sleep upon their rights. The plaintiff had equal opportunity with the defendant to take the initiative and suppress the nuisance. Shall he be permitted to allege its default in failing to do what he himself might just as well have done, but did not do, especially when the defendant, as it appears, was under no legal obligation to act, and therefore not liable for omitting to do so? We must not be understood to mean that, if the plaintiff's neighbor is liable, that fact acquits the defendant, if it is otherwise liable, but that the injury to the plaintiff would seem to be the result of his own inaction.

The court below ruled correctly upon the point presented, and we affirm the judgment dismissing the action.

No error.

ALLEN et al. v. BURCH et al.

(Supreme Court of North Carolina. Nov. 7, 1905.)

1. DEEDS—EVIDENCE—ADMISSIBILITY—REGISTRATION—AFFIDAVITS—SUFFICIENCY.

Acts 1905, p. 323, c. 277 (Revisal 1905, § 981), amending Laws 1885, p. 233, c. 147, requires for the registration of an ancient deed an affidavit that the affiant "believes such deed to be a bona fide deed and executed by the grantor therein named" in addition to the affidavit required by the original act to the effect that the grantor and witnesses were dead and proof could not be made of their handwriting. *Held*, that an affidavit whereby affiant merely "claims

title" under such deed is not a substantial compliance with the amendment so as to permit the introduction of the deed in evidence.

2. ACKNOWLEDGMENT—DEFECTS—ADMISSION IN EVIDENCE.

A deed registered upon an unauthorized probate cannot be introduced in evidence for the purpose of showing an essential link in the chain of title.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Acknowledgment, § 50.]

3. APPEAL AND ERROR—DISPOSITION OF CASE—EFFECT OF DECISION—PROCEEDINGS IN ANOTHER ACTION.

A deed introduced by plaintiff having been held inadmissible by reason of an insufficient probate and registration, plaintiffs excepted and submitted to a nonsuit to secure a review of the ruling. *Held* that, after a proper probate and registration, the deed would be admissible in another action, though the ruling of the lower court was affirmed.

Appeal from Superior Court, Person County; Moore, Judge.

Action by E. C. Allen and others against J. Burch and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Plaintiffs alleged that they were the owners of a tract of land described in the complaint, and that defendants were in the unlawful possession. Defendants denied plaintiffs' title, and the cause went to hearing upon the usual issues in actions for the recovery of real estate. For the purpose of showing title plaintiffs offered to introduce a deed from William L. Allen to James H. Harris and wife bearing date November 8, 1845. The certificate of probate on the deed was in the following words to wit:

"Personally appeared before me, D. W. Bradsher, C. S. C., Joe Burch, who being duly sworn, says that he claims title under a deed from Wm. L. Allen to J. H. Harris, said deed being dated November 8, 1845, and same hereto attached, and that the maker of said deed, and the witness thereto are dead, and that he cannot make proof of their handwriting.

his
"Joe X Burch.
mark

"Sworn to and subscribed before me this November 15, 1905.

"D. W. Bradsher, C. S. C.

"The annexed deed was this day proven before me by the affidavit of Joe Burch, hereto annexed. Therefore, let the said deed and affidavit, with this certificate, be registered. Witness my hand, this November 15, 1905."

Thereupon the clerk adjudged the execution of the deed to be duly proven, and ordered it to registration, which was done November 15, 1905. Defendants objected to the introduction of the deed, for that its execution was not proven in accordance with the provisions of the statute. Revisal 1905, § 981. The objection was sustained. Plaintiffs excepted, and, in deference to his honor's

ruling, "elected to take a nonsuit and appealed." Judgment of nonsuit was entered.

Graham & Devin and Jno. W. Graham, for appellants. Manning & Foushee and Kitchin & Carlton, for appellees.

CONNOR, J. (after stating the case). A single question is presented by the record. Was the deed properly proven? Prior to Acts 1885, p. 233, c. 147, where the grantor and witnesses to a deed were dead, the statute required satisfactory proof of the handwriting of the witness, and, if there was no subscribing witness, then proof of the handwriting of the grantor. Code 1883, c. 27, § 1246, subsec. 10. When the act requiring the registration of deeds, Laws 1885, p. 233, c. 147, was passed to enable persons holding old deeds, the grantor and witnesses to which were dead, to more easily have them probated, it was enacted (section 2) that persons holding unregistered deeds, executed prior to January 1, 1855, could have the same registered by making affidavit that the grantor and witnesses were dead, or could not be found, and that such person could not make proof of their handwriting. This section was amended by Acts 1905, p. 323, c. 277, which amendment was carried into section 981 of the Revisal of 1905, as follows: "Provided that it shall also be made to appear by affidavit that affiant believes such deed to be a bona fide deed and executed by the grantor therein named." The probate of the deed offered in evidence by the plaintiffs is defective in that it does not conform to the amended statute. It was the evident purpose of the Legislature to make this additional prerequisite to the registration of a deed to which the grantor and witnesses were dead. We concur with his honor's opinion that the deed was not properly probated under the amended statute, and not entitled to registration.

Counsel for plaintiffs call to our attention a line of cases in which it is held that if the probate substantially conforms to the statute it is sufficient, and that the words found in the certificate "he claims title under said deed" are sufficient. In *Young v. Jackson*, 92 N. C. 144, *Merrimon, J.*, says: "When the instrument is proven, and the probate is certified as prescribed by law, and it is registered in the proper county, the essential purpose of registration and the law is served, and this is sufficient, notwithstanding some of the nonessential, yet helpful, forms to be observed between the probate and registration of the instrument have been omitted. The Legislature certainly has power to make forms essential, but, unless it shall do so in plain terms, the failure to observe them, especially where they appear from their nature or terms to be directory, will not be allowed to defeat the chief purpose of a salutary statute." Conceding this to be the correct statement of the law, we think that the requirement that the person offering the deed

for probate shall make affidavit that he "believes such deed to be a bona fide deed and executed by the grantor therein named" is of the substance of the affidavit and in view of the fact that it was inserted by way of amendment to the act of 1885 it is evident that the Legislature intended that it be given effect. We cannot disregard so essential a requirement. It is well settled and conceded that the registration had upon an unauthorized probate is invalid. *Todd v. Outlaw*, 79 N. C. 235; *Turner v. Connelly*, 105 N. C. 65, 11 S. E. 179; *Lance v. Tainter*, 137 N. C. 229, 49 S. E. 211, and many other cases. While it is true that an unauthorized deed may be introduced for the purpose of showing color of title, it is evident that plaintiffs did not offer this deed for that purpose. They regarded it as an essential link in their chain of title, and it is so alleged in their answer, wherein notice was given plaintiffs that defendants would insist that the probate was defective. The plaintiffs, in accordance with the well-settled practice, and to prevent an estoppel upon them in a future action, submitted to a nonsuit in order that his honor's ruling might be reviewed. Upon a proper probate being had, the deed, if properly registered, would be competent in another action.

The judgment of his honor must be affirmed.

MARABLE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 7, 1906.)

1. CARRIERS—PASSENGERS—NATURE OF RELATION.

A carrier is not an insurer of the absolute safety of passengers, but its liability for injuries to a passenger is based on negligence.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1085.]

2. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

Where, in an action against a carrier for injuries to a passenger, there was no proof of negligence on the part of the carrier, the admission of an "Annual Clergyman's Reduced Permit," on which plaintiff traveled, providing that in consideration of the reduced rate granted by the permit, the owner assumed all risk of damage and accident to person or property while using the same, was harmless to plaintiff.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4153, 4035.]

3. TRIAL—SPECIAL INSTRUCTIONS—OMISSION—NECESSITY OF REQUEST.

Omission of the court to charge on a particular subject is not error, where no request for a special instruction was made.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 627.]

4. CARRIERS—TRANSPORTATION OF PASSENGERS—FREIGHT TRAINS—ASSUMED RISKS.

In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains when managed by prudent men in a careful manner.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, §§ 1098, 1192.]

Appeal from Superior Court, Iredell County; Ferguson, Judge.

Action by M. V. Marable against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is an action brought to recover damages for injuries alleged to have been caused by the negligence of the defendant. The plaintiff was a passenger on one of defendant's local freight trains in September, 1904. The train was composed of about 35 cars and a caboose, in which the plaintiff was sitting on a seat with his feet on a box having tools in it, a stove being near and in front of him. There were cushioned seats in the car. He took passage at Charlotte for Landis and presented to the ticket agent an "Annual Clergyman's Reduced Permit" which contained the following contract: "In consideration of the reduced rate granted by this permit, the owner assumes all risk of damage and accident to person or property while using the same." The plaintiff testified that his name was on the permit, but that he had refused to sign it, though he used it for the purpose of securing a reduced rate, and was allowed the reduced rate by the agent. The plaintiff objected to the introduction of the permit, the objection was overruled and he excepted. The conductor took up his ticket after he got on the train. When between Concord and Glass the train came to a sudden and violent stop, throwing the plaintiff from his seat on the end of the bench against the stove and bruised and otherwise injured his right forearm. His nervous system was affected and his health failed. The engineer, not now in the service of the company, testified that there were 35 cars in the train which were fully equipped with automatic air brakes and all necessary appliances. Everything was in first-class condition. When the train was approaching Glass, he got an order to stop there and did stop the train in the usual manner. The train was on an upgrade all the way to Glass from Concord and there could have been no unusual jar or jolt of the train when it stopped. There was a jar and always is when such a train is stopped. It comes from the slack in the cars. There is more jolting in a freight than in a passenger train. The train was running from 6 to 8 miles an hour. There was evidence tending to show that the plaintiff occupied a dangerous position and one likely to cause his fall from the seat if the train should make the usual stop and that a person not used to riding on a freight train of 35 cars is very apt to get a good bump if he is not careful, and that almost any one will be jolted some. There was much other evidence substantially to the same effect as that already stated.

The court, at the request of the plaintiff, charged the jury that a carrier cannot stipu-

late for exemption from liability for negligence, and the permit held by the plaintiff and used by him to get a reduced rate of fare would not exonerate the defendant if the plaintiff was injured by its negligence, and that it is no bar to his recovery; that where one is injured in a public conveyance and the injury resulted from something over which the carrier had control, the law raises a presumption of negligence which extends to the occurrence, regardless of the party who is injured; that, if the jury found that the plaintiff was injured as described by him, the law raised a presumption of negligence and he is entitled to recover, unless the defendant has shown by the greater weight of the evidence that the sudden and violent stoppage of the train was caused by something not within its control, and, unless this has been shown by the defendant, they will answer the first issue (as to defendant's negligence) "Yes"; that in such a case and under such facts and circumstances the doctrine of *res ipsa loquitur* applies and casts the burden on defendant to show that the injury was unavoidable, and, if it has failed so to do, they will answer the first issue "Yes." These were all the instructions requested by the plaintiff on the first issue, and all were given. The court, at defendant's request, charged the jury that the common law made the defendant an insurer of the plaintiff's safety, and that the permit had the effect of relieving the defendant of the said common-law liability, and that defendant would only be liable for negligence if there was any; that negligence must be shown to have caused the injury which must have proceeded from some fault of the defendant; that the plaintiff assumed the ordinary risks incident to the running of a freight train, such as the one in question was, if it was managed in a prudent and careful manner, and the jerking of the train which is alleged to have caused the injury was unavoidable and such as ordinarily occurs in the operation of a freight train, and, if the train was so managed and the jolting or jarring which caused the injury was unavoidable and only incidental to the running of such trains, even when prudently and carefully managed, they should answer the first issue "No." The court in its general charge, which was elaborate, explained to the jury the contention of the parties and the bearing of the testimony upon the issues in the case, and then substantially instructed the jury that, while the burden of the issue is upon the plaintiff and he must show negligence, yet, if there was such a sudden and violent stopping of the train that plaintiff was thrown from his seat, it would require explanation from the defendant, and the inquiry naturally arises, why was the train so suddenly stopped? The answer should naturally come from the defendant, as the plaintiff was in the caboose

and the defendant's servants were in charge of the train.

The jury answered the first issue, as to defendant's negligence, "No." Judgment was entered for the defendant, and the plaintiff appealed.

G. B. Nicholson, Furches & Coble, and J. B. Connelly, for appellant. L. C. Caldwell, for appellee.

WALKER, J. (after stating the case). We can find no fault with the instructions given by the court to the jury when they are considered together and construed in the light of the facts which the evidence tended to establish. The judge gave the plaintiff the full benefit of the circumstances attending the injury as evidence of negligence, and charged the jury that the defendant must show that the jolting of the train was unavoidable in order to acquit itself of negligence. A carrier of passengers is not an insurer, as is a carrier of goods. He is, therefore, not absolutely liable for the safety of the passenger as the carrier of goods is for the safety of the goods intrusted to his care. His liability is based on negligence, and not on a warranty of the passenger's freedom from all the accidents and vicissitudes of the journey. The doctrine that the carrier of goods is an insurer was adopted for reasons peculiar to the undertaking and because of the unlimited control of the carrier over the property. It was first announced, we believe, by Lord Holt in the famous case of *Coggs v. Bernard*, 2 Ld. Raymond, 909 (1 Smith's L. C. 869), in these words: "The law charges the person thus intrusted, to carry goods as against all events but the act of God and the enemies of the King," and this dictum of his was formally accepted as a principle of the common law by solemn decision in *Forward v. Pittard*, 1 Term Rep. 29, and *Christie v. Griggs*, 2 Camp. 79. In the latter case Sir James Mansfield drew the distinction between the two classes of carriers when he tersely said: "There is a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier is answerable at all events. But he does not warrant the safety of passengers." The distinction was recognized in *Aston v. Heaven*, 2 Esp. 532, *Crofts v. Waterhouse*, 3 Bing. 319, and *Harris v. Costar*, 1 Car. & P. 636, and finally settled in the leading cases of *Readhead v. Railway*, L. R. 4 Q. B. 379, and *Bridgers v. Railway*, L. R. 7 H. L. 231. In this country the measure of liability of the two kinds of carriers has been practically settled according to the English rule. *Ingalls v. Billa*, 9 Metc. (Mass.) 1, 43 Am. Dec. 346; *Stokes v. Saltonstall*, 18 Pet. (U. S.) 181, 10 L. Ed. 115; *Railroad v. Ball*, 53 N. J. Law, 283, 21 Atl. 1062; *Palmer v. Canal Co.*, 120 N. Y. 170, 24 N. E. 802, 17 Am. St. Rep. 629; *Gilbert v. Railway*, 160 Mass. 403, 36 N. E.

60; *Meler v. Railroad*, 64 Pa. 225, 3 Am. Rep. 581. This court has recognized the distinction, and erected different standards of duty for the two classes in *Hollingsworth v. Skelding* (at this term) 55 S. E. 212, *McNeill v. Railroad*, 135 N. C. 682, 47 S. E. 765, 67 L. R. A. 227 (s. c. 182 N. C. 510, 44 S. E. 34, 67 L. R. A. 227, 95 Am. St. Rep. 641), and *Everett v. Railroad*, 138 N. C. 68, 50 S. E. 557, 1 L. R. A. (N. S.) 985. A carrier of goods can only relieve himself of his common-law liability as an insurer for loss or damage not resulting from his negligence by a contract reasonable in its terms and founded upon a valuable consideration (*Everett v. Railroad*, supra), but this principle does not apply to the carrier of passengers, because he is under no such liability. 1 Fetter on Carriers, § 2; 6 Cyc. 590-594. In this view of the law, the evidence as to the permit was harmless.

The exceptions of the defendant are so placed in the charge that we are at a loss to know the particular proposition of law as laid down by the court which was considered objectionable. If it was supposed that the defendant was bound to exercise the highest degree of care and that the court failed to raise the degree to the required maximum, it is sufficient to say that there was no request for such a special instruction and the omission, if there was one, is not, therefore, available to the defendant. The many different forms of expression used in stating the rule of liability all recognize substantially the same test, the difference in statement being for the purpose of applying the rule to different states of facts. Thus it has been said that the carrier is required to exercise that high degree of care for the safety of the passenger which a prudent person would use in view of the nature and risks of the business, or, in general, the highest degree of care, prudence, and foresight to prevent injury to the passenger, which the situation and circumstances demand in view of the character and mode of conveyance, and which a prudent man engaged in the business, as usually conducted, would employ, and which is reasonably practicable and consistent with the efficient conduct of the particular business and the free use of all proper means and appliances. The standard of duty should be according to the consequences that may ensue from carelessness. 6 Cyc. 591-593; *Railroad v. Horst*, 93 U. S. 201, 23 L. Ed. 898. Whatever the rule may be, the plaintiff has no right to complain of its misapplication in this case, as the court gave all of the instructions he asked for, and, besides, the presiding judge finally brought the liability of the defendant to the true test, which is negligence, or the failure to exercise proper care, under the circumstances, and he told the jury that the defendant would be liable unless the injury was unavoidable. In taking passage on a freight train, the plaintiff assumed the usual risks

incident to traveling on such trains, when managed by prudent and competent men in a careful manner. While life and limb are as valuable and the right to safety may, perhaps, be the same in the caboose as in the palace car, yet it must be remembered that, in the operation of freight trains, the primary object is the transportation of freight, and the means and appliances used are, and are known by the passenger to be, adapted to that special business, and, therefore, one who travels on such trains must expect that jolts and jars will occur, and he necessarily takes the risk of those which are not caused by the negligence of the carrier's servants, but which are usual and consequent on such mode of transportation. 1 Fetter on Carriers, § 17; Railroad v. Horst, 93 U. S. 291, 23 L. Ed. 898. It seems to us that the charge of the court covered the entire case, and, when properly construed, submitted it fairly and correctly to the jury under all the circumstances, and when this is done the parties have no just ground of complaint, or for asking anything more, especially if they have failed to request more definite instructions. The charge appears to be in accordance with the law as stated by this court in Wallace v. Railroad, 98 N. C. 494, 4 S. E. 503, 2 Am. St. Rep. 346, s. c. 101 N. C. 454, 8 S. E. 166, Smith v. Railroad, 99 N. C. 241, 5 S. E. 896; and his honor, perhaps, was guided by those cases.

The defendant moved in this court to dismiss the appeal under rule 20 for failure to comply with the requirements of rule 19 (53 S. E. vii). A similar motion was made at this term, based upon substantially the same grounds, in Davis v. Wall, 55 S. E. 350, and we enforced the rules to the extent of dismissing the appeal in that case. We again specially direct the attention of the profession to those rules and to that decision as being very proper for their careful consideration when preparing cases on appeal. We have discussed this case at some length because the principles involved are of vital importance, and, as the practical result will be the same, we prefer to decide it on the merits instead of dismissing the appeal.

No error.

COTTON v. HIGHLAND PARK MFG. CO.
(Supreme Court of North Carolina. Nov. 7, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS.

Where, in an action for injuries to a servant, the only issuable facts presented by defendant were that plaintiff was injured by the act of a fellow servant, that the machine by which he was injured was not defective, and that plaintiff was guilty of contributory negligence, an instruction that, if the machine was defective and the defective condition thereof was the proximate cause of the injury, the jury should answer the issue as to whether plaintiff was injured by defendant's negligence as alleged

in the complaint in the affirmative, was not erroneous as eliminating the question whether defendant knew, or, by the exercise of reasonable care, could have known, of the defective condition of the machine.

2. APPEAL—INSTRUCTIONS—REVIEW—THEORY OF CAUSE.

Instructions are to be reviewed on appeal with reference to the theory on which the case was tried, and with reference to the evidence and contentions of the parties.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3402, 3416.]

On petition for rehearing. Petition dismissed.

For former opinion, see 53 S. E. 1039.

Action to recover damages for injury received in defendant's mill while working at a calendar machine. The cause was tried upon the following issues: (1) Was the plaintiff, Cotton, injured by the negligence of the defendant, as alleged in the complaint? Ans. Yes. (2) Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Ans. No. (3) What damages, if any, is plaintiff entitled to recover? Ans. \$425.

BROWN, J. This appeal was considered by the court at the last term and a per curiam judgment rendered, affirming the judgment without filing an opinion. 53 S. E. 1039. There was no new question presented arising upon the law of negligence, nor any novel application of an old principle. We regarded the case as involving largely questions of fact which we thought had been fully and correctly presented to the jury. We think so still, but in deference to the earnestness of the learned counsel for defendant we give our reasons why the petition to rehear is dismissed.

The plaintiff contends that his hand was hurt while in the discharge of his duties in operating a calendar machine. It seems that the machine suddenly started up while plaintiff was cramming the cloth in between the rollers with his fingers, and crushed them. The plaintiff had called one Fautkinberry to start the machine while he threaded it. The cloth slipped, and in obedience to plaintiff's orders Fautkinberry stopped the machine and plaintiff began to cram the cloth in the rollers. The machine suddenly started up and injured plaintiff's hand. Defendant contends that Fautkinberry started it up. Plaintiff contends it started up itself because of its worn and defective character. Defendant denies that said machine was defective in any way, but contends it was in perfect condition. There was evidence introduced on both sides as to why the machine started up and as to its condition.

The defendant bases its petition to rehear upon the following portion of the charge: "The court charges you that if you find from the greater weight of the evidence that the machine at which the plaintiff was injured was defective, and that the defective con-

dition of the machine was the proximate cause of the injury, you will answer the first issue 'Yes.'" The petitioner contends that the charge of the court was erroneous, in that it directed the jury to find the issue in favor of the plaintiff if the jury should find that the machine was defective and the defective condition of the machine was the proximate cause of the injury, and thus left out of consideration the essential question as to whether the defendant knew, or, by the exercise of reasonable care, could have known, of its defective condition. It is apparent upon the record that only three issuable facts were presented by the defendant upon the trial below and considered by the court, viz.: (1) That plaintiff was injured by the act of Fautkinberry, his fellow servant; (2) that the machine was not defective; (3) that plaintiff was guilty of contributory negligence.

There is absolutely no evidence upon which to charge plaintiff with negligence, and, as to the injury being due to the negligence of his co-servant, that was put to the jury fairly and fully by the court, and they were specifically instructed to find for defendant, if the machine was started up by Fautkinberry, whereby plaintiff was hurt. The plaintiff offered evidence tending to prove that the calendar machine was old and defective; that the gearing was worn and in bad repair, so that the machine when thrown out of gear would unexpectedly fly in gear, causing an unlooked for start of the calendar. This was denied by the defendant and evidence offered to prove that the machine was of a kind in general use and in perfect order. The defendant did not even suggest, much less contend, that, if the machine was defective, it should not be charged with constructive knowledge of its condition, doubtless for the reason that, if plaintiff's version of the evidence should be adopted by the jury, the defects were of such a character, were so manifest, and had continued for so long that defendant as a matter of law would be held to knowledge of them. This is perfectly manifest from reading the defendant's prayers for instruction, as well as the judge's statement of the contentions of the parties. The court gave all of defendant's instructions as we gather from the record, as there is no exception for failure to give any of defendant's prayers.

Instructions to the jury are to be considered with reference to the theory upon which the case is tried, and with reference to the evidence and contentions of the parties. Says Chief Justice Ruffin: "The language of the judge is to be read with reference to the evidence and the point disputed on trial, and, of course, is to be construed with the contexts." *State v. Tilly*, 25 N. C. 424. We did not overlook the principles laid down in *Hudson v. R. R.*, 104 N. C. 491, 10 S. E. 669, and we fully approve them, but we do not think the third proposition in the first

paragraph of the syllabus in that case was contended for or even suggested by defendant on the trial of this case. As defendant did not think the proposition worth contending for, we think his honor was excusable in not presenting it to the jury.

Petition dismissed.

WALKER, J., did not sit on the hearing of this petition.

DAVIS et al. v. KEEN.

(Supreme Court of North Carolina. Nov. 7, 1906.)

1. APPEAL AND ERROR—VIEW—HARMLESS ERROR—SUBMISSION OF ISSUES.

A complaint, seeking to set aside a sale of plaintiffs' realty under a power contained in a mortgage, alleged fraudulent disparagement by defendant of plaintiffs' title for the purpose of preventing competition at the sale. The court inserted the word "advertising" in submitting an issue, proposed by defendant and decided in his favor, as to whether in "advertising" and selling the lands defendant was the mortgagee's agent. *Held*, that the error, if any, in inserting the word, was harmless.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4212-4218.]

2. MORTGAGES—FORECLOSURE UNDER POWER—SETTING ASIDE SALE—FRAUDULENT STATEMENTS—PLEADING.

A complaint, seeking to set aside a sale of plaintiffs' realty under a power contained in a mortgage, alleged that defendant at such sale "slandered" plaintiffs' title by announcing that they "had no deed," and that "thereby" land worth \$300 was secured by defendant for \$45. *Held* to allege a fraudulent disparagement of plaintiffs' title by defendant for the purpose of preventing competition, and that therefore an issue as to whether defendant "did * * * slander the title of plaintiff * * * to the lands in dispute, and thereby cause it to bring a less price than its real value," sufficiently followed such allegation, without the addition of the words "as alleged in the complaint."

3. APPEAL AND ERROR—ASSIGNMENT OF ERROR—GENERAL TERMS—SUFFICIENCY.

An assignment of error "that the court failed to state in a plain and correct manner the evidence in the case, and to declare and explain the law arising thereon," is too general, and cannot be sustained.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3018.]

4. TRIAL—INSTRUCTIONS—REQUEST—NECESSITY.

A party cannot be silent under an alleged failure of the court to sufficiently state the evidence and explain the law, and then raise the objection after verdict against him.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 683.]

5. MORTGAGES—FORECLOSURE UNDER POWER—SETTING ASIDE SALE—FRAUD—EVIDENCE—SUFFICIENCY.

At a public sale, held under a power contained in a mortgage for \$5, the property, which the jury found to be worth \$250, sold for \$45. The sale was duly advertised, but was without the actual knowledge of the beneficial owners. The purchaser, while he did not represent the mortgagee at the sale, took an active part in conducting it, and by false and covert representations that the title was not good induced

others not to buy. *Held* to show such fraud as to authorize the setting aside of the sale.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1094; vol. 31, Cent. Dig. Judicial Sales, § 75.]

Appeal from Superior Court, Davidson County; Ferguson, Judge.

Action by Sylvester Davis and others against J. R. Keen and others. From a judgment in favor of plaintiffs, defendant Keen appeals. Affirmed.

The plaintiffs seek in this action to set aside a sale made under the power contained in a mortgage from Calvin Davis to Beek & Foust, at which sale the defendant Keen became the purchaser. The plaintiffs attacked the sale on several grounds, but in this appeal only one need be considered, as the appellant's assignment of error is confined to the second issue. The allegation of the complaint with respect to that ground of attack is that "the defendant Keen slandered the title of the said Calvin Davis, the mortgagor, and of the plaintiffs and his codefendants, Matthew and George Henry Davis, by publicly announcing to the purchasers gathered for the sale that Calvin Davis and the plaintiffs and Matthew and George Henry Davis (his codefendants) had no deed for the property being sold at the time and that, thereby, the said tract of land, now claimed by him, and which is well worth the sum of \$300, brought only the sum of \$45, which was bid by the said Keen, and for which sum a deed was made to him." The plaintiffs and the defendants, Matthew and George Henry Davis, are the heirs of Calvin Davis, the deceased mortgagor. The issues with the answers thereto are as follows: "(1) In advertising and selling the lands of Calvin Davis under the mortgage described in the complaint, did the defendant Keen act as agent for the mortgagees, R. L. Beek and T. W. S. Grimes, administrator of T. W. Foust? Ans. No. (2) On the day of sale under the mortgage of Calvin Davis, described in the complaint, did the defendant Keen slander the title of plaintiffs and of their deceased ancestor to the lands in dispute, and thereby cause it to bring a less price than its real value? Ans. Yes. (3) What price did the land bring on the day of sale? Ans. \$45. (4) What was the true value of the land on the day of sale? Ans. \$250. (5) Did the defendants Beek and Grimes, in their deed to defendant Keen, follow the description and boundaries set out in the mortgage from Calvin Davis to Beek & Foust? Ans. Yes. (6) At the time of the execution of the mortgage from Calvin Davis to Beek & Foust, or at any time afterwards, was Calvin Davis the owner of the lands described in the deed from defendants Beek and Grimes to defendant Keen? Ans. Yes."

The defendant Keen objected to the form of the second issue upon the ground that

the court should have added thereto the words "as alleged in the complaint." The issue, if thus amended, would be identical with the second issue tendered by the said defendant. The court refused so to amend the issue, and the defendant Keen excepted. The evidence pertinent to the second issue was as follows: T. E. Dorsett testified, "As I recollect, Keen came and asked me to sell the land; that it was a little sale, and he wanted me to auction it. After the sale he paid me 25 cents, and I gave him a receipt. I asked him (at the sale) to read the advertisement, as it was in his writing; cannot say whether I had the notice of sale in my hands or not. T. W. S. Grimes, administrator of the deceased mortgagee, lives in Thomasville, and R. L. Beek, the surviving mortgagee, lives in the country. Don't recollect that he told me that Grimes and Beek wanted me to sell the land. I sold to the highest bidder, and Keen bid it in at \$45. Don't remember number of people present." T. W. S. Grimes testified: "The mortgage was given by Calvin Davis to Beek & Foust in 1901 to secure \$5, and it was in the handwriting of Keen. We could not collect the debt and decided to foreclose. Asked Keen to write the advertisement and he did so. Saw him on Saturday before the sale, and asked him if it was necessary for me and Beek to go to the sale, and he replied that he did not know—that he was going on some business. I asked him to see the sheriff and have him sell the land for us, and he said he supposed he could. I told him to bring the report of the sale when he came back, and we would make the deed to the purchaser. He brought back a statement showing the amount bid and different items of expense, among which is a charge of \$1 for advertising sale and also \$1 for writing the deed, retained by himself out of the proceeds of the sale. Keen wrote the deed after the sale." W. O. Burgin testified: "I spoke to Keen that morning about the sale, and he told me that there was something wrong with the title. I reckon what he said kept me away from the sale. If the title was all right, I thought the lot was worth \$100. If there was one acre, it was worth \$200. I wanted to buy it for speculation, and would have gone to the sale if Keen had not told me the title might not be good. My recollection is that he said he was going to see about the sale. I think I asked him about the title, and he said the title might not cover the lot. I had looked at the lot. There has been litigation about the title ever since the sale." Z. B. Morris testified: "I was at the sale. Dorsett and Keen came out on the courthouse steps. Keen read a paper, and to the best of my recollection handed it back to the sheriff. Some one in the crowd asked about the title, and, as I recollect, Keen said there was no deed to the land or something to that effect. I went to the sale

expecting to bid, but did not bid, as I was afraid of the title, after Keen's statement was made." M. P. Murphy testified: "I was at the sale, and heard Keen talking in the sheriff's office before the sale. He talked like it might be a good while before one could get title, and might be a long while. I went there to bid, but after hearing what Keen said, I did not bid. The deed to Keen from the mortgagee covers all the land. Keen said he reckoned the mortgagees would make such title as they could, and added that sometimes you could get a good title, and sometimes you couldn't." The value of the lot was shown, and there was evidence that the heirs of Calvin Davis did not know of the sale. The defendant Keen testified in his own behalf, and the material part of his testimony was as follows: "Some one asked me if the parties would make a warranty deed, and I said I supposed they would make as good a deed as they could. They asked me about the title, and I told them I understood some one claimed part of the lot, and that I had never seen any deed. It was the truth that I had never seen any deed, and I had heard the parties claimed part of the land. At the depot, on the morning of the sale, Burgin asked me about the land and title, and I told him the title was uncertain to part of the land. So I understood it was, and I only gave the rumor." It was admitted that Calvin Davis was the owner of the land described in the pleadings at the time the mortgage was made to Beek & Foust.

The court charged the jury as follows: "As to the second issue, plaintiffs allege that defendant Keen at the sale slandered the title to the land, and thereby caused the land to bring less than its true value; that said Keen stated at the sale that Calvin Davis had no deed for the land. Defendant Keen denies that he slandered the title or made the statement alleged. Now, it is for you to say from the evidence how this is. [Did defendant Keen falsely, and with the purpose of deterring others from bidding at the sale, state that Calvin Davis had no title to said land, and thereby cause it to bring at the sale less than its true value? If you so find from the evidence, by the greater weight of the evidence, you will answer the second issue 'Yes.' If you fail to find from the evidence, by its greater weight, that he did so state, and thereby cause the land to bring less than its value at the sale, then you will answer this issue 'No.'"] Defendant Keen excepted to that part of the charge in brackets. The court also charged the jury as to the other issues, and no exception is made to his charge as to them.

The defendant Keen moved for a new trial upon the following exceptions stated: "(1) The failure of the court to submit the issues proposed by this defendant. (2) The

submission of the second issue in the form adopted by the court. (3) That the court failed to state in a plain and correct manner the evidence in the case, and to declare and explain the law arising thereon. (4) There was no evidence that the statements made by the defendant, J. R. Keen, at the sale about the title were false, and the court therefore erred in instructing the jury that if Keen falsely stated that Calvin Davis had no title to the said land, and thereby caused it to bring less than its real value, they will answer the second issue 'Yes.'" The motion was overruled, and the defendant Keen excepted. Judgment was entered upon the verdict, and an appeal taken by the said defendant.

E. E. Raper, for appellant. J. R. McCrary, for appellees.

WALKER, J. (after stating the case). The court submitted the first issue in practically the same form as the one proposed by the appellant, the introduction of the word "advertising" being proper under the circumstances. The verdict on that issue was in his favor, so no harm was done by the court's amendment, even if it was improper. The addition of the words "as alleged in the complaint" to the second issue, would not have essentially altered its meaning, as issues in contemplation of the law, have reference to the pleadings, and are based upon them. The issue as submitted substantially followed the allegation of the complaint, as the effect of the latter is to charge that the appellant disparaged the title for the purpose of deterring bidders, and preventing fair competition. It can make no difference what particular words are used to express the idea, for it all comes to this, that the appellant has committed a fraudulent act, so that he has secured an advantage to which he is not fairly entitled, and the law will not stop to inquire by what name it should be called. The case was argued before us as if it were an action for slander of title, but it is not. The plaintiffs claim no damages for any injury done by smirching their title. They ask, on the contrary, for equitable relief, in that they seek to set aside the sale and to cancel the deed because of the fraudulent conduct of the appellant in suppressing the bidding. The assertion of the appellant at the sale, that there was no deed, could imply nothing else than that the title was defective and that evidently was the construction placed upon it by those who intended to bid at the sale. He intended to impugn the title by insinuation, if not by a direct attack upon it. *Cardon v. McConnell*, 120 N. C. 461, 27 S. E. 109, does not, therefore, apply. The third assignment of error is too general, and cannot be sustained. Besides, any omission to state the evidence or to charge in any particular way, should be called to the at-

tention of the court before verdict, so that the judge may have opportunity to correct the oversight. A party cannot be silent under such circumstances and, after availing himself of the chance to win a verdict, raise the objection afterwards. He is too late. His silence will be adjudged a waiver of his right to object. The subject is fully discussed in *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225. The first three assignments of error are therefore overruled.

The fourth and principal assignment is equally untenable. It was admitted that Calvin Davis owned the land which he mortgaged to Beek & Foust. The sale was made under the power contained in the mortgage and the substance of the evidence is that the appellant, by false representations as to the state of the title, induced others to desist from bidding, so that he could buy the land at a grossly inadequate price, which he did. It is impossible to read the testimony without coming to the conclusion that the appellant intended what he said to those who proposed to buy should have the effect that it did, so that the sale would be chilled or the bidding stifled, and he thereby would be enabled to get the land for little or nothing. This was a clear attempt to perpetrate a fraud, as the law views it, and a court of equity will not permit it to go unrebuked. It may be said generally that mere inadequacy of price, independent of other grounds of relief, will not invalidate a sale, but it is a cogent circumstance to be considered by the jury when it appears, in connection with it, that there has been unfairness, or that an undue advantage has been taken, or that there has been any other inequitable conduct, and a court of equity will readily seize upon any such incident as a ground of relief when the property has sold for a price so low as to result in hardship. It is plainly just that it should interpose in such a case. Whether in any case, if the inequality between the price and the real value of the land be so great "as to shock the conscience, and confound the judgment of any man of common sense," the court will interpose, we need not inquire. Judge Nash said in *Potter v. Everitt*, 42 N. C. 152, that "mere undervalue is no ground for setting aside a contract, unless it be such as amounts to apparent fraud, or the situation of the parties be so unequal as to give one of them an opportunity of making his own terms." In more recent cases this court has expressed a doubt as to whether inadequacy of price, nothing else appearing, is sufficient ground upon which to invoke the aid of a court of equity. *Trust Co. v. Forbes*, 120 N. C. 355, 27 S. E. 43; *Monroe v. Fuchtiler*, 121 N. C. 101, 28 S. E. 63; *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285. See, also, 28 A. & E. Enc. 813; *Meath v. Porter*, 9 Helsk. (Tenn.) 224; 2 *Jones on Mortgages* (6th Ed.) § 1915. But we do not have to go far to find abundant authority for the position

that such inadequacy, when coupled with any other inequitable element, even though neither, when considered alone, may be sufficient for the purpose, will induce a court of equity to interpose, and do justice between the parties. 17 A. & E. Enc. (2d Ed.) 1003. As, for example, when there has been a resort to any method for the purpose of unduly inflating or depressing the price. "A sale at auction is a sale to the highest bidder, its object a fair price, its means competition. Any agreement to stifle competition, is a fraud upon the principles on which the sale is founded." *Smith v. Greenlee*, 13 N. C. 126, 18 Am. Dec. 564. Free and fair competition being the very essence of such a sale the principle just stated must necessarily apply to all cases where any means, such as false representations or deception, have been unduly employed to subvert this principle, and acquire the property upon unjust terms. The reports are full of analogous cases. *Brodie v. Seagraves*, 1 N. C. 96; *Morehead v. Hunt*, 16 N. C. 35; *Goode v. Hawkins*, 17 N. C. 393; *McDowell v. Simms*, 41 N. C. 278; *Id.*, 45 N. C. 130, 57 Am. Dec. 595; *Ingram v. Ingram*, 49 N. C. 188; *Dover v. Kennerly*, 44 Mo. 145. "In all public sales, whether made by a private individual as an auctioneer, or by an officer of the law as a sheriff, under an execution, the object is to secure to the person whose property is sold, a fair price, and to the creditor satisfaction of his debt. Puffing or by-bidding is a fraud on the vendee, as it has the effect of enhancing the price upon him, and any agreement not to bid, made for the purpose of paralyzing competition, is a fraud on the vendor, and vitiates the sale." *Bailey v. Morgan*, 44 N. C. 356. Sugden puts a case like ours and says, if a purchaser by his conduct deters others from bidding, the sale will not be binding and cites the barge case, *Fuller v. Abrahams*, 3 Broad. & Bing. (7 E. C. L.) 116, which is in principle similar to the case under consideration. 1 Sugden, Vend. & P. p. 80. Still more like this case is *Fenner v. Tucker*, 6 R. I. 551. See, also, 2 *Jones on Mort.* (6th Ed.) §§ 1912, 1910, 1911. "A purchaser who is guilty of any fraud, trick, or device, the object of which is to get the property at less than its value, will not be permitted to enjoy the fruits of his purchase so obtained." Section 1912. It is not required that the mortgagees should be present at the sale, for they can execute the power by an attorney duly appointed for the purpose of making the sale. *Parker v. Banks*, 79 N. C. 480; but their absence, as well as any other relevant fact which tends to show the true situation at the time the bid and purchase were made and the circumstances under which they were made, may be considered by the jury upon the question of fraud.

When we examine the facts of this case, even those that are not seriously controverted, we find little or no difficulty in discerning

the true nature of this transaction. It appears that the mortgage was made to secure a debt of \$5; that the sale, though it may have been duly advertised, was made without the actual knowledge of the beneficial owners of the property, who are the heirs of the mortgagor. The mortgagees themselves were not present at the sale, the defendant Keen, while he did not represent them as agent, in the sense that he was authorized to act for them at the sale and therefore their alter ego, seems to have taken a very active part in the conduct of the sale and the jury have found, as will appear by the verdict when construed in the light of the evidence and the charge of the court, that he falsely impeached the title of Calvin Davis for the purpose of stifling competition and buying the land at a price below its real value. There can be no doubt that he looked upon this land with a covetous eye, and was willing to seize the opportunity presented of gratifying his cupidity. It is of little or no importance whether he said enough to make him liable in damages for slander of title, for if he accomplished his purpose by other evil means or by artifice just as effective, it is quite sufficient for a court of equity to require a restoration by him of what he has thus wrongfully obtained. The sale was anything but a fair one, and it would be a reproach to the administration of justice if it were permitted to stand. One of the most important functions of a court of equity is to afford relief in just such cases.

Everything in the case strongly appeals to the conscience of the court in behalf of the plaintiffs, and clearly entitles them to its protection. We think the case was in all respects correctly tried.

No error.

MOTT v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Nov. 7, 1906.)

1. TELEGRAPHS—OPERATION—NEGLIGENT DELAY.

Where a telegram, requesting the addressee to come to his half-brother's funeral, reached the receiving office at 8:55 a. m., but did not leave it until 10:30 a. m., and according to the addressee's testimony, it was not delivered to him until 11:30 a. m., and his place of residence, a mile from the office, was known to the operator, the delay was prima facie negligent.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, §§ 33, 61, 63.]

2. SAME—FAILURE TO PREPAY CHARGES.

Where a telegraph operator tells the agent of the sender that there would be no extra charge for delivery, it is negligence to fail to make prompt delivery because such extra charges are not prepaid.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

3. SAME—RESULTING DAMAGES.

Where delivery of a telegram, requesting the sendee to come to his half-brother's funeral,

could have been made in 15 to 20 minutes, but in fact was not delivered for almost 3 hours, and thereby the addressee failed to catch his train, the company is liable in an action by the addressee.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

4. SAME—CONFLICTING DUTIES OF OPERATOR.

Time consumed by a telegraph agent in attending to his other duties as railroad agent, or in handling the mail, does not operate as an excuse for delay in the delivery of a telegram.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

5. SAME—DELIVERY TO SENDEE'S SON.

Where a telegraph message is given for delivery to the addressee's son, passing by on his wheel, he becomes the company's messenger, and any negligence by him in delaying delivery is the negligence of the company.

6. APPEAL AND ERROR—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In an action for a negligent delay in the delivery of a telegram, the jury were instructed that if the operator acted prudently in intrusting the message for delivery to the addressee's son, such action was not negligence. They were also instructed that, by giving the message to the son for delivery, he became the company's messenger, so that any negligence by him in delaying delivery was imputable to the company. *Held* that, though the charges were contradictory, it was no ground for reversal of a judgment in favor of plaintiff, since the instruction adverse to defendant was not erroneous.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Appeal and Error, § 4219.]

7. TELEGRAPHS—DELIVERY OF MESSAGE—DELAY—PAYMENT OF DELIVERY CHARGES.

While a telegraph company need not surrender a telegram until the addressee pays the extra charges for special delivery, yet where the addressee lives only a mile from the receiving office, though without the free delivery district, and no special reason appears for delaying an attempted delivery until word could be received from the sender as to delivery charges, a delay in delivery caused by the sending of a message requesting instructions as to such charges constitutes negligence, especially if the sender has been informed that no extra charges are required.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Telegraphs and Telephones, § 33.]

Appeal from Superior Court, Iredell County; Ferguson, Judge.

Action by Charles D. Mott against the Western Union Telegraph Company. From a judgment in favor of the plaintiff, defendant appeals. Affirmed.

On the 22d of June, 1906, the following message, charges prepaid, was delivered to defendant at Winston, N. C.: "To Charles Mott, Elmwood, N. C. W. M. Young killed in W. Va. Funeral here, three o'clock. Can you come. Della Young." The sender was the widow, and the sendee a half-brother, of the deceased. Hoosier, a witness for plaintiff, testified that he delivered the message to the operator at Winston about 7 a. m. and told him that the sendee lived a mile from Elmwood, and that, if there was any extra charge for delivery, he was ready to pay it, and asked if there was any such charge. The operator replied that the 29 cents which he paid was sufficient. This conversation was

corroborated by another witness, and the defendant did not contradict it by the testimony of its operator, nor show any cause why it did not produce him. It was in evidence that he was still living, though no longer in defendant's service. The operator at Elmwood testified that he knew the sender, who lived one mile from Elmwood and half a mile beyond the free delivery limit; that this message was delayed half an hour by a grounded wire, and was received at Elmwood at 8:55 a. m.; that at 9:31 he sent a service message to Winston that 25 cents was needed to secure delivery, and that at 11:11 he received a reply to make the delivery; that in the meantime the plaintiff's son, a boy 15 to 16 years of age, came by, riding a wheel, going in the direction of his father's house, and he gave him the message at 10:30 a. m. for immediate delivery. It appeared that the train going to Winston stopped at Elmwood at 9:08 a. m., and that the next train, and the only one after that which could have gotten the plaintiff to Winston in time for the funeral, did not stop at Elmwood, but stopped at Barber's Junction, eight miles from the plaintiff's house, who testified that he did not receive the message till 11:30. He testified as to the efforts he made to catch the train at Barber's Junction, and that he failed to do so. The plaintiff's son being dead, his testimony as to the time he received and when he delivered the message, and whether there was any delay, is not obtainable. Defendant appealed from the judgment rendered.

F. H. Busbee & Son and Armfield & Turner, for appellant. L. C. Caldwell and W. G. Lewis, for appellee.

CLARK, C. J. (after stating the case). The defendant's brief relies solely upon exceptions to the judge's charge. After telling the jury that the plaintiff did not rely upon any delay in the transmission of the message, but only on the delay to deliver after its receipt at Elmwood; that the defendant had a right to restrict its free delivery limits, and to charge for delivery beyond; that, unless the jury found that the extra compensation was offered and refused when the message was handed in, the receiving office could wire back therefor, and that any reasonable time necessary for this purpose and getting a reply should not be counted by the jury; and that, if the agent at Elmwood did what a prudent man should under existing circumstances in intrusting the message to the defendant's son, it was not negligence—he further charged the jury as to the evidence of what efforts the plaintiff made after receiving the message to catch the train at Barber's Junction, and that the defendant was not liable if the plaintiff could have done so by reasonable promptness and diligence, and a correct charge as to the assessment of damages for mental suffering, to all of which

there is no exception. The court further charged:

(1) That it being admitted that the message, charges prepaid, was received at Elmwood at 8:55 a. m. and that the operator then knew that the plaintiff lived a mile away, a prima facie case of negligence was made out, nothing else appearing.

(2) That it was the duty of the defendant, knowing where the plaintiff lived, not to hold the message, but to deliver the same promptly, whether the guaranty charges for delivery beyond the free delivery limits were paid or not, especially if the operator at Winston had told the sender that no extra charges were required when the message was handed him.

(3) That, by giving the message to the plaintiff's son for delivery, the defendant made the son its messenger, and any negligence by him in delaying delivery was the negligence of the defendant.

(4) That if the operator at Winston told the sender's agent, in reply to his inquiry, that there would be no extra charges, it was negligence to fail to make prompt delivery because such extra charges were not prepaid.

(5) That the jury could not take into consideration, as an excuse for delay, any time consumed by the agent at Elmwood in attending to his other duties as railroad agent or in handling the mail.

(6) That if, as the defendant's agent testified, delivery could have been made in 15 to 20 minutes—i. e., by 9:15 a. m.—but in fact, as the plaintiff testified, the message was not delivered till 11:30 a. m., and the plaintiff immediately made preparations to catch the train at Barber's Station, and failed to do so because of the aforesaid delay of the defendant to deliver the telegram, then the defendant is liable.

The exceptions to paragraphs 1, 4, and 6 are unfounded, and need no discussion.

Paragraph 5 is justified by what is said in *Kernodle v. Telegraph Co.*, 141 N. C. 438, 54 S. E. 423, where Brown, J., well says: "If the defendant employs an agent on joint account with the railroad company, it must abide the consequences of a conflict of duty upon the part of the agent." The contract of the telegraph company is for prompt delivery. It is no defense that its agent had other duties to attend to as agent for another company, any more than it would be an excuse that it had so much business of its own that one agent or the messengers it had could not promptly and properly handle it. In both cases the defendant is negligent if it does not have sufficient employees to discharge properly the duty it contracts to do and is chartered and paid to do.

As to paragraph 3 the court properly charged that giving the message to the plaintiff's son at its office, with request to deliver to his father, made him the defendant's agent, and it is responsible for the delays of its

messenger. It would be otherwise if the message had been delivered at the plaintiff's house to a person of reasonable age and discretion, the father not being at home, or if the father had sent his son to the telegraph office for a message and it had been delivered to him as his father's agent. The defendant complains that this charge is contradictory to one given on the same point, as above set out. But contradictory charges are only ground for reversal when the instruction adverse to the appellant is erroneous. If the jury followed the other instruction, which was given at the request of the appellant, it certainly could not complain.

As to the only remaining paragraph of the charge excepted to (No. 2 above), the delay to send the service message from 8:55 till 9:31, and the delay of a reply thereto till 11:11 a. m., was left to the jury on the question of negligence; but, disregarding that, the court did not err in telling the jury that "it was the duty of the defendant, knowing where the plaintiff lived, not to hold the message, but to deliver the same promptly whether the guaranty charges for delivery beyond the free delivery limits were paid or not, especially if the operator at Winston had told the sender that no extra charges were required when the message was handed him." *Telegraph Co. v. Snodgrass* (Tex. Sup.) 60 S. W. 308, 86 Am. St. Rep. 851; *Telegraph Co. v. Moore*, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515. In this last case, already cited by us with approval (*Bryan v. Western Union Tel. Co.*, 133 N. C. 606, 45 S. E. 938), it is said: "If there be any additional sum due, the company may require its payment before it surrenders the message to the sendee, if it prefers to do so, rather than rely upon the sender for its payment. The company will thus be furnished ample protection, and the expectations and purposes of the sender of the message will not be disappointed. * * * If, however, the company might occasionally lose a delivery charge, the loss of it would be trifling and inconsiderable, when compared with the possible loss and inconvenience to the public and patrons who have relied in good faith upon its delivery of the message." *Hendricks v. Telegraph Co.*, 126 N. C. 310, 35 S. E. 543, 78 Am. St. Rep. 658; *Bryan v. Telegraph Co.*, 133 N. C. 605, 45 S. E. 938. The company need not surrender the message till the sendee pays the extra charges for the special delivery. In *Hendricks' Case* Douglas, J., says that the clause in the telegraph blanks, that for delivery beyond free delivery limits "a special charge will be made to cover the cost of such delivery," by its very terms "does not apply to the office from which the message is sent." It does not say that the message will not be delivered beyond such limits, but that "a special charge will be made to cover the cost thereof," which clearly implies that it will be delivered. There may, of course, be cases where, by reason

of the distance and cost, the company should wire back and require the extra cost to be guaranteed by the sender; but such would be unusual and are not the facts of this case. Here the uncontradicted evidence is that the sending office was told where the sendee lived and assured the sender that the message would be delivered for the sum charged and paid. The sendee did not refuse to pay the extra 25 cents.

No error.

PARDON v. PASCHALL.

(Supreme Court of North Carolina. Nov. 7, 1906.)

1. HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — CONVEYANCE — DETERMINATION OF COVERTURE — ABANDONMENT.

Under Revisal 1905, § 2117, providing that every woman whose husband shall abandon her shall be deemed a free trader so far as to be competent to contract and to bind her separate estate, a deed executed by a wife alone, after a permanent abandonment by the husband, is a valid conveyance.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Husband and Wife, §§ 238, 716.]

2. TRIAL — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE — REQUESTS — NECESSITY.

One who has not requested a charge that there was no sufficient evidence of an issue in the case, and who has requested no instructions, cannot be heard, on motion to set aside the verdict, to raise an objection on the failure of the court to so charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 627.]

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Action by Thomas Pardon against Rachel Paschall. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Scott & McLean, for appellant. G. S. Bradshaw, for appellee.

PER CURIAM. The plaintiff claims title to the land in controversy under the will of his wife, Sarah Yates Pardon. The defendant claims under a deed executed by the wife alone, January 4, 1905. The court charged the jury that, if the plaintiff had permanently abandoned his wife prior to and at the time of the execution of the deed to the defendant, it was a valid conveyance, under Revisal 1905, § 2117, and the plaintiff would not be entitled to recover. The charge of the court is clear and free from error upon this, the only question at issue on the trial, and presents fully the contentions of both parties.

The only exception presented in the brief of the appellant is that there is no sufficient evidence of abandonment, and that the judge should have so instructed the jury. It nowhere appears in the record that the plaintiff requested the court so to charge, or that the plaintiff handed up any prayer for instructions to the jury. He cannot be heard therefore to raise that question by motion to set aside the verdict. "If he is silent when he

should speak, he ought not to be heard when he should be silent." *Boon v. Murphy*, 108 N. C. 192, 12 S. E. 1032, and cases cited. If it is any satisfaction to the plaintiff to know it, we will state that an examination of the record discloses ample evidence to justify the court in submitting the matter to the jury.

No error.

MERRIMON et al. v. SOUTHERN PAVING & CONSTRUCTION CO. et al.

(Supreme Court of North Carolina. Nov. 17, 1906.)

MUNICIPAL CORPORATIONS—ACTIONS BY CITIZENS AND TAXPAYERS.

The right of action being in the city where payments not authorized by the work as done are being made under a contract for paving for the city, citizens and taxpayers may, in the absence of any showing of fraud, maintain a suit to enjoin the payment only on showing that they have exhausted all means to have the city act, and merely requesting the mayor not to make payments is not enough; they should call on the board of aldermen to act, and if a regular meeting thereof will not be in time they should call on the mayor, or, he refusing, a majority of the aldermen, to call a special meeting.

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Suit by B. H. Merrimon and others against the Southern Paving & Construction Company and others. Demurrer was sustained to the complaint, and plaintiffs appeal. Affirmed.

The plaintiffs, citizens and taxpayers of the city of Greensboro, instituted this action on March 13, 1906, against the defendants, the Southern Paving & Construction Company, the city of Greensboro, T. A. Hunter, a member of the board of aldermen and chairman of street committee, W. G. Potter, city engineer, and T. F. Murphy, mayor of said city. They allege that the city of Greensboro was duly incorporated by an act of the General Assembly of the state. Priv. Laws 1901, p. 829, c. 333. That pursuant to power vested in said city of Greensboro, acting through the mayor and board of aldermen, it entered into a contract (a copy of which is made a part of the complaint) with the defendant construction company on September 20, 1905, by which, upon the terms and for the prices named, the said company undertook to furnish all materials, implements, labor, and everything necessary, and perform all of the work and labor required, to grade, improve, and pave, complete in all respects, certain streets in said city. The specifications, plans, etc., by which the materials were to be furnished and the work to be performed were made a part of the contract. The portions of the contract material to the decision of the appeal are that the materials furnished and work done were to be inspected and approved by the city engineer, and in case of disagreement his de-

cision was to be final and binding upon all of the parties. Approximate estimates of the work done were to be made by the engineer, and payment made upon his approval semimonthly, 10 per cent. of each estimate to be retained until the work was completed; warrants for the amounts due upon the semimonthly estimates to be issued by the mayor. The plaintiffs allege that the defendant company began the work as provided by the said contract, "but in numerous and material respects failed and neglected to perform the obligations imposed upon it by the terms of said contract and specifications, and failed and neglected to give to the city as good pavement as was called for. The complaint set out 11 respects in which the company failed to furnish good material and properly perform the work. They further allege that defendants Hunter and Potter have failed to discharge their duty in seeing to it that defendant company was complying with its contract. That on November 24, 1905, defendant Potter, city engineer, approved an estimate, and semimonthly thereafter approved other estimates, upon which warrants were drawn and payments made aggregating \$26,652.85. It appears from said estimates set out that 10 per cent. of the amount due was retained by the city. That said amount was about four-fifths of the entire sum to be paid on account of the contract. That the amount already paid defendant company is more than it is entitled to receive, by reason of the defective character of the materials and work. That after the plaintiffs came into possession fully of the facts with respect to the manner of doing the work on Elm street, and were prepared, with information they had gathered, to establish the defects in the work herein alleged and complained of up to the time of the bringing of this action, they were informed and believed that a payment of the city's money by the defendant T. J. Murphy, mayor, upon the certificate of the defendant W. G. Potter, city engineer, would be made unless action was taken to prevent it. That the plaintiffs had no opportunity, after this information was so obtained and collected, to lay the matter before the board of aldermen of the city of Greensboro, as there was no meeting of the board, and as they are advised and believe it was unnecessary for them to do so, but they did, through their attorney, communicate with the defendant T. J. Murphy, mayor, that there were material and serious defects in the work done by the defendant company in paving South Elm street, and that the defendant company had already received more money than it was entitled to receive, or would be entitled to receive when it had paved the remainder of Elm street to Church street, which had not been paved between Lee and Church streets, and that he ought not to make payments or issue warrants for money to the defend-

ant company, but should withhold any further payments or warrants until an investigation was made as to what the facts were, and request, further, that such payments and warrants be withheld until Friday, the 17th day of March, 1906; but the defendant T. J. Murphy declined to agree to withhold the payments, and showed no disposition or indications that he would make any investigation whatsoever, and on the 16th day of March, 1906, was in the act of issuing, or had issued and afterwards recalled, a warrant of \$2,628, in addition to the \$26,652.85 which had already been paid to the defendant company, or to the Southern Life & Trust Company for it, and, as plaintiffs are informed and believe, the defendant T. J. Murphy, mayor, was stopped from issuing said warrant upon which said amount of \$2,628 would have been paid out of the city's treasury only by the commencement of this action and the proceedings had herein. That the representations of the defendant company that it had done work entitling it to \$26,652.85 was approved by the defendant W. G. Potter when the same should not have been approved, and if the said Potter had complied with the obligations resting upon him in the contract hereto attached and marked "Exhibit A," he would not have so approved the said accounts and claims of the defendant company, as plaintiffs are informed and believe. That no order, direction, or warrant, or any action whatever, with respect to the acceptance of said work done by the defendant company, or any payment therefor, has been taken, made, or done by the board of aldermen of the city of Greensboro since the contract entered into with the defendant company on the 20th day of September, 1905, and whatever action is taken by the defendant T. J. Murphy, by the defendant T. A. Hunter, or by the defendant W. G. Potter, in approving or paying for any such work, is unauthorized, except it be authorized by the terms and conditions and stipulations of the said contract. Plaintiffs allege that it would be a fraud upon themselves and the other taxpayers of said city to permit further payments to be made to defendant company out of the funds of the city. They demand judgment that a perpetual injunction issue against the defendant company receiving, or the other defendants paying, any money on account of the said contract, etc.

Defendants demur to the complaint, and for cause of demurrer say: "That said complaint does not state facts sufficient to constitute a cause of action against said defendants, in that it appears from said complaint that any cause of action that may arise from the breach of the contract therein mentioned on the part of the defendant the Southern Paving & Construction Company is vested in, and accrues to, primarily, the said city of Greensboro, and not in or to the plaintiffs, and it is not alleged in said complaint that

plaintiffs, or either of them, ever requested or demanded of the governing body of the said city, to wit, the board of aldermen, that they proceed to enforce said contract, and that said board of aldermen refused so to do. And further, that it does not appear from said complaint that said plaintiffs, or either of them, ever gave said board of aldermen to understand or be informed that the said Southern Paving & Construction Company was violating its said contract, or that defendant T. A. Hunter, chairman of the street committee, or defendant W. G. Potter, city engineer, had been guilty of dereliction of duty, and requested that said board take action in the premises, and that said board had refused so to do. That it is not alleged in said complaint that the city authorities and the city of Greensboro, in carrying on the improvement and paving of Elm street pursuant to the contract therein mentioned, are or have been acting fraudulently and in bad faith in allowing the variations from the contract specified in the complaint, and not bona fide and in the exercise of the discretion vested in them by law and by the terms of said contract. His honor sustained the demurrer, and rendered judgment dismissing the action. Plaintiffs excepted and appealed.

J. Morehead and B. J. Justice, for appellants. W. P. Bynum, Jr., G. S. Ferguson, Jr., R. C. Strudwick, and Stedman & Cooke, for appellees.

CONNOR, J. (after stating the case). The demurrer raises three questions, all of which are clearly presented in the briefs and were ably argued in this court: (1) Does the citizen, in respect to his right to invoke the equitable powers of the court to control the action of a municipal corporation regarding its property, occupy the same relation to the corporation as a shareholder in a private corporation, and is his right to bring such suit governed by the rules applicable to such shareholder? (2) What are the limitations upon the right of a shareholder to bring suits regarding the control of the corporate property? (3) Do the facts set out in the complaint, and for the purpose of the demurrer admitted to be true, entitle the plaintiffs to maintain the suit, under the restrictions imposed by such rules?

That a citizen, in his own behalf and that of all other taxpayers, may maintain a suit in the nature of a bill in equity to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.—is well settled. Dillon, Mun. Corp. 914; High on Inj. 1236 et seq.; Carthan v. Lang, 69 Iowa, 384, 28 N. W. 650; Lodor v. McGov-

ern, 48 N. J. Eq. 275, 22 Atl. 199, 27 Am. St. Rep. 446; Liebstein v. Mayor, 24 N. J. Eq. 200; Bond v. Mayor, 19 N. J. Eq. 376; Roper v. Laurinburg, 90 N. C. 427. Judge Dillon says that the right to maintain such action is sustained by analogy to the principle applicable to the rights of shareholders in private corporations. "In these the ultimate cestui que trustent are the stockholders. In municipal corporations the cestui que trustent are, in a substantial sense, the inhabitants embraced within their limits. In each case the corporation or its governing body is a trustee. If the governing body of a private corporation is acting ultra vires or fraudulently, the corporation is ordinarily the proper party to prevent or redress the wrong by appropriate action or suit in the name of the corporation. But if the directors will not bring such an action, our jurisprudence is not so defective as to leave creditors or shareholders remediless, and either creditors or shareholders may institute the necessary suits to protect their respective rights, making the corporation and the directors defendants. This is a necessary and wholesome doctrine. Why should a different rule apply to a municipal corporation? If the property or funds of such a corporation be illegally or wrongfully interfered with, or its powers be misused, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant be allowed to maintain, in behalf of all similarly situated, a class suit to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property owners, on whom the loss will eventually fall, are without effectual remedy." Mun. Corp. 915. The author cites numerous cases showing that this most wholesome doctrine is generally recognized. The defendants, not denying this, say that the principal upon which the right of the citizen to sue, being the same as that which entitles the shareholder to sue, must be governed by the same limitations in regard to when, and under what circumstances, the suit may be brought. The plaintiffs insist that the citizen may sue without first applying to the governing body to take action. It is conceded that in some cases he may do so, just as in some cases the shareholder may. What is the general rule as to the right of shareholders to sue in cases where the right of action primarily vests in the corporation? The subject is treated, with his usual force and with much learning, by Mr. Justice Miller in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827. The English and American cases are reviewed, and the doctrine announced in that case has been adopted and followed by this and all other courts. The basic principle

is that the corporation is a distinct entity, and not a mere copartnership, composed of individuals; that by its charter certain powers are conferred upon this legal person or entity, to be exercised by the board of directors and other officers and agents provided for and elected in the manner prescribed; that when contracts are made by such boards or agencies, they are the acts of the corporation, and the duties assumed and rights acquired are corporate; that so long as the corporate acts are intra vires, and the officers are in the execution or discharge of such duties, exercising an honest judgment and discretion, the courts will not, except within the limitations prescribed, interfere at the suit of one or more stockholders.

The reason and policy upon which these limitations are based are so just and necessary to the existence and efficient operation of corporate powers and functions that they require no vindication; certainly nothing can be added in that regard to what is so clearly and forcibly said in *Hawes v. Oakland*, supra, and the quotations there made from opinions of other judges. The opinion in that case became the basis of the ninety-fourth rule in equity by which the federal courts are governed in taking jurisdiction in such cases. In *Loder v. McGovern*, supra, the plaintiff sued in equity to enjoin the governing body of the city from paying out funds on account of a contract made with the defendant, Loder, for paving streets, etc. The court, by Beasley, C. J., in an able and most satisfactory opinion, sustained the right of the plaintiff to bring the suit, but in discussing the form of the bill said: "So we further think that it was necessary for the complainant to show distinctly in his bill that the common council had been called upon to perform its duty, the not doing of which formed the basis of the complaint." He further said that the averment in the bill was sufficient. We quote the above to show that in the opinion of that eminent judge the averment was necessary. Evidently, Judge Dillon was of that opinion when he based the right to sue upon the same reason which entitled the stockholder to do so. The question has not been heretofore presented to or decided by this court. It seems to us that the reason of the rule applies with equal force to the right of a citizen to sue. As said by Mr. Clark in his work on Corporations: "The will of the majority must govern, and the courts will not interfere merely because a minority of the stockholders object to the transaction, and deem it injurious to the corporation." Page 396; *Hedges v. Dam*, 72 Cal. 520, 14 Pac. 183. So one or more citizens of a town may not, until the corporation or its governing body has refused, or for some of the reasons hereafter noted bring themselves within the exception, call upon the courts to interfere with the control of corporate property or the performance of corpo-

rate contracts. It would be quite impossible to carry out any plan or scheme of corporate work, such as paving streets, opening streets, erecting systems of water, lights, or other appropriate corporate enterprises, if any citizen of his own motion, and without notice to the corporate agents, can enjoin the work at any stage of its progress because he did not approve it or the manner in which it was being done. It is a matter of common observation that seldom, if ever, every individual in a town or city approves either the undertaking or manner of performance of municipal enterprises. Having become members of the corporation, with notice of its charter and governmental machinery, such citizen must, save in the excepted cases, be content to permit the will of the majority to prevail. As we shall see, his rights will be amply protected, if it is shown that those who have assumed the duty fail or refuse to do so, after he has demanded the performance, or otherwise brought himself within the reasonable rule prescribed by the law. Municipal corporations would find themselves embarrassed at every point of their corporate activity unless protected by some such restraint upon suits by the citizens. Officious intermeddlers or interested competitors could easily prevent all corporate action, if, without notice to the corporation or its governing body, courts entertained such suits. The contract to pave the streets was strictly within the power of the corporation. It appears to have carefully guarded the rights of the city. The engineer was made the sole arbitrator, and his judgment final. Ten per cent. of his estimates are retained by the city until the work is completed. It is stipulated that, even after his approval, the contractors are to be responsible for defective work. Assuming that there were defects in the work as it progressed, it does not follow, necessarily, that the city or its governing body was compelled to enjoin the further construction of the pavement. Many reasons occur to the mind, based upon observation and experience, which would control the sound discretion of the mayor and aldermen in permitting the work to go on. We know nothing of these matters save as disclosed in the record, and refer to them only to vindicate the wisdom of the law, which requires that a demand be made upon the authorities before the city is forced into litigation. Both upon reason and authority, we are of the opinion that the rule which protects private corporations from suits of this character applies to municipal corporations. Of course, as we shall see, when there is fraud, or the threatened action is *ultra vires*, the rule does not apply. Judge Miller in *Hawes v. Oakland*, *supra*, thus lays down the rule: "We understand the doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity in his own name a suit founded upon a right of action existing in the corporation itself, and in which the corporation itself is the appro-

priate plaintiff, there must exist, as the foundation of the suit, some action or threatened action of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves or with other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or when a board of directors, or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where a majority of shareholders are oppressively and illegally pursuing a course, in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity."

This court, in a well-considered opinion by Mr. Justice Merrimon in *Moore v. Silver Mining Co.*, 104 N. C. 534, 10 S. E. 679, cites with approval and adopts the doctrine of *Hawes v. Oakland*, *supra*, saying: "The right to bring, and the occasion of bringing, such actions arises only when and because the proper corporate officers will not, for some improper consideration, discharge their duties as they should do. But stockholders, as such, may not bring such actions at their pleasure, and have their rights as individuals, growing out of the corporation, settled and administered. * * * The case just cited [*Hawes v. Oakland*] was afterwards cited and fully approved by the same court in *Dimpfel v. O. & M. R. R. Co.*, 110 U. S. 209, 8 Sup. Ct. 573, 28 L. Ed. 121, and it was therein further held that it must appear that the plaintiffs had exhausted all the means in their power to obtain redress of their grievances within the corporation itself." The learned justice further says: "It is not alleged, nor does it appear in any way, that the plaintiff had ever taken steps, within the company last mentioned, to correct the grievances of which he complained, although he had known of them for years; nor does it appear that he has ever demanded and required of its officers that they take proper action to prevent them, or obtain redress on account of the same." Mr. Clark, in his excellent work on Corporations (pages 389, 390), states the doctrine as laid down by Judge Miller, and adds: "In addition to the existence of grievances calling for equitable relief, it must appear that the complainant has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances. He must apply to the managing officers to take action in the corporate name, and, if he fails with them, he must, if the matter will admit of the delay, seek to obtain action by the stockholders as a body, unless for some reason such at-

tempt would be useless." *Brewer v. Boston Theater*, 104 Mass. 378.

The plaintiffs earnestly insist that, conceding the full force and extent of the doctrine of *Hawes v. Oakland*, and that it applies to suits in equity by citizens and taxpayers of municipal corporations, the complaint contains allegations sufficient to entitle them to maintain the action. In *Lodor v. McGovern*, supra, while, as we have shown, the court held the averment necessary that the common council had been called on and refused to bring the suit, the opinion concludes with the statement that, "in view of the answer and proofs, it sufficiently appears that the common council was antagonistic to the plaintiffs' position, and that consequently the objection cannot prevail on final hearing." What the answer and proofs were are not set forth in the opinion or statement of the case; hence, in that respect, we have no information to enable us to see what facts controlled the court. In *Carthan v. Lang*, supra, the question raised by the demurrer was not presented or discussed for the obvious reason that: "It is alleged that the directors and Adams [the contractor] confederated together to defraud the district by the erection by the contractor of a house of a character inferior to the building required by the contract, and the acceptance and payment therefor by the directors. Other charges of fraud are made in the petition." The plaintiffs do not charge fraud on the part of the engineer, the mayor, or the aldermen, unless the allegation "that it would be a fraud on the plaintiffs' rights, as property owners and taxpayers for the city, to make the defendant paving company further payments," is so construed. This language is hardly capable of such construction. Plaintiffs' counsel on the argument frankly conceded that he did not intend to charge that the city authorities were acting from corrupt or dishonest motives. The cases all hold that the jurisdictional facts must be stated "with particularity." Mr. Justice Merrimon, in *Moore v. Mining Co.*, supra, says: "It is alleged that certain officers of the company were the authors of, and participants in, the alleged frauds and mismanagement, and that they refused to take action. But this allegation is indefinite, unsatisfactory, and evasive. * * * This is not sufficient." The plaintiffs negative the suggestion of fraud by saying that the defendants Potter, Hunter, and Murphy maintain that the work is being done according to specifications of the contract. It is a fundamental rule of pleading that when a plaintiff intends to charge fraud he must do so clearly and directly, by either setting forth facts which in law constitute fraud, or by charging that conduct not fraudulent in law is rendered so in fact by the corrupt or dishonest intent with which it is done. Certainly it cannot be contended that because of an honest difference of opinion in respect to the character

of work done and materials used in paving a street, the officers whose duty it is to have and act upon their opinion are guilty of fraud. It is not so contended. We find no averment that any of the officers are acting in the matter "for their own interest," or that their action is "destructive of the corporation," or that they are acting "oppressively or illegally," except in that they differ in opinion from the plaintiffs in respect to the character of the work. As we have seen, the action of the city authorities is *intra vires*, and in accordance with the charter of the city. We conclude, therefore, that the complaint contains no averment bringing the plaintiffs, in respect to their right to bring the suit, within any of the exceptions to the general rule which requires a demand upon the corporate authorities or governing board of the corporation and refusal by them to sue. Does the complaint allege any such demand? It is conceded that no demand was made upon the board of aldermen. Two reasons are assigned for not doing so. The first, that they were not required to do so, we have discussed and decided by what we have heretofore said. The second, "that there was no meeting of the board." It will be noted that there is no allegation as to the time within which there was no meeting of the board. By section 26, c. 333, p. 882, *Priv. Laws 1901*, being the charter of the city of Greensboro, it is provided that the board of aldermen shall meet at stated times to be fixed at their first meeting, and "shall be as often, at least, as once in every calendar month." It is further provided that special meetings shall be called by the mayor or a majority of the aldermen. A penalty of four dollars is imposed upon any alderman for failure to attend, unless good cause therefor is shown. It will be observed that the work was begun the fall of the year 1905, and from the estimates submitted semi-monthly considerable progress was made. Plaintiffs say that on March 13, 1906, as much as four-fifths had been completed. "That about this time plaintiffs came into possession of the facts with respect to the defects in the paving," etc. In *Moore v. Mining Co.*, supra, Merrimon, J., says: "It should be alleged frankly, plainly, and with particularity that the plaintiff had demanded and required of such officers that they should correct the grievances alleged, and take steps to obtain redress, and that they thereupon refused to do so." It is evident from the character of the specifications made by plaintiffs in the several particulars in which the work and materials were defective that they had knowledge thereof for some time. The allegation in that respect is far from the standard fixed by the law. They could, it would seem, have attended the monthly meeting of the board preceding the maturity of the March payment, or, if time did not permit this, call on the mayor, and, if he refused, a majority of the aldermen, to call a

special meeting. They would thus have "exhausted all the means within their reach to obtain within the corporation redress of their grievances," and this, all of the authorities say, must be done. The request to the mayor not to pay the money was not by any means a compliance with the rule. The mayor was, in respect to paying the money, the agent of the board of aldermen, as was the engineer in making the estimates and passing upon the work. Neither of these officers had any discretion or power to institute suit against the contractor. They would have incurred heavy responsibilities if, without instruction from the governing body, they committed a breach of the contract upon the request of the plaintiffs. It would be impossible to conduct the affairs of a municipal or private corporation if ministerial officers were permitted to assume the powers of the governing body. No one except the aldermen had the power to act in the matter. If they had, after being called upon, refused to act, and the plaintiffs' views in regard to the conduct of the paving company and the character of the material and work laid before them, and demand made that they take such action as was necessary to protect the interests of the plaintiffs, taxpayers, there can be no question that the plaintiffs would have been entitled to apply to a court of equity for relief. The allegation in regard to the request to the mayor to refuse to pay the amount then due was not a compliance with the law, and did not entitle plaintiffs to sue and enjoin the city and other defendants.

The plaintiffs say that to sustain the demurrer would be to permit the revenues to be misapplied, wasted, and "graft" to be practiced. This is a misconception of the rule and its exception. As we understand the term, "graft" is but another name for dishonesty, corruption, fraud. If the plaintiffs will allege either of these, the court will be swift to come to their aid and protection. So far as this complaint shows, a valid contract has been made for paving the streets of Greensboro. The plaintiffs honestly think that the paving company are not complying with their contract. Without mentioning their views and opinions to the board of aldermen, or alleging that they are acting improperly, or that they even know that plaintiffs think the work is not being properly done, they are sued and enjoined, the work is stopped, and a city of several thousand inhabitants thrust into a lawsuit by the action of these citizens. The result of permitting this course of procedure is manifest. The plaintiffs say that the defendants, by their demurrer, admit all of the grievances set forth in the complaint. The answer is, they admit them for the purpose of the demurrer; that is, they say, assuming them *pro hac vice* to be true, plaintiffs are not the proper party to sue. They have shown no such conduct on the part of the corporation or its governing body as gives them a right of action or *locus standi* in a court of equity. Every demurrer

directed to the incapacity of the plaintiffs to sue, the misjoinder of parties or causes of action or jurisdiction, admits the facts alleged for the purpose of the demurrer. Any other construction of a demurrer, which did not reach the merits of the controversy, would make it a vain thing. The doctrine which we have discussed is confined, of course, to the right of citizens of municipal, or shareholders in private, corporations to sue on account of right of action existing in the corporation itself. For corporate acts by the governing board or other officers injurious to the citizen or stockholders, as illustrated in numerous cases, the right of action accrues directly to the citizen or shareholder. Here, whatever injury was sustained by the failure of the paving company to perform its contract accrued to the city. No action at law could be brought by the citizen. It is only in a court of equitable jurisdiction that he may sue, and then only by conforming to its rules of practice and procedure. Until his trustee has refused to protect the trust properly, or has so acted as to relieve him of the duty of demanding performance, he has no status in a court of equity. The demurrer does not call into question the merits of the case; it simply denies their right to maintain the action in the present condition of the pleadings. If they had so desired, the court would have permitted an amendment if they wished to allege compliance with the law, or, if so advised, they can put themselves in a position to have their grievances redressed and their rights as taxpayers protected.

The suggestion of the plaintiffs that the injunction should be continued to the hearing only applies to those cases in which the facts constituting the cause of action are in controversy. Here, as we have said, the demurrer goes to the right of the plaintiffs to sue in the present condition of the record. No proof, in the absence of allegation, could remedy this fatal defect; hence, it would be an idle thing to continue the investigation to the hearing, when the plaintiffs are confronted at the outset with this insurmountable difficulty. The general proposition in plaintiffs' brief is correct, and supported by the authorities, but not applicable to this case.

Upon an examination of the entire record, we concur with his honor in sustaining the demurrer. The judgment must be affirmed.

LEVIN et al. v. GLADSTEIN.

(Supreme Court of North Carolina. Nov. 7, 1906.)

1. JUDGMENT—ACTIONS ON JUDGMENT—DEFENSES AT LAW.

A defendant in an action on a judgment cannot set up as a common-law defense that it was procured through fraud.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1726, 963, 964, 951-958.]

2. SAME—EQUITABLE DEFENSES.

A defendant in an action on a judgment may, in a court of equity, on a proper showing, obtain an injunction restraining the enforcement of the judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1726, 782.]

3. SAME—FOREIGN JUDGMENTS—CONCLUSIVE-NESS.

Where a judgment obtained by fraud in a court of a sister state was open to attack in the courts of that state by the judgment defendant proceeding in equity to restrain the enforcement thereof, that the courts of North Carolina in an action on the judgment gave defendant similar relief was not a violation of the constitutional requirement as to the faith and credit to be given such judgment.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1486.]

4. SAME—RELIEF AGAINST FOREIGN JUDGMENT PROCURED BY FRAUD.

A defendant sued on a judgment rendered by a court of a sister state need not, to obtain relief on the ground that the judgment was obtained by fraud, go into the sister state and enjoin there the enforcement of the judgment, but he may, in the state in which the judgment is sued on, obtain such relief.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, §§ 1760, 1486.]

5. SAME—ACTION ON FOREIGN JUDGMENT—EQUITABLE DEFENSE.

Under the Code, a defendant sued on a foreign judgment may set up the equitable defense that the judgment was procured through fraud.

[Ed. Note.—For cases in point, see vol. 30, Cent. Dig. Judgment, § 1760.]

6. JUSTICES OF THE PEACE—AUTHORITY TO GRANT EQUITABLE RELIEF—EQUITABLE DEFENSES.

A defendant in justice's court may interpose an equitable defense.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 184.]

7. SAME.

A defendant sued in justice's court on a foreign judgment may set up the equitable defense that the judgment was procured through fraud.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Justices of the Peace, § 184.]

Appeal from Superior Court, Durham County; Ferguson, Judge.

Action by Phillip Levin and another against M. Gladstein. From a judgment for defendant, plaintiffs appeal. Affirmed.

This was a suit upon a judgment obtained in the superior court of Baltimore City, Md. Personal service was had upon said defendant while in Baltimore. Action was instituted upon said judgment before a justice of the peace of Durham county, and from a judgment therein defendant appealed to the superior court. At the beginning of the trial in the superior court counsel for defendant stated that he admitted the regularity of the judgment sued upon, and withdrew all pleas and defenses to said action, save and except that the judgment upon which the action was brought was procured by a fraud practiced by plaintiffs upon the defendant, and that he insisted upon that plea alone. Thereupon the plaintiffs moved for judgment for that

the judgment rendered by the court of Maryland was not open to attack in this action for fraud. Motion overruled, and plaintiffs excepted. His honor held that the burden of proof was upon the defendant, and he proceeded to introduce testimony. Mr. Gladstein testified that he was the defendant in the case; that he knew Phillip Levin and Simon Levin, and had bought goods of them; that some time prior to his going to Baltimore he bought a bill of goods of plaintiffs, but had shipped some of them back to Baltimore because they were not up to the sample; that plaintiffs had refused to take the goods out of the depot in Baltimore; that upon his visit to Baltimore, summons was served upon him in the action brought there by the plaintiffs, but after said summons was served upon him, and before the return day, he saw one of the plaintiffs and had an interview with him at the store of L. Singer & Son, during which interview plaintiffs agreed with him to withdraw said suit and return the goods to him at Durham, provided he would, upon their receipt, pay the plaintiffs a sum of money, which they agreed upon, to wit, \$183, and freight and storage not to exceed \$3; that relying upon this agreement he returned to Durham, and made no defense to the action; that plaintiffs never returned the goods to him at Durham; that the first time he knew of the judgment was when called upon by attorneys for plaintiffs to pay said judgment. There was testimony contradicting defendant. After hearing testimony from both parties, the court submitted the following issue to the jury: "Was the alleged judgment rendered for \$143, bearing date April 27, 1904, in the superior court of Baltimore City, in favor of Phillip Levin and Simon Levin, copartners, trading as P. Levin & Co., against M. Gladstein, obtained by the fraud of plaintiffs?" To which the jury responded "Yes." Judgment was thereupon rendered that the plaintiffs take nothing by their action, and that the defendant go without day, etc. Plaintiffs excepted and appealed.

Biggs & Reade, for appellants. Winston & Bryant, for appellee.

CONNOR, J. (after stating the case). Two questions are presented upon the plaintiffs' appeal: First. Can the defendant, in the manner proposed herein, resist a recovery upon the judgment rendered against him by the Maryland court? Second. If so, has the justice of the peace jurisdiction to hear and determine such defense? The plaintiffs, relying upon the provision of the Constitution of the United States, art. 4, § 1, that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," earnestly contends that the defense is not open to the courts of this state; that the remedy for the fraud in procuring the judgment, if any,

must be sought in the courts of Maryland. The well-considered brief of plaintiffs' counsel thus states the question involved in the appeal: "The case presents the question of the right of a defendant to avail himself of the plea of fraud as a defense to an action in one state based upon a judgment obtained in a sister state." When a judgment rendered by the court of one state becomes the cause of action in the court of another state, and the transcript, as made in such state, duly certified, as prescribed by the act of Congress, is produced, it imports verity, and can be attacked for only one purpose. The defendant may deny that the court had jurisdiction of his person or of the subject-matter, and for this purpose may attack the recitals in the record. *Bailey on Jurisdiction*, §§ 198, 199. Jurisdiction will be presumed until the contrary is shown. If not denied, or when established after denial, defendant cannot interpose the plea of *nil debet*. This was held in *Mills v. Duryee*, 7 Cranch, 480, 3 L. Ed. 411, and has been uniformly followed by both state and federal courts. 2 Am. Lead. Cases, 538. In *Christmas v. Russell*, 72 U. S. 290, 16 L. Ed. 475, Mr. Justice Clifford said: "Substance of the second objection of the present defendant to the fourth plea is that, inasmuch as the judgment is conclusive between the parties in the state where it was rendered, it is equally so in every other court in the United States, and consequently that the plea of fraud in procuring the judgment is not a legal answer to the declaration. Principal question in the case of *Mills v. Duryee* was whether *nil debet* was a good plea to an action founded on a judgment of another state. Much consideration was given to the case, and the decision was that the record of a state court duly authenticated under the act of Congress must have in every other court of the United States such faith and credit as it had in the state court from whence it was taken, and that *nil debet* was not a good plea to such an action." The learned justice proceeds to say: "Domestic judgment, under the rules of the common law, could not be collaterally impeached or called in question if rendered in a court of competent jurisdiction. It could only be done directly by writ of error, petition for new trial or by bill in chancery." It will be found upon careful examination of *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535 (Id., 59 Md. 239, 43 Am. Rep. 554) that the question under consideration here was not involved. It is true that in the discussion Mr. Justice Gray uses the language cited by counsel which excludes the right of the defendant to impeach the judgment "for fraud in obtaining it." So, in *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538, Chief Justice Fuller, after quoting the language of the Constitution, says: "This does not prevent an inquiry into the jurisdiction of the court, in which judgment is rendered, to pro-

nounce the judgment, nor into the right of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their admitted territory." The learned Chief Justice relies upon the same line of cases cited by Judge Gray. Neither of them were discussing the question here presented, nor was it presented by the record in those cases. The case of *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152, was cited in *Cole v. Cunningham*, and as we shall see later, was approved. In *Maxwell v. Stewart*, 89 U. S. 77, 22 L. Ed. 564, the court simply reiterated the doctrine announced in *Mills v. Duryee*, supra, that the plea of *nil debet* could not be interposed in an action upon a judgment. *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88, *Bailey on Jurisdiction*, 191-192. This court, in *Miller v. Leach*, 95 N. C. 329, by Ashe, J., said that the judgment of a sister state was put by the Constitution upon the same footing as domestic judgments precluding all inquiry into the merits of the subject-matter, "but leaving the question of jurisdiction, fraud in the procurement, and whether the parties were properly before the court, open to objection—citing *Mills v. Duryee*, supra. See, also, *Coleman v. Howell*, 131 N. C. 125, 42 S. E. 555. It is elementary learning that this plea was not proper in actions founded upon a specialty or a record. *Shipman, Com. Law* Pl. 196. But, if plaintiff, in an action on a record, instead of demurring to the plea, accepts it and joins issue, the defendant is at liberty to prove any and every special matter of defense which might be proved under the same plea in debt. * * * For the plaintiff, by accepting the plea, founds his demand solely upon the defendant being indebted and thus waives the estoppel, or conclusive evidence of the fact," etc. *Overman v. Clemmons*, 19 N. C. 185; *Gould's Pl.* 287. Hence we find that in all of the cases in which the plea of *nil debet* was entered, the defendant demurred, and the decision was on the demurrer, which was uniformly sustained. *Mills v. Duryee*, supra; *Maxwell v. Stewart*, supra; *Benton v. Burgot*, 10 Serg. & R. (Pa.) 240; *Carter v. Wilson*, 18 N. C. 362; *Knight v. Wall*, 19 N. C. 125. In *Allison v. Chapman* (C. C.) 19 Fed. 488, *Nixon, J.*, says: "This subject is fully discussed * * * and the conclusion is reached that the allegation in a plea that a judgment was procured through fraud is not a good common-law defense to a suit brought upon it in the same or a sister state." This conclusion is fully supported by all of the authorities, and in this we concur with the learned counsel for the plaintiff. Notwithstanding the well-settled rule that the judgment, when sued upon in an-

other state, cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment.

Pearce v. Olney, 20 Conn. 544, was "a bill in chancery praying for an injunction against the further prosecution of an action at law." Defendant sued plaintiff in the Superior Court of New York City and obtained service upon him. Plaintiff saw and made an arrangement with defendant's attorney by which it was agreed that no further action would be taken in the case until plaintiff should receive further notice from him. Relying upon said agreement, plaintiff did not employ any counsel, and did not appear before said court, believing that said suit was to be no further prosecuted against him. Defendant, in violation of said agreement, procured judgment against plaintiff. Defendant, some time thereafter, brought suit in the court having jurisdiction in Connecticut, and at the time of filing the bill said suit was pending in said court. Defendant relied upon the constitutional provision, insisting that to enjoin him from prosecuting his action on the judgment would be to deny "full faith and credit to the judicial proceeding" in New York. The court said: "It is insisted that under the Constitution of the United States * * * it is not competent for the court to impeach the judgment of the Superior Court of New York; it being shown that the court had jurisdiction of the cause, by the regular service of process on the defendant in that suit, and cases are cited to sustain this position. This doctrine is correct enough, no doubt, properly understood and applied, but it has no application here. There is no attempt to impeach the validity of the New York judgment. In granting an injunction against proceedings at law, whether in a foreign or domestic court, there is no difference. The court of equity does not presume to direct or control the court of law, but it considers the equities between the parties, and restrains him from prosecuting an action." A perpetual injunction was granted. The case had a further history. The defendant in the equity suit and plaintiff in the judgment, assigned the judgment to one Dobson, who brought suit on it in the Superior Court of New York against Pearce, the defendant in the judgment. Defendant set up, by way of defense, the record of the equity suit in Connecticut and the injunction granted therein. Dobson sought to avoid the injunction. The cause was ably argued and carefully considered by the court. It was said: "So, fraud and imposition invalidate a judgment as they do all acts, and it is not without semblance of authority that it has been suggested that at law the fraud may be alleged whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment,

fruits of his fraud. But whether this is so or not, it is unquestionable that a court of chancery has power to grant relief against judgments when obtained by fraud." The court proceeded to say that under the judiciary system in New York, permitting equitable defenses to be set up in the answer, whether the fraud could have been pleaded or not in an action at law, it could be set up, as an equitable defense to defeat a recovery upon a fraudulent judgment. The court held that the injunction granted in Connecticut established the fraud, and that plaintiffs could not recover. As we have seen, this case was cited with approval in *Cole v. Cunningham*, supra. It is cited with approval by the chancellor in *Davis v. Headley*, 22 N. J. Eq. 123, in which it is said: "That the courts of equity will set aside judgments of their own and other states for fraud practiced in procuring them. * * * It will not lend its aid to enforce a judgment obtained by fraud, when the fraud is shown. Complainant must come with clean hands in the matter on which relief is sought." The doctrine is well stated in *Payne v. O'Shea*, 84 Mo. 129 (cited in *Black on Judgments*, § 919): "A proceeding in the nature of a bill in equity will lie to enjoin and avoid a domestic judgment obtained through fraud, and like remedies exist and may be resorted to against judgments obtained in other states, when sued on in this state. The fraud, however, for which a judgment will be enjoined must be in the procurement of the judgment." Nor does the constitutional provision stand in the way of such proceeding. Usually, the power of a court of equity to interfere in the enforcement of judgments obtained by fraud, is invoked to restrain the plaintiff; in such judgments, from issuing or enforcing execution. The theory was, as we have seen, that the court of equity did not call into question the integrity of the judgment, but by its decree operated in personam upon the plaintiff, enforcing the decree of punishing for contempt disobedience to it. But when the judgment, as in *Pearce v. Olney*, supra, was made the cause of action at law, equity enjoined the plaintiff, shown to be guilty of the fraud, from prosecuting the action. Our equity reports contain many illustrations of the practice. *Hadley v. Rountree*, 59 N. C. 107. The underlying principle is that the judgment of a sister state will be given the same faith and credit which is given domestic judgments.

It is contended, however, and with force, that the "faith and credit" to be given such judgment is measured by the law of the state in which it is rendered. We find, upon examining the decisions made by the Maryland court, that in that state a court of equity will enjoin the enforcement of a judgment obtained by fraud. We had no doubt that such was the law in that state. In *Little v. Price*, 1 Md. Ch. 182, the chancellor says: "The object of an injunction to stay proceedings at law, either before or after judgment, is to

prevent the party against whom it issues from availing himself of an unfair advantage resulting from accident, mistake, fraud or otherwise, and which would therefore be against conscience. In such cases the court will interfere, and restrain him from using the advantage which he has improperly gained"—citing Story's Eq. § 885 et seq. In *Wagner v. Shank*, 59 Md. 813, it appears that, when the complainants were summoned in the original actions, they employed counsel to defend them. The counsel saw plaintiff in the actions, and he concluded to dismiss the cases, and executed an agreement to do so. Counsel notified his clients of the agreement, and "they supposed the matter was finally disposed of, and gave themselves no further concern about it." The plaintiff, without notice to counsel or parties, had the magistrate to enter judgments, in 1,296 cases, amounting to \$127,838 and \$2,386, costs. Miller, J., after reciting the facts, says: "These facts alone make a plain case for relief in equity. * * * As to the jurisdiction of a court of equity to pass the decrees appealed from, we entertain no doubt. There are prayers in most of these bills, not only that these judgments may be perpetually enjoined, but that they may be canceled." After citing authorities sustaining the right of complainant to have the relief prayed, he concludes: "And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice." Concluding a very able opinion, he says: "The strong arm of a court of equity has protected the complainants, and the decrees in their favor will be affirmed." It is thus apparent that the judgment obtained by the fraud of plaintiffs, as found by the jury, would be open to attack in the courts of Maryland upon the universally accepted principles of equity jurisprudence invoked in the courts of this state, and in giving the defendant relief we are giving the judgment the same "faith and credit" which it has in that state. Mr. Bailey, in his work on Jurisdiction, 202, 203, notes the language of Judge Gray in *Christmas v. Russell*, supra, and Fuller, C. J., in *Cole v. Cunningham*, supra, saying: "However it should be conceded that whatever may have been the rule in the court prior to the decision in *Cole v. Cunningham*, that the rule there stated must be taken as the present doctrine of that court." He notes the diversity in the several states, saying that in Maryland the court has not followed the rule in *Cunningham's Case*, citing *Hambleton v. Glenn*, 72 Md. 351, 20 Atl. 121. In that case the question was whether in that state the judgment rendered in Virginia could be collaterally attacked for fraud. That is not the question here, but whether in Maryland the judgment of its own courts could be enjoined in equity for fraud, and, as we have seen, it may be. We are not seeking to know what the courts of Maryland would permit to be done if a North

Carolina judgment was sued upon there, but what they will permit to be done when one of their own judgments is sued upon or attacked for fraud. The plaintiff says, however this may be, the defendant can have this relief only in Maryland; that he must go into that state, and attack the judgment or enjoin the plaintiff. Mr. Freeman says: "If the judgment was procured under circumstances requiring its enforcement to be enjoined in equity, the question will arise whether these circumstances may be interposed as a defense to an action on the judgment in another state. Notwithstanding expressions to the contrary, we apprehend that, in bringing an action in another state, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement, when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other states. * * * It is true that two of the decisions of the Supreme Court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment—citing *Christmas v. Russell* and *Maxwell v. Stewart*, supra. We apprehend, however, that these decisions are inapplicable in those states in which the distinctions between law and equity are attempted to be abolished, and equitable as well as legal defenses are, when properly pleaded, admissible in actions at law." Freeman on Judgments, § 576. If those states in which equitable remedies were administered only by courts of equity enjoined proceeding at law upon a judgment obtained by fraud, why should not, in those courts administering legal and equitable rights and remedies in one court and one form of action, the defendant be permitted to set up his equitable defense to the action on the judgment? The question is answered by the case of *Gray v. Bicycle Co.*, 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720. The action was brought on a note which the court held was merged into a judgment rendered in Indiana. It was alleged that the judgment was procured by fraud. Vann, J., said that it was admitted that "even a foreign judgment may be successfully assailed for fraud in its procurement. * * * It was not necessary to go into the state of Indiana to obtain relief from the judgment through its courts, for, as we have held, a court from one state may, when it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in such other state. The assertion of the foreign judgment as a bar in this action was an attempt to enforce it indirectly and it was the duty of the trial court to send the case to the jury with the instruction that,

If they found the judgment was procured by fraud, it could not be asserted as a bar in this state." *Davis v. Cornue*, 151 N. Y. 172, 179, 45 N. E. 449. The same rule is laid down by Black.

In some of the states, when the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is brought upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now, when the same judgment is made the basis of an action of another state, he ought to be allowed the same latitude of defense; for if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the Constitution does not require. Black on Judgments, § 918. That the defense made by defendant may, under our Code, be set up by way of answer, is well settled. The cases in point are collected in *Clark's Code* (8d Ed.) p. 238. The remaining question is whether the defense is available to defendant in a justice's court. It is said that the remedy of defendant being an injunction against proceeding with the action, resort must be had to the superior court having equitable jurisdiction. The question is not free from difficulty. It would seem, however, that in view of the frequent decisions of this court that while a justice's court has no jurisdiction to administer or enforce an equitable cause of action a defendant may interpose an equitable defense in that court. His honor correctly submitted the issue raised by the defense. In *Lutz v. Thompson*, 87 N. C. 384, the defendants sought to prevent a recovery upon a bond by showing that it had been executed in accordance with certain agreements, and that by reason of which it would be inequitable to enforce one part of it and leave the other part unfulfilled. The objection was made that this defense, being equitable in its character, could not be interposed in a justice's court. *Ruffin, J.*, said: "Whenever such a court has jurisdiction of the principal matter of an action, as on a bond, for instance, it must necessarily have jurisdiction of every incidental question necessary to its proper determination; and though it cannot affirmatively administer an equity, it may so far recognize it as to admit it to be set up as a defense." In *McAdoo v. Callum*, 86 N. C. 419, originating in a justice's court for the purpose of ousting defendants, tenants of the

plaintiff, the defendants set up by way of defense a contract for a renewal of the lease, etc. To the objection that the justice had no jurisdiction to hear such defense, *Smith, C. J.*, said: "While this provision is not itself a renewal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically enforced in the court of a justice, will be recognized as a defense to a proceeding for the ejectment of the defendants." *Hurst v. Everett*, 91 N. C. 399. We can see no good reason why the defendant may not set up, by way of defense, the facts which show that the judgment, plaintiff's cause of action, was obtained by fraud practiced upon him. *Bell v. Howerton*, 111 N. C. 73, 15 S. E. 891; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770; *Vance v. Vance*, 118 N. C. 865, 24 S. E. 768. These and other cases in our reports illustrate the rule of practice, that equitable defenses may be set up in the court of a justice of the peace. In *Earp v. Minton*, 138 N. C. 202, 50 S. E. 624, the suit was not upon a judgment, but the judgment, in an action between the plaintiff and another party, one *Cranor*, was offered in evidence to sustain plaintiff's title. The judgment, when so offered, could not be attacked collaterally, as shown both upon reason and the authorities cited. In our case, the defendant, if in the superior court, would have pleaded the fraud in bar of plaintiff's recovery, just as if the suit had been upon a bond under seal obtained by fraud. We can see no good reason why he may not, for the same purpose, set it up in the justice's court. It would be incompatible with our conception of remedial justice under the code system to require the defendant to submit to a judgment, and be compelled to resort to another court to enjoin its enforcement. This is one of the inconveniences of the old system which was abolished by the Constitution and the adoption of the code practice. We but follow the line marked by *Ruffin, J.*, when he announced the general principle in *Lutz v. Thompson*, *supra*.

We find no error in the ruling of his honor in regard to the burden of proof or probative force of the testimony required to establish the defense. We have examined the authorities cited by plaintiffs' counsel, and while there is, to say the least, some apparent conflict, we are of the opinion that the conclusion reached by us is in accordance with the weight of authority and those best sustained by reason.

There is no error.

NEWMAN et al. v. NEWMAN et al.
(Supreme Court of Appeals of West Virginia.
Oct. 23, 1906.)

1. WILLS — CONSTRUCTION — NATURE OF ESTATE.

The will below does not vest in the widow an absolute fee estate, but vests in her a life estate, and creates a trust in her as trustee for the benefit of her children.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1418-1424.]

2. TRUSTS—CONSTRUCTIVE TRUSTS—LACHES.

The defense of laches, though not applying, as a general rule, to an express trust, does apply to a constructive trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 573.]

3. SAME—ENFORCEMENT.

Where a trustee holding under an express trust uses the trust property in the purchase and conveyance of land to another, in violation of the trust and with notice of it, it creates a constructive, not an express, trust in that third person, and laches will apply in favor of such person as a defense against the enforcement of such trust.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 573.]

4. ADVERSE POSSESSION—COAL IN PLACE.

The statute of limitations, for want of adverse actual possession, does not apply in favor of one claiming coal in state of nature in place not developed.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Adverse Possession, §§ 85, 80, 89, 487; vol. 34, Cent. Dig. Mines and Minerals, § 135.]

(Syllabus by the Court.)

Appeal from Circuit Court, Mason County. Bill by I. V. Newman and others against W. C. Newman and others. Decree for plaintiffs, and defendants appeal. Reversed, and bill dismissed.

John E. Beller and Rankin Wiley, for appellants. John W. English, W. R. Gunn, and C. E. Hogg, for appellees.

BRANNON, J. Isaac Newman died in 1836, leaving a will and a large estate, consisting of various tracts of land and slaves and other personal property. His will contained the following provisions: "I do hereby authorize my beloved widow to dispose of my property real and personal when it shall be for the benefit of the family and in all cases it shall be legal in law for the benefit of my eight children namely Junius Eastham Newman, Virginia Eastham Newman, Mary Cath—rine Newman, William Walter Newman, John Green Newman, Susan Ann Newman, Sarah Jane Newman, Isaac Vanburen Newman and if any other shall be born to my wife within nine months after my death. And the court is not to require security for the faithful discharge as I have unbounded confidence in her virtue and love for the interest of those she is left to protect. Subject however to the possibility that she should become the wife of another man; in that event she is to surrender my childrens' property as before named to my brother-in-laws

William George and Albert G. Eastham, who I do appoint my Executors in that contingency." He left a number of children. Mary Newman, the widow, made deeds to different children of different tracts of land vested in her by the will, and by her will devised other lands to some of the children, leaving out W. W. Newman, her son. To her said son she conveyed the half of the home farm of 384 acres. The controversy in this case arises from the fact that the widow, Mary Newman, conveyed to Luman Gibbs a small tract of land vested in her by her husband's will in exchange for the coal in a tract of 400 acres of land owned by Gibbs, and Gibbs conveyed said coal to W. W. Newman. Thus Mary Newman purchased said coal with land which she derived under her husband's will. I. V. Newman and others, as children and grandchildren of said Isaac Newman and Mary Newman, brought a chancery suit against the heirs of W. W. Newman, claiming that, as the said 400 acres of coal was purchased with land of the estate of Isaac Newman, it was a trust estate in the hands of W. W. Newman for the common benefit of all those interested in the estate of Isaac Newman; that Mary Newman held the land which she conveyed to Gibbs in trust for the benefit of the children of her husband; and that W. W. Newman was well aware of such trust, and took the deed for the said coal with notice of such trust, and therefore held it subject to their rights, and asked a partition thereof for the common benefit of all entitled under the will of Isaac Newman. The circuit court of Mason county sustained the plaintiffs' claim, holding the land in the hands of the heirs of W. W. Newman to be still subject to the trust created by the will, and imposed upon Mary Newman as trustee under it, and decreed that the said coal be partitioned. From this decree the heirs of W. W. Newman have appealed.

The first question that arises in the case is this: The defense contends that the will vested in Mary Newman an absolute estate in fee for her own absolute use, to be conveyed away as she might choose, without any account to the children of her husband; while the plaintiffs claim that the will created an express trust in Mary Newman, by which she held the estate in trust for the benefit of the children of her husband, saving a life estate to herself. The defense relies upon that rule of law given in many decisions, that where a will devises land to a person to dispose of at his pleasure, such devisee has the absolute property, even though his interest is called by the will a "life estate," and there is a provision whereby what may remain undisposed of at the death of the devisee goes to another person. *Melson v. Cooper*, 4 Leigh (Va.) 408; *Milhollen v. Rice*, 18 W. Va. 519; *Wilmoth v. Wilmoth*, 34 W. Va. 426, 12 S. E. 781; *Englerth v. Kellar*, 50 W. Va. 259, 40 S. E. 465; *Brown v. Strother* (Va.)

47 S. E. 236; *Cole v. Cole*, 79 Va. 251; *Hall v. Palmer* (Va.) 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653; *Burwell v. Anderson*, 3 Leigh (Va.) 348. But we hold that this doctrine does not apply to this case, because we think that it is plain that, though the testator intended to give the widow a support out of the whole estate, yet he did not intend her to consume the whole for her own purposes, but intended to vest in her the property for the benefit of her children. The will gives her a power of disposition, it is true, and that generally carries the absolute ownership; but if the will evinces a different purpose, that power of disposition does not have that effect. In this case the will, while giving a power of disposition to the widow, yet declares that it is to be exercised for the benefit of the children, naming them. It does not say that she shall exercise the power of sale for her sole use, or that she may consume the proceeds. The will says she shall only exercise the power of disposition "when it shall be for the benefit of the family." This shows a restricted power of disposition. It shows that it can only be exercised for the benefit of the family, widow and children together. The very clause constituting the devise—the vital devising clause—tells that the devise to the widow is for the common benefit of the entire family. Moreover, the will makes the devise subject "to the possibility that she should become the wife of another man; in that event she is to surrender my childrens' property as before named to my brother-in-laws." Now here the testator calls the property "my childrens' property," and provides for the widow's estate to end on her remarriage. If he intended to give her complete ownership, why this provision? We cannot help thinking that, while the testator intended to provide amply for his wife out of his large estate, he yet remembered that he had children to be provided for. He reposed full confidence in his wife to deal justly with his children; even in that clause he manifested an intent that his wife should care for and protect his children with the property vested in her. We deem it hardly necessary on this point to cite authority, since it is only a question of the purpose of Newman as manifested in his will; but I cite *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527, *Milhollen v. Rice*, 13 W. Va. 510, and *Young v. Bradley*, 101 U. S. 782, 25 L. Ed. 1044, as reflecting light on this particular matter. As the will gives power of disposition to the widow for the benefit of the children, counsel ask, who was to say when her act of sale would be proper? We answer, a court of equity, which has power to administer trusts and control trustees. If the will did confer absolute property upon Mary Newman, that would end the case, for she would have perfect right to exchange land which was derived from her husband for the coal, and give it to her son, W. W. Newman,

free of any trust; but, as we deny that the will confers such absolute estate, we must go on with further questions arising in the case.

The plaintiffs properly claimed that the will created only a trust estate in Mary Newman, and they say that as Mary Newman held the land in trust, so did W. W. Newman, and so do his heirs. They say that there is no difference between the tenure of Mary Newman and W. W. Newman. It is undeniable that W. W. Newman, when Gibbs conveyed the coal to him, had full notice of the trust aforesaid. It is settled law that one acquiring trust property with notice of a trust from a trustee is himself a trustee, holding the property on the same trust under which his grantor held it. "A trust fund may be pursued by the beneficiary, as long as the same can be identified, into any land or other form of investment made by the trustee, as the law raises an implied trust as to such property in their behalf." *Marshall v. Hall*, 42 W. Va. 641, 26 S. E. 300. See *Crumrine v. Crumrine*, 50 W. Va. 226, 40 S. E. 341, 88 Am. St. Rep. 859; *Reel v. Reel* (W. Va.) 52 S. E. 1023; *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644; *Heth v. Richmond R. R.*, 4 Grat. (Va.) 482, 50 Am. Dec. 88; *Vance v. Kirk*, 29 W. Va. 344, 1 S. E. 717; *Barksdale v. Finney*, 14 Grat. (Va.) 338. The many authorities sustaining this position are collected in that valuable work, *American & English Decisions in Equity*, vol. 2, p. 652, showing that trust funds may be followed up. *Hogg's Equity Princ.*, 763, is full authority on this point. So the right of the plaintiffs to follow up this coal originally is very clear, but they are barred by great lapse of time. The conveyance of the coal to W. W. Newman from Gibbs dates August 16, 1853, and so does the deed from Mary Newman to Gibbs, and this suit was brought in 1902—a great span of 49 years, and none of the parties under any disability. But the plaintiffs say that neither the statute of limitations nor laches applies. They argue that the statute of limitations does not apply to an express trust and that laches does not. "No statute of limitation runs against an express trust, nor does lapse of time avail until the duties are ended or the trust disavowed." *Gapen v. Gapen*, 41 W. Va. 422, 23 S. E. 579. Express trusts are not liable to the statute, and for the most part not liable to laches, though sometimes even an express trust is lost by great lapse of time. See *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309. That is the law of express trusts, and if Mary Newman held the title to the coal which Gibbs conveyed to W. W. Newman, doubtless the trust would be enforceable against her; but W. W. Newman is not Mary Newman. She would hold under an express trust; he did not. What is the character of trust under which W. W. Newman held? It was not an express trust, but a

constructive trust. Here lies the controlling distinction in this case. W. W. Newman did not take as a trustee by the terms of his deed, as that is an absolute conveyance to him, thus denying any trusteeship. There is no competent evidence to prove that he agreed to hold in trust. I. V. Newman says he did so, but W. W. Newman being dead, and I. V. Newman being a plaintiff, and one to be benefited by an enforcement of the trust, his evidence is wholly incompetent. W. W. Newman, on the theory of the plaintiff, took his estate in the coal *ex maleficio*—that is, in wrong; in fraud of the rights of those interested in the trust. He took in hostility to their rights, not in acknowledgment of their rights. Say that he took in fraud of their rights. Taking, however, with notice of the trust, equity would make him a constructive trustee under a constructive trust, not under an express trust. He never did a thing to recognize any obligation resting on him as trustee, nor did his heirs. Hogg's Equity Princ., 738, classifies trusts in two general divisions—"direct or express trusts (that is, those springing from agreement of the parties), and into constructive or implied trusts (that is, those created by the rules and principles of equity). Under this latter class fall all those trusts known distinctively as implied or constructive, as well as those called 'resultant'; those arising from acts of fraud or otherwise; in short, all those that do not spring from the agreement of the parties. * * * A constructive trust is one not created by any words either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." I submit that W. W. Newman was not holding under an express trust, but under a constructive trust—one made or created by the law of equity jurisprudence. *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; 2 Minor's Inst. 188; 15 Am. & Eng. Ency. L. (2d Ed.) 1123. This is not a trust assumed by the consent of Newman, but it is imposed upon him against his will by equity law, because he did a wrong in taking property bought with trust property. Such a trust is sometimes called an "involuntary trust" and sometimes a "trust *ex maleficio*." "The basis of a constructive trust is fraud, actual or constructive." 15 Am. & Eng. Ency. L. (2d Ed.) 1185. It is in the failure of counsel for the plaintiffs to recognize this distinction between express and constructive trusts that their contention fails. Thus, W. W. Newman, holding under a constructive trust, is protected by the lapse of 49 years. All the plaintiffs knew of his deed, as it was at once put on record. Outside of that, the evidence fully establishes notice on the plaintiffs of that deed. They were bound to know of it, and did know of it. *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262. True, the statute of limitations does not apply, because the

coal was not developed, and there was no adverse possession of it, as it was in a state of nature. *Wallace v. Elm Grove*, 52 S. E. 485, 58 W. Va. —. But, this being a suit to enforce a constructive trust, that limitation raised by equity law called "laches" does apply. It is not true that limitation and laches do not apply to any trust. They do not apply to express trusts, but do apply to constructive trusts. *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309, holds that express trusts, cognizable only in equity, are alone free from limitation created by laches or statute. All other trusts, whether legal or equitable, are either subject to the statute of limitations, or liable to be barred by laches." Hogg's Equity Princ. § 567, plainly makes this distinction, saying that time does not run against a suit to enforce an express trust till the trustee denies the trust and the beneficiary has notice of it; "but those trusts which arise by operation of law, as all constructive trusts, are within the operation of the statute of limitations." Many West Virginia and Virginia authorities are cited by Mr. Hogg. In 28 Am. & Eng. Ency. L. (2d Ed.) 1133, this distinction between express and constructive trusts, for the purpose of limitation, is recognized. There it is stated that when the trust ends in any way the statute runs. The trust of Mary Newman—the express trust—ended with the conveyance by her to Gibbs of trust land, in wrong, for the purchase of the coal. Then it was a hostile claim by W. W. Newman. Then time began to run. A mere constructive trustee may protect himself by limitation. *Sheppard v. Turpin*, 3 Grat. (Va.) 373. Laches lies "to suits to charge another with a constructive trust, and the like." Hogg's Equity Princ. p. 417. So the plaintiffs are barred of relief by laches. So many years fled away (nearly half a century) from the date of the deed from Mary Newman to Gibbs and the date of the deed from Gibbs to W. W. Newman for the coal (both the same date) 16th August, 1853, until 1902, when this suit was brought, the adverse parties knowing of those deeds. No stronger case could be presented for the application of the doctrine stated in *Trader v. Jarvis*, 23 W. Va. 100; that is: "Delay in the assertion of a right, unless satisfactorily explained, even where it does not constitute a positive statutory bar, operates in equity as an evidence of assent, acquiescence, or waiver; and especially is such the case in suits to set aside transactions on account of fraud or infancy. Laches and neglect are always discountenanced by a court of equity." See *Phillips v. Pines*, 53 W. Va. 543, 44 S. E. 774, 97 Am. St. Rep. 1040. But the defense of laches is rendered clearer still as a bar by the fact that the immediate parties to the transaction, who above all others could speak the truth upon it, had been slumbering in their tombs for many years when this suit was brought. The mother, Mary New-

man, died in 1871, 17 years after the recordation of those deeds. W. W. Newman died in 1884, 30 years after those deeds were made. While Mary Newman and W. W. Newman lived no suit was brought, no claim made; and after W. W. Newman died they waited 18 years before attacking his children. From appearances these people were people of character. It is not to be presumed that a just mother would do injustice among her children. It is not to be supposed that W. W. Newman, a licensed attorney, and a member of the Virginia Senate, would do a wrong to his brothers and sisters. Why this coal was conveyed to him we do not know. If he and his mother were in life, they might give us a perfect defense and justification of this act; but their lips are sealed, and long have been. It is, however, fair to say that the long acquiescence on the part of the other children in this act of the mother and brother, their long silence while the mother and brother were in life, speaks forcibly to tell us that there is some reasonable justification of this transaction. If there had not been, why this long silence and acquiescence by those deeply interested? It is a strong argument against any action by a court of equity after so long a time that the parties to the transaction are dead, so that the truth cannot be known. This is always an argument against relief. *Pusey v. Gardner*, 21 W. Va. 469 (Syl. point 6). The disinclination of courts to enforce trusts after long delay is well stated in the opinion by Judge Dent and the authorities given in *Woods v. Stevenson*, 43 W. Va. 149, 27 S. E. 309.

Another argument against any relief lies in the fact that Mary Newman conveyed and devised to various children different tracts of land, some of which have been sold away and others incumbered by deeds of trust, thus involving rights of third parties. How can these lands be brought into hotchpot?

Another argument advanced by the plaintiffs is that in 1852 the members of the Newman family met and agreed upon a partition of the land orally, which was carried partly into execution by the conveyance by Mary Newman of some lands to some children, and that by that oral family agreement certain of the children were to get the tract of land out of which Mary Newman conveyed a part to Gibbs in exchange for the coal conveyed by Gibbs to W. W. Newman. How can this help the plaintiffs? Saying that that is so, it makes their case worse, because it shows that W. W. Newman, in violation of the agreement, diverted the land from the course it was to take by that agreement, and in conjunction with Mary Newman used it to acquire a deed to himself for the coal. If this be so, surely this was no express trust, but purely a constructive trust—an act in character adversary to others under said family agreement—and, if possible, time applies all the more for that agreement. It cannot be thought for a moment that W. W.

Newman by this act became a voluntary trustee. It was an act of wrong against his brothers—the wrong of having the trustee divert the trust property from the use to which it was to go under that family agreement—an act repudiating that agreement. Surely he held not as trustee to execute that agreement. I will add that letters from I. V. Newman and Emma Newman to the children of W. W. Newman treat this coal as the legitimate property of W. W. Newman. I. V. Newman pointed out to W. W. Newman's children the coal land owned by their father, and held it out to them as belonging to them. He paid taxes for them on the coal out of their money. Through these many years W. W. Newman and his children paid taxes on this coal, the other parties paying none. This goes to repel a trust, and shows a recognition of W. W. Newman's right as just. If they owned an interest, why not help pay taxes? Several of the children in numerous ways recognized the right of W. W. Newman and his children to this coal. A writing signed by W. W. Newman, dated 28th November, 1870, is relied upon. It certifies that about 1853 there was an agreement on a division of the property left by Isaac Newman, and that by a deed to certain land thereafter he received his portion in full of said estate, and had no claim on the estate of his mother. To what deed does this refer? Both the deed from Gibbs and that from his mother for half the home farm were after that family agreement. It may refer to the deed for the coal. Anyhow, it is only an admission that he had received his share; it does not meet the defense of laches.

What excuse for long delay in suing is given? One that the mother was old, and her children did not wish to disturb her peace. This is no legal excuse. Besides, they would not be suing her, but W. W. Newman, and they waited so long after she died. Another excuse is that W. W. Newman was resident in Virginia. He, and his sons after him, were frequently in Mason county, visiting some of the plaintiffs, and could have been personally served with process. But personal service was not necessary, since the suit to enforce the trust by partition or conveyance to the heirs was in nature an *in rem* proceeding.

For these reasons, we must reverse the decree of the circuit court, and dismiss the plaintiffs' bill without relief.

RITCHIE COUNTY BANK v. BEE et al.
(Supreme Court of Appeals of West Virginia.
Oct. 23, 1906.)

1. ERROR, WRIT OF FINAL JUDGMENT—NECESSITY.

In an action before a justice on a note, on appeal to the circuit court, the jury finds "for the defendant," and the court overrules as well a motion to set aside the verdict and awards a new trial as a motion in arrest of judgment, and renders judgment alone for costs, but r.n.

ders no judgment adjudicating the matters in difference between the parties litigant, a writ of error will not lie, for want of a final judgment.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 329-343.]

2 SAME.—JURISDICTION OF SUPREME COURT.

In such case the appellate court has not jurisdiction to extend the judgment into a final judgment in favor of the defendant in order to pass upon the alleged errors of the court in the trial of the case.

(Syllabus by the Court.)

Error to Circuit Court, Mason County.

Action by the Ritchie County Bank against E. L. and R. J. Bee. Judgment for defendants, and plaintiff brings error. Dismissed.

Freer & Robinson, for plaintiff in error. S. A. Powell, Duty & Fidler, and Homer Adams, for defendants in error.

MCWHORTER, P. This is a writ of error from a judgment of the circuit court of Ritchie county rendered on the 1st day of February, 1906. Action was brought upon a note for \$204 against E. L. Bee and R. J. Bee before a justice of said county who rendered judgment against the defendants for the amount of the note sued for with its interest, from which judgment Rebecca J. Bee appealed to the circuit court. In the circuit court a jury was impaneled in the case and returned a verdict for the defendant, a motion by the plaintiff to set aside the verdict of the jury and grant plaintiff a new trial was overruled, as was also a motion in arrest of judgment, to which rulings of the court the plaintiff objected and excepted. The judgment of the circuit court in the case, after the said rulings of the court and the exceptions of the plaintiff, was: "Therefore it is considered by the court that the said defendant Rebecca J. Bee do recover of and from the said plaintiff, Ritchie County Bank, a corporation, her costs in this suit expended, and her costs before the justice expended." The plaintiff in the course of the trial took two bills of exceptions, numbered 1 and 2, respectively, to the various rulings of the court.

At the threshold of the case we are met with the contention that there is no final judgment rendered in the case upon which the writ of error and supersedeas to the judgment could be founded; the same being simply and solely a judgment for costs and no adjudication of the matters in difference between the parties litigant. If this fact is established, the writ of error and supersedeas must be dismissed as improvidently awarded. "A reviewable final judgment or decree must be finally determinative of the controversy to the aggrivement of the person claiming review." 5 Cur. Law, 134; *Tipton v. Harris* (Ky.) 82 S. W. 585. To be appealable "a judgment must be complete and certain in itself, and must appear to be an adjudication of the court and not a memorandum. The form of the judgment is im-

material. * * * But, in substance, it must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in litigation have been adjudicated." 2 Cyc. 614. "A judgment which merely awards costs to the defendant, without more, is not a final judgment. In order to have that character, it must profess to terminate and completely dispose of the action. Hence, if for the defendant, the final judgment must state that he is dismissed without day, or that it is considered that the plaintiff take nothing by his suit, or otherwise refer to the disposition made of the subject-matter." 1 Black on Judgments, par. 31. And the author in the same section, citing *Scott v. Burton*, 6 Tex. 322, 55 Am. Dec. 782, proceeds to say that, while the form of the judgment is immaterial, it must show intrinsically and distinctly, and not inferentially, that the matters in difference between the parties in litigation had been adjudicated, that costs are a mere incident or appendage to the judgment, and generally recoverable by the victor in the contest. "But, as an incident, they cannot be substituted for the principal, and a judgment for the recovery is not a decision of the matter at issue; and it is, therefore, no such final judgment as can, by law, come within the revisory power of the court."

Not only the great weight of authorities have settled this matter as to the finality of the judgment in this case, but it is well settled by the rulings of this court. It is insisted by counsel for plaintiff in error that "sections 173, 114, and 53 of the Code, c. 50 [Code 1906, §§ 2124, 2065, 2004], tell how judgments are to be entered and said chapter controls, as the common law has been abolished as to justices case, and for this we have the authority of the case of *Davis v. Trump*, 43 W. Va. 193, 27 S. E. 397, 64 Am. St. Rep. 849"; and cite *Hutchinson's West Virginia Treatise*, p. 117, form 54. It is true this form of *Hutchinson's* supports the contention of the plaintiff in error, but the form there given is not authorized by the statute nor by the authorities. There must be an adjudication of the differences between the litigants, and a judgment simply for costs does not so adjudicate. In *Corley v. Corley*, 53 W. Va. 142, 44 S. E. 132, it is held in the syllabus: "An order, entered on the verdict of a jury on an issue out of chancery, that the defendant merely recover costs of the plaintiff, is not a final judgment, decree or order, giving the right to appeal." And the same volume (53 W. Va.) page 82, 44 S. E. 152, *Hannah v. Bank* is a case exactly in point, where it is held, syllabus point 2: "In a trial of right of property originating in a justice's court under section 152, Code, chapter 50 [Code 1906, § 2103] on appeal to the circuit court, the verdict finds the property to be the property of the claimant, and the court overrules a motion to set aside the

verdict, and gives judgment for costs, but renders no judgment touching possession of the property. No writ of error lies for want of a final judgment." And in 2 Cyc. 616 (b): "A writ of error or appeal will not lie from the verdict of a jury without an entry of judgment thereon, nor from the finding of facts or conclusions of law by the court not followed by judgment. Hence, the opinion of the court, no order being entered in accordance therewith, is not reviewable."

Counsel for plaintiff in error, in their brief, ask this court if it should hold that the judgment is not a final judgment that the same "be extended to a finality here; and so extended the court proceed to determine the error or lack of error in the case. If the court cannot do this, we ask that we do not lose the benefit of our appeal, but that the circuit court be required to correct its judgment." To extend the judgment here as requested would be to assume the prerogative of the circuit court and to decide the merits of the case for or in advance of the circuit court. The judgment is a judgment for costs only which is within the province of that court to render, but as it has not adjudicated the questions in difference or at issue between the litigants this court has not the jurisdiction to pass upon it. Upon the dismissal of the writ of error here the case goes back to the circuit court for adjudication of the questions of difference between the litigants.

The writ of error must be dismissed as improvidently awarded.

**STATE ex rel. DILLON, Tax Com'r, v.
BRAXTON COUNTY COURT et al.**

(Supreme Court of Appeals of West Virginia.
Oct. 23, 1906.)

1. TAXATION—DELEGATION OF POWER.

Legislative and sovereign in character, the power of taxation is presumed, until the contrary appears, to remain in the lawmaking body of the state, and a claim of the delegation thereof to local tribunals, whether by legislative acts or constitutional provision, cannot be sustained in the absence of a clear manifestation of intent that the authority claimed shall exist.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 59, 60.]

2. COUNTIES—TAXATION—LEGISLATIVE CONTROL.

County courts are subject to legislative control in respect to the amounts of money they may raise by taxation for county purposes, within the limitation imposed by section 7 of article 10 of the Constitution of this state.

3. SAME—LIMITATION OF TAX.

The clause in section 29 of chapter 39 of the Code of 1899, as amended by chapter 48, p. 445, of the Acts of 1905 [Code 1906, § 1231], prohibiting county courts from levying taxes in the year 1905 which shall exceed by more than 5 per cent. the aggregate amount of taxes levied by them in the year 1904, from levying taxes in the year 1906 which shall exceed said aggregate amount by more than 7 per cent., and from levying taxes in the year 1907 which shall exceed said aggregate by more than 9 per cent.,

is not beyond legislative competency by reason of constitutional powers respecting county levies possessed by county courts.

4. STATUTES—LOCAL OR SPECIAL ACTS.

Said clause of section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231], as so amended, is not violative of section 39 of article 6 of the Constitution, prohibiting the passage of local or special laws in any of the cases therein enumerated, and requiring the Legislature to provide by general laws for them and all other cases for which provision can be so made.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 73-76.]

5. SAME.

The quality of generality in a law is not necessarily precluded by lack of uniformity, in the full sense of the term, in the results of its operation throughout the state.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 70, 71.]

6. SAME—ILLEGAL EXCEPTION.

A legislative act, containing an illegal exception, is not vitiated by the exception, on the ground of want of generality, if, upon the elimination thereof, what remains is in such condition that, had it been so enacted originally, it would have been a complete and general law.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

7. SAME.

The clause in section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231], above referred to, is not rendered invalid, as being special, by the attempted exception of the counties of McDowell and Gilmer from the operation thereof.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 58-66.]

8. CONSTITUTIONAL LAW — WHO MAY QUESTION STATUTE.

Courts will not hear objections to laws, on the ground of unconstitutionality, from persons whose rights are not affected by them.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 39-41.]

9. SAME—OBLIGATION OF CONTRACTS.

County courts cannot refuse obedience to a legislative act limiting their powers to raise money by taxation for the discharge of existing county debts, on the ground that it is violative of clause 1 of section 10 of article 1 of the federal Constitution, prohibiting the passage of laws impairing the obligation of contracts. Being mere agencies of the Legislature, and not interested in the debts due from them, otherwise than as owing duties to other persons respecting them, failure to perform which may affect the honor of the state or occasion public expense, matters subject to legislative discretion and power, their interests are not such as to bring them within the protection of said constitutional guaranty.

(Syllabus by the Court.)

Application by the state, on the relation of C. W. Dillon, State Tax Commissioner, for a writ of mandamus to the county court of Braxton county and others. Writ awarded.

Mollohan, McClintic & Mathews, E. G. Rider, and C. W. Dillon, for petitioner. Jake Fisher and Price, Smith, Spilman & Clay, for respondents.

POFFENBARGER, J. The state, at the relation of C. W. Dillon, state tax commissioner, invokes the aid of this court, by its writ of mandamus, to compel the county court of Braxton county, composed of the

respondents, Jacob Huffman, president, and John I. Bender and E. H. Cunningham, commissioners, to compel that body to lay a levy for county purposes in accordance with the law. Said court, on the 18th day of July, 1906, at a regular term thereof, made up its estimate of the amount necessary to be levied for the current fiscal year to cover expenses and all county debts and liabilities payable during said year, and then levied, upon every \$100 of the valuation of the property taxable in the county, the sum of 65 cents, which, as the valuation of property is over \$10,000,000, would yield more than \$65,000 in taxes. This the court did in violation of that clause of section 29 of chapter 39 of the Code of 1899, as amended by chapter 48, p. 445, of the Acts of 1905 [Code 1906, § 1231], which provides as follows: "No county court shall in the year nineteen hundred and five assess or levy taxes, including district road taxes, which shall exceed by more than five per cent. the aggregate amount of taxes levied by it in the year nineteen hundred and four; nor in the year nineteen hundred and six assess or levy taxes which shall exceed by more than seven per cent. the aggregate amount of taxes levied by it in the year nineteen hundred and four; nor in the year nineteen hundred and seven assess or levy taxes which shall exceed by more than nine per cent. the aggregate amount of taxes levied by it in the year nineteen hundred and four. The word 'taxes' shall be construed to include district road taxes, as well as all other taxes for county purposes. If the county court of any county shall be of opinion that the maximum fixed by this proviso is insufficient for any of said years, it shall make up an itemized estimate of the expenses to be provided for in such year, with the rate of levy in cents on each one hundred dollars of valuation necessary to provide for the payment thereof, and may submit the question of an increased levy to the voters of the county at an election to be held therein on not less than thirty days published notice, and may make such rules and regulations as may be necessary for the holding of such election; and if three-fifths of the votes cast on the question of increased levy at such election be in favor of such levy, the county court may levy the amount stated in the notice of election as necessary; but this proviso shall not extend to the counties of McDowell and Gilmer, but in such counties, for said years, the county court may levy taxes under the limitations contained in section 7 of article 10 of the Constitution of this state." In the year 1904, there was raised by taxation in said county for county purposes only about \$27,596. An additional 7 per cent. for the year 1906 would make the amount about \$28,457, and the rate to be prescribed, in order to yield that amount, would be not more than 28 cents on each \$100 valuation.

Resistance to the application is based, first, upon the claim that there is vested in the county court of every county, by the Constitution, the right and power to raise any amount of taxes for general county purposes in any year, which shall not exceed 95 cents on each \$100 of the taxable valuation of the property in the county, and an additional amount for the support of free schools, and that the Legislature has, therefore, no power to limit or impair that right. Section 24 of article 8 of the Constitution provides that the county courts shall, "under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies." Section 7 of article 10, relating to the subjects of taxation and finance, reads as follows: "County authorities shall never assess taxes, in any one year, the aggregate of which shall exceed ninety-five cents per one hundred dollars valuation, except for the support of free schools; payment of indebtedness existing at the time of the adoption of this Constitution; and for the payment of any indebtedness with the interest thereon, created under the succeeding section, unless such assessment, with all questions involving the increase of such aggregate, shall have been submitted to the vote of the people of the county, and have received three-fifths of all the votes cast for and against it." Whether by virtue of these constitutional provisions county courts have unrestricted power to assess and cause to be collected taxes in each year equivalent in amount to 95 cents on each \$100 in valuation depends upon certain principles of constitutional law that are fundamental and run through the whole system of republican government. Like all others in the American states, our Constitution contains many provisions which are intended to secure individual and political rights that are deemed to be of such great importance as to preclude, on the ground of public policy, their being left to the will and discretion of the executive, legislative, and judicial departments. They are safeguarded by constitutional guaranties, which must be observed by all the departments of government exercising sovereign powers. For the better security of all rights and the more harmonious and systematic administration of public affairs, and as an effectual restraint upon the exercise of arbitrary power, the Constitution creates, by powers granted and limitations imposed, certain divisions of sovereign power, and then, by subdivision of powers in each of the three great departments of government, executive, legislative, and judicial, and the imposition of further limitation upon the powers of all officers and tribunals charged with the execution of the powers belonging to each of these three great departments, re-

spectively, creates a number of jurisdictions in each of which certain functions are required to be performed which are withheld from all the others. In some cases, the subdivisions are territorial; in others, they are authoritative within the same general department; and in this way a system of checks upon and balance of power is established, not only among the three great divisions of sovereign power, but also among the officers, tribunals, and functionaries in each of these divisions charged with the execution of the powers that belong to it, as well as among the people, respectively, inhabiting the several territorial divisions of the state.

In the opinion of the ablest constitutional lawyers and the most celebrated jurists and law writers of this country, the individual, civil, and political rights recognized in the Constitutions of the American states are not of constitutional creation or birth. They are older than the Constitutions themselves, and Constitutions were ordained by the people for the better protection and regulation of the enjoyment of them. The separation of powers was an accomplished fact in all the American colonies before any of the Constitutions in the American states were adopted, and the purpose of these instruments is rather to preserve that status than to create and vest rights. So in every colony there were territorial subdivisions, known in some as counties and in others as towns and townships, by the officers and tribunals of which certain powers, legislative, executive, and judicial, had been exercised, not only from the date of the independence of the states, but from that of the beginning of the life of organized Christian society on the continent. The expediency and necessity of such subdivisions had been demonstrated by experience, not only in this country, but in the mother country. In adopting our Constitutions, we have simply provided that these institutions, which had grown up with the settlement and development of the country as agencies for its better government and the due administration of justice and execution of the laws, shall remain, by placing it beyond the power of the executives, the courts, and the Legislatures to destroy or impair them. Keeping in view the nature and purpose of Constitutions, the courts, in interpreting them, do not always confine themselves to the strict letter of these instruments. They sometimes assume, not that particular rights and powers were granted to persons or tribunals by implication, but that the right or power in question, as to which the Constitution is silent, already existed at the time of the adoption thereof, and that it was not the purpose or design of the people to impair or take it away. This principle was invoked by Judge Cooley in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, in which the court held that the Legislature had no power to appoint the members of the board of public works of the

city of Detroit as permanent officers for the term provided by the act establishing such board, and that permanent appointments for purely municipal purposes could only be made by municipal authority. The language of the Constitution relating to the mode of providing officers for municipal corporations was somewhat vague and uncertain. Judge Cooley thought it was sufficient to prevent the Legislature from appointing the officers of the city; but he insisted that, if it were not, the right in the municipality to name its own officers was impliedly recognized in the Constitution. In the course of his opinion he said: "Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs—in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but, if it were sought to establish such a government over our cities by law, it would hardly do to call upon a protesting people to show where in the Constitution the power to establish it was prohibited. It would be necessary, on the other hand, to point out to them where and by what unguarded words the power had been conferred." The same principle was declared by Bates, in his argument in *Hamilton v. County Court*, 15 Mo. 5, 13, in the following terms: "What is a constitution, and what are its objects? It is easier to tell what it is not, than what it is. It is not the beginning of a community, nor the origin of private rights. It is not the fountain of laws, nor the incipient state of government. It is not the cause, but consequence, of personal and political freedom. It grants no rights to the people, but is the creature of their power, the instrument of their convenience, designed for their protection in the enjoyment of the rights and powers which they possessed before the Constitution was made. It is but the form and framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it. It is all derived from a known source. It presupposes an organized society, laws, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachment of tyranny. A written constitution is, in every instance, a limitation upon the powers of government in the hands of agents. For there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition. Our Constitution in express terms acknowledges

and continues in force all former rights, laws, officers, and functions of office. In the body of the instrument the method of changing them is pointed out, as is the method of changing the Constitution itself." This is partially quoted by Judge Cooley in his work on Constitutional Limitations, at page 68.

Counsel for the respondents seem to rely, not only upon this principle, but also upon the express terms of the two constitutional provisions above quoted. Wherefore their contention will be examined in the light of both. The right guarantied to county courts to lay and disburse county levies is coupled with the qualification that it shall be exercised under such regulations as may be prescribed by law. It is not denied that the Legislature has the power of supervision and control over county courts in the exercise of this right, but it is insisted that that power of control does not extend to any restraint upon them as to the amount of money to be raised. It is easy to conceive many respects in which this function of regulation may be exercised and yet not extend to the determination of the amount of the levy. The statute now under consideration is the first direct attempt on the part of the Legislature to restrict the authority of the county courts of the state in respect to the amount of the levies to be laid by them; and yet there has been at all times a statute directing the time at which the levy should be laid, prescribing the manner in which the amount thereof should be determined, as well as the modes of collecting and disbursing it. This uniform practice, together with the language of section 7 of article 10, forbidding county authorities to assess taxes in excess of a certain amount, lends apparent countenance to the theory upon which counsel for the respondents proceed; but the proposition arises, nevertheless, by construction. There is no express grant of the power claimed. The assumption that the language of section 7 of article 10 is directed to the county authorities, and not to the Legislature, if its soundness could be conceded, would be strong argument against the supervisory power of the Legislature, but there is no particular direction in it. It is found in the article dealing, not with county courts or county organization, but with the subjects of taxation and finance. It assumes the obvious truth that taxes raised for county purposes are to be assessed by county authorities, whether the Legislature has any supervisory power over these authorities or not. If such power does exist, then the limitation applies to both the Legislature and the county courts; to the latter directly, and the former indirectly. The reserved power of the Legislature to regulate seems clearly to extend to the amount of taxes to be raised by county courts. It controls the action of these tribunals in respect to those things which create the liabilities to be provided for by levy. The cost of county government is occasioned by the exercise of police

power lodged in the hands of the county authorities, which includes the establishment and regulation of roads, ways, bridges, public landings, ferries, and mills, and many other things. The Constitution says county courts shall have the superintendence and administration of these under such regulations as may be prescribed by law. As there is a clear right in the Legislature to control the action of county courts in respect to those things which occasion the cost and expenses to be provided for by the county court, the Legislature, by its regulating power, can make these costs heavy or light as it may deem best. In so doing, it fixes the amount of cost, and thus, indirectly, the limit of taxes to be raised. Moreover, the salaries of the county officers, another item in the cost of county government, are not left wholly within the discretion of the county courts. Maximum and minimum limits are prescribed by the Legislature. All these instances of the exercise of legislative control bear directly upon the question of the amount to be raised for county purposes. To this it is to be added that the Legislature of this state, as did the Legislature of Virginia at all times, has limited the amount to be raised, as well as prescribed the times and manners of laying the levies and the mode of disbursing them. County courts have never had unbridled latitude within the limit fixed by the Constitution. They have been permitted to raise only so much money in any year as was necessary to cover county debts and liabilities payable during the year, including the probable expenditure for county purposes, the amount of outstanding unpaid orders, and proper allowances for delinquent taxes, etc. Section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231]. It may be that one purpose of this statute is to prevent the accumulation of an idle surplus, on the one hand, and the creation of an indebtedness on the other; and it is true that under it the county court could, at any time, have levied taxes up to the constitutional limit. Nevertheless it inhibits the raising of money within that limit, not needed for current expenses and indebtedness. It is an assertion of power over the county courts respecting the amounts of the levies to be raised.

The power of taxation is sovereign and purely legislative. *Meriwether v. Garrett*, 102 U. S. 472, 517, 26 L. Ed. 197; *Heinie v. Commissioners*, 19 Wall. (U. S.) 655, 22 L. Ed. 223. In determining the extent to which it is, in respect to local self-government, in the state and in the county authorities, regard must be had to its peculiar nature. It may well be assumed that there is some difference between those powers which are usually exercised by the people, such as that of the election of officers, and those which have been uniformly recognized as belonging to the Legislature. The imposition of taxes belongs to the latter class. All power of taxation, not vested in any other body,

must be regarded as being in the hands of the Legislature. Delegations thereof are sometimes made by that body itself and sometimes by the organic law of the state, for purposes of local self-government. Cooley on Cons. Lim. 264. When made by the people through their Constitution, they are neither revocable by, nor subject to the control of, the Legislature. *St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575. When made by the Legislature itself, the delegated power is revocable. *Meriwether v. Garrett*, cited. In determining whether there has been a delegation by the Legislature, the courts are bound by the rule of strict construction. "Acts of this class are construed with great strictness. Two concurring principles leading to strict construction apply. Such acts affect arbitrarily private property, and are grants of power. * * * The power can be delegated by the Legislature, but only in plain and unambiguous words. Statutes for that purpose will be construed strictly, and they must be closely pursued. A departure in any material part will be fatal. Any doubt or ambiguity arising out of the terms used by the Legislature must be resolved in favor of the public." *Lewis' Sutherland*, Stat. Cons. § 541. The reasons given for this rule are equally applicable in determining whether there has been a delegation or separation of such power by means of constitutional provisions. The power is the same in nature and its possession leads to the same results, whether the claim to it be based upon constitutional provisions or legislative acts. It is so high and extraordinary in character that it is presumed to remain in the Legislature until the contrary is shown by express provisions or the equivalent thereof. Our conclusion is that two principles unite in denying the power claimed. County authorities never at any time before the adoption of the Constitution determined, except by authority of the Legislature, as agencies in its hands, the amounts of taxes raised for local government. On the contrary, they acted as such agencies, recognizing in the Legislature supervisory power over them. Hence it cannot be maintained that the people, in adopting the Constitution, recognized a legislative power of this kind in these local tribunals, which they signified their intention to leave in their hands by not expressly divesting them. No clause of the Constitution, either in express terms or by necessary implication, denies to the lawmaking body the exercise of this species of legislative power, which must reside in it, if it has not been taken away.

Invalidity of the limiting statute, enforcement of which is here sought, is predicated on the further ground that it is violative, in two respects, of that clause of section 39 of article 6 of the Constitution, which declares that "in no case shall a special act be passed, where a general law would be proper and

can be made applicable to the case." Instead of prescribing a uniform rate for each county, as the limit of the power of taxation, so that each county may raise taxes proportionate with its taxable wealth, the act adopts an arbitrary basis for each county, viz., the amount of money raised for county purposes in the year 1904, and forbids the laying of a levy that will produce more revenue than was collected in the year 1904 and an additional 7 per cent. of that amount, in consequence whereof the limit of taxation in each county bears no necessary relation to its taxable wealth, and a different maximum rate of taxation may be established in each county. This, it is urged, deprives the act of the quality or character of generality, and makes it special as to every county in the state, if it extends to all. That it is a special act, forbidden by the Constitution, is urged upon the further ground that McDowell and Gilmer counties are excepted from the operation thereof. If this act extends to all the counties of the state, and for the present this will be assumed, it is clearly general in character, except in respect to the results wrought out by it in the several counties. It has some effect in all. It reaches all the territory and all the people of the state. That it does not affect all alike is not conclusive of the question of the want of the necessary element of generality. While the results in the several counties may be, and probably are, different in respect to the limitations imposed, as tested by the relation which the taxes to be raised bear toward the taxable values, they are the same as tested by the relation which the taxes to be raised in each county bear to the taxes raised in the year 1904. The amounts of taxes necessary for the annual expenses of a county through a series of years are not greatly variant. The salaries of officers do not appreciably change in amount. Witness and jury fees remain about the same. Incidental and contingent expenses vary but little. Wherefore the Legislature might well have assumed that, in adopting the quantum of revenues for the year 1904 as the basis from which to fix the limitation, no injustice would be done, and that the effect would be, not technically, but substantially, like or similar in all the several counties. For aught that the court can see, this assumption is well founded; and it is clear from this that the statute is general in character, not only in the sense that it reaches the authorities of every county, but that it affects them all in a similar manner.

The statute is not uniform in its operation throughout the state, but the constitutional provision under consideration, unlike those of many of the states, is content with the requirement of generality only. It does not say that, when practicable, general and not special laws shall be enacted, and that, when enacted, they shall be uniform in operation and effect throughout the state. If it did,

the objection urged here would be more serious. Ordinarily, general laws do so operate, it must be confessed. Provisions for the mode of trial by jury, assessment of taxes, election of officers, and numerous other acts and proceedings, made by general law, are uniform throughout the state. To allow them to be otherwise would work injurious discriminations and hardships upon the people. These results would be inevitable, for the reason that there are no differences in conditions upon which discriminations could be based. But many other things which form the subjects-matter of legislation differ in situation and circumstances, though not in nature or in character, so that variations of the rule, operating throughout the state, so as to meet the exigencies of differing conditions, work out justice, equity, and wise results. The decisions of the courts of the various states show a vast number of instances in which classifications of persons, things, and localities have been made by the Legislatures, and laws passed applicable to some of these classes and not to others, and these laws are regarded as general in character nevertheless. Instances of the exercise of this power may be found in the legislation and decisions of our own state. The statutory provision under consideration is a temporary one, which the Legislature deemed it expedient to pass as an incident or step in effecting an extensive and all-pervading alteration of the tax system of the state. This legislation changed the basis of valuation in every county from that of the cash value of the property, real and personal, to that of the actual market value. In view of the expectation and design that vast increases of value for purposes of taxation would result, this clause was added to section 29 of chapter 39 of the Code of 1899 [Code 1906, § 1231] to prevent excessive and burdensome taxation at the hands of county authorities by the sudden imposition of levies entirely out of proportion, in the amounts to be exacted, with the sums which taxpayers had previously been called upon to pay. Its purpose was to prevent oppression and hardship upon property owners, which it would otherwise have been in the power of county authorities to inflict while the transition from the old to the new basis of valuation is in course of execution. The restraint imposed by it is temporary, being for the period of only three years. This makes it plain that the law is general in still another sense, namely, that of aiding in the effectuation of an important and far-reaching modification and alteration of the general tax system, operating upon all the people and all the property of the state. Since, in view of these elements of generality in the statute, it is by no means clear that the Legislature, in passing it, has exceeded its powers, we cannot sustain this contention of counsel for the respondents. Statutes cannot be overthrown by courts as unauthorized, unless the want of power in

the Legislature to pass them is beyond doubt. *Bridges v. Shallcross*, 6 W. Va. 562; *State v. Mines*, 38 W. Va. 125, 18 S. E. 470; *Railroad Co. v. Patton*, 9 W. Va. 648; *Montclair v. Ramsdel*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 481.

We have no doubt that the exception at the end of the proviso, designed to preclude its operation in McDowell and Gilmer counties, can be stricken out without affecting the validity of the proviso itself. Upon striking it out, the language of all that remains will apply to all the counties in the state. When a statute containing an invalid clause is so framed that elimination of said clause leaves the residue of it in such form that, if it had been so passed originally, it would have been a complete and valid statute, courts do not declare the entire statute void because of the insertion of the illegal exception. They cut out the exception and uphold the act from which it is eliminated. But for the exception, the terms of the act would expressly embrace every county in the state. The exception is an attempt to withdraw from its influence two counties. A well-settled rule of construction precludes the overthrow of a statute on constitutional grounds when it may be so construed as to avoid such result. *Slack v. Jacob*, 8 W. Va. 612; *Shields v. Bennett*, 8 W. Va. 74. "Constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. * * * If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed wholly independent of that which was rejected, it must be sustained." *People v. Knopf*, 183 Ill. 410, 56 N. E. 155. See, also, *Cooley's Const. Lim.* 178; *State v. Barker*, 55 Ohio St. 1, 44 N. E. 516; *Lewis' Suth. Stat. Con.* § 598.

The remaining ground of defense is predicated upon that part of clause 1 of section 10 of article 1 of the Constitution of the United States which forbids the passing of laws impairing the obligations of contracts. In the year 1889 Braxton county issued, in the manner prescribed by law, a large amount of bonds, the proceeds of which were used in aiding the construction of a railroad. Section 29 of chapter 39 requires county courts in such cases to provide, by annual levies, for the payment of interest on the bonds and for the creation of a sinking fund with which to pay them at maturity. Some of these bonds are now redeemable, but none of them are due in the sense that enforcement of payment thereof can be had, nor will they become so due for a number of years. It is also shown that there are outstanding orders issued by the county court which, as well as the current expenses, must be paid out of the levy of this year. It is probably true that a levy laid in accordance with the requirement of the statute in question will not yield a sufficient sum to pay interest on the bonds, the outstanding

orders, and the current expenses and contribute to the sinking fund, and it may be that the statute is violative of the provision in the federal Constitution above referred to. For reasons now to be stated, we are not called upon to decide whether it is or not. "It is a fairly established principle of law that no one can be allowed to attack a statute as unconstitutional who has no interest in it and is not affected by its provisions. This rule applies to all cases both at law and in equity, and is equally applicable in both civil and criminal proceedings. All constitutional inhibitions against the taking of private property without due process of law and all constitutional guaranties of equal rights and privileges are for the benefit of those persons only whose rights are affected, and cannot be taken advantage of by any other persons." 8 Cyc. 787, 788. "It is well settled that a statute must be assumed to be constitutional and valid, until some one complains, whose rights it invades." *Speer v. Commonwealth*, 23 Grat. (Va.) 935, 938, 14 Am. Rep. 164. The following from *Cooley's Constitutional Limitations*, 163, was quoted with approval by Judge Snyder in delivering the opinion of this court in *Shephard v. Wheeling*, 30 W. Va. 479, 483, 4 S. E. 635, 637: "Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it. On this ground it has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remaindermen against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remaindermen themselves. *Antoni v. Wright*, 22 Grat. (Va.) 857. And a party who has assented that his property may be taken under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property. The statute is assumed to be valid until some one complains whose rights it invades." He also quotes at length from the opinion of Chief Justice Shaw in *Wellington v. Petitioners*, 16 Pick. (Mass.) 96, 26 Am. Dec. 631, in which the soundest reasons for the refusal of courts to hear constitutional objections to statutes from persons not affected by them are set forth. In the course of the opinion as quoted, Chief Justice Shaw said: "Prima facie, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained." The principle is uniformly applied by the Supreme Court of the United States. *Wiley v. Sinkler*, 179 U. S. 58, 67, 21 Sup. Ct. 17, 45 L. Ed. 84; *Bank v. Craig*, 181 U. S. 548, 21 Sup. Ct. 703, 45 L. Ed. 994. In this last

case Mr. Justice Peckham said: "One who does not belong to the class that might be injured by a statute cannot raise the question of its invalidity." For this proposition he cited *Supervisors v. Stanley*, 105 U. S. 305, 28 L. Ed. 1044; *Clark v. Kansas City*, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392; *Lampasas v. Bell*, 180 U. S. 276, 21 Sup. Ct. 368, 45 L. Ed. 527.

Being of the opinion, hereinbefore stated, that the county court holds its powers respecting the quantum of revenues to be raised each year by delegation from the Legislature, as an agency in its hands and under its control, and not by delegation from the people, effected by the Constitution, and so deciding, it follows necessarily that the powers and rights so created are not contractual in their nature. No provision of the federal Constitution places any restraint upon the powers of the Legislature to revoke them. *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *United States v. Railroad Co.*, 17 Wall. (U. S.) 322, 21 L. Ed. 597; *Commissioners v. Lucas*, Treasurer, 93 U. S. 108, 23 L. Ed. 822. "Institutions of this kind, whether called counties or towns, are auxiliaries of the state in the important business of municipal rule, and cannot have the least pretension to sustain their privileges or their existence upon anything like a contract between them and the Legislature of the state, because there is not and cannot be any reciprocity of stipulation, and their objects and duties are utterly incompatible with everything of the nature of a compact." *Laramie County v. Albany County*, 92 U. S. 307, 311, 23 L. Ed. 552. In respect to the bonds, interest, sinking fund, outstanding county orders, current expenses, and other obligations resting upon the county, the Legislature, by this statute, merely seeks to control the exercise of the discretionary powers of its own agent, concerning the amount of money it shall use in the payment of current expenses and indebtedness. It permits the raising and expenditure of as much and presumably more money than the court was ever allowed to exact from the people in any previous year, since the levy for 1904 rose to the constitutional limit of 95 cents. The creditors themselves thus have a more ample provision, under this limitation of power, for the satisfaction of their debts, than was possible at the time the debts were contracted. If they have been content to wait until this time, and the Legislature, in limiting the powers of its fiscal agent, saw fit to assume that they would willingly continue to indulge their creditor until such time as payment could be more conveniently made, we see no reason, and know of no principle, upon which it can be asserted that the agent, to whom nothing is due, may nevertheless precipitate upon itself and the public the burden of the immediate discharge of heavy obligations to others, none of whom are here, or were before the county court, claiming or demanding it. The only contracts that can possibly be affected

are those which impose obligations upon and against the county and in favor of persons who are not parties to this action, either in person or by representation. If the statute in question should prevent the enforcement of any of these obligations, it will confer an immediate pecuniary benefit upon the respondent, and inflict no possible detriment other than a taint upon the public honor, and that has been intrusted to the Legislature, rather than to the county courts. If it merely delays payment with the consent of the creditors, instead of repudiating the obligations, no detriment of any kind results, except the additional burden of interest; and whether, in view of the financial conditions prevailing at a given time, a wise public policy demands the procurement of forbearance by its payment, is also a matter within the supervisory power and control of the Legislature.

By constitutional provision the county courts are the levying and disbursing agents in local self-government. The Constitution commits to them the superintendence and administration of the internal police and fiscal affairs of their counties. But in the execution of all these powers they must act under such regulations as are prescribed by law. Thus the means for discharging their obligations and making improvements are subject to legislative control, and may be limited or withheld, not to the material prejudice of a creditor, but certainly as against the county court. The Legislature of the state of Tennessee repealed the charter of the city of Memphis, a corporation against which many thousands of dollars of indebtedness existed, and its power to terminate the existence of the corporation, notwithstanding its debts, was upheld by the unanimous opinion of the Supreme Court of the United States. *Meriwether v. Garrett*, 102 U. S. 472, 511, 26 L. Ed. 197. Its relation to the contracts of indebtedness as obligor did not bring it within the protection of any guaranty of the federal Constitution. The contracts were not destroyed or impaired by the repeal of the city charter. They survived, and it remained for the state to make provision for them. It was not assumed in that case, nor can it be here, that the state intended to repudiate public obligations or unreasonably postpone performance. Mr. Justice Field said the Legislature had "thus provided against future claims from the improvidence or recklessness of the new government," and that "the power of the state to make this change of local government is incontrovertible." If, then, we are correct in the conclusion that the Legislature may control county courts in respect to the amounts of revenue they may raise, it is perfectly manifest that they must pay their debts with such funds as the Legislature allows them to provide for the purpose, and expend in public improvements only so much as they may be able to obtain for that purpose out of the amount they are allowed to collect; and if the Legislature, by any restrictions it may

impose, should contravene the rights of creditors, in violation of a clause of the federal Constitution, the creditors alone may complain. This proposition harmonizes with the decision of the federal Supreme Court in *Board of Liquidation v. Louisiana*, 179 U. S. 622, 21 Sup. Ct. 263, 45 L. Ed. 347.

Entertaining the views herein expressed, we award the peremptory writ of mandamus prayed for.

MORGAN v. MORGAN et al.

(Supreme Court of Appeals of West Virginia.
Oct. 23, 1906.)

1. DEEDS—CONSTRUCTION—INCONSISTENT PROVISIONS—ESTATE CONVEYED.

A will or deed containing two inconsistent provisions, one indicating that a life estate only in real estate is intended to be conveyed to a person, and the other giving or granting to such person an absolute and unlimited power of alienation and disposition of such estate in fee simple, will be held to pass a life estate or the fee simple, as the one or the other may appear to be the primary intention disclosed by a consideration of the whole instrument.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 344-355, 375, 436.]

2. TRUSTS—TRUST DEED—ESTATE OF CESTUI QUE TRUST—EQUITABLE ESTATE IN FEE SIMPLE.

A deed made on the 30th day of July, 1860, in which C. Leander Zane was the party of the first part, John Morgan, Jr., trustee, was the party of the second part, and Louisa Morgan, wife of John Morgan, Sr., was the party of the third part, whereby Zane conveyed to said trustee a certain tract of land, "to have and to hold the said tract or parcel of land to the said party of the second part upon trust that said trustee shall permit the said party of the third part to occupy, possess, and enjoy the said tract or parcel of land, and the rents, issues, and profits thereof to take for her sole use and benefit, free and clear from all manner of charge and incumbrance of her said husband, or any husband she may hereafter take, for and during her life, and upon the further trust that the said party of the second part shall sell or otherwise dispose of the said property at such time, in such manner, and upon such terms of credit or otherwise as said party of the third part by writing signed with her name shall appoint and direct, upon this further trust that, should the said party die without having directed and completed any sale of said property, and her said husband, John Morgan, survive her, then said party of the second part shall reconvey the said property to the said John Morgan in fee, and upon the further trust that, should the said party of the third part survive her said husband and die without having sold said property as hereinbefore empowered, then the said party of the second part shall hold said property in trust for the heirs of said John Morgan," passed an equitable estate in fee simple in said land to the wife, Louisa Morgan.

3. SAME—LIMITATION OVER—REPUGNANCY.

The attempted limitation over after the death of Louisa Morgan was inoperative and void for repugnancy and uncertainty.

4. SAME—CONVEYANCE BY BENEFICIARY.

After such deed was made, the wife, Louisa Morgan, had full power to convey her equitable estate in fee by deed, in which her husband joined as provided by statute, without direction to, or the intervention of, the trustee named in the deed from Zane.

5. SAME.

John Morgan, Jr., the trustee, and John Morgan, Sr., having died, and Louisa, the widow, having remarried, a deed made by her and her last husband to her son, James P. Morgan, conveying to him all the right, title, and interest of said Louisa and husband in and to the land conveyed by the deed from Zane, except the part previously conveyed to Hupp, passed an equitable estate in fee to the son, James P. Morgan.

6. SAME—CONVEYANCE OF LEGAL TITLE.

James P. Morgan is entitled to a conveyance, by a trustee appointed in this suit in the place of John Morgan, Jr., of the legal title to the land, in which he (James P. Morgan) holds the equitable estate in fee under the deed from his mother and her last husband.

(Syllabus by the Court.)

Appeal from Circuit Court, Ohio County.

Bill by James P. Morgan against S. Brady Morgan and others. Decree for defendants, and plaintiff appeals. Reversed and remanded.

Joseph R. Naylor and James W. Ewing, for appellant. Henry M. Russell, for appellees.

COX, J. James P. Morgan complains of a decree of the circuit court of Ohio county, dismissing his bill of complaint filed against S. Brady Morgan, Henry Morgan, Archie Morgan, Brady H. Morgan, and Amy E. Roe, for the purpose of having a trustee appointed and a conveyance by such trustee of the legal title to certain real estate, hereinafter mentioned, to him, the said James P. Morgan. The material facts appearing from the record are the following: By deed dated the 30th day of July, A. D. 1869, in which C. Leander Zane was the party of the first part, John Morgan, Jr., trustee, was the party of the second part, and Louisa Morgan, wife of John Morgan, was the party of the third part, Zane conveyed to said trustee a certain tract of land on Zane's Island in the city of Wheeling, "to have and to hold the said tract or parcel of land to the said party of the second part (1) upon trust that said trustee shall permit the said party of the third part to occupy, possess, and enjoy the said tract or parcel of land, and the rents, issues, and profits thereof to take for her sole use and benefit, free and clear from all manner of charge and incumbrance of her said husband, or any husband she may hereafter take, for and during her life; (2) and upon the further trust that the said party of the second part shall sell or otherwise dispose of said property at such time, in such manner, and upon such terms of credit or otherwise as said party of the third part by writing signed with her name shall appoint and direct; (3) upon this further trust that, should the said party die without having directed and completed any sale of said property, and her said husband, John Morgan, survive her, then said party of the second part shall reconvey the said property to the said John Morgan in fee;

(4) and upon the further trust that, should the said party of the third part survive her said husband and die without having sold said property as hereinbefore empowered, then the said party of the second part shall hold said property in trust for the heirs of said John Morgan." The figures (1), (2), (3), and (4) above are not found in the original, but are inserted to indicate the several parts or clauses into which the provision of the deed above quoted is divided for consideration hereinafter. These clauses will be referred to as the first, second, third, and fourth, corresponding to said figures. John Morgan, Jr., trustee, was the son of John Morgan, the husband. By joint deed, dated the 7th day of August, 1876, John Morgan, Jr., trustee, John Morgan, Sr., and Louisa Morgan, the wife, conveyed a part of said tract of land to John C. Hupp. That part is not involved in this suit. On the 3d day of September, 1876, John Morgan, Sr., died, leaving surviving him his widow, Louisa, and his children, John Morgan, Jr., and the defendants S. Brady Morgan, Henry Morgan, and the plaintiff, James P. Morgan; the plaintiff being his child by his marriage with Louisa, and the others being his children by a former marriage. In the year 1878 John Morgan, Jr., died, leaving surviving him a widow, who afterwards died, and his only children and heirs at law, the defendants Archie Morgan, Brady H. Morgan, and Amy E. Roe (formerly Morgan). Subsequently Louisa Morgan, the widow of John Morgan, Sr., intermarried with one Geo. W. Barnes, and on the 17th day of January, 1901, the said Louisa and Geo. W. Barnes, her husband, made a deed of conveyance to James P. Morgan, her son, conveying, among other parcels of real estate, all the right, title, and interest of the said Louisa Barnes and husband in and to the tract of land conveyed by Zane to John Morgan, Jr., trustee, except that part previously conveyed to Hupp. Louisa Barnes died previous to the institution of this suit. Other facts appear, but only those which we deem material have been mentioned.

The plaintiff contends that the deed from Louisa Barnes and husband to the plaintiff, James P. Morgan, passed to him an equitable estate in fee simple in the land conveyed by the Zane deed, except that part which had previously been conveyed to Hupp. The defendants contend that, if the deed passed anything, it passed no more than an equitable estate for the life of Louisa Barnes, and that they, together with the plaintiff, as the heirs of John Morgan, Sr., are now, Louisa Morgan being dead, entitled to the land in fee. This controversy involves the construction of the Zane deed, or more especially the provision, above quoted, which imposed the trust upon John Morgan, Jr., the trustee. In construing the deed, all its provisions must be considered together. The words are to be taken in their usual and ordinary sense, unless it appears

that they were used in a technical or special sense, or unless, when applied to the subject-matter, they have a technical or special meaning. The intention of the parties to the deed is paramount and controlling, so far as that intention is within the law. The several clauses in this provision above indicated by figures in parentheses occupy positions of equal prominence and importance in the deed. The second clause mentioned involves the right of the wife of John Morgan, Sr., to sell and dispose of the land, or to have that done by the trustee. This clause, standing alone, gave to her the absolute and unlimited power of sale and disposition at such time, in such manner, and upon such terms as she should direct. Its sweeping language gave absolute and unlimited power of sale and disposition of the land in fee, at the will and pleasure of the wife. We apprehend that no contention can be made, if the second clause stood alone, that the power of disposition was not absolute and unlimited, if exercised in conformity to the deed. This absolute and unlimited power of disposition meant absolute power and control over the land. Alone it gave an equitable estate in fee simple to the wife; the legal title being conveyed to a trustee. In speaking of the provisions of a will, Judge Tucker in *Burwell's Ex'rs v. Anderson's Adm'r*, 3 Leigh (Va.) 348, says: "From the earliest time it has been among the received doctrines of the common law that an absolute and unqualified power of disposing, conferred by will, and not controlled or explained by any other provision, should be considered as a gift of the absolute property. In this the law but corresponds with the dictates of common reason. Every man of ordinary capacity would understand a power to dispose of a thing as he pleased as a gift of the thing itself; and hence every one who uses the phrase without qualification is understood by the law as intending a gift. The power of absolute disposition is, indeed, the eminent quality of absolute property. He who has the absolute property has inseparably the absolute power over it; and he to whom is given the absolute power over an estate acquires thereby the absolute property, unless there is something in the gift which negatives and overthrows this otherwise irresistible implication." See, to the same effect, *Davis v. Heppert*, 98 Va. 775, 32 S. E. 467; *Farish, trustee, v. Wayman*, 91 Va. 430, 21 S. E. 810. In *Davis v. Heppert* it is said: "A line of decisions of this court, from *May v. Joynes* to *Farish v. Wayman*, establishes the doctrine, well stated by Judge Burks, that 'though property is devised or bequeathed to one for life, even in the most express terms, yet if by other terms in the same instrument it is manifest that the devisee or legatee is invested with absolute power to dispose of the subject at his will and pleasure, he is not a mere life tenant, but absolute owner; for there can be no better definition of absolute ownership than absolute dominion.'"

This second clause of the provision of the deed under consideration is preceded by a clause requiring the trustee to permit the wife to occupy, possess, and enjoy the land, and the rents, issues, and profits thereof, for her sole use and benefit, free, etc., for and during her life, and succeeded by clauses intended to create a limitation over after the wife's death in case she should not exercise the power of disposition. Do these provisions cut down the wife's estate to an equitable estate for her life? Judge Green, delivering the opinion of this court in *Milhollen v. Rice et al.*, 18 W. Va. 510, in which the provisions of a will were under consideration, laid down two propositions which he considered established: First, that "it is settled that if a testator gives property to a devisee or legatee, to use or dispose of at his pleasure—that is, to consume or spend, sell or give away at his pleasure—such devisee or legatee has the fee simple or absolute property, even though his interest in it be called by the will a life estate, and there be a provision in the will whereby what may remain of the property at the death of the devisee or legatee is given to another person." Second, that "there would seem now to be no doubt that, when a devise or bequest expressly gives a life estate, a superadded power of disposition will not enlarge the life estate into a fee simple, or make the property bequeathed absolute." Many authorities are cited for both of these propositions. It will be observed that one difference in the two propositions relative to life estates is that the first would seem to relate to a case where the power of disposition is contained in the clause by which the gift is made, while the second proposition would seem to relate to a case where the power of disposition is contained in a superadded clause. We conceive that this difference can only be material upon the question of intent. Therefore, if the absolute and unlimited power of disposition at pleasure, whether contained in the same clause in which the gift is made or in a superadded clause, appears to be the primary or dominant intent disclosed by a consideration of the whole instrument—that is, intended to prevail over the words indicating a life estate—it will be given that effect. After an examination of many authorities, English and American, including those of Virginia and of this state, we think that the two propositions laid down by Judge Green mean simply that effect will be given to the primary or dominant intent to be ascertained from all the provisions of the instrument. A primary or dominant intent must prevail over a secondary intent, where the two are inconsistent. This rule as to primary or dominant intent is expressed in different language by different authorities. By some the primary intent is termed the general intent; by others, the paramount intent. 2 Page on Cont. § 1113; Clark on Cont. 290; 9 Cyc. 583; Washburn on Real Prop. § 2314; 2 Devlin

53

on Deeds, § 840. The effect of the rule is that, where two clauses are inconsistent, they must be construed so as to give effect to the intention of the parties as collected from the whole instrument. 9 Cyc. 583; *Tuck v. Singer Mfg. Co.*, 67 Iowa, 576, 25 N. W. 812. If the primary or dominant intent be to create a life estate, then such intent will prevail over words indicating an absolute and unlimited power of disposition; and, vice versa, if the absolute and unlimited power of disposition appears to be the primary or dominant intent of the instrument, then a fee-simple estate will be thereby created. In *Burwell's Ex'rs v. Anderson's Adm'r*, and other cases, it is recognized that the gift of a life estate and also of an absolute and unlimited power of disposition are inconsistent provisions. Therefore effect will be given to the one or the other according to the primary or dominant intent of the whole instrument. We think that the principle that effect must be given to the manifest primary intent underlies all the decisions on this subject. This seems to be what was meant by Chancellor Kent in *Jackson v. Robins*, 16 Johns. (N. Y.) 537, where, after a review of the English and American cases, he says: "We may lay it down as an incontrovertible rule that where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of the power of disposition of the reversion." We take it that the expression "by certain and express words" means that the intent to give a life estate must be clearly stated, or, in other words, be the primary or dominant intent. The same idea is expressed by Judge Tucker in *Burwell's Ex'rs v. Anderson's Adm'r*, in these words: "Where, indeed, such an inconsistent life estate is given, the fee does not pass; for this whole matter rests upon intention. The estate being the testator's to give, his will is the law of the subject, unless that will is against the law of the land."

Following this idea of primary or dominant intent, we find the two classes of cases, both English and American, construing words indicating a life estate, and also words indicating an absolute and unlimited power of disposition contained in the same instrument; one class permitting the power of disposition to prevail, and the other permitting a life estate to prevail. *Milhollen v. Rice*, 13 W. Va. 510; *Shermer v. Shermer*, 1 Wash. (Va.) 266, 1 Am. Dec. 460; *Shermer v. Richardson*, Wythe (Va.) 159; *Guthrie v. Guthrie*, 1 Call (Va.) 7; *Riddick v. Cohoon*, 4 Rand. (Va.) 547; *Burwell v. Anderson*, 3 Leigh (Va.) 348; *Nelson v. Cooper*, 4 Leigh (Va.) 408; *Brown v. George*, 6 Grat. (Va.) 424;

May v. Joynes, 20 Grat. (Va.) 692; *Carr v. Effinger*, 78 Va. 197; *Cole v. Cole*, 79 Va. 251; *Bowen v. Bowen*, 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664; *Hall v. Palmer*, 87 Va. 354, 12 S. E. 618, 11 L. R. A. 610, 24 Am. St. Rep. 653; *Farish v. Wayman*, 91 Va. 430, 21 S. E. 810; *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467; *Brown's Gdn. v. Strother's Adm'r*, 102 Va. 145, 47 S. E. 236; *Jackson v. Robins*, 16 Johns. (N. Y.) 537; *Atty. Gen. v. Hall*, Fitzg. 314; *Benferd v. Street*, 16 Ves. 135; *Irwin v. Farrer*, 19 Ves. 86; *Ide v. Ide*, 5 Mass. 500; *Willmoth v. Willmoth*, 34 W. Va. 426, 12 S. E. 731; *Bank of Berkeley Springs v. Green*, 45 W. Va. 168, 31 S. E. 260; *Cressap v. Cressap*, 34 W. Va. 310, 12 S. E. 527; *Smith v. Schlegel*, 51 W. Va. 245, 41 S. E. 161; *Madden v. Madden*, 2 Leigh (Va.) 377; *Missionary Society v. Calvert*, 32 Grat. (Va.) 357; *Lee v. Law* (Va.) 19 S. E. 255; *Miller v. Potterfield*, 86 Va. 877, 11 S. E. 486, 19 Am. St. Rep. 919; *Johns v. Johns*, 86 Va. 333, 10 S. E. 2; *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175; *Smith v. Bell*, 6 Pet. (U. S.) 68, 8 L. Ed. 322; *Brant v. Va. Coal & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927; *Giles v. Little*, 104 U. S. 291, 28 L. Ed. 745; *Jackson v. Bull*, 10 Johns. (N. Y.) 19; *Bradley v. Wescott*, 13 Ves. 453; *Goodtitle v. Otway*, 2 Wills. 6. The first 20 cases cited are especially applicable to this case, and we think fully sustain the conclusion we have reached. It seems to us that the tendency of the later cases, and especially those of Virginia, is to eliminate all distinction between a gift or grant to one indefinitely with absolute and unlimited power of disposition, and a gift or grant to one for life with a superadded absolute and unlimited power of disposition, and to give effect, as the primary and dominant intent, to the absolute and unlimited power of disposition in all cases. Thus we find it stated in broad language in *Davis v. Heppert*, 96 Va. 775, 32 S. E. 467: "An estate for life, coupled with the absolute and unlimited power of alienation of the fee, express or implied, comprehends everything, and constitutes a fee-simple estate." To the same effect are *Brown's Gdn. v. Strother's Adm'r*, 102 Va. 145, 47 S. E. 236, and *Farish, Trustee v. Wayman*, 91 Va. 430, 21 S. E. 810. In the latter case, Judge Harrison, speaking for the court, says: "It cannot be longer doubted that the law is settled by the courts and text-writers everywhere, of the highest authority, that an estate for life, coupled with the absolute power of alienation, either express or implied, comprehends everything, and the devisee takes the fee." The later Virginia cases appeal to us with peculiar force, owing to the fact that they were decided upon consideration of the early Virginia cases, which are law alike in the two Virginias. Whether this be the correct view or not, the primary or dominant intent must prevail; and it may be said that the cases of *Milhollen v. Rice* and *Burwell's*

Ex'rs v. Anderson's Adm'r do recognize the distinction mentioned.

In the case at bar the land was granted by Zane to a trustee. The wife of John Morgan, Sr., was the third party to the deed. It may be contended that the first clause above mentioned indicated a life estate in the wife. Is this necessarily true, upon consideration of the whole deed? We are inclined to think that one of the principal objects of the first clause was to take the possession, rents, issues, and profits of the land from the trustee during the life of the wife, and to give them to the wife in the first instance, leaving the trustee without right to possession. The language used is that the trustee shall permit the wife to occupy, possess, and enjoy. This clause defines the duty of the trustee, rather than the quantity and extent of the wife's estate. It appears to us that it was not the intent of this clause to limit the wife's equitable estate to an estate for her life. If this be incorrect, we are then clearly of the opinion that it was not the intent of this clause to limit the effect of the second clause, which gave absolute and unlimited power of sale and disposition. We think that this absolute and unlimited power of disposition was manifestly the primary intent upon consideration of the whole deed, notwithstanding that the clause taking the possession from the trustee may have indicated a life estate in the wife if it stood alone. The words of the third and fourth clauses assist in reaching this conclusion. In the third clause it is said: "Should the said party [wife] die without having directed and completed any sale of said property." And in the fourth clause: "Should the said party of the third part [wife] survive her said husband and die without having sold said property as hereinbefore empowered." These words show plainly that it was contemplated that the absolute and unlimited power of disposition might be exercised, and that there might be nothing left upon which the limitation over could operate. The third and fourth clauses were thus made subject to the exercise of the power of disposition under the second clause. Our view of the true construction of the whole provision of the Zane deed imposing the trust is that it was the intention by the first clause to take the possession, rents, issues, and profits from the trustee and give them to the wife in the first instance during her life, and not to define the quantity or extent of the wife's estate; that it was the intention by the second clause to give an absolute and unlimited power of disposition to the wife, which necessarily implies an equitable estate in fee simple; and that it was the intention by the third and fourth clauses to create a limitation over if the power of disposition should not be exercised. As we have said, if in error as to the intent of the first clause, still the second must prevail as the primary or dominant intent of the whole provision. Applying this construc-

tion, we hold that the wife took an equitable estate in fee in the land conveyed by the Zane deed. Her equitable estate being in fee, the limitation over indicated by the third and fourth clauses was inoperative and void, for repugnancy and uncertainty, under all the authorities in this state and Virginia. The intent to create a limitation over, not being within the law, failed. The first taker took all, and nothing remained for the second. See the following cases, before cited: *Guthrie v. Guthrie*; *Jackson v. Robins*; *Atty. Gen. v. Hall*; *Ide v. Ide*; *Riddick v. Cohoon*; *Melson v. Cooper*; *Mays v. Joynes et al.*; *Cole v. Cole*; *Hall v. Palmer*; *Missionary Society v. Calvert*; *Farish v. Wayman*—and other cases.

It is contended that the wife could not exercise the absolute and unlimited power of disposition in any other manner than that provided by the deed; that is, upon written direction to, and by the intervention of, the trustee. It will be observed that the Zane deed was made on the 30th of July, 1869. The trust imposed thereby upon John Morgan, Jr., trustee, was passive, not active. He held only the legal title, without possession. The wife's equitable estate in the land conveyed by the Zane deed was her separate estate, and, being an equitable estate in fee, the right to convey it attended as an incident. By the express terms of the deed, as well as incidental to her estate, she had the *jus disponendi*. In equity she was the owner of the land, and could convey her equitable estate according to the statute. See *Radford v. Carwile*, 13 W. Va. 572; *Perry on Trusts*, 520, 667; 1 *Bishop on Law of Married Women*, §§ 852, 865, 867; *Jones v. Tatum*, 19 *Grat. (Va.)* 733. In this feature of the case, and as to the effect of our present Constitution and the legislation thereunder, the case of *Johnson v. Sanger*, 49 W. Va. 405, 38 S. E. 645, is controlling. It is unnecessary to repeat the argument there made to show that *Louisa Barnes*, by a deed in which her husband joined, had the right to convey her equitable estate in fee, without direction to or the intervention of the trustee. The deed from *Louisa Barnes* and her husband to the plaintiff used the words "all the right, title, and interest" of the grantors. It is said that this is a very guarded expression, and is limited and restricted in effect. Undoubtedly, the grant of all the right, title, and interest of the grantors passed whatever estate the grantors had at the time the deed was made; and, if the grantor *Louisa Barnes* had an equitable estate in fee, the grant was sufficient to pass that equitable estate. *Shepard's Touchstone*, 98. Any interest in or claim to real estate may be disposed of by will or deed. Code 1899, c. 71, § 5 [Code 1906, § 3024]. It follows that all the interest of a party or parties may be so disposed of.

We conclude, then, that the deed from *Louisa Barnes* and husband to the plaintiff, her son, passed an equitable estate in fee simple

in the land conveyed by the Zane deed not previously conveyed to Hupp. This being true, and the trustee being dead, the plaintiff is entitled to have another trustee appointed in this suit, and to have a conveyance from him of the legal title to the land, in which the plaintiff already has the equitable title in fee. As said by Judge Brannon in *Johnson v. Sanger*: "She could sell and convey the land, and compel the trustee to pass the legal title to her alienee by uniting in the deed, or by separate deed, or the purchaser under a deed from her and her husband could do so."

For the reasons stated, the decree complained of is reversed, and this cause is remanded, to be further proceeded with according to the principles herein announced and the rules governing courts of equity.

JOHNSON v. BANK.

(Supreme Court of Appeals of West Virginia. Oct. 23, 1906.)

1. TRIAL—QUESTIONS FOR JURY.

When the issue in an action at law involves the question whether an oral promise is original or collateral, which must be determined from materially conflicting evidence and circumstances and inferences therefrom, and the evidence and circumstances are such that the verdict of a jury for either party could not be set aside, because without sufficient evidence to support it, or because plainly against the decided weight and preponderance of the evidence, such question is one of fact, to be determined by a jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 342, 343.]

2. SAME—INSTRUCTIONS.

In such case instructions which in effect direct the jury to determine such question from a part only of the proper and material evidence and circumstances, excluding other parts thereof in conflict with the part directed to be considered, are erroneous.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 613-623.]

3. FRAUDS, STATUTE OF—ORAL PROMISE—INTENTION OF PARTIES.

In determining whether an oral promise is original or collateral, the intention of the parties at the time it was made must be regarded.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 20.]

4. SAME—EVIDENCE.

In ascertaining such intention, the words of the promise, the situation of the parties, and all the circumstances attending the transaction should be taken into consideration.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, § 20.]

5. SAME—CREDIT GIVEN THIRD PERSON.

An oral promise to pay for services rendered to a third person is not actionable, if the services were rendered wholly or partly upon the credit of an independent original promise or liability of such third person. If any credit whatever was given to such third person at the time the services were rendered, so that he was in any degree independently and originally liable, the oral promise of the other party is invalid.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 35-46.]

(Syllabus by the Court.)

Error to Circuit Court, McDowell County. Action by George Ben Johnson against Ida Bank. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Cook & Howard, for plaintiff in error. D. J. F. Strother, for defendant in error.

COX, J. In this action of assumpsit instituted by Geo. Ben Johnson, a surgeon of Richmond, Va., against Mrs. Ida Bank, in the circuit court of McDowell county, there was a verdict of a jury and a judgment for the plaintiff for \$500, being the amount of a fee claimed by him for the performance of a surgical operation upon Mrs. Louis Jaffe, a sister of Mrs. Bank. She obtained a writ of error to the judgment.

The amount of the recovery is justified by the evidence, if the evidence fixed a liability upon Mrs. Bank, the defendant. She complains of the giving to the jury of instructions Nos. 1 and 2 at the instance of the plaintiff, of the refusal to give instruction No. 1 offered by her, and of the overruling of her motion to set aside the verdict and grant to her a new trial. The plaintiff claims that there was an oral promise by defendant to pay his fee. The services were not rendered to the defendant, but to a third person, the defendant's sister. The two crucial questions involved in the issue in this action are: (1) Did the defendant make the promise claimed by the plaintiff? (2) If so, was that promise original or collateral? If there was a promise by defendant, and it was to answer for the debt of another, then, being oral, it is not actionable under the statute of frauds. Section 1, c. 98, Code 1899 [Code 1906, § 3438]. On the other hand, if the promise by defendant was to pay her own debt, it is actionable without writing, although the services were rendered to a third person.

A partial statement of the evidence is necessary. Drs. Daniel and Hall testified for plaintiff substantially that they were practicing physicians and were called to attend upon Mrs. Jaffe by her husband, Louis Jaffe; that, after a diagnosis and consultation, they decided that an operation was necessary; that they did not care to undertake it without assistance; that they consulted the defendant, Mrs. Bank; that they told Mrs. Bank that it would be necessary to operate upon Mrs. Jaffe in order to save her; that they told her that they did not want to undertake the operation without assistance; that Mrs. Bank mentioned the name of a doctor in New York or Baltimore; that they told her that they could get the plaintiff, Dr. Johnson, cheaper and quicker; that Mrs. Bank said: "Money is no object. Get a good doctor. I will see it paid"—that thereupon they sent a telegram to Dr. Johnson; that Dr. Johnson came and performed the operation; and that they did not consider Louis Jaffe financially responsible, and would

not have sent for Dr. Johnson, had it not been for Mrs. Bank's statement. Dr. Johnson, the plaintiff, testified in his own behalf substantially that the telegram received from Drs. Daniel and Hall was according to his recollection in the following language: "Come to Welch on first train prepared to operate. Fee good. [Signed] Daniel and Hall"—that upon this call he came and performed the operation upon Mrs. Jaffe; that no other arrangement was made as to the payment of his fee previous to the operation; that he relied upon Drs. Daniel and Hall as having made proper arrangements for his fee; that after the operation Daniel and Hall stated to plaintiff that, in the event Mrs. Jaffe's husband did not compensate him, her sister would; that plaintiff rendered his bill for the operation to Louis Jaffe, the husband; that the bill was made from plaintiff's book; that after receiving no response from the husband he communicated with Drs. Daniel and Hall, and was told by them that according to their agreement he should send the bill to the sister, if he heard nothing from the husband. Mrs. Bank, the defendant, testified on her own behalf substantially that Daniel and Hall said that an operation was necessary upon Mrs. Jaffe; that they were unwilling to undertake it without assistance; that they had decided to send for Dr. Johnson before she knew of their intention of so doing; that, when informed of this, she asked who Dr. Johnson was; that she had never heard of him before; that she remarked that she wished Dr. Kelly, of Baltimore, was present; that Dr. Hall wrote the telegram and gave it to Louis Jaffe to send; that Dr. Johnson came and operated upon Mrs. Jaffe; and that Mrs. Jaffe died leaving an estate worth \$700 or \$800. When asked if the statement that Daniel and Hall made before the jury was true, the defendant replied: "It is not true that I promised to pay Dr. Johnson's bill."

We have not detailed all the evidence, but enough to show that the evidence and circumstances are materially conflicting as to both questions mentioned. Answers to these questions must be deduced from such conflicting evidence and circumstances and inferences therefrom. In calling Dr. Johnson, Daniel and Hall, acting for Mrs. Bank, could bind her within the scope of the authority given to them by her, and no farther. If the conversation between Mrs. Bank and Daniel and Hall, considering the situation of the parties and the circumstances surrounding the transaction, authorized them to make an original promise for her, then they could so bind her; but without such authority, express or implied, they could not do so. In determining whether a promise is original or collateral, regard must be had to the intention of the parties at the time the promise was made. Throop on Verbal Agreements, §§ 183-188. In 29 Amer. & Eng. Enc.

of Law, 907, it is stated that "while, as a matter of law, a promise absolute in form to pay, or to be 'responsible,' or to be 'paymaster,' is an original promise, and while, on the other hand, if the promisor says 'I will see you paid,' or 'I will pay if he does not,' or uses equivalent words, the promise, standing alone, is collateral, yet, under all the circumstances of the case, an absolute promise to pay, or a promise to be 'responsible,' may be found to be collateral, or promises deemed prima facie collateral may be adjudged original." See Brown on Statute of Frauds (4th Ed.) §§ 198, 199; Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 828. In that case the Supreme Court said: "The real character of a promise does not depend altogether upon the form of the expression, but largely upon the situation of the parties and upon whether they understood it to be a collateral or direct promise." In ascertaining the intent and the extent of the promise, the expressions used, the situation of the parties, and all the circumstances attending the transaction should be taken into consideration. Elder v. Warfield, 7 Har. & J. (Md.) 897. This being true, and the evidence and circumstances being materially conflicting in this action as to whether the promise, if made, was original or collateral, and the evidence and circumstances being such that a verdict for either party could not be set aside, because without sufficient evidence to support it, or because plainly against the decided weight and preponderance of the evidence, the question is one of fact to be determined by a jury. Throop on Verbal Agreements, §§ 183-188. "Where the question whether the promise was original or collateral depends alone upon its terms, and the language used is established by undisputed testimony such question is one of law for the court. But the nature of the promise is usually one to be determined by the jury as a question of fact; for it may appear that a promise original in form was in fact made and intended as collateral." 29 Amer. & Eng. Enc. of Law, 906; Browne on Statute of Frauds, § 199; Boston v. Farr, 148 Pa. 220, 23 Atl. 901. It is also true that it may appear that a promise collateral in form was in fact made and intended as original.

In view of what we have said, we will consider the instructions given and refused. The instructions for plaintiff are as follows: No. 1: "The court instructs the jury that if they believe, from the evidence in this case, that the defendant in this case, through Drs. Daniel and Hall, as her agents, sent for Dr. Geo. Ben Johnson, the plaintiff, and that by reason thereof the said plaintiff came to Welch and performed the operation upon Mrs. Louis Jaffe, then the agreement to pay was not a collateral agreement, but a primary and original agreement, and that it is not necessary that it be in writing, but that

Mrs. Bank, the defendant, is primarily liable for a reasonable amount for said services." No. 2: "The court instructs the jury that if they believe, from the evidence, that Mrs. Ida Bank, the defendant in this case, authorized Drs. Daniel and Hall to send for Dr. Geo. Ben Johnson to perform the operation upon Mrs. Louis Jaffe, and that in pursuance thereof that Dr. Geo. Ben Johnson came to Welch and performed said operation, then the defendant, Mrs. Bank, is primarily liable for a reasonable sum for said operation, and they should find for the plaintiff in such sum as they think reasonable for said operation as disclosed by the evidence in this case." These instructions were binding. They made the character of the promise depend wholly upon whether or not Mrs. Bank sent for Dr. Johnson, or authorized him to be sent for, regardless of whether her promise was original or collateral. If she sent for him under an original promise, she would be liable without writing; but, if she sent for him under a promise to answer for the debt of another, she would not be liable without writing. Instead of submitting to the jury the determination of the character of the promise, if one was made, from all the conflicting, but material, evidence and circumstances here appearing, these instructions virtually withdrew from the jury the determination of the character of the promise from all the evidence and circumstances and directed the jury, in effect, that if Mrs. Bank, through Daniel and Hall, sent for Dr. Johnson, she was primarily, and not collaterally, liable. These instructions were plainly erroneous.

Instruction No. 1, offered for defendant and refused, is as follows: "The court instructs the jury that, though they believe from the evidence in this case that there was a promise on the part of the defendant to pay the plaintiff's claim, yet, if they further believe from the evidence that the plaintiff gave any credit whatever to either Mrs. Louis Jaffe or her husband, so that either or both of them were in any degree liable for the payment of the plaintiff's claim, then such promise on the part of Mrs. Bank is a collateral undertaking, and they must find for the defendant." In *Waggoner v. Gray's Adm'r*, 2 Hen. & M. (Va.) 603, Judge Roane considered it settled "that where the person on whose behalf the promise is made is not discharged, but the person promising agrees to see the debt paid, so that the promisee has a double remedy, the promise is considered collateral, and must be in writing, but where the promisor undertakes to become the paymaster it becomes immediately his debt and he is liable without writing." *Ware v. Stephenson*, 10 Leigh (Va.) 155, holds "that where the defendant's undertaking is for a consideration to be received by, or articles to be supplied to, a third person, if the transaction be such that the third person is responsible to the person who supplies the

articles, or from whom the consideration proceeds, the undertaking is collateral, and under the statute of frauds will not bind, unless it be in writing." See, also, *Noyes' Ex'r v. Humphreys*, 11 Grat. (Va.) 636. *Radcliff v. Poundstone*, 23 W. Va. 724, adheres to the principle announced in *Ware v. Stephenson*, supra. See, also, *Gerow v. Riffe*, 29 W. Va. 462, 2 S. E. 104, *Barnett v. Lumber Co.*, 43 W. Va. 441, 27 S. E. 209, and *Faulkner v. Thomas*, 48 W. Va. 148, 35 S. E. 915. An oral promise to pay for services rendered to a third person is not actionable, if the services were rendered wholly or partly upon the credit of an independent and original promise or liability of such third person. If any credit whatever was given to such third person at the time the services were rendered, so that he was in any degree independently and originally liable, the oral promise of the other party is invalid. See authorities before cited; also 29 Amer. & Eng. Enc. of Law, 922, 923, and authorities there cited. So far as instruction No. 1 offered for defendant announces this principle, it is correct. In view of the evidence in this action, this instruction is subject to the objection that it did not say that the credit must have been given to the third party at the time the services were rendered. Under the terms of this instruction the credit to the third party may have been first given after the services were rendered. The jury might readily confound the giving of credit to a third party with a charge made against such third party after the services were rendered. If sole credit was given to a promise by the defendant at the time the services were rendered, then the fact that a book charge was afterwards made to another may be explained. Such a charge to another after the services were rendered, while a circumstance tending to show to whom credit was originally given, may be susceptible of explanation. *Cutler v. Hinton*, 6 Rand. (Va.) 509; *Throop on Validity of Verbal Agreements*, § 190; *Browne on Statute of Frauds*, 198. Whether the evidence in this action shows a satisfactory explanation is not for our present determination. Instruction No. 1 offered for defendant was calculated to mislead the jury, and its refusal was not erroneous.

For the reasons stated the judgment complained of is reversed, the verdict set aside, a new trial awarded, and this action remanded to be further proceeded with according to law.

GOLDING SONS CO. v. CAMERON POTTERY CO. et al.

(Supreme Court of Appeals of West Virginia. Oct. 23, 1906.)

BILLS AND NOTES — PARTIES — ELECTION OF HOLDER.

Where one makes a negotiable note, and the payee does not indorse it, and strangers sign their names upon its back, and it is then de-

livered to the payee, such payee may, in the absence of an agreement or understanding that he shall treat those signing the note on its back in a particular manner, treat them as joint promisors, or as guarantors, or as indorsers, at his election.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 555-557.]

(Syllabus by the Court.)

Error from Circuit Court, Marshall County.

Action by the Golding Sons Company against the Cameron Pottery Company and others. Judgment for defendants, and plaintiff brings error. Reversed, and judgment entered for plaintiff.

J. B. Somerville, for plaintiff in error.
Chas. C. Newman, for defendants in error.

SANDERS, Judge. The Golding Sons Company brought an action of assumpsit in the circuit court of Marshall county against the Cameron Pottery Company, a corporation, S. E. Stricklin, J. N. Howard, Frank Culley, and Harrison Hicks, upon a promissory negotiable note for the sum of \$700. The action having been dismissed, it is now here on writ of error for review.

The note sued on was payable to the plaintiff and signed upon its face by the Cameron Pottery Company and upon its back by the other defendants. It was not indorsed by the payee. The defendants, who indorsed their names upon the back of the note, say that they should be treated as indorsers, and as the note was not protested they deny liability. If they should be treated as indorsers, the plaintiff has lost the right to charge them by failing to make demand and give notice of protest; but, upon the other hand, if they should be treated as joint makers or guarantors, no protest or notice of non-payment is necessary. The law is well settled in this state that where one makes a negotiable note and the payee does not indorse it, and another, a stranger to the note, puts his name upon its back, and it is then delivered to the payee, he may treat them both as joint makers, or he may treat the one indorsing his name upon the back as indorser or guarantor, at his election, unless he agrees before or at the time of the delivery of the note to treat the one so signing in a particular manner. The elementary principle underlying the entire matter is that the status of an irregular indorser of a negotiable promissory note is to be determined by the intention of the parties at the time of the transaction. If there is an agreement, that must govern; but, if there is no such agreement, the law presumes that such irregular indorser intended to bind himself as joint maker, or as guarantor, as the payee, at any time, may elect. The cases of Powell v. Com., 11 Grat. (Va.) 822, Burton & Co. v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571, and Miller v. Clendenin et al., 42 W. Va. 416, 26 S. E. 512, fully and clearly establish this

doctrine, which also finds support in the case of Young v. Sehon, 53 W. Va. 127, 44 S. E. 136, 62 L. R. A. 499, 97 Am. St. Rep. 970. This being the rule, the payee has the right to charge the defendants, who signed their names upon the back of the note, as joint makers, unless they can show that before or at the time of the delivery of the note to the payee it was agreed that they should be otherwise treated. From the agreed state of facts, it appears that the plaintiff was a creditor of the defendant the Cameron Pottery Company, and after the indebtedness became due the note in question was executed in settlement thereof. The representative of the plaintiff refused to accept the individual note of the Cameron Pottery Company, and the other defendants signed their names upon the back of the note, in which condition it was delivered to the plaintiff. So it will be seen that there is no fact from which it could even be inferred that the payee agreed to treat the defendants signing the note upon its back as indorsers, and, not so agreeing, it has the right to treat them as joint makers.

It is contended by counsel for the defendants that the decision of Roanoke Grocery & Milling Co. v. Watkins et al., 41 W. Va. 787, 24 S. E. 612, supports the judgment of the circuit court. In fact, it appears that the decision of the lower court was based upon the decision in that case. The syllabus of that case does not appear to be inconsistent with the principles herein announced, nor in discord with the decisions of this state. Judge Holt, in delivering the opinion, seems to have recognized the doctrine as announced in Burton & Co. v. Hansford, supra, as he cites it as authority to support his views. There may be statements in the opinion which are misleading, and apparently put it in conflict with the case of Burton & Co. v. Hansford, supra, and Miller v. Clendenin et al., supra. Without deciding this, but granting that it does conflict with these cases, as it is claimed it does, yet certainly it was not the intention of the court to depart from the doctrine previously announced in Burton & Co. v. Hansford, supra, because Miller v. Clendenin, supra, in which Roanoke Grocery & Milling Company was cited, was later decided upholding the rule there announced.

It further appears from the agreed statement of facts that the defendant the Cameron Pottery Company on the 12th day of July, 1904, was adjudicated a bankrupt; that afterwards it effected a composition with all of its creditors on the basis of 40 cents on the dollar of all its indebtedness, which composition was duly reported and confirmed by the court, and the Cameron Pottery Company was discharged from all further liability on its said indebtedness; and that the plaintiffs received from the Cameron Pottery Company on the 8th day of October, 1904, pursuant to said settlement, the sum of \$428.96, which is a proper credit upon the note here involved.

The judgment of the circuit court is reversed, and judgment is given against all of the defendants, except the Cameron Pottery Company, for the amount of the note, with its interest, subject to the credit of \$428.96, as of the 8th day of October, 1904.

STATE ex rel. DILLON, Tax Com'r, v. GRAY-BEAL, County Assessor, et al.

(Supreme Court of Appeals of West Virginia. Oct. 23, 1906.)

1. MANDAMUS — COMPELLING ASSESSMENT — AUTHORITY OF STATE TAX COMMISSIONER.

As relator the state tax commissioner may invoke the aid of a court by its writ of mandamus to compel an assessor to make an assessment in conformity with the requirements of the law.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Mandamus, §§ 54-58, 249.]

2. TAXATION — BANKS — DEDUCTION — CAPITAL STOCK.

A bank, owning shares of the capital stock of a corporation which has caused itself to be assessed with its property in the manner prescribed by section 77 of chapter 25 of the Code of 1899, as amended by chapter 35, p. 317, of the acts of 1905, and having elected to have its capital stock, surplus, and undivided profits assessed to it, in conformity with the provision of section 79 of said chapter of the Code of 1899 as so amended (Acts 1905, p. 320, c. 35), is entitled to have the value of such shares deducted, along with the value of its real estate and property exempt from taxation, in the ascertainment of the taxable value of its capital stock, surplus, and undivided profits.

3. SAME — VALUE OF REAL ESTATE.

The value of the real estate, owned by banks and trust companies, to be deducted in ascertaining the taxable value of their capital stock, surplus, and undivided profits, under the provisions of section 79 of chapter 29 of the Code of 1899, as amended by chapter 35, p. 320, of the Acts of 1905, is the assessed value, not the actual value thereof at the time of the assessment.

4. SAME — DOUBLE TAXATION.

While double taxation, in a practical sense, is not always violative of the provisions of the Constitution requiring equality in taxation, courts, in construing statutes, always presume that it was not intended, unless the legislative intent to impose it is clearly manifest. Doubts are always resolved against it.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 104, 135.]

(Syllabus by the Court.)

Application by the state, on the relation of Charles W. Dillon, state tax commissioner, for a writ of mandamus to J. Walter Graybeal, assessor of McDowell county, and the McDowell County Bank. Writ awarded.

C. W. Dillon, Mollohan, McClintic & Mathews, for petitioner. John H. Holt, Rucker, Anderson, Strother & Hughes, and Wyndham Stokes, for respondents.

POFFENBARGER, J. The state, at the relation of Charles W. Dillon, state tax commissioner, seeks a writ of mandamus to compel J. Walter Graybeal, assessor of McDowell county, to assess the McDowell County Bank in accordance with what the

relator conceives to be the law applicable to the assessment of said bank, in view of the nature and character of its property and assets. If his conception of the law be right, the value will be about \$115,000, and if it be as assumed by the assessor, the assessed value will be about \$29,000. They did not disagree concerning the total value of the capital, surplus, and undivided profits of the bank, which is \$154,519.86; but they did differ respecting the amounts and character of deductions to be made from said total value, in ascertaining the sum with which to charge the bank on the personal property book. These differences involve two items, one of which is the tangible property (real estate, furniture, and fixtures), the assessed value of which is \$35,670, and the actual value \$71,721.71, and the other, 500 shares of the capital stock of the Pocahontas Consolidated Coal Company, preferred, of the aggregate par value of \$50,000, owned by the bank. The assessor proposes to deduct \$71,721.71 on account of the tangible property and \$50,000 on account of the Coal Company stock, while the state insists that only \$39,333.47 should be deducted; it being the aggregate assessed value of the real estate, furniture, and fixtures, together with unearned discounts, amounting to \$3,663.47.

Though the right of the state tax commissioner to enforce by proper remedies the performance of legal duty by an assessor is not denied or questioned here, it is well, in view of the importance and extent of the power thus claimed and asserted, to ascertain whether it is well founded. Chapter 4, p. 31, of the Acts of 1904, created the office of tax commissioner, and that act, together with chapter 35, p. 285, of the acts of 1905, amending chapter 4, p. 31, of the Acts of 1904, conferred upon said officer certain supervisory powers over the assessment and collection of taxes and levies, which had previously been vested in the Auditor of the State, and probably increased and extended them. Certain it is that, in transferring these powers from the Auditor to the state tax commissioner, the Legislature did not narrow them in any respect. The provisions of the two acts by which the transfer was made and the duties of the tax commissioner prescribed confer very broad powers in general terms, and supplement them by specifications and enumerations which clearly show that they are intended to vest all the authority which this court, in *State v. Buchanan*, 24 W. Va. 362, held to have been conferred upon the Auditor by statutes less comprehensive and definite in the terms used. His right to invoke mandamus to compel an assessor to perform a legal duty is, we think, perfectly clear.

The statute under which banks are assessed is found in section 79, c. 35, p. 320, of the Acts of 1905, which reads as follows: "The shares of stock in a bank, trust company or national banking association, shall

be assessed at their true and actual value, according to the rule prescribed in section twelve of this chapter, to the several holders of such stock in the county, district and town where such bank, company or association, is located, and not elsewhere, whether such holders reside there or not. The real and actual value of such shares shall be ascertained according to the best information which the assessor may be able to obtain, whether from any return made by such bank, company or association to any officer of the state or United States, from actual sales of the stock, from answers to questions by the assessor as hereinafter provided, or from other trustworthy sources. The cashier, secretary or principal accounting officer, of every such bank, company or association, shall cause to be kept a correct list of the names and residences of all the shareholders therein, and the number of shares held by each, which list shall be open to the inspection of the assessors of the county, and of the state tax commissioner; and such cashier, secretary or officer shall answer under oath such questions as the assessor may ask him concerning the matters shown by said list, and concerning the value of said shares, and shall be subject to the same penalties, for failure to do so, which are imposed by law upon individuals failing to answer questions which the assessor is authorized to ask. The taxes so assessed upon the shares of any such bank, company or association shall be paid by the cashier, secretary or proper accounting officer thereof, and in the same manner and at the same time as other taxes are required to be paid in such county, district and town. In default of such payment such cashier, secretary or accounting officer as well as such bank, company or association, shall be liable for such taxes, and, in addition, for a sum equal to ten per centum of the amount thereof. Any taxes so paid upon any such share may, with interest thereon, be recovered from the owners thereof by the bank, company, association or officer paying them, or may be deducted from the dividends accruing on such shares. The real estate of any such bank, company or association shall be assessed as in other cases, and a proportionate share of such assessed value shall be deducted in ascertaining the market value of the shares. Notwithstanding anything hereinbefore provided for, any such bank, company or association may have its capital stock assessed and may pay taxes thereon as hereinafter provided, and in that case the shares of its capital stock shall not be assessed for taxation. In such case the bank, company or association electing to have its capital stock assessed shall list the same for taxation, within the time prescribed as to other taxpayers, which list shall be made as of the first day of April, and shall be in the form used in making reports to the Comptroller of the Currency of the United States, or

the state commissioner of banking, as the case may be. It shall be verified by the oath or affirmation of the president, cashier or secretary of such bank, company or association, and be attested by the signature of at least three of the directors. Such report shall exhibit in detail, and under appropriate heads, the resources and liabilities of the bank at the close of business on the thirty-first day of March previous. It shall especially show as of that date, the amount of the capital, surplus and undivided profits, the value of any real estate, and the amount and value of any property exempt from taxation, which property claimed to be so exempt shall be specifically described. Upon consideration of the matters shown by such list, and of any former or other return or report made by such bank to the Comptroller of Currency of the United States, or the commissioner of banking in this state, and of any other information he may obtain upon the subject, the assessor shall fix the value of said capital, surplus and undivided profits, after deducting the value of such real estate and property exempt from taxation, and enter the same in his personal property book. If the capital stock of such bank, company or association is thus assessed, its real estate shall be assessed and entered in the land books as in other cases. No property shall be considered as exempt from taxation which shall have been purchased or procured for the purpose of evading taxation, whether by temporarily holding the same over the first of April or otherwise, and whether the same be in this state or elsewhere."

This section, it will be observed, prescribes, first, the mode of assessment for banks, trust companies, and national banking associations, when such bank, company, or association does not elect to have the assessment made in another way; and, second, the mode of assessment which must be adopted when the bank, company, or association does elect to have the assessment made under it. The first plan of assessment requires the shareholders of the capital stock to be assessed with the actual value of their shares, less the proportionate value of the real estate. Under this plan the bank itself is not assessed. The shares only are charged to the persons owning them, and, this being done, there is no assessment at all in the name of the bank, except in respect to its real estate. Payment of taxes on the value of the shares by the shareholders satisfies the demand for taxes. This first part of the section authorizes in express terms only one deduction to be made from the value of the shares, and that is the assessed value of the real estate of the bank. No deduction on account of any exempt property owned by the bank is authorized. Under this plan, the shares will be taxable to the owners thereof at their actual value, less the proportionate value of the real estate assessed against

the bank on the land books, although all its capital, surplus, and undivided profits might be invested in government bonds, which are not taxable. For some reason the Legislature has seen fit to provide a less onerous plan, which becomes available to the bank and its stockholders by the election of the bank to have the assessment made under it. This plan requires the assessment to be made upon the value of the capital, surplus, and undivided profits, after deducting the value of the real estate and property exempt from taxation. Prior to the passage of this statute, shares in banks were required to be listed by their owners and taxed along with their other personal property, unless the bank in which they were caused itself to be assessed with the value of its capital invested or employed. Code 1899, c. 29, § 41. When a bank did cause itself to be assessed, its personal property was not listed for taxation like that of a natural person. The assessment was made as a single item, called the "value of the capital employed," and it was the aggregate value of all the personal property of the bank, not exempt from taxation, including money, credits, and investments, less indebtedness of the bank. Code 1899, c. 29, § 64. The real estate was charged to the bank on the land book, and no notice of it taken in ascertaining the amount to be entered in the personal property book. There was no requirement that any tangible property be entered on the personal property book, but it was considered in estimating the value of the capital. Substantially the same method was prescribed for the assessment of individuals and firms not incorporated, engaged in any trade or business taxable by law. Code 1899, c. 29, § 65. The direct subjects of taxation in these instances were not the several articles of property owned by the corporation, firm, or individual, but the value of the capital used in the business.

The new tax law found in chapter 35, p. 285, of the Acts of 1905, made very radical changes. As to all corporations except railroad, foreign insurance and telegraph companies, telephone, pipe line, and car line companies, and banks and trust companies, it requires the valuation to be put, not upon the capital invested or used, but upon the property owned by them, which is required to be listed in the personal property book under several and distinct items. Until the year 1909 this list is not to include the value of the real estate, but thereafter it shall be listed and returned to the assessor for taxation, but entered in the land book, while all other property returned is to be entered in the personal property book, and the statute (section 78, p. 317, of said chapter) says the property mentioned in items C, D, E, and F shall constitute all the property on which any corporation shall be liable to pay taxes. Items A and B in the list to be returned show the amount of capital authorized to be employed by the corporation and the

amount of cash capital paid on each share of the stock. As to these corporations there is no taxation of the capital stock, but only taxation of the property owned by them, as in the case of individuals. Turning, now, to section 79, relating to banks and trust companies, it is to be noticed that there is no taxation on their property *eo nomine*. The taxes as to them are assessed against the shareholders on the shares owned by them under one plan, or against the bank on account of the value of the capital, surplus, and undivided profits; and the capital to be so taxed is defined in that section to be the capital stock, not merely the money employed in carrying on its business. As to all corporations other than those excepted by sections 77 and 78 the subjects of taxation are the properties owned by them, while in the case of banks and trust companies the subjects of taxation are the shares in the hands of the holders thereof, or the capital stock, surplus, and undivided profits. They are not charged with any property, as such, in either case. No property, other than capital stock, surplus, and undivided profits, is listed or assessed in their names. Other provisions to be kept in mind are as follows: "When the property, stock or capital of any company, whether incorporated or not, is assessed to such company, no person owning any share, portion or interest therein, shall be required to list the same, or be assessed with the valuation thereof." Section 66, c. 35, p. 311, of the Acts of 1905. "When the property of an incorporated company is assessed as aforesaid, no individual shareholder therein shall be required to list or be assessed with his share, portion or interest in the capital stock of such corporation." Section 78, p. 317, Acts 1905. The same rule is applied to shareholders in banks and trust companies when the assessment is upon the capital stock.

These provisions constitute the basis of a claim for deduction of the value of the stock of the coal company owned by the McDowell County Bank; it being admitted that said coal company has caused itself to be assessed in its own name with all of its property, wherefore the shares of its stock are not to be taxed in the hands of the owner thereof. The contention is that this bank, being the holder of shares in said coal company, has the same status with reference to them as a natural person would have, and that since, if it were a natural person, the shares could not be taxed in its hands, it is entitled to have a deduction made from the value of its capital stock, surplus, and undivided profits, equal to the value of the shares. It is further contended, in view of the provisions above quoted, that the deduction of the value of these shares is expressly authorized by section 79, because they are, within the meaning of that chapter, property exempt from taxation. If we regard only the letter of the statute, it is apparent

that no assessment can be made against any bank upon its property, as such, in the manner in which property is assessed in the names of natural persons. Neither its tangible property, nor its choses in action, nor its stocks are listed for taxation. In the case of banks, the specific articles of property owned by them, though imparting value to their stock, and being in part its representative, are not the subjects of taxation. They are neither listed nor taxed. They are simply reported to the assessor for the purpose of aiding him in determining the value of the capital stock, surplus, and undivided profits. The statute says that the assessor, upon consideration of the matters shown by the list and of any other information he may obtain upon the subject, shall fix "the value of said capital, surplus and undivided profits, after deducting the value of such real estate and property exempt from taxation, and enter the same in his personal property book." Failure to deduct from the amount of capital, surplus, and undivided profits the value of stock held in another corporation constitutes no violation of the letter of the provisions of the statute above quoted, which say that shares in a corporation which has caused itself to be assessed with its property or capital stock shall not be listed or assessed in the name of the owner thereof. In assessing a bank under either of the plans prescribed in section 79, such shares are neither listed nor assessed. The assessment is made upon the capital stock, surplus, and undivided profits, things which are wholly different and distinct from property owned by the bank.

If the Legislature intended in this way to burden banks and trust companies somewhat more heavily than natural persons and those corporations which are required to pay taxes on the property they own, no constitutional limitation upon the powers of the Legislature is encountered. It is a mere incidental result of which the limitation takes no notice. There are numerous instances of it to be found in the system of law relating to taxation. The owner of real estate owing practically its entire value as mortgaged indebtedness pays taxes on it at its full value, while the mortgagee is taxed on the amount of the debt, for which he has a lien upon the property and which may amount to practically its entire value. This, although in practical effect double taxation, is not so regarded by any court. In the recent case of *Harvey Coal Co. v. Dillon*, 53 S. E. 928, this court decided that a lease upon land, already taxed at its full value by the acre, might be put upon the personal property books and made to bear taxation, notwithstanding the practical effect of it is to compel the landowner to pay an additional tax on his land by way of abatement from the rent which he would be able to obtain but for the tax on the lease, and although it requires the lessee to pay a tax on a right carved out

of a thing already taxed to its full value. This conclusion was reached by adhering to the legal principle that the lease and the land covered by it are, in law, two separate and distinct properties. Here the distinction between capital stock and the property owned by the bank is much clearer. The capital stock of a bank, by reason of the franchise under which it operates and the nature of the business it transacts, may have, and often does have, a value far in excess of the aggregate value of all the property it owns. This has been adverted to by many of the courts in marking this distinction. Of course, the capital stock has some relation to the property in point of fact. Every conceivable thing, tangible and intangible, has some such connection with some other thing or things; but they are regarded as wholly distinct and individually complete for many purposes. In the material world, animate and inanimate, relationships are innumerable and incomprehensibly vast; but this does not preclude individuality and complete separation for certain purposes. So, in the law, discrimination must be made by classes, according to the peculiar nature and character of things.

For the position that several distinct kinds of property are to be found in corporations, many decisions of the Supreme Court of the United States, as well as of the highest courts of the several states, may be cited. In *Tennessee v. Whitworth*, 117 U. S. 129, 136, 6 Sup. Ct. 645, 647, 29 L. Ed. 830, Chief Justice Waite said: "In corporations four elements of taxable value are sometimes found: (1) Franchises; (2) capital stock in the hands of the corporation; (3) corporate property; and (4) shares of the capital stock in the hands of the individual stockholders." In *Farrington v. Tennessee*, 95 U. S. 687, 24 L. Ed. 558, Mr. Justice Swayne made the following enumeration of objects liable to be taxed, other than the capital stock of a corporation: "(1) The franchise to be a corporation and exercise its powers in the prosecution of its business. (2) Accumulated earnings. (3) Profits and dividends. (4) Real estate belonging to the corporation and necessary for its business." In *Bank of Commerce v. Tennessee*, 161 U. S. 184, 16 Sup. Ct. 456, 40 L. Ed. 645, the accumulated surplus of a bank was held liable to taxation, notwithstanding a provision in its charter which declared that the payment of one-half of 1 per cent. on each share of its capital stock should be in lieu of all other taxes. The cases, however, in which these distinctions are made, usually arise under statutes in which there is a manifest intent, disclosed by the terms used, to impose a tax upon the franchise alone, rather than to impose a single tax upon both the property and franchise. The theory of a franchise tax on corporations, measured or estimated by the amount of the business transacted, was ad-

vanced and sustained by the federal Supreme Court in three cases, reported in 6 Wall. 594, 611, 632, 18 L. Ed. 897, 907, 904, viz., *Society for Savings v. Coite*, *Provident Institution v. Massachusetts*, and *Hamilton Company v. Massachusetts*. The principles enunciated in those cases have been greatly extended and applied under various conditions. In the last one of the three the statute in question imposed a tax of one-sixth of 1 per cent. upon the excess of the market value of all the stock of the corporation over the value of its real estate and machinery. Under general laws imposing taxes the real estate and machinery were also taxed. The tax upon the excess of market value was held to be a franchise tax, and not a property tax. On the ground that it was a franchise tax, and not a property tax, the Supreme Court of the United States held that no deduction could be made on account of nontaxable bonds and securities of the United States in which a very large amount of the capital of the corporation was invested. A careful examination of the many decisions distinguishing between a tax upon the franchise and a tax upon the property, and upholding both against the corporation, will show that the former was purely a franchise tax, and not a tax upon both the franchise and the property. The presumption against any intent on the part of the Legislature to impose a double tax, either directly or indirectly, has always been observed by the courts, and, while they do not deny to the Legislature the power to doubly tax property in a practical sense, they seldom or never uphold a construction of the statute which leads to this result, unless the intent is so plainly expressed as to preclude any other view. In *Tennessee v. Whitworth*, 117 U. S. 129, 6 Sup. Ct. 645, 29 L. Ed. 830, Chief Justice Waite said: "Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but, if they do, it is because the Legislature has unmistakably so enacted. All presumptions are against such an imposition."

In view of this general rule, it is proper to observe here that the policy of this state, as disclosed by the chapter of the legislative acts providing for the assessment of property, is emphatically against taxation of the capital of a corporation in its name and the stock of that corporation in the hands of the holders of its shares at the same time. While such taxation may not be inhibited by the constitutional requirement of equality and uniformity in taxation, it is plain that the Legislature deems it unwise and impolitic. Technically it may not be double taxation, but practically it is. Therefore the Legisla-

ture has expressly exonerated the shareholder when the capital stock or property of the corporation in which his shares are held has been assessed. Section 79 does not say whether the status of a bank as the holder of stock in another corporation shall be the same as that of a natural person or not. It requires the capital, surplus, and undivided profits to be taxed after making certain deductions, in which is included property exempt from taxation. Shares of corporation stock are not exempt from taxation in the ordinary legal sense of the terms, for they are to be taxed in the name of the owner, along with his other personal property, if the corporation does not cause itself to be taxed with its property or capital stock. Still it is conditionally exempted in the case of natural persons, and may be so exempted in the case of banks, without destroying or impairing so much of the tax imposed upon them as may be regarded in any sense as founded upon the banking franchise. To illustrate: Let us suppose a bank, the capital stock, surplus, and undivided profits of which have an aggregate value of \$150,000, and all the property of which, except the franchise, has an aggregate value of \$145,000. If \$10,000 of that property be stock in another corporation, and is deducted, it does not relieve the bank of the \$5,000 which may be supposed to represent the value of the franchise. It simply relieves the bank from taxation upon a species of property in respect to which all natural persons and many other corporations are entitled to be relieved. To refuse deduction of the corporation stock, therefore, would be to make a clear and seemingly groundless discrimination against banks and other corporations in respect to taxation. If it be conceded that the Legislature, under its undoubted power to classify persons and properties for purposes of taxation, with reference to the business in which they are engaged, could legally make such a discrimination, it must be remembered that the rules of construction applied by the courts recognize a presumption against it which must be overcome by intent on the part of the Legislature plainly manifest in the terms of the statute. In respect to all other property, such as real estate and choses in action, banks are treated as natural persons, and, if any peculiar reason exists for treating them differently in respect to shares of corporate stock, it has not been brought to the attention of the court and is not perceived. It may be that the ownership of such shares brings to the bank some advantages in business; but these advantages, whatever they may be, enter into the value of the capital stock of the bank. The deduction to be made on account of the shares is, not their peculiar value to the bank holding them, but their market value. If by a wise use of the franchise, in causing capital to be invested in certain shares which bring advantages other than dividends, realized or anticipated, the

result is enhancement of the value of the bank stock, not that of the shares it owns, and deduction of the market value of the shares does not take it away. It remains to be taxed.

The claim of right to deduct the actual value of the real estate, instead of its assessed value, is predicated upon the failure of the Legislature to limit the word "value" in the latter part of section 79 by the use of the word "assessed" in connection with it, as it did in the first part of the section. To sustain this contention would impute to the Legislature either a grave oversight, by which the taxes on vast amounts of values in the capital of banks and trust companies would be lost to the state, counties, and municipalities, or an intention to allow these values to escape taxation. Such institutions are located in the cities and towns of a prosperous and rapidly growing state. Their real estate holdings are nearly always city property, constantly increasing in value. The assessment of real estate made in 1905 is to remain unchanged until the year 1909, while the assessment of banks and trust companies is to be made annually. As the real estate assessment cannot be changed, opportunities would be afforded in many instances, if the actual, instead of the assessed, value could be deducted, of cutting down the taxable value of the capital of the banks by deducting large valuations on account of real estate, due to appreciation since 1905, on which no taxes could be assessed or levied. In this case \$35,700 was presumably the value of the bank's property when the real estate assessment was made. Now it is over \$70,000. To allow this large deduction, we must say the Legislature intended that, under such conditions, \$35,000 of the value of the capital of the bank should be released from taxation. The statement of the proposition works its own refutation. In limiting the reduction to the assessed value, no possible injustice is done the bank. In paying taxes on the assessed value of its real estate, and in addition thereto taxes on the aggregate value of its real estate and capital, surplus, and undivided profits, less the assessed value of the real estate, a bank pays taxes on nothing more than it owns. If allowed to deduct a sum larger than the assessed value of the real estate, as an actual value, it would pay on only a part of what it owns. It cannot be presumed that the Legislature intended to do that which the Constitution forbids, namely, exonerate property from taxation. On the contrary, it is to be presumed that there was an intention to exact from the banks taxes on all the property owned by them, not exempt from taxation, or on which the taxes have not been paid by some other corporation or person.

From these views it results that so much of the prayer of the petition as relates to the deduction on account of the real estate valuation must be granted, and the writ

awarded as to it, but refused as to the proposed deduction on account of the Coal Company stock owned by the bank.

ELLINGTON v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

HOMICIDE—VOLUNTARY MANSLAUGHTER—INSTRUCTIONS.

The only error of law complained of being that the court erred in giving in charge to the jury the law of voluntary manslaughter, and it appearing that the facts and circumstances proved authorized the charge, and the verdict being sustained by the evidence, no cause for reversing the judgment refusing a new trial is shown.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Homicide, § 653.]

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Isaac Ellington was convicted of manslaughter, and brings error. Affirmed.

W. C. Davis, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

GLOVER v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

VAGRANCY.

There was sufficient evidence to convict the defendant of the offense of vagrancy, and no reason appears for the reversal of the judgment of the lower court refusing a new trial.

(Syllabus by the Court.)

Error from City Court of Valdosta; O. M. Smith, Judge.

Annie Glover was convicted of vagrancy, and brings error. Affirmed.

S. M. Varmdoe, for plaintiff in error. Jas. M. Johnson, Sol. for the State.

ATKINSON, J. The defendant was convicted of vagrancy, on substantially the following evidence: With the exception of one month (while absent in Florida) she had resided in Valdosta for one year. A policeman, the sheriff, and one merchant (witnesses) each had frequently seen her at various hours of the day and night loitering about the streets with lewd women, and none had ever seen her do any work. She was frequently seen around barrooms and in "Rat Row." She had no property or visible means of support that they knew of. Each testified that she might have worked and might have had property without their knowledge. She admitted to the sheriff while on the way to jail that she had no money, but stated that she had been at work. Another witness testified that she had known defendant for a year in Valdosta, and had seen her loitering on the streets for maybe a hundred and may-

be a thousand different times, and had never seen her at work but one time; that defendant had no husband, nor any visible means of support that she knew of. This witness also testified as to seeing the defendant walking the streets with lewd women. She also testified that the defendant may have worked and may have had means of support without her knowing it.

When so many see the defendant so often at different times, never working, but always loitering, mostly in questionable neighborhoods, and frequently keeping lewd company by day and by night, and where the officers of the law are unable to locate any property or visible means of support belonging to the defendant, and where she admitted that she had no money, but claimed to work for a living, it is reasonably certain that she belongs to that class which the law describes as "vagrants," and we are not prepared to hold that the judge, in passing upon the evidence, erred by finding her guilty. The evidence supported the verdict, and no sufficient reason appears for reversing the judgment of the court below. See, in this connection, *Welborn v. State*, 119 Ga. 429, 46 S. E. 645.

Judgment affirmed. All the Justices concur.

WHITEHEAD v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW—PROCEDURE—INTRODUCTION OF EVIDENCE.

There was no abuse of discretion on the part of the court in admitting evidence of certain inculpatory statements made by the defendant, over objection on the ground that they were not in rebuttal. The reopening of a case for additional evidence is largely a matter of discretion with the presiding judge.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1619-1624.]

2. SAME—APPEAL—REVIEW.

The evidence warranted the verdict of guilty, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Muscogee County; W. A. Little, Judge.

Sherman Whitehead was convicted of crime, and brings error. Affirmed.

D. L. Parmer, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

NERO v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW—STATEMENT OF DEFENDANT.

The defendant's statement to the jury should be restricted to a narrative account of the matter under investigation, and it is not

error for the court to refuse to instruct a defendant that he may continue the reading of a letter to the jury, after he has begun to read it, but has been interrupted by the solicitor's objection thereto.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1589.]

2. SAME—NEW TRIAL.

It is not ground for a new trial that another has been indicted since the trial for the same offense of which the defendant was convicted.

3. BURGLARY—EVIDENCE.

The evidence supported the verdict.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Lewis Nero was convicted of perjury, and brings error. Affirmed.

F. R. Martin, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

EVANS, J. The defendant was convicted of burglary. The only assignment of error in his motion for a new trial which we deem of sufficient importance to specially notice is that relating to the right of the defendant to read to the jury as a part of his statement a letter which he stated had been received by him. Under our system of criminal procedure, the defendant is given the right to make a statement. This privilege is accorded the defendant, so that he may acquaint the jury with his version of the matter under investigation, and may make reply to the charge against him by way of denial, explanation, or avoidance. In availing himself of this privilege, the accused is not hampered by strict rules of evidence (*Vaughn v. State*, 88 Ga. 735, 16 S. E. 64), but at the same time he may not indulge in a long, rambling, and irrelevant harangue (*Lloyd v. State*, 45 Ga. 53; *Coxwell v. State*, 66 Ga. 310). The prisoner must have some regard to relevancy and the rules of evidence, for it was never intended that, in giving his narrative of matters pertaining to his defense, he should attempt to get before the jury wholly immaterial facts, or attempt to bolster up his unsworn statement by making profert of documents, letters, or the like, which, if relevant, might be introduced in evidence, on proof of their genuineness. Without such proof, he cannot place them before the jury as corroborating evidence of what he says. It would be extending his privilege far enough to accord him the right of making a statement to the effect that he had received a document or letter of a certain purport, without permitting him to produce the same and read it, for the purpose of convincing the jury of its existence or genuineness. If he desires to corroborate his statement by documentary evidence, the writing itself should be offered in evidence in the usual and regular way; and if the writing be immaterial, or for any other reason inadmissible, then for a greater reason should the defendant be denied the privilege of making

profert of it and reading it to the jury as a part of his statement. In *Montross v. State*, 72 Ga. 262, 58 Am. Rep. 840, the prisoner was restrained from reading to the jury extracts from a newspaper, and in *Wells v. State*, 97 Ga. 210, 22 S. E. 958, this court distinctly ruled that it was not error to refuse to allow the accused to read a letter to the jury as a part of his unsworn statement.

The evidence in the present case supported the verdict, and there was no error in refusing a new trial on the ground stated in the second headnote.

Judgment affirmed. All the Justices concur.

NASH v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

The court having charged that in order to convict the defendant they must believe him guilty beyond a reasonable doubt, arising from the evidence or want of evidence submitted in the case, or it would be their duty to acquit, it furnished no ground for a new trial that he did not proceed further and define and explain to the jury what constituted a reasonable doubt. *Nelms v. State*, 51 S. E. 588, 123 Ga. 575, 578.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1904.]

2. SAME—EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from City Court of Miller; C. C. Bush, Judge.

Dave Nash was convicted of crime, and brings error. Affirmed.

Wm. I. Geer, for plaintiff in error. W. L. Stapleton, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

GILES v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

HOMICIDE—VOLUNTARY MANSLAUGHTER.

The evidence for the state authorized a finding that the accused and the deceased became engaged in a sudden quarrel, which led up to a mutual combat between them with deadly weapons, and therefore the conviction of voluntary manslaughter should be allowed to stand; no complaint being made that the court below committed any error of law during the progress of the trial.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Homicide, § 86.]

(Syllabus by the Court.)

Error from Superior Court, Rabun County; J. J. Kinsey, Judge.

Bill Giles was convicted of manslaughter, and brings error. Affirmed.

W. S. Parris and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

MILLER v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW—CERTIORARI—PROCEDURE.

Unless the act creating a city court prescribes the method of taking a case by certiorari to the superior court, the procedure pointed out in Civ. Code 1895, § 4637, is to be followed, as was done in the present case. *Dixon v. State*, 49 S. E. 811, 121 Ga. 846.

2. SAME.

The plaintiff in certiorari having complied with all the requirements of the law in regard to the time and manner of presenting his petition for certiorari to the judge of the superior court, and having affirmatively alleged that on the trial in the city court there was no proof of venue, the petition should have been sanctioned. *Simpson v. Town of Lumpkin*, 48 S. E. 904, 121 Ga. 167.

(Syllabus by the Court.)

Error from Superior Court, Tift County; R. G. Mitchell, Judge.

R. L. Miller was convicted of crime, and from an order denying a writ of certiorari, he brings error. Reversed.

R. D. Smith, for plaintiff in error. W. E. Thomas, Sol. Gen. for the State.

EVANS, J. Judgment reversed. All the Justices concur.

EAMES v. ARMSTRONG et al.

(Supreme Court of North Carolina. Nov. 7, 1906.)

1. COVENANTS—SEISIN—BREACH—BURDEN OF PROOF.

Where, in an action for breach of covenant of seisin, defendants merely deny the breach, plaintiff has the burden of proof.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, §§ 211-215.]

2. SAME.

Where, in an action for breach of covenant of seisin, defendants first admit execution of the deed, but deny breach, and in a subsequent defense admit that as to one of the tracts conveyed they had no title when the deed was executed there is an admission of the breach, as to such tract, requiring no proof thereof, but placing on defendants proof of the new matter alleged in avoidance.

3. SAME—ACTION AFTER CONVEYANCE BY COVENANTEE.

The covenantee may maintain an action on a covenant of seisin though before bringing it he has conveyed his title to the land.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, §§ 77, 78.]

4. SAME—PROPERTY INCLUDED IN COVENANT.

A deed conveying two tracts, one large one, known as the "R. Property," and one small one, known as the "C. Property," described them merely by metes and bounds, the habendum was

to have and to hold "the aforesaid tracts" together with any rights the parties of the first part had in any and all lands belonging to or forming the entire property known as the "R. Property." The covenant of seisin, which was a continuation of the habendum was as to "said premises." *Held*, that the covenant of seisin included both tracts.

5. SAME—ACCRETION OF RIGHT OF ACTION.

One may maintain an action on a covenant of seisin without averring either eviction or threatened litigation, the right of action being complete on delivery of the deed.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Covenants, §§ 104, 178.]

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by Richard Eames, Jr., against C. A. Armstrong and others. Judgment for defendants. Plaintiff appeals. Reversed, and new trial ordered.

Plaintiff alleges: That on May 7, 1903, defendants executed a deed conveying to him two tracts or parcels of land, one containing 356 acres, the description of which is set forth by metes and bounds, the other known as the "Coggins Meeting House Lot," described by proper calls, containing three acres. A copy of the deed is attached to and made a part of the complaint. That the deed contained a covenant in the following words, to wit: "To have and to hold the aforesaid tracts of land and all privileges and appurtenances thereto belonging to the said party of the second part, his heirs and assigns to his only use and behoof forever, together with any and all rights, interests, titles, which the said parties of the first part may have, in law and in equity, in and to any and all lands belonging to or forming and constituting the entire property known as the Russell Gold Mine, to his heirs and assigns in fee; and the said parties of the first part covenant that they are seized of said premises in fee, and have right to convey the same in fee simple; that the same are free and clear from all encumbrances." That at the time of making the said deed defendants were not the true and lawful owners of said lands and were not seized of the same in fee simple, nor did they have a right to convey the same. That by reason thereof there was a breach of said covenant, and thereby plaintiff has sustained damage to the amount of \$2,300, being the purchase price paid therefor, and for this sum he demanded judgment, etc. Defendants answered "that the allegations contained in paragraph 1 are admitted, except as hereinafter explained in defendants' second and third separate defenses." They admitted that the copy of the deed attached to the complaint is correct. They deny the breach of the covenants. For a second defense defendants say that immediately upon the execution of the deed plaintiff took possession of the premises conveyed and on May 13, 1904, conveyed same to one Geo. T. Whitney for a profit of \$2,700; that neither plaintiff nor

his grantee have been evicted from the premises or in any way damaged; that said grantee is now in the peaceable possession of the lands conveyed, nor has any one threatened to sue them on account of any alleged breach of said covenant. For a third defense defendants allege: "That the deed set out in paragraph 1 of the plaintiff's complaint and attached thereto does not constitute the entire contract between plaintiff and defendants, part of said contract being in writing as evidenced by said deed, and part by parol, namely, that, in order to induce defendants to execute said deed, the plaintiff made a contemporaneous agreement with defendants in parol that, if defendants would execute said deed and insert in the same the covenants of seisin, right to convey, and freedom from incumbrances, defendants should in no way be injured thereby, as it was necessary to insert these covenants in order to effect the advantageous sale which plaintiff then had in view and which he was anxious to make, stating that he had a purchaser who was willing to pay \$5,000 in cash for said lands, but would not do so unless the deed was executed in this form, and that, if defendant would so execute the deed in such form, he would become a copartner with defendants, the plaintiff receiving \$2,700 of the purchase money and defendant \$2,300 of said \$5,000 to be paid for the lands, and that defendant could and should in no event be injured or damaged by the insertion of said covenants in said deed, the only reason for their insertion being to induce the purchaser to take the property at the price named, the plaintiff and defendants sharing therein as above set forth; that, by reason of said importunities and assurances of plaintiff and at his urgent request in order to effect the sale, and, upon plaintiff's assurances that the defendants should not be damaged or injured thereby, defendants were induced to include in said deed the second tract of land described therein as the 'Coggins Meeting House Lot,' containing three acres, more or less, to which defendants had no title and so informed plaintiff, who insisted upon its being included, saying he, plaintiff, already had title to this tract and that defendants could not and should not be damaged by including the same in the deed, and that he could not effectuate the sale to his proposed purchaser unless the same was included in the deed, the plaintiff at the same time agreeing with defendants that, in case he realized more than \$5,000 as the purchase price of said lands, then plaintiff and defendants should share in said excess in the proportion above set forth. That plaintiff induced defendants to execute two deeds for said lands, one to the plaintiff, Richard Eames, and the other to Geo. I. Whitney or E. B. C. Hambley, the expected purchaser, and caused the same to be deposited in the Davis & Wiley Bank in

Salisbury, N. C., in escrow, one or the other to be delivered at the option of the purchaser, and that, upon payment of the purchase money, the deed to plaintiff was delivered, plaintiff executing a deed to said George I. Whitney and the sum of \$2,300 paid to defendants by the purchaser, Geo. I. Whitney, and \$2,700. as defendants are informed and believe, to plaintiff." When the cause came on for trial before the jury, plaintiff introduced the deed, showed the payment of the purchase money, and rested. Defendants offered no evidence, demurring to plaintiff's evidence, and demanding judgment of nonsuit. His honor, being of opinion that plaintiff was not entitled to recover, rendered judgment of nonsuit. Plaintiff excepted, and appealed.

J. S. Henderson, for appellant. T. F. Kluttz, Adams, Jerome & Armfield, and L. H. Clement, for appellee.

CONNOR, J. (after stating the case). The record in this case presents several interesting questions of practice. The learned counsel for plaintiff insisted, and cited authorities which sustain his position that, upon showing his deed with covenant of seisin, he was entitled to judgment; that the burden of showing that there had been no breach of the covenant was cast upon the defendants; that, by reason of the familiar rule of practice, when one has peculiar opportunity of knowing, and is in possession of the evidence showing, how the fact in issue is, he will be called upon to do so, although it result in requiring him to prove a negative. That such was the rule in actions upon covenants of seisin in courts proceeding under the common law practice is shown by uniform authority. 4 Kent, Com. 479; 2 Devlin on Deeds, § 892; Rawle on Cov. § 65. Mr. Rawle, after stating the rule, says: "If, under statutory systems of pleading, the defendant is not required to set forth his title in his answer, but may rest upon a mere general denial of the plaintiff's right to recover, the burden of proof is upon the plaintiff, and, unless at the trial he establishes by evidence a prima facie case, the judgment will be for the defendant." In *Ingalls v. Eaton*, 25 Mich. 32, it was held that, when the defendant made a general denial of a breach of his covenant of seisin, the burden of proof to show the breach was upon the plaintiff. With the exception hereafter noted, this is the only case cited by the text-books which holds contrary to the common-law rule. The court rests its conclusion upon the statute which entitled the defendant to rely upon the general issue. Plaintiff relies, among other authorities, upon the case of *Abbott v. Allen*, 14 Johns. (N. Y.) 248. The law was held in that case in accordance with plaintiff's contention. In *Woolley v. Newcombe*, 87 N. Y. 605, it was held that, since the adoption of the Code of

Civil Procedure, the rule of practice in respect to the burden of proof in an action upon a covenant of seisin had been changed. The facts in that case were very much as in the one before us. Plaintiff sued for breach of covenant of seisin, and, after introducing his deed showing the covenant and the amount of the purchase money, rested his case. The defendant introduced no evidence, and moved for a dismissal of the complaint. The court dismissed the complaint, and on appeal the judgment was affirmed. *Rapallo, J.*, referring to *Abbott v. Allen*, supra, says: "The case last cited involved only the question of pleading, but the matter of proofs was also referred to, and *Platt, J.*, in delivering the opinion of the court, says that the marked distinction between a covenant of seisin and those for quiet enjoyment and general warranty consists in this: that the covenant of seisin if broken at all must be so at the very instant it is made, whereas, in the latter covenants the breach depends upon the subsequent disturbance and eviction, which must be affirmatively alleged and proved by the party complaining of the breach. A grantor who gives either of these covenants is not bound to deliver to his grantee the title deeds and evidences of his title. Here the defendants covenanted that they had a good title. The legal presumption, therefore, is that they retain, or can produce, the evidence of that title, if any. The grantee relied on that covenant, and, until the grantors disclose their title, he holds the negative and is not bound to aver or prove any fact in regard to an outstanding title. The rule of pleading sanctioned by this case, and which carried with it the rule as to the proofs, is very ancient, and was that the plaintiff might assign the breach by simply negating the words of the covenant. The defendant might plead that he was seised, etc., and, in this particular kind of action, issue might be joined by a replication simply reiterating the denial of seisin, without setting up that any other person was seised, or specifying any defect in the title. The plaintiff could, if he chose, assume the burden of attacking the title, but was not bound to do so."

The court proceeded to give an interesting history of the method of pleading and proof in actions upon covenants of seisin based upon the right of the defendant, making such covenant, to retain his title deeds to enable him to make good his covenant. There being then no statute requiring the registration of deeds, so that the state of the title should be made public, the covenantor was allowed to retain such deeds for the very purpose of answering to the covenants. In *Buckhurst's Case*, 1 Co. Rep. 1, it was held that if the grantor sold with warranty he had a right to retain all deeds and evidences necessary to maintain his title. It was upon these reasons, and the peculiar rules of practice prevailing at common law, in such actions,

that the burden of proof, in actions upon a covenant of seisin, was cast upon the defendant. It was held, however, that, under the Code of Civil Procedure, the defendant, not being required to set up in his answer performance of the covenant, could rely upon a general denial and put in issue the allegation of the breach of the covenant, casting upon the plaintiff the burden of proving it. The case of *Abbott v. Allen*, supra, was practically overruled or, at least, it was held that the doctrine therein announced was changed by the Code practice. Plaintiff cites *Britton v. Ruffin*, 123 N. C. 70, 31 S. E. 271, to sustain his contention. We do not find that the court there discussed the question as to burden of proof. It was simply held that the covenant was broken if the covenantors had no title at the time the deed was executed. We are of the opinion that, for the reasons so clearly stated by the court in *Woolley v. Newcombe*, supra, the burden of proof, in the absence of any admission showing a breach, is upon the plaintiff. This rule is in harmony with our Code system of pleading which permits the defendant to deny any material averment in the complaint, avoiding the technical niceties often obstructing, and sometimes defeating, justice. Under our registration acts it is always within the power of the grantee to make or require an abstract of the title of his grantor, and to show if there be any outstanding paramount title; hence the reason of the ancient rule, wise enough when unrecorded title deeds and muniments of title were concealed in trunks, tin boxes, and "family chests." "*Cessante ratione legis cessat et ipsa lex.*" The plaintiff contends that, however this may be, the defendants have, in their answer, admitted that, in regard to the Coggins meeting house lot, they had no title at the time of executing the deed, thereby admitting the breach of the covenant. Defendants say that the admission, in that respect, must be taken in connection with, and as explained by, the matter set up in the third defense, and that, when thus considered, they show a perfect defense to the action. It is clear that the defendants, in responding to the allegations of the complaint, expressly deny the breach of the covenant. It is elementary that the issues are made by the pleadings and arise out of allegations made by the plaintiff and denied by the defendant. In order to settle the issues the court must examine the pleadings to ascertain what allegations of fact are controverted. It is an idle thing to submit an issue in respect to an admitted fact. When the answer clearly admits facts which, as a matter of law, show plaintiff's right to recover, it is immaterial how, or in what manner, the admission is made. If it be by way of confession and avoidance, the issue arises upon the new matter alleged in avoidance, the burden being upon defendant to show the truth of the new matter. William-

son v. Bryan, 142 N. C. —, 55 S. E. 77. In *Reed v. Reed*, 98 N. C. 462, the defendant denied the execution of the bond sued upon, and "for further defense" said that "the alleged bond" sued on, etc. The court held that in the "further defense" the execution of the bond was not admitted. In our case the answer admits the execution of the deed containing the covenant, and denies the breach. This was entirely proper because the complaint alleged that two tracts of land were conveyed. It alleged a breach generally that is in regard to both tracts. The defendants properly denied the allegation as made, and could, if so advised, have rested their defense upon such denial. As we have seen, the plaintiff would have been compelled to show the breach, not necessarily to the extent charged, but to either of the tracts. The defendants, however, in their further defense expressly admit the fact which establishes the breach as to the Coggins meeting house lot, thus removing from the plaintiff the necessity of proving it. The only issue, therefore, in respect to that lot was upon the new matter set up in avoidance of the plaintiff's right of action. If plaintiff had so desired, he could have tendered an issue as to the breach of the covenant in regard to the other tract. It appears that, if such issue was submitted, he offered no testimony, hence the action was tried, so far as the record shows, only as to the small lot. In this condition of the case, the defendants offering no evidence in support of the defense, we are of the opinion that the plaintiff was entitled to judgment. Whether the new matter alleged, if established, would have been available as a defense to the action, or only in diminution of damages, we express no opinion.

The defendants insist that plaintiff cannot maintain the action, because it is alleged he sold the land before bringing the action. It is sufficient to say that, although alleged, it is not admitted or proven. It is well settled, however, "both upon reason and authority that a covenant of seisin is broken, if at all, immediately upon the delivery of the deed, and the cause of action accrues at once. *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230; *Wilder v. Ireland*, 53 N. C. 85, 90; *Britton v. Ruffin*, 123 N. C. 67, 31 S. E. 271. It is for this reason that the covenant of seisin, unlike a covenant for quiet enjoyment, wherein the cause of action does not accrue until eviction under paramount title, does not run with the land. The grantee of the covenantee therefore cannot sue upon the covenant. The doctrine and the reason upon which it is founded is thus stated in *Jones on Conv.* § 851: "A covenantee may maintain a suit upon the covenant of seisin, although, at the time of bringing it, he had parted with his title to the land. The covenant, if broken at all, was broken at the time of the conveyance. The covenantee is the only person

who can maintain an action for a breach of the covenant, which is a nonassignable chose in action."

The defendants further insist that the covenant of seisin does not include the Coggins meeting house lot, that it is confined to the "entire property known as the Russell Gold Mine." It will be noted that neither tract is so designated in the descriptive language of the deed. The habendum refers to "the aforesaid tracts" and the covenant, rather inartificially drawn, is a continuation of the habendum. We cannot concur with defendants' construction of the deed in this respect. Plaintiff insists that when he showed a breach of the covenant, and the amount of the purchase money, he was entitled to judgment therefor. It is true that the measure of damage for breach of a covenant of seisin is the purchase money and interest. This is well settled. The plaintiff does not allege that, by reason of the breach, he has been disturbed in his possession or called upon to pay out any money to perfect his title. It is clear that it is not necessary to aver either eviction or threatened litigation. The right of action is complete immediately upon the delivery of the deed. The same rule in regard to the measure of damages applies when there is a breach of a covenant of quiet enjoyment. Because the right of action accrues only upon an eviction under paramount title, but little difficulty is found in administering the remedy. *Williams v. Beman*, 13 N. C. 483, cited by plaintiffs, was an action upon a covenant of quiet enjoyment. It was there held that, when there was an eviction from the whole estate, the purchase money and interest was the measure of the recovery. It was also said by Henderson, C. J., that no rule had been prescribed by the court as to the measure of damages when there was a partial eviction of the estate, or when the eviction was upon a life estate or smaller interest than the fee. The only decisions of this court in which any suggestion is made in regard to any other measure of damages for breach of a covenant of seisin are *Bank v. Glenn*, 68 N. C. 35, and *Price v. Deal*, 90 N. C. 290, in both of which it is held that, when the covenantee has purchased the outstanding title for less than the purchase price, he will recover only the amount paid therefor. When the covenantee has lost the land or any part thereof, either in quantity or estate, there is no difficulty in applying the rule for measuring his damage. When he or his grantee is, at the time of bringing the action, in possession and no action has been taken or claim asserted against them, the courts have met with difficulty in adjusting the rights of the parties. An interesting discussion of the question will be found in *Rawle on Cov.* 176 et seq. and note; 2 *Sutherland on Damages*, § 597 et seq. This case being before us on the exception to the judgment of nonsuit, we are not called upon, nor would it be prop-

er for us, to enter into a discussion of the question of damages. We have considered and decided only those questions discussed by counsel bearing upon the exception.

For the reasons given we are of opinion that in directing a nonsuit there was error. There must be a new trial.

HARRINGTON v. HARRINGTON et al.
(Supreme Court of North Carolina. Nov. 7, 1906.)

DOWER—PROPERTY SUBJECT TO—ESTATE CONVEYED BY HUSBAND.

Revised 1906, § 3084, declares that a widow shall be endowed of one-third in value of all lands whereof her husband is seised during coverture, in which third shall be included the dwelling house in which her husband resided. A husband conveying portions of his land without his wife joining therein died seised of the dwelling house of his residence with other lands, ample in quantity to allot to the widow a third in value of all lands of which he was seised during coverture. *Held*, that the purchaser had a right to require that dower be allotted out of the lands remaining, and that the lands which he had purchased and paid for be relieved of the widow's claim.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Dower, § 332.]

Appeal from Superior Court, Moore County; Webb, Judge.

Petition by Lucy A. Harrington against A. O. Harrington and others for the assignment of dower to petitioner. From a judgment affirming the ruling of the clerk ordering that petitioner's dower be assigned as therein directed, petitioner appeals. Affirmed.

Petition for dower, heard on appeal from the clerk of the superior court of Chatham county, before his honor, Judge Webb, holding the courts of the Eighth district. The petition was filed by the widow against the heirs at law of A. J. Harrington, deceased, and on application duly made T. A. Yarborough and A. D. Judd, purchasers of certain lands conveyed to them by said A. J. Harrington during his life, were made parties defendant. On the hearing before the clerk, he found the facts pertinent to the inquiry and gave judgment as follows: "The court finds as a fact that this is a proceeding for dower in the lands of the late A. J. Harrington; that some time prior to his death he had sold the land claimed by T. A. Yarborough, to wit, 15 acres to the said Yarborough, and that he had sold the land claimed by A. D. Judd to N. G. Yarborough, who had sold and conveyed by proper deed the same to A. D. Judd, of all which property the said A. J. Harrington was seised during coverture; and that his wife, the plaintiff in this action, did not join in the execution of either of said deeds, but they were executed by A. J. Harrington alone. The court further finds as a fact that the report of the jury herein filed covers and embraces all the said lots of the said Yarborough and Judd as a part of the dower they allot; that

there is a sufficiency of land outside of the said lots to constitute said dower, there being something like 150 acres; and that the dwelling house and improvements are not on either of the lots of said intervenors. The court, being of the opinion that it is proper and right for the value of the lots of the said Yarborough and Judd to be considered in estimating the value of the property out of which dower is to be allotted, is also of the opinion, and so adjudges, that the said Yarborough and Judd have the right to require the dower to be allotted elsewhere than on their property, so long as there is a sufficiency to make up same. The court further finds that the said T. A. Yarborough has put certain improvements on his lots, and that it would be inequitable to permit the same to pass to the widow in dower. It is therefore considered, ordered, and adjudged that the exceptions filed by the intervenors be, and they are hereby, sustained, and the report is remanded to the jury, and they are instructed to proceed to value the real property of the late A. J. Harrington, including the lots of the intervenors, and to allow one-third thereof in value, including the dwelling house, to the plaintiff, but they will allot the same on the lands other than the said two lots of the said intervenors and make their report to this court. Jas. I. Griffin, Clerk of Superior Court, Oatham County." These facts at the hearing before the judge below were admitted to be true; and thereupon the judge approved and confirmed the ruling of the clerk, and ordered that petitioner's dower be assigned as therein directed. From this judgment, petitioner excepted and appealed.

Seawell & McIver, for appellant. Womack, Hayes & Bynum, for appellees.

HOKE, J. (after stating the facts). Our statute on the subject (Revisal 1905, § 3084) enacts that a widow, entitled thereto, shall be endowed of one-third in value of all the lands, tenements, and hereditaments whereof her husband was seised at any time during coverture, in which third part shall be included the dwelling house in which her husband last usually resided, together with offices, outhouses, etc. Another clause of this section provides that the jury summoned for the purpose of assigning dower to a widow "shall not be restricted to assign the same in every separate and distinct tract of land, but may allow her dower in one or more tracts, having a due regard to the interests of the heirs as well as the rights of the widow." Where a decedent died seised and possessed of lands in counties other than that in which the petition is filed, section 3089 provides a method by which the jury in such county, charged with the duty of assigning dower, shall be informed of the value of the lands lying in the other counties, to the end that this value may be considered in deter-

mining the dower to be allotted. In construing this statute, our court has held (1) that the entire dower must be allotted in a single action; (2) that the dwelling house in which the husband last usually resided, if the right of dower attaches thereto, or so much of it as the dower interest will cover, shall be included in the allotment; (3) that subject to this direction as to the dwelling house the jury, according to the express terms of the statute, is not required to allot the dower in each and every tract, but may assign the entire dower in one or more of the tracts, having a due regard to the rights and interests of the parties concerned. *Askew v. Bynum*, 81 N. C. 350; *Howell v. Parker*, 136 N. C. 373, 48 S. E. 762. While the question does not seem to have been directly presented in this state, the better-considered authorities elsewhere have established the principle that where the husband has sold and conveyed portions of his land for valuable consideration without the joinder of the wife, but retained lands, which descend to his heirs, of a kind and quantity which permit that dower be assigned out of the lands descended, and according to the provisions of the statute, the purchasers have a right to require that dower be allotted out of lands descended, and the lands which they have purchased and paid for be relieved of the widow's claim. This is so held in *Wood v. Keys*, 6 Paige (N. Y.) 478, and *Lawson v. Morton*, 6 Dana (Ky.) 471. And these cases are cited for law in *Scribner on Dower*, vol. 2, p. 597. In *Howell v. Parker*, supra, decided intimation is given that, under certain circumstances, equity would require that the widow's dower should be assigned in lands descended and the purchaser for value be protected.

In the case before us the widow's dower can be so assigned and every requirement of the statute be complied with. The husband died seised and possessed of the dwelling house in which he last usually resided, and this, with the other lands retained, is ample in quantity to allot to the widow one-third in value as the statute provides, estimating for this purpose the land conveyed as a part of the estate. There are decisions in other jurisdictions which may seem to uphold a contrary view; but they will be found, no doubt, to rest on the position that after the death of the husband the widow's claim for dower is an estate which attaches to each and every separate parcel of land, and to be so allotted, and where no statute exists, as it does with us, permitting that dower be assigned in all or any one of the tracts as may be deemed best for the interest of the parties.

We are of opinion, and so hold, that on the facts stated the judgment of the court below, awarding the dower in the lands descended, is in accord with the statute, and with sound principles of equity, and the same is affirmed.

Affirmed.

COZART, EAGLES & CARR v. ASSURANCE CO. OF AMERICA.

(Supreme Court of North Carolina. Nov. 17, 1906.)

1. APPEAL—STATEMENT OF CASE—TIME TO SERVE—EXTENSION.

In the absence of an agreement of the parties, the court has no power to extend the statutory time for the preparation and service of a case on appeal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2503, 2504.]

2. SAME—EXTENSION OF TIME BY AGREEMENT.

Where the time for the preparation and service of a case on appeal is fixed by agreement of the parties, the time agreed is a substitute for the statutory time, and cannot be further extended by the court.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 2503, 2504.]

3. SAME—SETTLEMENT AFTER TIME.

The settlement of a case on appeal by the trial judge does not cure a failure to serve the case in apt time.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 2507.]

4. SAME—EXCUSES.

That appellant's failure to serve his case in time was the result of negligence of his counsel was no excuse; his remedy being an action against the counsel for damages sustained.

Petition for certiorari by Cozart, Eagles & Carr against the Assurance Company of America. Writ denied.

Aycock & Daniels, for petitioners. Busbee & Busbee, for defendant.

CLARK, C. J. At the time the appeal was taken counsel made the following agreement in open court, which the judge caused to be entered on the docket: "Plaintiffs allowed 90 days to serve case, and defendants allowed 60 days thereafter to serve counter-case." The plaintiffs did not serve their case within the time agreed, and when it was served, several days thereafter, the defendants ignored it, as they had a right to do, and on their motion the appeal was affirmed in this court; there being no error upon the face of the record proper. This is a motion to reinstate and for a certiorari that the case may be "settled" by the trial judge.

If the parties had not agreed upon an extension of the statutory time, the court had no power to extend it. *Pipkin v. McCartan*, 122 N. C. 194, 29 S. E. 334, and cases cited. The time agreed is a substitute for the statutory time, and the courts cannot further extend it. If the trial judge had settled the case on appeal, it would not have cured the failure to serve the case in apt time. *Barrus v. Railroad*, 121 N. C. 504, 28 S. E. 187, and cases cited. This matter has been recently reviewed, and the authorities reaffirmed, in a case "on all fours" with this. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445. Counsel for appellants strenuously insist that the custom and general understanding of the bar, in the county where this case was tried, has

been for years that no advantage will be taken of the failure to serve case or counter-case on appeal in apt time. In *Wilson v. Hutchinson*, 74 N. C. 432, this court held that such understanding or custom among lawyers could not prevail against the terms of the statute regulating appeals, and, of course, it cannot prevail against the agreement of the parties. Besides, if they were relying on such custom, why was this agreement made and entered on the docket? As this court has often said: "Counsel are the best, indeed the sole, judges as to what courtesies they will extend to each other. The courts administer rights."

The appellant contends that, the neglect being the neglect of counsel, the client should not be hurt by it. This, if held, would simply repeal all legislative regulation of appeal. The more careless and disregardful counsel could be of the law regulating appeals, the more certain clients would be of delay and postponement, if desired. In truth, compliance with the statutory regulation as to appeals is a condition precedent, without which (unless waived) the right to appeal does not become potential. Hence it is no defense to say that the negligence is negligence of counsel, and not negligence of the party. The action which, under the statute, is necessary to be taken in apt time to save the right of appeal, was not taken, and there is no legal "case on appeal." In such cases the remedy of the client is by action against the counsel for the damages sustained, if any. In *Ice Co. v. Railroad*, 125 N. C. 17, 34 S. E. 100, all of appellant's counsel were insolvent and there were other exceptional circumstances. In the later case of *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445, the court said that *Ice Co. v. Railroad* was a precedent which could rarely be followed, and only in a like unusual combination of circumstances.

We have, however, looked into the appellant's petition, and, taking his allegations to be true, even in the most favorable light for him, we think that substantial justice has been done, and that the appeal could not have availed the plaintiff, if it had been duly perfected.

Motion denied.

CONNOR, J., did not sit on the hearing of this case.

HICKS v. NAOMI FALLS MFG. CO.

(Supreme Court of North Carolina. Nov. 13, 1906.)

1. MASTER AND SERVANT—PERSONAL INJURIES—DEFECTIVE MACHINERY—NEGLIGENCE OF SERVANT—EVIDENCE—SUFFICIENCY.

Where a servant suing for personal injuries testifies that he was injured by reason of the absence of a slat from a screen of slats protecting the part of the machine he was cleaning from the beaters of the machine, and that he was unaware of the defect, which was hidden by a covering of the machine, defend-

ant is not entitled to a nonsuit on the basis of no negligence, as shown by other evidence, to the effect that the machine was a standard machine, without defects.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1017.]

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where a servant suing for personal injuries testifies that the cleaning of a certain machine by hand, which resulted in the injury, would have been safe had there not been missing a slat from a screen of slats protecting the place to be cleaned from the beaters of the machine, and that he was unaware of the defect, which was hidden by a covering of the machine, which he had never had occasion to raise, defendant is not entitled to a nonsuit, on the ground of contributory negligence, as shown by other evidence that the servant negligently exposed himself by the unusual method he adopted of cleaning the machine.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 1089-1132.]

3. SAME—INSTRUCTIONS.

In an action by a servant for personal injuries, defendant offered evidence to show that the machine on which the injury occurred was a standard machine superseding an old style, and that an opening exposing the beaters of the machine, by which plaintiff was injured, was a structural part of the machine, and not a defect therein. Plaintiff contended that the old machine to which he was accustomed offered full protection at such point, and that if the new machine did not do so, the employer should have warned him. The jury were instructed that, if they found the new machine different in this respect from the old machine, and that plaintiff was not warned of the opening in the new machine, and was not guilty of negligence in failing to discover it, etc., he could recover. *Held*, that the instruction was addressed to the necessity of warning of the change, and did not set up the old machine as a standard of excellence, rather than such machines as were operated in and in general use.

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Action by Joseph Hicks against the Naomi Falls Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. P. Bynum, Jr., Cabell, Talley & Cabell, and G. S. Ferguson, Jr., for appellant. R. C. Strudwick, for appellee.

HOKE, J. This cause was before the court on a former appeal, and will be found reported in 138 N. C. 319, 50 S. E. 703. Pursuant to the order then made, a new trial was had before his honor, Judge Ferguson, and a jury in the superior court of Guilford county; and the case, under the charge of the court, was submitted to the jury on the usual and ordinary issues in actions of this character.

On the trial below, the plaintiff, among other things, claimed and testified that, at the time of the injury, he was an employe of defendant, at work in the lapper room; that these machines were incased in a covering, and their operation, in the process of cleaning cotton, was explained to the court and the jury by means of a model exhibited at the time of the examination; that when

plaintiff first went to work, there were three machines in the room—two Atherton, and one Whiting. In a month or so, another machine was installed, known as the "Kitson," and plaintiff was injured in endeavoring to clean out this machine. Plaintiff further testified that he had worked at this particular employment at this and other mills for several years; and in all properly constructed machines, and all that plaintiff had ever examined, there was underneath the covering a screen made by slats from one-eighth to one-half inches apart, and extending from the mote box, which was on the floor of the lapper room, clear around to the feed roll, the point where the cotton entered the machine, and these slats were well nigh a complete protection for any one cleaning the machine from the beaters of the machine as it revolved; that, at the time of the injury, plaintiff was endeavoring to clean out the machine, when his hand was caught by the beater, and severely injured, and this was caused by reason of the fact that one of the slats in this Kitson machine was missing, thus preventing the screen from offering the complete protection which it would otherwise have done.

On question and answer, the examination of the witness on this point was as follows: "Q. What were you doing when you were hurt? A. I was cleaning out the motes. Q. How were you cleaning them out? A. With my hands. I raked out what I could with my hands; then I had to stick my head and shoulders in to reach back there. Q. I will ask you if there was any danger in cleaning out this machine while same was running if slats were all in place? A. No, sir. Q. Why? A. There was no other place for me to be hurt. Q. I will ask you if these screens fully composed of the slats would have protected you whether running or not? A. Yes, sir. Q. Was there any danger of putting part of your person in there if all the slats had been there? A. No, sir. Q. What then was the cause of your being injured? A. Missing slat." Plaintiff further testified that he had never examined this machine or raised the covering, having no occasion to do so, and was not aware of any defect in it till some time after the injury, when he went back and examined the machine, and found the slat missing, as stated. There was evidence of the defendant to the effect that the machine was a standard machine, approved and in general use, and was in no way defective; (2) that plaintiff had negligently exposed himself to injury by the unusual manner in which he was endeavoring to clean the machine at the time, etc. On the argument here, it was earnestly urged by counsel that, defendant having supplied plaintiff with a standard, up-to-date machine, there was no fault imputable to defendant, by reason of this injury; and it was further contended that plaintiff was guilty of contributory negligence by the un-

usual and uncalled for method by which he was endeavoring to clean out the motes.

The fallacy of these positions rests in this: They both assume that the evidence offered by defendant is true, or was uncontradicted; whereas, the plaintiff as we have seen, testified that he was injured by reason of a defective machine of which he had no notice; and, secondly, if the machine had been in proper condition, there was no danger to be reasonably apprehended from cleaning the machine in the manner testified to. If this be true, there was a right of action, and his honor committed no error in refusing to nonsuit plaintiff on defendant's motion. Defendant further alleges for error the portion of the charge pointed out in exception 13, as follows: "If you shall find from the evidence, by the greater weight, that the defendant removed the Whiting machine, and placed the Kitson machine in its place, and that the slats of the Whiting were so arranged that the plaintiff, in getting out the motes from the mote box, and he claims that the slats between that and the beater were so arranged that he could not get his hand through it, that the spaces were so close together that there was not sufficient space that his hand could go through; and you further find from the evidence, by its greater weight, that the Kitson machine, upon which he was hurt, was put in the place of the Whiting machine, and should further find from the evidence that in the Kitson machine the space between the upper slat was sufficient for the hand of the plaintiff to have gone through, and should further find that the plaintiff didn't know of this space in the Kitson lapper and could not have known of it by the exercise of ordinary care in doing and performing the duties required of him, and he was put to work on that Kitson machine without any notice of the condition of the slats or space—then I charge you that the defendant would be guilty of negligence, and it would be your duty to find, if you find that the plaintiff was injured on account of the negligence of the defendant, to answer the first issue yes." Defendant contends that this charge erroneously fixes upon the Whiting machine as the standard of excellence; whereas, the standard is such machines as are approved and in general use. But we do not think this a correct interpretation of his honor's charge. Defendant was contending, and had offered evidence to show, that the Kitson was a standard machine that was coming in and superseding the old machines, and that the opening, by reason of which plaintiff's hand was injured, was not on account of a missing slat, but was a part of the structural plan of the machine.

Plaintiff, in reply, had alleged that in the machines which he had hitherto used—the Atherton and Whiting—the slats or screens afforded complete protection to the operator engaged in cleaning them; and if defendant had caused a new and different machine to

be installed, which created an additional danger, it was the duty of the employer to warn plaintiff of this condition, and not direct him to go on and clean the same when in motion, as he had been doing the others. 20 Amer. & Eng. Ency. p. 94. The charge of the court pointed out by this exception was addressed to this feature of negligence imputed to defendant, and did not and was not intended to make any particular machine an arbitrary standard of excellence.

Under a charge free from error, the jury have accepted the plaintiff's version of the occurrence; and this being true, the plaintiff has a clear cause of action, and the judgment must be affirmed.

No error.

HODGIN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 13, 1906.)

1. JURY—QUALIFICATION OF JURORS—FREE-HOLDERS.

A husband, whose wife is seized in fee of real estate and is the mother of children by him, is a freeholder and eligible as a juror, notwithstanding Const. art. 10, § 6, providing that the property of any female acquired before or after marriage, shall remain her separate estate, and may be devised, and with the written assent of her husband, conveyed by her as if she were unmarried.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Jury, § 256.]

2. APPEAL—CHALLENGES TO JURORS—HARMLESS ERROR.

The error of the court, in allowing a party's challenge of a juror, is not prejudicial to the adverse party, who did not exhaust his peremptory challenges.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 4125.]

3. RAILROADS—INJURY TO PERSONS ON TRACK—CARE REQUIRED AT CROSSINGS.

A traveler, approaching a railway crossing at which the railroad keeps a flagman for the purpose of warning travelers, who discovers that the flagman is absent, is put on his guard, and must look and listen for the approach of trains, and exercise ordinary care for his own safety.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, § 1072.]

Appeal from Superior Court, Guilford County; Moore, Judge.

Action by James A. Hodgin, by his next friend, against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action to recover damages for injuries received by plaintiff from a collision with defendant's train at a crossing. The court submitted the issues of negligence, contributory negligence, and damage. The jury found the issue of contributory negligence against the plaintiff. From the judgment rendered plaintiff appealed.

John A. Barringer, for appellant. King & Kimball, for appellee.

BROWN, J. One of the jurors was challenged by defendant upon the ground that he

was not a freeholder. The challenge was allowed, and plaintiff excepted. The juror owned no land, but his wife was seised of a fee, and had children by her husband. While the Constitution, art. 10, § 6, has wrought very material and far-reaching changes as to the rights and dominion of the wife over her separate property, it seems, nevertheless, to have been held by this court that the husband still has what is termed an "interest" in her land which constitutes him technically a freeholder. In *Thompson v. Wiggins*, Mr. Justice Clark said of the husband, "by reason of such bare seisin he is still a freeholder, and as such has always been deemed eligible as a juror in those cases in which being a freeholder is a qualification." 109 N. C. 510, 14 S. E. 301. Although it is said in *Walker v. Long*, 109 N. C. 510, 14 S. E. 299, that the husband has no estate in his wife's land until after her death, being intestate, yet Mr. Justice Merrimon says: "But he has an interest as tenant by the curtesy initiate" and cites *Thompson v. Wiggins*. The same case is also cited with approval by Mr. Justice Avery in *Jones v. Coffey*, 109 N. C. 518, 14 S. E. 84. While much may be said to the contrary, we think it best to adhere to the former decisions of the court. The exception, however, cannot be sustained, and will avail the plaintiff nothing as he did not exhaust his peremptory challenges. *State v. Teachey*, 138 N. C. 592, 50 S. E. 232; *McDowell's Case*, 123 N. C. 768, 31 S. E. 839; *Hensley's Case*, 94 N. C. 1021. We, however, notice the matter briefly in order to set it at rest.

Inasmuch as the jury found the issue of negligence in favor of the plaintiff, it is unnecessary to consider the numerous exceptions in the record to the admission and rejection of evidence, and to the charge of the court, which bear only upon that issue.

The only exception we deem it necessary to notice relates to the charge of the court upon the issue of contributory negligence. The defendant offered evidence tending to prove that plaintiff had been to Greensboro on horseback, and was returning home about 11 o'clock at night; that, as he approached the railroad crossing, he did not pay any attention or exercise any care; that he had been drinking, and was under the influence of liquor, and either ran into a passing train, or else the train ran into him. There was evidence tending to prove that the company had kept a flagman stationed immediately at this crossing for the purpose of warning passersby, and that plaintiff knew of this custom. It is stated in appellant's brief and is in evidence that when plaintiff got near the railroad crossing he looked for the watchman, but saw none. It is contended by the plaintiff that, as he looked for the usual watchman and saw none, he had a right to cross the track, and was absolved from the usual duty of looking and listening, and that his honor erred in refusing to so charge.

For this position plaintiff relies upon *Russell v. Railroad*, 118 N. C. 1109, 24 S. E. 512. We do not think the citation gives any support to plaintiff's contention. We do not gainsay the proposition that where a railroad company keeps gates at a crossing for the protection of the public, and the gates are opened, it is an invitation to enter and cross the track. The company then assumes the care and protection of the passers. But if the passer sees when he gets near the track that the usual gates are gone, he is at once put on his guard, and he should look and listen for passing trains before crossing. The same rule applies when a watchman is stationed at the crossing to give warning. The traveler who sees the watchman in his place has the right to rely on him for protection, but when he discovers that the watchman is absent from his post of duty, he is put on his guard at once, and must exercise ordinary care to protect himself from injury. He should himself then look and listen for passing trains. It is true, the watchman is guilty of negligence when he deserts his post, but when this negligence was discovered by plaintiff it made it all the more incumbent upon him to look and listen for his own protection for he had ample time to do so. There would be more in plaintiff's contention had he proceeded to cross the track before he discovered that the watchman was absent, relying upon the protection which he supposed the watchman was giving him.

We have examined his honor's charge, and especially that portion relating to contributory negligence. In explaining to the jury the relative rights and duties of railroad companies and travelers at surface crossings, his honor quoted extensively from Mr. Justice Bradley's lucid opinion in *Improvement Company v. Stead*, 95 U. S. 161, 24 L. Ed. 403. The charge is also fully sustained by the principles laid down in *Norton v. Railroad*, 122 N. C. 928, 29 S. E. 886; *Cooper v. Railroad*, 140 N. C. 209, 52 S. E. 932; *Parker v. Railroad*, 86 N. C. 221; *Richmond v. Chicago*, 87 Mich. 374, 49 N. W. 621; and *Merrigan v. Railroad*, 154 Mass. 189, 23 N. E. 149.

The judgment of the superior court is affirmed.

BARRETT et al. v. BREWER et al.

(Supreme Court of North Carolina. Nov. 13, 1906.)

1. INFANTS — ADVERSE POSSESSION — POSSESSION BY FATHER IN BEHALF OF INFANT CHILDREN — EVIDENCE — PRESUMPTIONS.

An infant had a deed constituting color of title to land. She did not enter under the deed and died in infancy leaving infant brothers and sisters, who lived with their father on other land in another county. The father went into possession of the land included in the deed to the infant, cut timber thereon, and worked the trees thereon for turpentine. There was no evidence that he went into possession on behalf of his

minor children, who had color of title on the theory that they acquired the right to the land by virtue of descent. *Held*, that it would not be presumed that the father entered in behalf of his children in order to ripen their colorable title into a perfect one by continuing to hold the possession a sufficient length of time for that purpose.

2. APPEAL—INSTRUCTIONS—EXCEPTIONS—NECESSITY.

Where, in ejectment, there was no evidence warranting an instruction in favor of plaintiff, and defendant had moved to dismiss the action, defendant was not bound to except to the instruction.

Appeal from Superior Court, Montgomery County; Ward, Judge.

Action by R. A. Barrett and others against Robert Brewer and another. From a judgment for plaintiffs, defendants appeal. Reversed and action dismissed.

The plaintiffs brought this action to recover possession of a tract of land and damages for withholding the same. They introduced a deed from Alexander McQueen to George Bryant dated February 8, 1862, and a deed from George Bryant to Josephine Barrett dated February 5, 1870. These deeds covered the land in dispute. Plaintiffs then proved that Josephine Barrett, who was their sister, was born in 1864 and died in 1872, without ever having entered upon the land, and that the plaintiff, R. A. Barrett, was born in 1866, J. D. Barrett in 1872, Charlotte McArthur in 1873 or 1874, Ruhamah McNeill in 1876 and Mary L. Barrett in 1887 or 1888, and it appears that Maud M. Barrett and R. G. Barrett are now minors and appear in this action by their next friend, U. L. Barrett. All of said plaintiffs are the children of Robert W. Barrett and lived with their father at his home on another tract of land, until his death, which occurred in the year 1897. Evidence was then introduced by the plaintiffs tending to show that their father took possession of the land in controversy in 1881 or 1882, and cut timber on it or worked the trees for turpentine by himself or his tenants until his death in 1897, when the plaintiff R. A. Barrett entered into possession for himself and his coplaintiffs and had timber cut on the land; that there was no part of the land cleared prior to 1897, when R. W. Barrett died. The defendants introduced a grant from the state to the defendants Frank Brewer and H. A. Johnson, dated October 15, 1891, and a deed from the grantee H. A. Johnson, to C. A. Brewer, who was one of the defendants, and they claimed title under the grant and deed which covered the land. They also introduced evidence tending to show that R. W. Barrett, and the plaintiffs after him, did not, as the plaintiffs alleged and attempted to prove, have adverse possession of the land, but that they, and those claiming under and for them, had been in the adverse possession of it since the grant was issued in 1891, and had cleared and cultivated a part of it and worked the trees for turpentine; that they ousted Martin

Black, the tenant of Robert W. Barrett. The defendants' counsel moved, at the close of the plaintiffs' testimony and again at the close of all the testimony, to dismiss the action under the statute. Their motion was overruled, and they excepted. Defendants' counsel also requested the court to charge, among other things, that, if the jury believed the evidence, they should find that the land belonged to Frank Brewer and H. A. Johnson in October 1891. This instruction was refused, and they again excepted. The court charged the jury as to what was required in this state to constitute title to land and explained to the jury what is meant by adverse possession, and further explained, as the case states, "the force and bearing of Robert W. Barrett taking possession for his children," to which there was no exception. It does not appear, though, what his honor said in this connection. The court further instructed the jury that the possession of Robert W. Barrett prior to the date of the state grant, October 15, 1891, could not be considered, but only the possession of the plaintiffs, if they had any, since that time, and then told the jury, if they found that the plaintiffs had been in adverse possession of the land, under color of title, from October 15, 1891, to the spring of the year 1899, they should answer the first issue, as to the ownership and right to the possession of the land, "Yes." The usual issues in ejectment were submitted. There was a verdict for the plaintiffs, and the defendants moved for a new trial upon exceptions taken to the several rulings of the court as to evidence, the refusal to give instructions, and the instructions given, and also to the refusal to nonsuit the plaintiffs. The motion was denied and judgment entered upon the verdict, whereupon the defendants excepted, and appealed.

J. A. Spence and R. T. Poole, for appellants. U. L. Spence, for appellees.

WALKER, J. (after stating the case). It was conceded that, if the plaintiffs' counsel cannot avail themselves of their father's possession of the land, they cannot recover. The argument before us in this case indicated that the court had charged the jury to presume that Robert W. Barrett went into possession of the land and held it for his minor children, because, during the time of his occupancy, they lived together as members of the same family, and as he was their father and therefore was under the duty and obligation to look after all their affairs and as they had color of title. We do not think this proposition can be sustained, and after diligent search we have not been able to find any authority sustaining it, and yet it must be upheld in order to affirm the judgment, as there is no evidence that the father actually took possession of the land for his children. Indeed, the testimony tends to show that he was acting for himself. In Campbell

v. Everhart, 139 N. C. 517, 52 S. E. 201, we stated, incidentally though not decisively, the general rule to be that, as between persons occupying parental or filial relations, the possession of one is presumed to be permissive and not adverse to the other who holds the title. But in that case the parties were living together as one family on the same tract of land, it being the locus in quo, while here the plaintiffs did not live with their father on the land in dispute but on a different tract and, as stated in the argument, in another county. It may also be said that in that case the controversy was one between the father and his children and the question presented was whether the father's possession was adverse to the children so as to have the effect of barring their right by the lapse of time, while here the dispute is between the children and a stranger, the former claiming by virtue of the alleged adverse possession of their father. *Clark v. Trindle*, 52 Pa. 492; *Allen v. Allen*, 58 Wis. 202, 16 N. W. 610; *McDougal v. Bradford*, 80 Tex. 558, 16 S. W. 619. The two cases are therefore entirely different. Here Josephine Barrett had a deed for the land which constituted color of title. She did not enter under this deed and died at the age of eight years. The plaintiffs were not in actual possession of the land prior to the death of their father in 1897. They therefore had no title under which he could rightfully enter as their agent or trustee, but at the most only color of title provided that they acquired the right to claim under the deed to their sister, Josephine Barrett, by virtue of descent cast, she not having had any seisin during her lifetime. The case therefore presents this question: Will the father be presumed to have entered in behalf of his children, when there is no evidence that he professed to do so, and none that they had any title, but at most only color, which would make his entry a trespass from the start? Is he presumed to have trespassed on another's land and to have subjected himself to a suit for damages by the true owner in order to ripen the colorable title of his children into a good and perfect one by continuing to hold the possession a sufficient length of time for that purpose? We think this would be pushing the doctrine of presumption a great way, and that the father cannot, under the given circumstances, be presumed to have been acting for his children. He may be in a certain sense their natural guardian or protector, but no such duty as that supposed can be held to rest upon him. His possession commenced by disselsin, and, if it had continued long enough, it might have ripened into a good title, but it would have been a title which accrued to him and not to his children. When there is a mixed possession by several persons, the law adjudges the legal seisin to be in him who has the title. *Hall v. Powell*, 4 Serg. & R. (Pa.) 456, 8 Am. Dec. 722; *Langdon v. Potter*, 3 Mass. 219; *Codman v. Winslow*, 10 Mass. 151;

Com. v. Dudley, Id. 408; *Cheney v. Ringgold*, 2 Har. & J. (Md.) 87, 94. *Newell on Ejectment*, p. 366. But no such case is presented here, as the possession was taken and maintained by the father apparently for himself, and besides during the time he was in possession of the land, the plaintiffs did not have the title, nor were they the owners of it, but they had merely a deed to their sister, which they claimed to be color of title. We held in *Francis v. Reeves*, 137 N. C. 269, 49 S. E. 213, that there is no presumption that the husband is the agent of his wife and acting for her, and we do not see why we should hold that the father is the agent of his children and acting for them when he takes possession of land and commits a trespass in doing so. Is there anything in the relation of parent and child which casts the duty upon him of committing a trespass in their behalf so as to raise a presumption that in such a case he is acting for them? We think not. There being no evidence that Robert Barrett was acting for his children, and none from which such an inference should be drawn, his possession did not inure to them so as to perfect any colorable title they may have had.

The defendants were not bound to except to the instruction as to the "force and bearing of R. W. Barrett's possession for his children," as there was no evidence to warrant the same and they had already moved to dismiss the action.

The court should therefore have granted the defendant's motion to nonsuit the plaintiffs under the statute, and, in refusing to do so, there was error, for which the judgment is reversed, and the action dismissed.

Reversed.

ISLEY v. VIRGINIA BRIDGE & IRON CO.
(Supreme Court of North Carolina. Nov. 13, 1906.)

1. TRIAL — INSTRUCTIONS — REQUESTS — INSTRUCTIONS ALREADY GIVEN.

In an action for injuries to an employe, where the negligence charged was that a chain used in moving heavy irons had not been occasionally annealed, in consequence of which it had become crystallized, causing it to break and injure plaintiff, and the evidence that the chain had become crystallized was conflicting, defendant was entitled to a requested instruction directing a finding for it on the issue of negligence as alleged, if the jury found the chain was not crystallized, and it was not sufficient that the instruction was inferentially given in the charge.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 651, 478.]

2. TRIAL—SETTING ASIDE VERDICT FOR EXCESSIVENESS.

The superior court judges cannot reduce a verdict without the consent of the party in whose favor it was rendered, but may set it aside, if injustice has been done.

Appeal from Superior Court, Alamance County; Ferguson, Judge.

Action by Warren W. Isley against the

Virginia Bridge & Iron Company. The court submitted the following issues: "(1) Was the plaintiff injured by the negligence of the defendant as alleged? (2) What damage has the plaintiff sustained thereby?" From a judgment for plaintiff, both parties appeal. Reversed.

See 53 S. E. 841, 141 N. C. 221.

J. T. Morehead and W. H. Carroll, for plaintiff. Brooks & Thompson and Parker & Parker, for defendant.

BROWN, J. This cause was tried upon the issues submitted upon the first trial, and we refer to the former report for the facts. On the second trial the defendant requested the court to charge the jury: "If you find from the evidence that the link of the chain in evidence was not crystallized, then I charge you to answer the first issue, 'No.'" The court declined to give this special instruction, and defendant excepted.

The only theory of negligence presented by the plaintiff was that the chain suspended from the trolley and used in moving heavy pieces of iron had not been occasionally annealed, in consequence of which it had become crystallized, which caused it to break and drop the iron upon plaintiff's leg. The testimony of Albright and Turrentine, plaintiff's witnesses, tends to prove that the use of chains in lifting heavy weights tends to crystallize the links, or some of them; that the method used to prevent this is by annealing the metal; and that this chain had become crystallized. There is no other evidence of negligence, and plaintiff does not undertake to account for the breaking of the chain upon any other theory. The defendant offered evidence tending to prove that the broken link had not become crystallized, and that the occurrence was an accident, and was not occasioned by any negligence of its agents.

In presenting defendant's contentions, the only charge the court gave was as follows: "If an inspection could not have discovered any defect in the chain—that is, would not have discovered that the chain had become crystallized and brittle, if it was crystallized, and liable to break in its use—and if you should fail to find from the evidence that it was necessary to anneal the chain, or that, if the chain had been annealed, it would not have broken, you will answer the first issue, 'No.'" It is contended that the defendant's prayer for instruction was inferentially given. This is not sufficient. The court should have given the prayer definitely and with certainty. The defendant was entitled to that; for it is plain to us that, if the chain had not become crystallized, the occurrence was an accident, "an event from an unknown cause," which reasonable care could not guard against. There is no evidence that the link was worn so badly as to be dangerous, or that the chain was of inferior quality; but the case was tried upon the theory that de-

fendant, by its negligence in not having it properly annealed, had allowed the metal to become crystallized.

His honor declined to set aside the finding upon the issue of damages, upon motion of the defendant, upon the ground that the amount was excessive, but reduced the amount to \$1,500. The plaintiff tendered judgment for \$2,000, which the court refused to sign, and plaintiff excepted and appealed. This must have been an inadvertence upon the part of the able judge who tried this case. In view of the disposition we have made of the defendant's appeal, a new trial is necessary; but we deem it proper to say that in this state judges of the superior court have no power to reduce verdicts without the consent of the party in whose favor the verdict is rendered. *Shields v. Whitaker*, 82 N. C. 523. When the trial judge thinks an injustice has been done, it is his duty to set aside the verdict, and he may set it aside as to damages, either excessive or inadequate. *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242, 47 L. R. A. 83.

Let costs of defendant's appeal be taxed against plaintiff, and costs of plaintiff's appeal be taxed against defendant.

New trial.

SMITH PREMIER TYPEWRITER CO. v. ROWAN HARDWARE CO.

(Supreme Court of North Carolina. Nov. 18, 1906.)

1. EVIDENCE—PAROL EVIDENCE—CONTRADICTING WRITTEN INSTRUMENT.

The testimony of a buyer of a machine, admitting the written order therefor to be part of the contract, which establishes an additional stipulation resting in parol to the effect that he was entitled to a reduction from the purchase price for commissions on machines then sold or being sold, merely proves a method by which a part of the obligation might be paid, and does not contradict the written order.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2148.]

2. SAME—ADMISSIONS.

A company gave an order for a machine. The president of the company testified that after the order was signed he called the agent of the seller and the agent of the company giving the order, and asked the agent of the seller to explain ambiguous stipulations, and that the agent then explained the order, and stated that the company should be allowed a specified sum as commissions on machines then sold or being sold. *Held*, that the evidence of the statement of the agent was not objectionable as varying the written order.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2148.]

3. APPEAL—ERRONEOUS INSTRUCTIONS—HARMLESS ERROR.

Where, in an action for the price of a machine, the jury found the existence of the verbal stipulations insisted on by the buyer, an error in an instruction imposing a qualification not required by law to make the verbal stipulations valid, was not prejudicial to the seller.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4056-4058.]

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by the Smith Premier Typewriter Company against the Rowan Hardware Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Civil action, tried on an appeal from a justice of the peace before his honor, Justice, judge, and a jury, at Rowan special term, 1905. Plaintiff sued on a written order given by defendant to plaintiff for a typewriter at the price of \$102.50, and dated April 28, 1905; the trade having been negotiated through one B. W. Allen, who was at the time a traveling salesman, and agent of plaintiff. Defendant admitted having placed this order in writing signed by defendant, and averred by way of defense, that at the time the order was given, and as a part of the contract, the agent Allen, who made the trade, agreed for plaintiff that defendant, in part payment for the machine ordered, should have a credit, as agent of plaintiff, of \$40, the commission on four other machines then sold, or being sold; three of them to other parties, and this one to be included in the number on which the commission should be allowed. And defendant, by answer, claiming this reduction of \$40, on the price, made a formal tender of \$62.50 and interest, the price of this machine, less the alleged credit. On the trial in superior court, the plaintiff offered in evidence the written order and rested. For the defendant S. A. Gregg being duly sworn, testified, in part, as follows: "That on April 28, 1905 [it being the time the original order was made for the typewriter] I was president of the Rowan Hardware Company, defendant. Mr. Allen was agent of the plaintiff. We gave him the order for the machine, and the machine was shipped to us from Richmond, Va. I did not hear the original contract, as it was made by Mr. Allen and Mr. Sossaman. After the order was signed and placed in Mr. Allen's hands, I called Mr. Allen and Mr. Sossaman over to my desk, and told Mr. Allen that I did not understand the contract and wanted him to explain it to me. Mr. Allen then showed me the order and said that we were to be allowed a credit of \$40.00 on the same for four machines he had heretofore sold or was in the course of selling, which would leave a balance of \$62.50 due on the note or order." Cross-examined: "I understood that we were only paying \$62.50 for the machine. We did not especially need a machine at that time, but I thought if we could get this one cheap we had better take it." The issue was submitted as to the amount defendant owed the plaintiff. The case on appeal then proceeded as follows: "After his honor had charged the jury, the jury retired, and, after having been out two and one-half hours, returned and said they could not agree. Whereupon, his hon-

or asked them if there was any matter of law upon which he could instruct them. The jury, then, through their foreman, asked "whether they should be governed by the oral evidence or by the written contract. Whereupon, his honor instructed them: "The written contract is the contract of the parties at the time, and unless you find that Allen was the general agent for the plaintiff and that Allen agreed, after the execution of the contract that the defendant should have ten per cent. on four machines sold and that \$40.00 was to be credited on the note, then the written contract would control." The plaintiff excepted to all evidence concerning the \$40.00 credit on the note, and all the evidence as to commissions allowed the defendants on the sales made by Allen. Objection overruled. Exception by the plaintiff. The plaintiff excepts to the charge of his honor as above set forth upon the ground that the same is not supported by the evidence."

Hayden Clement, for appellant. R. Lee Wright, for appellee.

HOKE, J. (after stating the case). This record and case on appeal disclose no error which gives the plaintiff any just ground of complaint. The testimony offered by defendant, admitting the written order to be a part of the contract, tended to establish, as an additional feature, a further stipulation resting in parol as to the method by which a part of the obligation should be paid. It did not contradict the written paper, but only tended to show that such paper did not contain the entire contract. It is well established that, as between the original parties to an executory agreement, such testimony is competent. The principle upon which the doctrine rests, and instances where same has been applied, are so clearly set forth in an opinion at this term by Mr. Justice Walker that further discussion of the question is considered unnecessary. *Evans v. Freeman*, 142 N. C. —, 54 S. E. 847. In that well-considered opinion, as especially applied to the facts of the present case, it is said: "It is competent to show, by oral evidence, a collateral agreement as to how an instrument for the payment of money should, in fact be paid, though the instrument is necessarily in writing, and the promise it contains is to pay in so many dollars." Citing several decisions of our own court. And, further: "Numerous other cases have been decided by this court in which the application of the same principle has been made to various combinations of facts, all tending, though, to the same general conclusion that such evidence is competent where it does not conflict with the written part of the agreement, and tends to supply its complement, or to prove some collateral agreement made at the same time. The other terms of the contract may generally

thus be shown, where it appears that the writing embraces some, but not all, of the terms." The testimony, then, offered by the defendant was clearly competent, and, if accepted by the jury, it establishes a valid defense to the amount allowed in the verdict.

The plaintiff makes further objection to the testimony of the witness Gregg, that by its admission, Allen was allowed to explain or vary a contract already entered into and complete, by subsequent statements, when there was no evidence that the original contract was abandoned, and a new one entered into; and "there was no consideration for any subsequent contract." But we do not think this is a correct interpretation of the testimony. It is true the witness said: "I called Allen and Sossamon, and asked Allen to explain the contract to me, as I didn't understand it." This was as to written order for the machine, and which contained certain stipulations as to commissions which were to some extent ambiguous. The reply of Allen, however, did not, and was not intended, to explain away or vary the contract at all; but was an admission or statement on his part as to what the contract was. And it cannot be contended that this was without authority. It was a statement by the agent at the time, and as a part of the transaction. The order had been signed, but it was then in the office, and its meaning and terms were still being discussed. And it is accepted law that one who adopts and seeks to enforce a contract made for him by an agent is bound by its terms and stipulations. As said in *Corbett v. Clute*, 137 N. C. 551, 50 S. E. 217: "If he claims the benefit, he must accept the burdens." Citing *Harris v. Delamar*, 38 N. C. 219; *Black v. Baylees*, 86 N. C. 527.

Nor can the objection to the charge of the court made in response to a question by the jury, be urged by plaintiff for error, "that the written contract would control, unless, after the execution, Allen agreed that defendant should be allowed the commission." We agree with plaintiff that there was no evidence of any subsequent contract; and the law does not require that the stipulation, to be available to defendant, should be made after the written agreement was entered into. As we have seen, it could be set up as a defense and shown by testimony, though it was contemporaneous. But the jury, in rendering their verdict, have necessarily accepted the existence of the verbal stipulations insisted on by defendant; and the fact that his honor, annexed to it a qualification not required by the law to make it a valid defense is not error of which plaintiff can complain. The response of the court was more favorable to the plaintiff than he had a right to expect.

There is no reversible error in the record, and the judgment below is affirmed.

No error.

THAXTON v. METROPOLITAN LIFE INS. CO.

(Supreme Court of North Carolina. Nov. 13, 1906.)

1. INSURANCE—PROOF OF DEATH OF INSURED—SUFFICIENCY.

In an action on a life insurance policy, where the answer admitted the death of the insured, the insurer cannot object to the quantum of proof of the death of insured presented to the company under the terms of the policy.

2. SAME—FORM OF PROOF—WAIVER OF OBJECTIONS.

Where proof of death of insured was made on blanks supplied by the insurer in July, and no objection or suggestion of any defect was made as to the proof until November following, when the insurer filed an answer in an action on the policy, denying liability, the objection as to the form of proof was waived.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Insurance, §§ 1398-1401.]

3. SAME—SUICIDE BY INSURED—VALIDITY OF PROVISION IN POLICY.

A provision in an insurance policy that if the insured, within one year from its issue, die by his own act or hand, whether sane or insane, the company shall be liable only for the premiums paid, is valid.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1155.]

4. SAME—CONSTRUCTION OF PROVISION.

A provision, limiting an insurer's liability if the insured die by his own act or hand, whether sane or insane, refers to suicide, and does not include a killing by accident, though the act of the insured may have been the unintended means of causing the death.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1158.]

5. SAME—EVIDENCE OF SUICIDE.

In an action on a life policy, evidence held insufficient to overcome the presumption that the insured, who was found dead with a gunshot wound in his side, did not intentionally commit suicide.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1720.]

Walker, J., dissenting.

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by Mollie F. Thaxton against the Metropolitan Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Civil action to recover the amount of an insurance policy, tried before Justice, Judge, and a jury, at June special term, Rowan superior court, 1905. Issues were submitted and responded to by the jury as follows: "(1) Has plaintiff complied with all the conditions of the contract of insurance set out in the complaint, which by the terms of the contract were to be performed by her as a condition precedent to her recovery on this contract? Answer: 'Yes.' (2) Did the insured, Beverly Wiley Thaxton, die by his own hand or act, with intent to commit suicide? Answer: 'No.' (3) Is the defendant indebted to the plaintiff, if so, in what sum? Answer: '\$2,000.'" Judgment on the verdict for the plaintiff, and defendant excepted and appealed.

Burwell & Cansler and L. H. Clement, for appellant. R. Lee Wright and P. S. Carlton, for appellee.

HOKE, J. At the close of the testimony, the court instructed the jury that if they believed the evidence, they would answer the first issue, "Yes"; the second issue, "No"; and the third issue, "\$2,000," the amount stipulated in the policy. The defendant objected to this charge of the court, and the brief for defendant filed in the cause stated that all other exceptions are abandoned. We are of opinion that the objections to the charge cannot be sustained. On the trial, the plaintiff introduced the policy, insuring the life of the deceased for plaintiff's benefit for the sum of \$2,000; proved the payment of premiums, which by the terms of the policy kept same alive, till June 18, 1905; and then introduced a clause of the defendant's answer which admitted that deceased died on the 25th of April, 1905. According to the authorities, this testimony makes out a prima facie case for plaintiff, and nothing else appearing, would justify the charge of the court as given. *Sprull v. Insurance Co.*, 120 N. C. 141-150, 27 S. E. 39; *James v. Insurance Co.* (at the present term) 56 S. E. —.

Defendant's first objection rests upon the allegation that no satisfactory proof of the death of the insured has been made; that the requirements of the policy as to the form and quantum of proof has not been fully complied with. We fail to discover any essential defect in the matter referred to; but if such defect existed, we do not think the objection is now open to defendant. So far as the quantum of proof is concerned, it is admitted in the answer that the insured is now dead, and was, at the beginning of the suit. And as to the form, to which this objection is chiefly urged, it is well established that where proofs of death have been formally made, and the company retains them without suggesting any defect or failure in this respect to comply with the requirements of the policy, and finally refuses to pay the claim, it thereby waives any defect in the formal proof of death, and acknowledges that the requisite proofs were received by it. *Niblack, Benefit Societies & Accident Insurance*, vol. 2, § 326, and authorities cited. Here, proof of death was made on blanks supplied by the company in July, 1905. So far as the testimony shows, no objection or suggestion of any defect was made as to the proof until answer filed November following, denying liability on the policy; and then, in such general terms that plaintiff could hardly discover what change or correction was desired. Under such circumstances, the objection as to the form of proof is properly held to be waived.

Again, the charge of the court is urged for error in connection with the second issue, the issue being in form as follows: "Did the insured die by his own act or hand with in-

tent to commit suicide?" The policy, bearing date June 18, 1904, contains a condition that if the insured, within one year from the issue of the policy, die by his own act or hand, whether sane or insane, the company shall not be liable for any greater sum than the premiums, etc. A condition of this kind is held to be valid stipulation. *Sprull v. Insurance Co.*, 120 N. C. 140, 27 S. E. 39; *Vance on Insurance*, p. 532. And it is generally held also that such a provision, in its terms, refers to suicide, and does not include a killing by accident, even although the act of the insured may have been the unintended means of causing death. *Vance on Insurance*, supra. The issue was therefore properly framed: "Did he die by his own hand with intent to commit suicide?" It is also accepted doctrine that on such an issue addressed to this question, the presumption is against an act of suicide, and the burden is on the party who seeks to establish it. *Amer. & Eng. Enc.*, vol. 1, 331; *Vance on Insurance*, p. 523; *Lawson's Law of Presumptive Evidence*, p. 241; *Sprull v. Insurance Co.*, supra; *Mallory v. Insurance Co.*, 47 N. Y. 52, 7 Am. Rep. 410. In *Lawson on Presumptive Evidence*, supra, the case is thus put: "H. is found dead. An examination reveals that his death was caused by taking arsenic. His life is insured, and the question arises whether his death was caused by suicide or accident. The presumption is that it was caused by the latter." This being the presumption, and defendant's having offered no evidence, the question arises whether, on the testimony introduced by the plaintiff, there is, in law, sufficient evidence for the consideration of a jury tending to rebut the presumption. The testimony we find in the record pertinent to this question will be found in the statement of plaintiff and of the coroner, on file pursuant to a requirement of the policy as a part of the proof of death. That of plaintiff is as follows: "Give cause of death (full particulars). Ans. Was caused by gunshot wound in left side. Everything pointed to an accident in handling the gun, which was supposed to have been empty." That of the coroner: "Was death the result of the deceased's own hand or act? Ans. Yes: or by some unknown hand, accidentally or otherwise." The statement of the coroner is colorless and without probative force of any kind. It amounts, in fact, to his saying what the physicians had said in answer to the same question: "They didn't know." The testimony then discloses that the deceased was found dead with a gunshot wound in his left side.

There is no testimony as to the temperament, condition, or domestic, social, or business life of the deceased which would tend to indicate suicide, or as to any declaration, written or oral, of like tendency. There is nothing offered as to the position of the body, the placing of the gun, or the character and course of the wound which would support such a theory. The testimony before us

leaves the matter as stated, with the objective fact, "Found dead with a gunshot wound in his left side," with the additional and only explanatory statement of the applicant, "Everything pointed to an accident in handling the gun, which was supposed to be empty," and this supports the presumption raised by the law that the killing under such circumstances is presumed not to be with suicidal intent. We think it clear, therefore, that his honor was correct in charging the jury that if the testimony was believed, they should find according to this presumption and answer the second issue, "No." There is nothing in *Sprull's Case*, supra, p. 150, 151, relied on by defendant, which militates in any way against our present decision. In that case, the plaintiff had stated, in his proof of loss, that the insured "had died by his own hand;" and the judge writing the opinion had held that this statement, standing unexplained, was an admission of suicide, and at once shifted the burden of proof. The decision proceeded upon the idea that by fair intendment, and by uniform construction of the courts, these words, unexplained, amounted to an allegation or admission of suicide; and the opinion, on this point, says: "The plaintiff, though she went on the stand herself, in no wise contradicted the import of these words; nor did she testify to any facts tending to show she had used them by mistake or inadvertence. Her admission, unexplained and uncontradicted, justifying his honor's direction to the jury." But there is no such admission in the proof offered here. Even if the statement of the applicant permits the interpretation that the deceased had hold of the gun when the death wound was inflicted; not only is there no admission of suicide, but such an inference is repelled by positive averment. "Everything pointed to an accident in handling a gun supposed to be empty."

There is no error in the charge of the court, and the judgment is affirmed.

No error.

WALKER, J. (dissenting). It may be conceded that where nothing else appears but the fact that the death of the insured was caused by his own act, the law will presume it to have been accidental rather than suicidal, for it will not generally presume a wrong, and it may also be conceded that, under the terms of the contract, the death must have been caused by the voluntary and intentional act of the insured in order to avoid the policy. But with these concessions made, it seems to me that there is sufficient evidence here of deliberate self-destruction to carry the case to the jury. The provision against liability in the event of suicide, is not only a valid one, but a policy which insures against such a risk as suicide has been held to be void as being against public policy. *Ritter v. Insurance Co.*, 169 U. S. 139, 18

Sup. Ct. 300, 42 L. Ed. 693. Such a clause of exemption from liability should therefore be favorably considered as it is in harmony with the policy of the law. No one can read the testimony of the beneficiary without being impressed with the belief that in her answer to the question as to the cause of death she intended to convey the meaning that the insured died of a gunshot wound in his left side which was inflicted by himself. If there was any doubt as to what she did mean, it was for the jury and not for the court to resolve that doubt. The legal effect of this testimony was to bring the case within the operation of the principle laid down in *Sprull v. Insurance Co.*, 120 N. C. 141, 27 S. E. 39, for when she admitted substantially that he died of a self-inflicted gunshot wound, it was equivalent to saying that he died by his own hand, which in that case was said to be sufficient to establish a case of suicide. It is true, she added that "everything pointed to accident in handling the gun which was supposed to have been empty," but is the defendant to be concluded by such a statement? In the first place, it is evident that she is merely expressing an opinion, and not stating positively a fact within her knowledge. It is merely her inference from supposed attending circumstances which she deemed sufficient to justify her conclusion. But is it evidence? Is it not condemned by the elementary rules governing the admission of testimony? The law deals with facts, and not opinions or conclusions of witnesses, except in certain cases of which this certainly is not one. Again, we turn to the coroner's testimony, and find that to the question, "Was death the result of the deceased's own hand or not?" he gives this answer: "Yes; or by some unknown hand—accidentally or otherwise." Here again we have precisely the answer that was given in the *Sprull Case*, and there is added, as was done by the beneficiary when replying to a similar question, what is nothing more or less than rank conjecture. He first says: "Yes;" that is, "he did die by his own hand or act," and then proceeds to express his opinion in regard to something he evidently knew nothing about. The very terms of his further answer to the question, after he had said positively that he had died by his own hand or act, shows clearly that he did not intend to speak of his own knowledge, but was only making a guess as to what other circumstances may have caused his death.

The insured died in April, and the proofs were not filed with the company until the following August. Why this delay? But if this fact be not at all significant, why was not an investigation made in the meantime to ascertain if he had been shot by any one else? There is no suggestion that any one has even been suspected of having shot him. That he killed himself is the only fair and reasonable inference to be drawn from this evidence. It

may be added that those who are supposed to know all the facts and circumstances in regard to the manner of the killing, have vouchsafed no definite explanation of it, but have considered their duty performed by giving us a mere surmise, which we are just as capable of making as they. We are not told what was the position of the gun with reference to the body when it was found; what the habits of the deceased, nor are any of the attendant circumstances given, although some of them must have been known. I do not think it was incumbent on the defendant to show that which was peculiarly within the knowledge of the other side or of which they at least had the better opportunity of acquiring knowledge, and especially is this true when the coroner had admitted and the plaintiff virtually so, that the insured died by his own hand, thereby casting upon the plaintiff the burden of explaining the occurrence.

It is also to be noted that the coroner testified that he held no inquest, and made no post-mortem examination, because no foul play was alleged. What did he mean by this statement? Simply that the insured died by his own hand and not by the hand of any one else; that a suicide and not a felonious homicide had been committed. These were all matters for the jury.

It is further to be said that the policy provides expressly that "the proofs shall be evidence of the facts therein stated in behalf of, but not against the company." That which makes for the company shall be considered, but not that which may tend to make for the beneficiary. The sufficiency of the evidence for the purpose of being submitted to the jury and considered by them is to be determined in the light of this stipulation which is reasonable and valid, and should therefore be enforced (*Insurance Co. v. Dick* [Mich.] 76 N. W. 9, 44 L. R. A. 486, and notes), and surely this must be so when all of the evidence was introduced by the plaintiff. If these matters are considered, it sufficiently appears, prima facie at least, that the insured died by his own hand (*Bigelow v. Insurance Co.*, 93 U. S. 284, 23 L. Ed. 918), and the other statements in the proofs are merely some evidence, if evidence at all, to qualify or contradict this admission, but at last it is all for the jury to weigh and decide upon. *Insurance Co. v. Higginbotham*, 95 U. S. 380, 24 L. Ed. 499; *Insurance Co. v. Dick*, supra; *Johns v. Relief Association*, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587; *May on Insurance*, § 325. If the opinion or conjecture of the plaintiff stated in the proofs was competent at all, it certainly should be considered by the jury, and not held as matter of law to absolutely overcome and destroy the other statement. They would not, perhaps, attach as much weight to a mere expression of opinion as they would to the positive statement of a fact within her knowledge. It was evidence therefore for the jury

and not such as warranted the court in rejecting altogether the other part of the answers and virtually directing a verdict. It is to be noted that the plaintiff did not go on the stand, nor did she offer the other witnesses who joined her in the proofs. This is significant and was a proper subject of comment in discussing the evidence before the jury, and was a circumstance proper for their consideration. *Goodman v. Sapp*, 102 N. C. 477, 9 S. E. 483; *Yarborough v. Hughes*, 139 N. C. 199, 51 S. E. 904.

The right of trial by jury is one that should be jealously guarded and accorded to the citizen in all cases, where there are any disputed matters of fact which raise issues between the parties. It is one of the fundamental guaranties of our system of government, and should never be denied to any litigant in whose favor a reasonable inference of fact may be drawn from the evidence. *Sprull v. Insurance Co.*, supra. Unless it is perfectly clear and manifest that there is no such evidence, to take from him the privilege of having the evidence weighed by the only tribunal appointed for that purpose, and the best ever devised by the wit of man, is a plain invasion of his constitutional right. With all possible deference for my brethren, from whom I always regret to differ, I must think that there is evidence in this case which entitles the defendant to be heard by a jury, and to have their judgment upon the facts. The majority, it seems to me, have attached too much importance to incompetent, irrelevant, and inconclusive statements in the proofs, and have failed to shift the burden of proof from the defendant to the plaintiff upon the admissions in the "proofs of death" (*Insurance Co. v. Newton*, 22 Wall. [U. S.] 32, 22 Ed. 793), or to give proper heed to the provision of the policy as to the effect those "proofs" shall have as between the parties to an action on the contract of insurance. When his honor instructed the jury as he did, in my opinion, he committed an error.

PITTSBURG, J., E. & E. R. CO. v. WAKE-FIELD HARDWARE CO.

(Supreme Court of North Carolina. Nov. 13, 1906.)

1. ATTACHMENT—WRONGFUL ATTACHMENT—DAMAGES—MEASURE—DETENTION OF ATTACHED PROPERTY.

Where cars are wrongfully attached, evidence of profits which the owner might have made during the period of their detention from hiring them out, as was its custom, may not be shown, as this would be speculative damages, and the true measure of damages is the interest on their value, increased or diminished, as the case may be, by the difference between their deterioration if in daily use, and their deterioration while wrongfully tied up, provided the owner was not able to avoid all injury from the attachment by simply giving bond.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, §§ 1384, 1378.]

2. SAME—EVIDENCE—DUTY TO LESSEN INJURY.

In an action for damages for detention of cars by attachment, defendant may show that plaintiff could, for a small sum, have secured a replevin bond, it being its duty to do what it reasonably could to lessen the injury.

3. MALICIOUS PROSECUTION — PROBABLE CAUSE—EVIDENCE.

Evidence, in an action for malicious prosecution of an action with attachment, held sufficient to go to the jury on the question of probable cause.

4. SAME—MALICE—EVIDENCE.

Evidence, in an action for malicious prosecution of an action with attachment, that defendant laid all the facts before counsel of high standing and sued out the attachment under his advice is evidence to rebut malice.

[Ed. Note.—For cases in point, see vol. 33, Cent. Dig. Malicious Prosecution, § 66.]

5. PROCESS—ABUSE OF PROCESS—LIABILITY OF PARTY.

Plaintiff in attachment is not liable for abuse of process because of the levy on an excessive quantity of property, unless it directed, advised, or encouraged such acts.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 258.]

6. SAME—DISTINGUISHED FROM MALICIOUS PROSECUTION—ABUSE OF PROCESS.

An action for malicious prosecution is distinguished from one for abuse of process in that, in the former, malice, want of probable cause, and termination of the former proceedings must be shown; and in the latter, none of these, but an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding must be shown.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Process, § 257.]

Appeal from Superior Court, Guilford County; W. R. Allen, Judge.

Action by the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company. From the judgment, both parties appeal. Affirmed on plaintiff's appeal. Reversed on defendant's appeal.

This case was here (135 N. C. 73, 47 S. E. 234), when a demurrer for misjoinder was sustained because the surety on the attachment bond had been joined as defendant. It was again here (138 N. C. 174, 50 S. E. 571), when a demurrer to the complaint was overruled. The defendant had instituted an action against the Coke & Coal Company, a corporation of this state, for the recovery of \$415 for car material, and joined the plaintiff herein, a railroad company incorporated in Pennsylvania, as codefendant. The two companies had at that time the same officers and nearly the same stockholders, and the material had been used on the latter's cars. The complaint alleged that the material was bought for said railroad company in fact as an undisclosed principal. In said attachment, 10 of the defendant's cars were attached, and, it not offering to give bond, the said 10 cars were held two years, when the attachment was dissolved. This action was brought for damages, alleging malice and want of probable cause, and that the attachment of the 10 cars was excessive and an abuse of the process of the

court. Both plaintiff and defendant appealed.

J. T. Morehead, W. H. Carroll, and Scott & McLean, for plaintiff. Taylor & Scales, for defendant.

Plaintiff's Appeal.

OLARK, C. J. (after stating the case). The plaintiff sought to show that for the 10 cars attached it should recover what the cars would have earned by way of rental or car toll. It was in evidence that the plaintiff's road is only 17 miles long, but that it owns a large stock of cars and its principal business was the hiring out on mileage its freight and coal cars to be used on other roads, in short, as its counsel somewhat felicitously expressed it, its chief business was that of a "railroad livery stable," hiring out conveyances. His honor properly excluded the evidence of profits which the plaintiff might have made from hiring its cars, because that would be speculative damages. *Sharpe v. Railroad*, 130 N. C. 614, 41 S. E. 799. The true measure of damages is the interest upon the value of the cars, increased or diminished, as the case might be, by the difference between the deterioration in the cars if in daily use and their deterioration while wrongfully tied up, provided of course the plaintiff could not have avoided all injury from the attachment by simply giving bond—as it is shown that it was amply able to do—and retaining possession of its cars.

No error.

Defendant's Appeal.

It was error to refuse to admit the testimony of the agent of the company which was surety on the prosecution bond in this action, that, for a payment of \$10, it would have signed a replevy bond to secure release of the 10 cars when attached. Though it may not be the duty of a defendant in all cases to execute a replevy bond, it would be preposterous to justify nonaction whereby the plaintiff claims it has lost \$4,750 rental of cars when it was a perfectly solvent company, owing no debts, as its president testified, and could, at a petty expense and probably without any at all, have given bond and retained possession of its cars. "The rule, in brief, is that, in cases of contract as well as in tort, it is generally incumbent upon an injured party to do whatever he reasonably can to improve all reasonable and proper opportunities to lessen the injury. * * * He must not remain supine, but should make reasonable exertions to help himself, and thereby reduce his loss and diminish the responsibility of the party in default to him." Note to *Wright v. Bank*, 6 Am. St. Rep. 365. Where a mule was wrongfully taken it was held that the injured party should have bought another, and could not recover the profits of the crop he would have made, if

the mule had not been taken. *Sledge v. Reid*, 73 N. C. 440.

The court below erred in instructing the jury that "if they believed the evidence to answer the first issue 'Yes.' That issue was, 'did the defendant wrongfully, and without probable cause, cause to be issued and levied a warrant of attachment upon the property of the plaintiff?' There was ample evidence to submit to the jury upon the question of probable cause. There was the testimony of the general manager of the defendant that the party who bought the goods told him they were for the use, and bought for the account, of the plaintiff; that he had no reason whatsoever to disbelieve this statement; that the action was instituted by the defendant in the utmost good faith, believing that the plaintiff verily owed the debt for which the property was attached; that, notwithstanding this belief, out of the abundance of caution, he submitted honestly all the facts to his counsel, who advised him that he had a cause of action against the plaintiff; that no steps were taken except such as were advised by his attorney; that, as for attaching more property than the amount of his claim would warrant, he had no idea what property the sheriff had attached under, and by virtue of, the writ, and that his only cause for taking a nonsuit at the time of the trial of the action was his inability to secure the attendance, as a witness, of the party who bought the goods." The defendant had laid all the facts before counsel of high standing in the profession, and had sued out the attachment under his advice. This is evidence tending to rebut the allegation of malice. *Smith v. B. & L. Asso.*, 116 N. C. 73, 20 S. E. 963, and there are many authorities holding that it is evidence, also, of probable cause. See cases collected in note 98 Am. St. Rep. 461. This action furthermore cannot be maintained for malicious prosecution, if as the jury have found, there was no malice. *Railroad v. Hardware Co.*, 138 N. C. 174, 50 S. E. 571.

The only ground for an action for abuse of

process is the levy on an excessive number of cars for the alleged purpose of forcing payment of an alleged debt, preferably to submitting to loss and inconvenience by the attachment. There was certainly evidence, above set out, in denial of this, and it was error in any aspect of the case to instruct the jury to answer the first issue "Yes." If the officer levied, as it seems that he did, on an excessive quantity of property, the plaintiff in the attachment was not liable for the abuse unless it had in some way directed, advised, or encouraged such act. 19 Am. & Eng. Enc. (2d Ed.) 630. This being denied, raised an issue for the jury.

It may be as well to note here the distinction between an action for malicious prosecution and an action for abuse of process. In an action for malicious prosecution there must be shown (1) malice, and (2) want of probable cause, and (3) that the former proceeding has terminated. *Railroad v. Hardware Co.*, 138 N. C. 174, 50 S. E. 571. In an action for abuse of process it is not necessary to show either of these three things. By an inadvertence it was said in the case last cited that want of probable cause must be shown. "If process either civil or criminal is willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie." 1 Cooley, Torts (3d Ed.) 354. "Two elements are necessary: First, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding. *Id.* 355; 1 Jaggard, Torts, § 203; Hale on Torts, § 185. "An abuse of legal process is where it is employed for some unlawful object not the purpose intended by law. It is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not." *Mayer v. Walter*, 64 Pa. 283. The distinction has been clearly stated. *Jackson v. Tel. Co.*, 139 N. C. 356, 51 S. E. 1015, 70 L. R. A. 738.

Error.

WOODY v. FOUNTAIN.

(Supreme Court of North Carolina. Nov. 12, 1906.)

1. BOUNDARIES — PROCESSIONING — ISSUES — TITLE—TRIAL—DOCKETS.

Revisal of 1903, §§ 325, 326 (passed in 1893), provide that the owner of land may file a petition for the establishment of a boundary, stating the facts constituting the location of the line; that if defendant denies the location, the clerk shall enter judgment after survey, from which judgment an appeal may be taken, whereupon the clerk "shall certify the issues raised" to the superior court for trial, and that occupation of land shall constitute "sufficient ownership for the purposes of the section." Section 717 (Acts 1903, p. 959, c. 566), provides that in special proceedings it shall be competent for defendant to plead any defense competent in a civil action, and that when such pleadings are filed the clerk shall transfer the cause to the civil issues docket for trial upon all issues raised. Defendant, in a proceeding under sections 325 and 326, denied plaintiff's ownership, pleading the 20 years and 7 years statutes as a defense. *Held*, that the proceeding was properly transferred by the clerk to the civil issues docket for trial as an action to quiet title, without first trying the issue of boundaries.

2. SAME—PROCESSIONING—BURDEN OF PROOF —TITLE—POSSESSION.

Revisal 1905, § 326, establishes special proceedings before the clerk to "settle a boundary," and provides that occupation of the land shall constitute "ownership for the purposes of this section." By section 717, however, the proceedings are transferable to the civil issues docket for trial upon all issues when a question of title arises. *Held*, that plaintiff's title having been denied, the burden was on him, on transfer of the proceedings, to establish his title as in an action to quiet title, possession not constituting proof of ownership as to such issue.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, § 149.]

3. SAME—BURDEN OF PROVING BOUNDARY.

In proceedings to establish boundary brought before the clerk under Revisal 1905, §§ 325, 326, and transferred under section 717 to the civil issues docket for trial on all issues, on account of an issue of title having been raised, the burden of establishing the boundary alleged is on plaintiff.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Boundaries, §§ 149-152.]

Appeal from Superior Court, Person County: Moore, Judge.

Proceedings to establish boundary line by Mildred F. Woody against Griffin Fountain. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Kitchin & Carlton, for appellant. Wm. D. Merritt, for appellee.

CLARK, C. J. This was a special proceeding under Revisal of 1905, §§ 325, 326, to establish the boundary line between the plaintiff and defendant. These sections provide that the owner of land may file a petition stating the facts constituting the location of the line claimed by him, that if this is not denied the clerk shall enter judgment establishing the boundary as alleged in the petition, but if denial of the location is

made in the answer, the clerk shall cause the line to be surveyed, according to the contention of both parties, and after the surveyor's report and map are filed, the clerk shall hear the cause, and render judgment determining the boundary, and if an appeal is taken the clerk shall certify the issues raised before him to the next term of the superior court for trial by jury de novo. This was the act of 1893 and while designating this a special proceeding and providing that the procedure except as therein modified "shall, in all respects, be the same" as in other special proceedings, marks out the procedure only when there is no denial of plaintiff's allegations, or a denial as to location of his boundary only. But the later act of 1903, p. 959, c. 566, now Revisal of 1905, § 717, provides further that in all "special proceedings it shall be competent for any defendant to plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed, the clerk shall transfer the cause to the civil issue docket for trial during the term upon all issues raised by the pleadings."

In this case the defendant denies the plaintiff's allegation that she is "owner in fee," and pleads both the 20 years and 7 years statute as a defense. It is true that under Revisal 1905, § 326, "occupation of land constitutes sufficient ownership for the purpose of that section," i. e., establishing boundary. That would be sufficient when the answer does not deny the boundary, or denies only the boundary. But the Act of 1903, p. 959, c. 566, now Revisal 1905, § 717, authorizes the defendant, in any special proceeding, to plead any defense which he might do in a civil action. The defendant has denied the plaintiff's title. It would be a vain thing, indeed, to go on to establish a boundary when the title is controverted. It would be equally a hardship to turn the plaintiff out of court merely because the defendant has denied his title as well as boundary, and "the whole object in passing the act may be utterly defeated." *Stanaland v. Rabon*, 140 N. C. 204, 52 S. E. 417. Indeed, such course would discourage these proceedings which should rather be encouraged when possible. Boundary lines may be readily settled with small cost and delay. The simpler plan, now that both parties are already in court and know each other's contentions is, as the statute has now provided, Revisal 1905, § 717, "when such pleas are filed, the clerk shall transfer the cause to the civil issue docket for trial during the term upon all the issues raised by the pleadings," i. e., in this case both the issues of boundary and title. Instead of turning the plaintiff out of court to begin anew by an action of ejectment, or doing the vain thing of trying a boundary, when the title of plaintiff is denied, the statute simply controverts the pending special proceeding into a civil

action to quiet title. It is true, as held in *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273, that in a "proceeding for processioning the question of title does not arise." But that applies in cases where the nature of the action is not changed by a plea arising on issue of title. This is analogous to a special proceeding for partition in which, if the allegation of ownership is not denied, the lines laid out are an adjudication between the parties, subject only to a change of the dividing lines on appeal, but after judgment the partitioners are estopped to deny each other's title. Partition is a proceeding to establish boundary lines, but if title is not denied, the judgment cannot be impeached by a party for defect of title, and if title is denied in the answer, the cause is transferred to the superior court and "becomes substantially an action of ejectment, and subject to all the rules of law applicable to such trials." *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748, 64 Am. St. Rep. 757; *Huneycutt v. Brooks*, 116 N. C. 788, 21 S. E. 558; *Purvis v. Wilson*, 50 N. C. 22, 69 Am. Dec. 773; *Bullock v. Bullock*, 131 N. C. 29, 42 S. E. 458.

This is the same view which this court has taken of this special proceeding "to establish boundary," commonly called "Processioning" in all the decisions since the Act of 1903, p. 959, c. 566, now Revisal 1905, § 717. At the next term (Aug. 1903) in *Parker v. Taylor*, 133 N. C. 103, 45 S. E. 473, the court stated that the purpose of the act is to furnish a cheap and speedy mode of establishing a boundary "between adjoining proprietors who do not question each other's title to their respective tracts," but that like a special proceeding in partition, "if an issue as to title is raised by the answer," the cause should be "transmitted to the court at term, thenceforward to be proceeded in as if originally brought to determine the issue of title as in an action of ejectment." That case is cited as authority in *Smith v. Johnson*, 137 N. C. 43, 49 S. E. 62. In *Stanaland v. Rabon*, 140 N. C. 202, 52 S. E. 417, it was held that in a special proceeding under the processioning act, when an issue as to title is raised in the pleading the cause should be transferred to the court at term for trial, and that the court erred in dismissing the proceeding. In *Davis v. Wall* (at this term), 55 S. E. 350, the above three cases are cited and it is said: "It is true that a processioning proceeding is for a settlement of a boundary line, title not being involved, but if the defendant therein denies the title of the plaintiff as well as the location of the boundary line, upon the issue of title thus raised, the case would be transferred to the court at term for trial and tried as if the action had been originally brought to the term of court just as when an issue of title is raised in proceedings for partition." The practice is thus simple and is well settled, and conforms to the statute (Revisal 1903, § 717) and to the practice in all other special proceedings. By the denial of

the allegation in the complaint that the plaintiff is "owner in fee," the action became in effect a civil action assimilated to an action to quiet title (Act 1893, p. 37, c. 6, now Revisal 1905, § 1589), and should have been tried at term according to the practice and rules governing such trials. There is no formal order in the record transferring the issues for trial at term, but it was in fact transferred since it was tried there, and if objection had been made on that account, the clerk was in the courtroom and the judge could and would have ordered an amendment *nunc pro tunc* to perfect the record.

The first issue was, "Is the plaintiff the owner and in possession of the tract of land described in the complaint?" His honor erred in instructing the jury that "if they believed the evidence you will answer the first issue 'yes.'" He was doubtless misled by the provision in Revisal 1905, § 326, that "occupation of land constitutes ownership for the purpose of this section." But, as we have seen, "the purpose of that section" is to "settle a boundary," when there is no denial in the answer or the denial is merely of the location thereof. But when the denial extends to plaintiff's title also, and the case is transferred to the term of court for "trial on all the issues raised," Revisal 1905, § 717, the action, becomes substantially a civil action to quiet title, Revisal 1905, § 1589, and is governed by the rules appertaining thereto. It devolved upon the plaintiff to make out his title as well as his boundary, and possession ceased to be sufficient proof of ownership when ownership was denied.

His honor also erred in instructing the jury that "if they should find from the greater weight of the evidence in this case that the original and true line between the plaintiff and defendant is as claimed by defendant, then you will answer this issue (as to boundary) in his favor." This was, in effect telling the jury that the issue could not be answered in the defendant's favor, unless they found the greater weight on his side. The burden of proof is on the plaintiff to establish the line contended for by her. *Hill v. Dalton*, 136 N. C. 339, 43 S. E. 784; *Id.*, 140 N. C. 9, 52 S. E. 273.

There are other errors, but we need not consider them as they are not likely to occur again when the case goes back to be tried, "as if it were an action to quiet title originally brought to the term of court." *Parker v. Taylor*, 133 N. C. 103, 45 S. E. 473; *Davis v. Wall*. The special proceeding for "processionings" is and will remain a cheap and speedy method of settling a boundary where only the boundary is in question and should be encouraged. When an issue of title is raised by the answer instead of throwing the costs upon the plaintiff and forcing him to bring a new action to term time the case being already in the superior court before the clerk, the statute converts it into an action to quiet title, and transfers

it to the term of court for trial, to the economy of time and expense.

Error.

WALKER, J. I concur in the conclusion of the court, and also in its opinion to this extent: It seems to me that in processioning proceedings, unless, perhaps, both parties claim under a paper title, it will be difficult if not impossible to confine the investigation required to the mere location of the dividing line. When both parties claim by right of possession, or one by a paper title and the other by adverse possession, it will become necessary in the large majority, if not all of the cases, to ascertain the nature and extent of the possession and, even in the case of a claim under a paper title, the true location of corners and of other boundaries, as preliminary to the location of the dividing line which is in dispute. So that it may, speaking generally, be safely said that the title to the land is not involved in such a proceeding, but that means that it is not directly involved, for, in many cases, as we have already shown, it may become incidentally one of the questions or issues in the case, which must be decided before the main issue, as to the location of the dividing line, can be determined. The illustration put by the Chief Justice is an apt one. I refer to the case of a partition proceeding. There the question of title is not necessarily involved, but it may become necessary upon a plea of sole seisin to determine first how the parties stand with reference to the title, before deciding whether they are tenants in common, and entitled to partition. It is a preliminary question which must be settled before the relief prayed can be granted. A partition proceeding will very often run into an action of ejectment and the same may be said of a processioning proceeding. In the latter case, ownership of the land on either side of the alleged disputed line, which is a prerequisite to the right of having the land processioned, cannot always be determined by mere occupancy, but often will require an investigation of the title, as in other cases where the issue is not primarily involved.

JONES et al. v. COMMISSIONERS OF STOKES COUNTY.

(Supreme Court of North Carolina. Nov. 13. 1906.)

1. TAXATION — UNIFORMITY — PAYMENT OF RAILROAD BONDS.

Certain townships in S. county having raised taxes to pay railroad bonds, Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, providing that the county taxes derived from the railroad property in those townships whose bonds had been paid should be expended exclusively in such townships in repairing roads, etc., until the amount so used should fully reimburse the townships for the amount paid out on subscriptions to the rail-

road, was not unconstitutional, as interfering with the uniformity and equality of taxation.

2. MANDAMUS—REMEDIES OF TAXPAYERS.

Where the commissioners of S. county refused to comply with Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, providing for the application to townships of certain railroad taxes, taxpayers of the township had capacity to maintain mandamus proceedings to compel compliance with such act.

[Ed. Note.—For cases in point, see vol. 83, Cent. Dig. Mandamus, §§ 55, 56.]

3. LIMITATION OF ACTIONS—MANDAMUS.

The duty of the county commissioners of S. county to apportion railroad taxes imposed by Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, being a prescriptive and continuing duty, taxpayers' action to compel performance thereof was not barred by limitations.

4. SAME—NECESSITY OF RELIEF.

Laws 1895, p. 182, c. 131, § 2, require the county commissioners of S. county to invest each year, in interest-bearing securities, county taxes derived from the taxation of the property of a certain railroad in S. township, as a sinking fund for the payment, at maturity, of bonds issued by the township in aid of the railroad. Held that, the bonds having been paid off, taxpayers were not entitled to compel performance of such requirement.

Appeal from Superior Court, Stokes County; Ward, Judge.

Mandamus on petition of A. G. Jones and others against commissioners of Stokes county. From a judgment in favor of plaintiff for less than the relief demanded, both parties appeal. Affirmed.

In 1880 Sauratown and Meadows townships in Stokes county, under the authority of chapter 67, p. 75, Laws 1879, voted to subscribe \$6,660.66 each to the capital stock of the Cape Fear & Yadkin Valley Railroad Company to procure said railroad to be built through their respective townships, and to levy a tax on said townships to pay the subscription, which has since been fully paid up. The road was built through said townships and has since become the property of the Southern Railway Company. Meadows township has been divided into two townships, Meadows and Danbury. In 1887, said Sauratown township, Stokes county, under the authority of chapter 87, Laws 1887, voted to subscribe \$10,000 to the capital stock of the Roanoke & Southern Railroad Company to procure said railroad to be built through the township, and to issue \$10,000 in bonds to be sold to pay up said subscription, which was done, and subsequently the township paid off and canceled said bonds. The road was built through said township, and has since become the property of the Norfolk & Western Railroad Company. In 1893 the General Assembly enacted chapter 448, p. 430, Laws 1893, which, as amended by chapter 131, p. 182, Laws 1895, reads as follows:

"Section 1. The commissioners of Stokes county are hereby authorized and directed to set apart from all other county taxes all the taxes paid each year as county taxes by the Cape Fear & Yadkin Valley Railroad Company on their property, lying and being in

Sauratown and Meadows townships of said county of Stokes; and the same so respectively paid each year on the property in each of said townships by said railroad company, shall be divided into two equal shares, one half thereof to belong to Sauratown township, and the other half to belong to the territory now embraced in Meadows and Danbury townships, to be divided between said Meadows and Danbury townships in proportion to the amount of taxes paid by said territory now embraced in Danbury and Meadows townships, respectively, to the Cape Fear & Yadkin Valley Railroad Company, and shall be expended exclusively within the said Sauratown and Meadows and Danbury townships, respectively, for repairing the public roads, building bridges, extending schools, or such other purposes as the Commissioners may deem best, and not otherwise."

Sec. 2. The commissioners of Stokes county are authorized and directed to invest each year in interest-bearing securities, which in their judgment are safe and reliable, the surplus money arising from the county taxes paid by the Norfolk & Western Railroad Company, over and above the amount required to pay interest on the bonds issued by Sauratown township in aid of said railroad, on all their property lying and being in Sauratown township, in said county of Stokes, the interest on the bonds outstanding first having been paid each year before said surplus is invested; and the surplus so invested shall be a sinking fund for the redemption of the bonds at maturity, it being the intention of this act that the surplus shall not be used by the county as a part of the general county fund, but for the purpose herein set forth.

Sec. 3. That whenever the bonded debt, principal and interest, of said township, constructed in aid of the Roanoke & Southern, now the Norfolk & Western Railroad, shall have been paid by said county taxes on said road, and the said township fully reimbursed for what has been already paid, and whenever the Meadow township shall be fully reimbursed and said taxes, principal and interest, the amount paid by said township that this act shall cease to be operative, and all such taxes shall be paid into the general county fund.

This is an action brought by these taxpayers of the aforesaid townships, on behalf of all the taxpayers therein, averring that the defendant, board of county commissioners of Stokes, has never complied with the requirements of the aforesaid acts, but has collected the taxes on said railroad property in said townships, and has applied them to general county purposes, and, though a demand was made on the board, before bringing this action, that it should apply the aforesaid taxes to the purposes set out and required by said acts, the defendant refused to do so. The relief sought is a mandamus to compel the defendant to comply with the statute by applying the taxes raised on said railroad

property in the townships named, as follows: "That the taxes levied on the property formerly owned by the Cape Fear & Yadkin Valley Railroad Company be applied to repairing the public roads in said townships and for the other purposes set out in said act, and that the taxes levied on the property owned by the Norfolk & Western Railway Company be paid to said Sauratown township until said township is reimbursed in both the principal and the interest paid on said bonded indebtedness of \$10,000," and for a reference to ascertain the sum that should be so applied. His honor granted judgment as asked in favor of the plaintiffs as to the taxes hereafter to be collected on the Southern Railway in said township, that the same shall be applied as provided in section 1 of the act in the manner and to the extent therein mentioned, and for a reference to ascertain the amount. From this order, the defendant appealed.

It was further adjudged that Sauratown township is not entitled to be reimbursed in any amount for the sums paid out on the subscription for building the Roanoke & Southern Railroad, and from this order the plaintiff appealed.

Lindsay Patterson and W. W. King, for plaintiff. Manly & Hendren and N. O. Pe-tree, for defendant.

Defendant's Appeal.

CLARK, C. J. (after stating the case). The township named in the act having, by the extra taxation they had imposed upon themselves, procured the building through their territory of the Cape Fear & Yadkin Valley Railroad, now the property of the Southern Railway Company, the General Assembly thought it just and equitable that the county taxes derived from such property in those townships should be expended exclusively in said townships "in repairing roads, building bridges, extending schools, or such other purposes as the commissioners may deem best," until the amount so used in said townships should fully reimburse them for the amount paid out on subscriptions to aid in building said railroad. We know of no provision in the Constitution which disables the Legislature from passing such act.

The defendant contends that the act interferes with the requirement of uniformity and equality of taxation. But there is no constitutional requirement that the tax rate for county purposes shall be the same everywhere. It varies in the different counties. The rate of taxation may vary in different townships, parts of townships, districts, towns, and cities in the same county, as where some have voted extra taxation for roads, fences, schools, etc. and in this very instance the taxes were higher a few years ago in those three townships, by reason of the tax to pay their railroad subscription—an inequality for which this act seeks to

reimburse them. In fact the levy for county taxation is uniform throughout the county under this act, which is merely a legislative requirement of the appropriation of money raised from certain property taxes, in those townships, to certain public purposes therein, which the General Assembly thought just and proper. The act does not interfere with the constitutional provision appropriating the poll tax and fines, forfeitures, and penalties. The defendant suggests, however, that it infringes upon the provisions of the Constitution "establishing counties and requiring them to be maintained in their integrity." But we do not find any such provisions. The Constitution recognizes the existence of counties, townships, cities, and towns as governmental agencies (*White v. Commissioners*, 90 N. C. 437, 47 Am. Rep. 534), but they are all legislative creations and subject to be changed (*Dare v. Currituck*, 95 N. C. 189, *Harris v. Wright*, 121 N. C. 172, 28 S. E. 269), abolished (*Mills v. Williams*, 33 N. C. 558), or divided (*McCormac v. Commissioners*, 90 N. C. 441) at the will of the General Assembly. In *Tate v. Commissioners*, 122 N. C. 813, 30 S. E. 352, it is mentioned that the names of 14 counties, formerly existing, have disappeared from the map of the state. Another (Polk) was once abolished and subsequently recreated. A case exactly in point with this in *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. 841, which held constitutional an act "directing and providing for the application of taxes assessed upon any railroad in a town, city, or village towards the redemption of bonds issued by the municipality to aid in the construction of such railroad," and pointed out that this did not impose a tax upon property in other portions of the county for the benefit of any township, city, or town, but simply appropriated the taxation upon such railroad property for the benefit of the municipality which had incurred a burden to procure the building of such railroad. The same view is upheld in *Commissioners v. Lucas*, 93 U. S. 108, 23 L. Ed. 822. It rested in the judgment of the General Assembly to direct the commissioners of Stokes county to make this application of the county taxes derived from railroad property in those townships. Should this statute not meet the approval of subsequent Legislatures it can be repealed, but unless repealed it is the duty of the county commissioners to obey it, until, as provided therein, the townships named in section 1 shall be reimbursed in the manner stated.

It was competent for these plaintiffs, taxpayers in said township, to bring this action, "the question being one of common or general interest" to all the taxpayers therein. *Revisal 1905*, § 411; *Bronson v. Insurance Co.*, 85 N. C. 411; *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692; *McMillan v. Reeves*, 102 N. C. 550, 9 S. E. 449. Nor is there any statute of limitations. The plaintiff is not seeking

to recover a debt, nor even to compel the county commissioners to account for the taxes heretofore collected on railroad property in said townships, but the relief sought is prospective, to require compliance with the statute in future. It imposes a continuing duty until it shall be complied with or repealed.

No error.

Plaintiff's Appeal.

Section 2 of the act (Laws 1895, p. 182, c. 131) requires the county commissioners to invest each year, in interest-bearing securities, the county taxes derived from the taxation of the property of the Norfolk & Western Railroad Company in Sauratown township, as a sinking fund for the payment, at maturity, of the bonds issued by said township to aid in building said railroad (after first deducting thereout enough to pay the current interest). As the bonds of said township have been paid off, there is no sinking fund required to pay the bonds, and the mandamus in this regard was properly refused.

It would have been otherwise if this section had, like section 1, required the reimbursement of that township by disbursing the taxation, derived from said railroad, for roads, schools, etc. in the townships named. Whether it shall be so amended is a matter for the Legislature. The statute does not now so require.

No error.

CARLETON v. YADKIN R. CO. et al.

(Supreme Court of North Carolina. Nov. 18, 1906.)

1. CARRIERS—INJURY TO PASSENGER—LIABILITY OF LESSOR OF RAILROAD FOR INJURY BY LESSEE.

A railroad company, which has leased its track and rolling stock to another corporation, is liable for injury to a passenger caused by the negligence of the lessee's servants.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1249.]

2. SAME—JOINDER OF DEFENDANTS.

Railroad companies jointly operating their roads through the agency of a lessee may be joined in one action for negligent injuries to a passenger being carried over their lines, where the negligent acts were continuous and chargeable to the common agent of the lessee.

[Ed. Note.—For cases in point, see vol. 9, Cent. Dig. Carriers, § 1251.]

Appeal from Superior Court, Rowan County; Justice, Judge.

Action by P. S. Carleton, as administrator, against the Yadkin Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was brought for the purpose of recovering damages by reason of the death of plaintiff's intestate alleged to have been caused by the negligence of defendants. The plaintiff alleged: That the defendants, the

Yadkin Railroad Company and North Carolina Railroad Company, are separate and distinct corporations, and, as such, are engaged in the business of common carriers of passengers and freight. The defendant Yadkin Railroad Company owns a line of railroad extending from Salisbury, N. C., to Norwood, N. C., and the defendant North Carolina Railroad Company owns the line of railroad extending from Greensboro, N. C., via Salisbury, to Charlotte, N. C. That prior to and at the time of the negligence complained of, both of said defendants had leased their aforesaid line of railroad to the Southern Railroad Company, a corporation existing under and by virtue of the laws of the state of Virginia, and by virtue of said lease the said lessee company, by permission and consent of defendants, had control and possession of the aforesaid lines of railroad, and was running its trains and cars thereover in charge of its servants, agents, and employees. That both defendants operate jointly the lines of said railroad from the Salisbury depot to the Salisbury cotton mills, which is a part of the North Carolina Railroad right of way. That on August 22, 1905, plaintiff's intestate purchased of said lessee company's agent at Norwood a ticket from that point to his home, and became a passenger on said line of railroad belonging to the said defendant Yadkin Railroad Company. That after becoming said passenger, and taking a seat in one of the passenger cars on said line, said intestate became suddenly ill and unconscious, and that shortly thereafter the conductor on said train aroused said intestate, and obtained his ticket. Said conductor then saw and realized that said intestate was dangerously ill, but negligently and carelessly passed him by without providing him with any comforts, restoratives, medicines, or physician, and negligently and carelessly failed to notify any physician of the serious condition of said intestate, although six towns were passed through in which physicians resided, and which could have been easily procured, if the conductor on said train had performed his duty to said intestate. That said lessee negligently and carelessly failed to remove said intestate from said train after he became ill and unconscious, but negligently brought him on to Salisbury; said train arriving at 7:15 o'clock p. m. That aforesaid lessee, through its servants and agents, failed to remove said intestate from said car, or to provide him with any physician, etc., but negligently placed said car upon one side of its track, with said intestate as the only passenger or person therein, and negligently left said intestate in said car on said side track until 10 o'clock next morning without attention, etc. That about 12 o'clock said intestate died.

The defendant Yadkin Railroad Company demurred to the complaint, and assigned as

ground of demurrer: "(1) The plaintiff has joined two separate and distinct causes of action arising out of an alleged tort against two separate and distinct defendants: First, an alleged cause of action against the North Carolina Railroad Company for alleged acts of negligence by the employees of the Southern Railway Company, while the Southern Railway Company was alleged to be operating a train over the railroad tracks of the North Carolina Railroad Company, and while said train was not on any railroad tracks of this defendant, with an alleged cause of action against this defendant, for the alleged negligence of the employees of the Southern Railway Company, while operating a train over the railroad of this defendant, and before the said train reached the railroad of the North Carolina Railroad Company; second, that as to this defendant, complaint does not state facts constituting a cause of action as to those matters alleged to have occurred after the said train left the said road of this defendant, and said cause of action for such alleged negligent acts is solely against the North Carolina Railroad Company, and said cause of action has been improperly joined with an alleged cause of action against this defendant for matters alleged to have occurred on the road and track of this defendant, over which it is not alleged that the North Carolina Railroad Company had any control. (2) It does not appear from the said complaint, and it is not alleged, that the alleged acts of negligence alleged to have occurred upon the road of this defendant, caused the death of the plaintiff's intestate. (3) It does not appear from the said complaint that any acts done or failed to be done while the said train was on the track or road of this defendant caused the death of the plaintiff's intestate."

The defendant North Carolina Railroad Company demurred for the same causes set forth in the demurrer of its codefendant. The cause coming on for hearing, the court overruled both demurrers. Defendants were allowed to file answer. Defendants excepted, and appealed.

T. C. Linn, for appellant. R. Lee Wright, for appellee.

CONNOR, J. (after stating the facts). That a railroad company which has leased its roadbed, track, and rolling stock to another corporation is liable for the torts of the lessee has been so frequently decided by this and other courts that it cannot now be considered open to discussion. *Aycock v. Railroad*, 89 N. C. 321; *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959; *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Norton v. Railroad*, 122 N. C. 910, 29 S. E. 886; *Pierce v. Railroad*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316. That this liability extends to an injury sustained by a passenger by the negligence of the servants of the lessee is decided

In Tillett's Case, *supra*. In *Rocky Mount Mills v. Railroad*, 119 N. C. 693, 25 S. E. 854, 56 Am. St. Rep. 682, it was shown that a number of railroad companies formed an association under the name of the "Atlantic Coast Dispatch"; that bills of lading were issued in the name of, and by, the said association, by which it undertook to carry freight from Lowell, Mass., to Rocky Mount, N. C. For negligent delay in carrying such freight the consignee sued two road members of the association. Faircloth, C. J., said: "Upon examination and reflection, we are of the opinion that the defendants and their connecting lines are jointly liable, each for the others, on the contract before us; * * * that is to say, that they are engaged in business as partners under the name of the 'Atlantic Coast Dispatch.' They are still common carriers; none the less so because they have certain stipulations. Having jointly agreed to conduct the 'All Rail Fast Freight Line' under the name above stated, * * * and having so informed the public, and so contracted with the plaintiff, their true character is fixed by the law according to the nature of their business." The demurrer and argument made to sustain it fails to note the allegation "that both defendants operate jointly the line of said railroad from the Salisbury depot to the Salisbury cotton mills, and which is a part of the North Carolina Railroad right of way," and the further allegation that the plaintiff's intestate purchased a ticket of the agent of the lessee of said roads from Norwood to Salisbury. The conductor was the employé of the lessee, and the agents and servants whose negligence is complained of were in the employment of the lessee. The case presented by the complaint comes to this: Two railroad corporations jointly operating their properties through the agency of a lessee between two points, connected by their roadbeds and tracks, in the discharge of their duty as common carriers, undertake to carry plaintiff's intestate over their tracks from Norwood to Salisbury. Why should they not be jointly liable for a failure to discharge the duty undertaken in a joint operation and use of their property in the exercise of their franchise? To hold otherwise would violate elementary principles of law, and practically deny to the passenger any remedy. It may be that he could, if so advised, sue each road separately, but as in a case like the one disclosed by the complaint, where the negligent acts were continuous, and chargeable to the common agent of the defendant's lessee, who for the purpose of this case must be considered as the defendants themselves, we can see no reason why he may not join them in one action. The underlying principle upon which the decision is based is the liability of the lessor for the acts of its lessee; this being based upon the principle that a railroad company cannot divest itself of its duty to the public or its consequent liability by leasing its

track, or in any other manner permitting its track to be used by some other corporation. For the purpose of this appeal the relation of the two roads must be construed as a joint undertaking in the discharge of their duty to the public as common carriers, using the lessee as their common agent for that purpose. In this point of view it is immaterial whether we treat the cause of action as for a breach of contractual duty or a tort arising out of a breach of contract. The cause was argued before us principally upon a demurrer for misjoinder, and we think it best to refrain from entering into any discussion of the merits of the case as disclosed by the complaint. The principles applicable to the case after the facts shall have been developed on the trial are well settled.

The judgment, overruling the demurrer and directing the defendants to answer over, must be affirmed.

Affirmed.

BROWN, J. (concurring). I concur in the judgment overruling the demurrer because of the peculiar wording of the complaint, which appears to allege that both defendants "operate jointly" the lines of said railroad from Salisbury, etc., which allegation was admitted when a demurrer was interposed. If it should turn out when the real facts are found upon the trial (as doubtless it will) that the only connection between these two defendants is that at different times each leased its roadbed, etc., to the Southern Railway Company, then I should hold that insufficient to create a liability upon the part of the North Carolina Railroad Company for the negligence of the Southern (the lessee) upon the tracks of the Yadkin road, and vice versa. As I interpret Logan's and similar cases, the liability of the lessor company for the negligence of its lessee must be confined to acts occurring on the lessor's property. The fact that the Southern holds leases of different railroads, runs a train through over each track, and sells one ticket good over all, would not in my judgment alter this principle.

The decision in the *Rocky Mount Mills* Case was based upon the idea that different railroad companies engaged actively in the transportation of merchandise had formed a transportation copartnership under the name and style of the Atlantic Coast Dispatch, and that each copartner was liable for the acts of the other done within the scope of the copartnership. The fact that two railroad corporations happen to independently lease their properties to the same lessee by different leases would not create a transportation copartnership between the lessors, or extend the liability of each lessor for the acts of the lessee beyond each lessor's own property.

Therefore, I hold that, in order to create a liability upon the part of the North Carolina Company, it must be established that

the actionable negligence—the breach of duty upon the part of the Southern—which caused the death of plaintiff's intestate actually occurred upon the property of the North Carolina Company.

CLARK, C. J. (concurring with Mr. Justice BROWN). Barring the word "jointly," which doubtless was unadvisedly used in the complaint, I think that there is no liability accruing to the North Carolina Railroad Company by reason of any misconduct of the conductor of the Yadkin Railroad Company simply because both roads had been leased to the same lessee. There is no contract between the two lessors. Nor, when the Yadkin Railroad Company, acting through its lessee, contracted to take a passenger from Norwood to Salisbury, did any liability arise to the North Carolina Railroad Company for mistreatment of a passenger from the fact that the Yadkin Railroad Company ran its train for $1\frac{1}{2}$ miles over the track of the North Carolina Railroad Company. The latter would be responsible to the public, as for fires set out by the Yadkin train while on its track (*Aycock v. Railroad*, 89 N. C. 321), or injury accruing to any one on its tracks; but it would not be liable for any breach of contract or tort by the Yadkin Company to its passengers or employes (*Washington v. Railroad*, 101 N. C. 239, 7 S. E. 789, 1 L. R. A. 830; *White v. Railroad*, 115 N. C. 631, 20 S. E. 191, 44 Am. St. Rep. 489). The North Carolina Railroad Company was not the lessee of the Yadkin Railroad Company, nor was it operating the latter's train merely because it ran over the North Carolina Railroad track a short distance.

WEEKS v. SPOONER.

(Supreme Court of North Carolina. Oct. 30, 1906.)

BANKRUPTCY — PREFERENCES — TRANSFER OF PROPERTY — VALIDITY.

A seller agreed to sell a specified number of ties to be delivered on a vessel at a place designated to a buyer who agreed to inspect and count the ties, and settle for the number accepted at a specified sum. The buyer received a number of ties shipped to him on a schooner, without being inspected or counted, and they were en route when the seller became bankrupt. The buyer, when the ties were shipped, had no knowledge of the insolvency of the seller. The buyer, on learning of the seller's insolvency, took possession of another lot of ties ready for shipment. All of the ties had been invoiced to the buyer and drafts at the specified rate had been paid. *Held*, that as the buyer had paid a present consideration for the ties received, there was no preference within the bankruptcy act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 259.]

Appeal from Superior Court, New Hanover County; Webb, Judge.

Action by C. D. Weeks, trustee in bankruptcy of Flynn & Co., against H. J. Spooner, Jr. From a judgment of nonsuit, plaintiff appeals. *Affirmed*.

Davis & Davis and E. K. Bryan, for appellant. Rountree & Carr and H. McClammy, for appellee.

CLARK, C. J. This action is brought by the plaintiff as trustee in bankruptcy of Flynn & Co. against the defendant to recover certain cross-ties, or their value, received or taken possession of by the defendant within four months prior to the bankruptcy of Flynn & Co., and therefore alleged to be a preference within the bankrupt law. Flynn & Co. contracted with the defendant, who lived in Rhode Island, to furnish him "not less than 60,000 nor more than 75,000 cross-ties," of specified description, at 28 cents apiece, said ties to be delivered on vessel at Wilmington; that when as many as 2,000 at any time were assembled at Wilmington, Flynn & Co. were to notify the defendant, and could send him a bill or invoice of the same, and draw therefor 25 cents for each tie; that the ties were to be inspected and counted by the defendant, and the number accepted should be settled for at 25 cents each. 43,000 cross-ties were billed to the defendant, on which invoices he paid 25 cents each, i. e., \$12,000. Of the ties which the defendant received, 8,879 were shipped to him on the schooner "W. P. Hood" without being inspected or counted, and were still at sea en route to Rhode Island when the bankruptcy occurred. When these were shipped, the defendant had no knowledge of the insolvency of Flynn & Co. Another lot of 3,744 ties were in the swamp in Brunswick county when the defendant, learning that Flynn & Co. were about to go into bankruptcy, went over, and took possession of the same before the petition in bankruptcy was filed, and shipped the cross-ties. All these cross-ties, and more, had been invoiced to the defendant, and drafts at the rate of 25 cents for each tie invoiced had been paid. After allowing for these two lots (and those shipped previously) it was found that Flynn & Co. had invoiced more ties than they had shipped, and had been paid some \$5,000 more than was due them. The defendant filed his claim in bankruptcy for said amount overpaid by him.

There can be no question as to the first lot of ties. The evidence is uncontradicted that when these ties were paid for and shipped, the defendant had no knowledge of the insolvency of Flynn & Co., if they were then insolvent, and that he paid a present consideration. It is true the ties had still to be inspected, and those not coming up to specifications could be rejected, but that only affected the amount to be paid, and did not prevent the title passing to the defendant on delivery to the carrier. As to the second lot also, the defendant paid a present consideration, the ties having been billed to him, and paid for by draft drawn for the amount. The title passed to him

when he took possession of them. Though he knew at that time that Flynn & Co. were insolvent and contemplated bankruptcy, he took only his own property which he had paid for. *Chase v. Denny*, 130 Mass. 508. The requirement that the ties should be delivered on vessel in Wilmington was a stipulation which could be waived by the defendant. A preference within four months prior to bankruptcy is held invalid because it diminishes the common fund by the sum or property given the preferred creditor. But when there is a full and fair present consideration, it is not a preference, for the fund is not diminished, the debtor receiving in exchange the value of the property transferred. Here, the defendant's case is still stronger, for he not only paid the present consideration, but, by virtue of the invoice and draft drawn against it which he paid, the right to possession of the ties had passed to him, and, of course, the title when he actually took possession. The cross-ties were cut for the defendant under his contract. These specific ties were invoiced and paid for, certainly those shipped and those taken possession of were identified.

In nonsuiting the plaintiff there was no error.

WALKER, J., concurs in result.

SHAW v. HIGHLAND PARK MFG. CO.

(Supreme Court of North Carolina. Nov. 21, 1906.)

1. MASTER AND SERVANT—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE.

In an action for injuries to a servant, evidence held insufficient to show that the gangway from which the servant fell was in a defective condition.

2. SAME—PRESUMPTIONS.

In an action for injuries to a servant caused by the slipping and falling of a plank in a gangway, where the evidence shows that the gangway was built by a competent builder, on a proper plan, of good material, and was in good condition up to a few minutes before the plank fell with the plaintiff, the occurrence of the accident carries with it no presumption of negligence on the part of the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 881.]

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a servant caused by the falling of the bed plate of a cloth press weighing several thousand pounds, it was a question for the jury whether the servant was guilty of negligence in standing before the plate as it stood on its edge and directing a battering ram propelled against it from the opposite side.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

Appeal from Superior Court, Mecklenburg County; Peebles, Judge.

Action by J. W. Shaw against the Highland Park Manufacturing Company. From a judgment in favor of defendant, plaintiff appeals. Judgment on first cause of action affirmed,

and on second cause of action reversed and remanded.

Action to recover damages for personal injuries received by plaintiff while in the employment of defendant. There were two separate actions for distinct injuries at different times. The actions were consolidated and tried upon a first and second cause of action. As to first cause of action, the court sustained a motion by defendant to nonsuit. As to second cause of action, the court intimated an opinion that, upon the whole evidence, he would instruct the jury that if they believed it the plaintiff was not entitled to recover. Thereupon plaintiff submitted to a nonsuit, and from the judgment rendered, appealed.

Burwell & Cansler and McNinch & Kirkpatrick, for appellant. Tillett & Guthrie, for appellee.

BROWN, J. First cause of action. It appears from the evidence that the plaintiff was an employé of the defendant and general utility man. On August 12, 1904, plaintiff was ordered by C. W. Johnston, defendant's general manager, to assist Robert McAlister in measuring the quantity of brickwork in the walls of the power house. Plaintiff and McAlister went upon a scaffold around the power house by means of a gangway, which led from the ground up to the scaffold. McAlister walked on the same side of the gangway as he and plaintiff went up that the plaintiff walked on in returning. After plaintiff and McAlister had taken the measurements of the brickwork, McAlister came down from the scaffold ahead of the plaintiff by means of the gangway. Horace Johnston, a boy, was walking down the gangway in front of Shaw and, appearing to be frightened, plaintiff caught up with him, and walked down the gangway side by side with him, plaintiff walking on the two outside planks, and Johnston walking on the two left-hand planks, plaintiff having hold of Johnston's right arm. This part of the gangway was about 12 feet above the ground. The two planks on which plaintiff was walking slipped off from the bench, or cross-piece, upon which they rested, falling with the plaintiff, whereby he was injured. The scaffold and gangway were erected by one Brown, a reputable contractor, who was doing the brickwork for a new mill by contract.

We deem it unnecessary to consider the question so ably argued as to defendant's liability for the injury of its servant upon the scaffold of the independent contractor. We concede, for the sake of the argument, that the gangway and scaffold were instrumentalities of the defendant, and then we are of opinion there is no evidence of any breach of duty defendant owed plaintiff. In order to entitle plaintiff to recover he must prove these facts: (1) That the gangway was in a defective condition. (2) That its

defective condition was the proximate cause of his injury. (3) That the defendant knew of its defective condition, or was guilty of negligence in not discovering and repairing the same. *Hudson v. Railroad*, 104 N. C. 491, 10 S. E. 669. We think the plaintiff has failed on all three. The gangway was built by a reputable contractor and used constantly by his own employes without accident. There is no evidence that it was deficient in strength or improperly constructed. *McAllister*, a heavier man than plaintiff, had safely preceded plaintiff up the same gangway only a few minutes before. Plaintiff was a carpenter who had built scaffolds and was fully competent to judge of the safety and capacity of the one he ascended. The evidence shows a gangway built by a competent builder, upon a proper plan, of good material, capable of sustaining a number of people and heavy weights, with no evidence of its being out of repair, but, on the contrary, all of the evidence showing that it was in good condition, safe for the purposes for which it was intended, as tested by actual use, up to a few minutes before the plank fell with the plaintiff. We do not think, taking the evidence as a whole, the doctrine of *res ipsa loquitur* has any application in this case. The fact of an accident carries with it no presumption of negligence on the part of the employer. *Patton v. Railroad Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. The case of *Railroad v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136, is cited with approval in the *Patton* Case. In that case it was held that the plaintiff, a servant who was injured by the explosion of a boiler, had not produced sufficient evidence to go to the jury when he proved the fact of the explosion and his injury thereby. The court held that, in order to make out his case, he must establish, not only that the boiler was defective, but must affirmatively establish such other facts as constitute negligence on the part of the master, to wit, that the master knew of the defect, or, by the exercise of ordinary care, ought to have known of it. There have been cases wherein the circumstances surrounding and connected with the occasion of the injury were such that they were permitted to go to the jury and to be considered by them upon the issue of negligence. This is not such a case. *Womble v. Grocery Co.*, 135 N. C. 474, 47 S. E. 493; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Ross v. Cotton Mills*, 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298.

Second cause of action. It appears from the evidence that plaintiff was again injured on May 19, 1905, while engaged in assisting in, and directing the work of, tearing down a cloth press in defendant's mill, preparatory to moving it to another part of the building. The press consisted of a top piece and a bed plate. Plaintiff had taken down the press and was endeavoring to separate the plunger from the bed plate. The bed plate was 4½

feet long, 3½ feet wide, and 3½ inches thick, and weighed several thousand pounds. It had a shaft called a "plunger" fastened in its center, which extended some feet from it and the end of which was supported by a chain. This plunger weighed about 1,400 pounds, and worked up and down in a cylinder immediately under the bed plate, which, by means of hydraulic pressure, was used to raise and lower the bed plate when necessary. It was necessary to separate the plunger from the bed plate in order to move the machine separately. As the bed plate rested on its edge, it leaned a little towards the plunger and away from the plaintiff, who was standing on the opposite side looking over the top of it at the plunger, while he directed two of the boys to drive it out of the bed plate by hitting the latter first on one side and then on the other, of the plunger, with a piece of iron shafting weighing 40 or 50 pounds used as a battering ram. When the plunger was knocked loose, the bed plate was driven over on plaintiff and broke his leg. There was evidence tending to prove that Constable, the superintendent, was present and saw the manner in which it had been done. Plaintiff testified upon the question of negligence that he had demanded more help and also sufficient blocks and tackle to move the bed plate, and that the superintendent refused or failed to furnish them, but directed him to do the work without them. Plaintiff also testified that, if they had been furnished, he would have fastened a chain around the bed plate while it was on its edge, and have secured it so it could not have fallen when the blows on it succeeded in unfastening the plunger.

No question was made in the argument before us as to there being a sufficiency of evidence to go to the jury tending to prove the negligence. It appeared to be conceded that the intimation of his honor as to his charge relates solely to the issue of contributory negligence. It is argued that the plaintiff according to his own evidence was in a position of great and obvious danger, such as no prudent man would occupy. It must be admitted that to stand immediately behind and look over a heavy bed plate on its edge and direct a battering ram which is being propelled against it is somewhat of a dangerous business. Whether it was so obviously dangerous that no prudent man would have acted under similar circumstances as the plaintiff did, we are unable to say. The jurors are more competent to pass on that question than we are. If, from all the circumstances surrounding the plaintiff, the jury should conclude that he had placed himself in a position of obvious danger, such as no prudent man would be willing to incur, he would not be entitled to recover. *Marks v. Cotton Mills*, 138 N. C. 402, 50 S. E. 769. In taking this question from the consideration of the jury and drawing the conclusion himself, we think his honor erred.

The judgment on the first cause of action is affirmed. As to the second cause of action, it is ordered that the cause be remanded for a new trial. Let the costs of this court be equally divided.

New trial.

WALKER, J., did not sit on the hearing of this case.

HARRISON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Nov. 21, 1900.)

1. TELEGRAPHS — MESSAGES — PURPOSE — DELAY IN DELIVERY.

Where a telegram notified a stepmother of the death of her stepson, and of the hour fixed for the funeral, it should not be construed as merely intended to notify the addressee of the hour of the interment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, *Telegraphs and Telephones*, § 70.]

2. SAME—DAMAGES—MENTAL ANGUISH—QUESTION FOR JURY.

Where, in an action against a telegraph company for delay in delivering a death message announcing the death and contemplated burial of plaintiff's stepson, she testified that she had raised deceased from a small boy; that she had no children of her own; that she treated him with affection and would have attended his funeral had the message arrived in time, but that when she arrived he had been buried; that she was very nervous, and would never "get over it," whether she suffered mental anguish for which she was entitled to recover was for the jury.

Appeal from Superior Court, Rowan County; Council, Judge.

Action by Annie Harrison against the Western Union Telegraph Company for delay in delivering telegram. The court charged that on all the evidence plaintiff was entitled to recover only the sum of 25 cents which was the cost of the telegram, and plaintiff excepted and appealed. Reversed in part. Partial new trial ordered.

For opinion on former appeal see 48 S. E. 772.

R. Lee Wright, for plaintiff. Tillett & Guthrie, for defendant.

BROWN, J. In this case the only question before us relates to the measure of damages the plaintiff is entitled to recover, as the negligence of the defendant is very properly admitted. This court has, in its decisions, laid down the rule governing the measure of damages, and has held that such damages as were not within the contemplation of the parties cannot be recovered. The rule is aptly stated for the court by Mr. Justice Walker in *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559: "In order to enable him to recover substantial damages, based upon his mental distress and suffering, it is necessary for him to show that the defendant could reasonably have foreseen from the face of the message that such damages would result from a breach of its contract or duty

to transmit correctly, or that it had extraneous information, which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff." Not only was defendant's agent notified of the important character of the telegram, but on its face it stated the "pregnant facts of death and burial." It notified a stepmother of the death of her stepson, and of the hour fixed for the funeral. We think the learned counsel for the defendant takes a view much too restricted when he contends that the only purpose of the telegram was to notify the mother of the hour of the interment, and that nothing else was reasonably within the contemplation of the parties. The evident purpose was to notify the stricken mother at once that her son was dead, to the end that she might come without delay, and have the melancholy pleasure, and perform the the sacred duty, of being with his remains as long as possible before they were committed forever to the grave. The fact that the hour fixed for the funeral is stated in the telegram is a mere incident to the general purpose for which the telegram was evidently sent. It was most natural that the plaintiff should desire to know the hour when the burial rites would be performed, but not at all in accord with the promptings of the heart of the average woman that she should be content to put off coming until the last moment. The plaintiff testified she would have come by the first train had she received the telegram when it should, with due diligence, have been delivered to her. There is no presumption of mental anguish growing out of the relation of stepmother and son, but under our decisions it is a fact the plaintiff may prove, if she can, to the satisfaction of the jury, for the state of the mind is as much susceptible of proof as the condition of the stomach.

The plaintiff's testimony, if believed, tends to prove something more than mere disappointment. She says: "I raised the deceased from the time he was a small boy, and he had been with me from then until just before his death. I have no children of my own. He called me 'mother.' I addressed him as son. He was kind to me, and treated me with kindness and affection. I regarded him as my own son. I loved him, and loved him dearly. I would have come to Salisbury if I had received the message in time. I did come on the first train after it was delivered to me. When I arrived he had been buried. I did not get to Salisbury in time to attend the funeral. It made me very nervous, and affected me so that I can never get over it."

We think the cause should be submitted to the jury under proper instructions to the end that if they are satisfied the plaintiff has really suffered mental anguish, as distinguished from mere disappointment, they may award her such reasonable sum only, as will in a measure compensate her for the injury done by the defendant's negligence.

Partial new trial.

CLARK, C. J. (concurring). The doctrine of damages for mental anguish as the probable result to be anticipated from the failure to deliver messages concerning death or illness is not only imbedded in our decisions, but it was adopted and has been reiterated after the fullest consideration and upon what seemed and still seem to us the soundest principles of justices and public policy as well. Inasmuch as the representatives of the telegraph company continue to question the correctness of these decisions it may be well to again notice their principal arguments which are: (1) That some other courts have not held the telegraph company liable for such damages. If there is any force in this argument, it is countervailed by the fact that the courts in about an equal number of states have sustained the doctrine. The courts, maintaining each side of the question, are summed up by Mr. Justice Douglas in *Green v. Telegraph Co.*, 136 N. C. 504, 505, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955; also, see *Bryan v. Telegraph Co.*, 133 N. C. 606, 45 S. E. 938, and *Watson, Pers. Inj.* § 450. (2) It has been contended that damages for mental anguish should not be allowed because there can be no exact standard of measurement. But that is true in most instances in which damages of any kind are sought, especially where damages are sought for wrongful death or physical suffering. Damages for mental anguish are as old as the law. They have been allowed in all courts where they are accompanied by physical suffering, and damages for physical suffering are as difficult to admeasure as those for mental suffering. When the latter alone are sought to be recovered they cannot be more difficult to measure than when both mental and physical suffering are to be measured—a double uncertainty. Besides in very many instances, damages for mental suffering unaccompanied by physical suffering have long been allowed in all courts as in actions for breach of promise of marriage, seduction, libel, slander, malicious arrest, false imprisonment, wrongfully putting a passenger off the train, and other instances cited, with authorities. *Young v. Telegraph Co.*, 107 N. C. 384, 11 S. E. 1044, 9 L. R. A. 689, 22 Am. St. Rep. 883. To say that most of the instances in which damages have been allowed for mental anguish unaccompanied by physical injury have been actions of torts, not actions based on breach of contract, is merely to allege a technical distinction without any reason for a difference. There are many torts in which no mental sufferings should be allowed as an element of damages, and many actions *ex contractu* where they should be allowed. The test is not whether the action under our former practice was *ex delicto* or *ex contractu*, but the common sense ground, whether in each case, the mental suffering is the natural and probable consequence of the breach of contract or tort. *Croswell, Elec.* § 649, puts this clearly, "as damages are allowed for pecuniary

loss when the subject-matter of the telegram is a pecuniary transaction, so damages should be allowed for injury to the feelings when the subject-matter of the telegram is a transaction involving feelings. Thus messages which, on their face, show that they relate to sickness or death of relatives, give direct information to the telegraph company of the nature of the damages which may be suffered through its negligence." (3) The third ground usually urged in behalf of a defendant telegraph company is the increased litigation, but as there can be no recovery unless the company has been negligent, it is entirely in the power of the defendant to relieve the courts of the labor, and itself of the expense of the threatened additional litigation by faithfully discharging the duty it undertakes, by virtue of the public franchise it enjoys, of delivering promptly and faithfully the messages intrusted to it, and which it is paid to transmit. A failure to do so "is not a mere breach of contract, but a failure to perform a public duty which rests upon it as a servant of the people." *Reese v. Telegraph Co.*, 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583.

As was said in *Cashion v. Telegraph Co.*, 123 N. C. 272, 31 S. E. 494: "A quasi public corporation, exercising extraordinary powers and receiving enormous profits solely in consideration of the performance of its public duties, cannot be permitted to neglect or evade those duties with practical impunity. To allow it to cancel all liability for a negligence that may have wrung the heart strings of the citizen, for whose service it was created, by refunding the 25 cents which it had received, but never earned, would destroy all sense of responsibility." It shocks the moral sense of mankind. In all countries but this the telegraph is an integral part of the post office department (charging much lower rates than here) and the direct exercise of public opinion compels efficient service, as in our postal service. But, here, notwithstanding the act of Congress in 1869 giving the government the option to take charge at any time of the telegraph service, and the recommendation of several Post Masters General that this be done, the telegraph service, whose efficiency is a matter of the utmost importance to the public, remains under private ownership, and public opinion is no factor in securing efficient or removing inefficient servants. The only remedy for a citizen wronged by delayed or undelivered messages, are damages at the hands of a jury for injuries caused by such negligence. So far from removing the liability for negligence in transmitting messages concerning death or illness, the public judgment and sense of justice have been always exercised, when exercised at all, by legislation reversing previous decisions of the courts which had held telegraph companies not liable for mental anguish, caused by their negligence in such cases, as in South Carolina, Arkansas,

Virginia, and other states. *Meadows v. Telegraph Co.*, 132 N. C. 44, 43 S. E. 512. Our stand has been taken not hastily and unadvisedly nor been adhered to by mere persistence, but has been founded upon justice, and the "reason of the thing," as it has seemed to us.

HAYES v. ATLANTA & C. AIR-LINE R. R.
(Supreme Court of North Carolina. Nov. 21, 1900.)

1. ACCORD AND SATISFACTION — EXECUTORY CONSIDERATION.

Where there is an agreement to settle a controverted demand for a consideration, all or a portion of which is executory, the defendant may plead it as a defense, by making proper averments in regard to performance, as an accord and satisfaction of the original demand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Accord and Satisfaction, § 155.]

2. RELEASE—EXECUTION—FRAUD.

Plaintiff, who was illiterate, was induced to settle a cause of action against defendant railroad company for injuries for cash and defendant's obligation to give him employment for life. Defendant's agent, however, produced a release, which contained no reference to such employment, which plaintiff was induced to sign on the misrepresentation and believing that it contained the contract of employment agreed on, after which defendant refused to give plaintiff employment. *Held*, that the release was void for fraud, and constituted no defense to plaintiff's cause of action for his injuries.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 32.]

3. SAME—DEFENSES—RETURN OF CONSIDERATION.

Where, in an action for injuries, defendant pleaded a release as an accord and satisfaction, which was void for fraud, plaintiff was not bound to return the money received as a part of the consideration for the release as a condition of his right to plead the fraud in avoidance of the release.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Release, § 45.]

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by Samuel Hayes against the Atlanta & Charlotte Air-Line Railroad. From a judgment dismissing the cause, plaintiff appeals. Reversed. New trial ordered.

See 52 S. E. 416.

This was an action for the recovery of damages for personal injury. The defendant denied plaintiff's right to recover, and, by way of defense and accord and satisfaction, alleged that plaintiff on October 2, 1902, in consideration of the sum of \$125 paid him, and an amount agreed upon, paid his counsel, executed a release in full and final settlement and satisfaction of any and all injuries, damages, etc., caused from the accident. The plaintiff, by way of reply, alleged that, some time after the injury, the agent of defendant company proposed to settle with him, and offered to give plaintiff a position with the Southern Railway Company, which would afford a living to him and his family during his life, and in addition pay him \$125 to

live on until he should be able to go to work. That plaintiff accepted said proposition; that thereupon said agent tendered to plaintiff a paper writing to be executed, which he represented to plaintiff as containing the terms and provisions of said proposition, and plaintiff, being unable to read for himself and relying upon the truth of said proposition, executed said paper writing by making his mark, and thereupon received the sum of \$125 in money; that he thereafter requested defendant to give him the position promised, which it failed, and now refuses, to do; that if defendant holds a release, or what purports to be a release, from the plaintiff, as alleged, the same was procured by the false and fraudulent representations of defendant's agent. Plaintiff testified that, after the injury had been sustained and suit was brought therefor in Atlanta, in which he had submitted to a nonsuit, that he executed a paper writing presented to him by the agent of defendant corporation. In respect to this he said: "I signed a release to the company. Mr. Stracham saw me about it. He was working for the railroad. He came over to Gastonia two or three times after I was hurt. It was a good while after I was hurt before he spoke about the release. He said he would give me \$125 and a lifetime job watching railroad crossings some where. This was in the waiting room at Gastonia. The next time I saw him he came over there on 39 and brought me over here with him on 36; asked me if I had made up my mind to sign the release. He said he was going to Salisbury. I was going up the main street in Charlotte, met Mr. Torrence, policeman, who told me Mr. Stracham was looking for me. We went to the depot, found Mr. Stracham; he wrote my name and told me to touch the pen, and had Mr. Torrence to sign; Walter Dick also signed it as a witness. When I signed it I asked Mr. Stracham to read it over; he said it was no use to read it, but read a part of it to me. He read this: 'Sam Hayes was to have a lifetime job on the Southern that will pay him \$25 a month—a lifetime job.' He gave me a pass and I went back home. He paid me the \$125. I went to Atlanta before I signed any paper, went on a pass furnished by the company. I went down there four times. I went down there to withdraw a case I had against the Southern." Upon cross-examination, he said: "Mr. Stracham told me that he would pay me \$125 and give me a lifetime job watching crossings. He paid me. I kept the money; never returned it. I signed the paper. Part of paper was read to me—that Sam Hayes is to have a lifetime job. I agreed with Mr. Stracham that if they would give me \$125 and give me a lifetime job this was to be a compromise for the loss of my leg. He was representing the Southern Railroad. He told me to report to Mr. Baker when I got ready to work. I had employed Mr. Mangum to represent me and talked to him about

representing me. Erwin went with me to Arnold & Arnold in Atlanta. He is a brother of Robert Erwin, who lives in Gastonia. I did agree to compromise this matter for \$125, signed a paper to that effect and a lifetime job. I got the money and have never given it back." There was evidence in regard to the alleged negligence and the injury sustained by plaintiff. Upon the conclusion of the plaintiff's evidence, his honor, upon motion of defendant, directed judgment of nonsuit. Plaintiff excepted, and appealed.

Pharr & Bell and A. G. Mangum, for appellant. L. C. Caldwell, for appellee.

CONNOR, J. (after stating the case). We concur with counsel for defendant that where there is an agreement to settle a controverted demand for a consideration fixed by the parties, all or a portion of which is executory, the defendant may set it up, by making proper averments in regard to performance, as an accord and satisfaction of the original demand. In this case, if there were no controversy in regard to the terms of the agreement to release, we should not hesitate to hold that the defense was complete, and that plaintiff would be compelled, for any breach of the contract, to sue upon that cause of action. While, for manifest reasons, we could not compel specific performance of the contract of employment, the plaintiff could recover damages for its breach. The difficulty in fixing the amount would not affect his right of action. The authorities cited in defendant's brief sustain the contention made by counsel in that respect. The principle is well stated in *Laughhead v. Coke Co.*, 209 Pa. 368, 58 Atl. 685, 103 Am. St. 1014. "It is no doubt true that, when the accord is founded upon a new consideration and is accepted as satisfaction, it operates as such, and bars the remedy on the old contract. There is an obvious distinction between an engagement to accept a promise in satisfaction and an agreement requiring performance of the promise. If the promise itself, and not its performance, is accepted in satisfaction, this is a good accord and satisfaction without performance."

The difficulty which we find in this appeal is that plaintiff alleges that he was to receive a certain amount in cash and to have the promise or obligation of the defendant to employ him, etc. This defendant denies. If plaintiff's contention be correct, and defendant, by the fraud of its agent, has procured the execution of the release, omitting this most valuable portion of the consideration, it is in no position to rely upon the release as executed—and it offers nothing more. The plaintiff alleges that there is fraud in the factum; that, being illiterate, the paper writing which he signed was falsely read to him, and that he signed it believing that it contained the terms of the agreement, as made by him. He testifies to his

allegation. If the jury should find with his contention, the release is utterly void. It does not truthfully set forth the agreement upon which the accord and satisfaction is based. In the case cited and relied upon by defendant, *supra*, it is said: "The receipt was in full, and was a receipt for unliquidated damages upon a disputed claim, and, as such, became final and conclusive, because not successfully impeached for fraud, accident, or mistake." The plaintiff, if so advised, could have asked equitable relief by way of reforming the instrument, so that it would conform to the agreement as he alleged it to be. Instead of doing so, he denies that he knowingly executed such a paper writing. It is well settled that if one be illiterate, unable to read, and the paper writing be read to him falsely—that is, otherwise than it is written—and he sign it, such paper writing shall not be his act and deed. This is elementary. *Furches, C. J., in Cutler v. Railroad*, 128 N. C. 477, 39 S. E. 30, after stating the rule regarding fraud in the treaty, says: "If the plaintiff has required it to be read, and E. had read it falsely, it would have been a fraud in the factum." Judge Battle, in *McArthur v. Johnson*, 61 N. C. 317, 93 Am. Dec. 593, after giving an illustration of a fraud in the factum, says: "Another instance is afforded by the case of a deed executed by a blind or illiterate person, when it has been read falsely to him upon his request to have it read." The language of the present Chief Justice, in his concurring opinion, in *Cutler's Case*, *supra*, is decisive of this appeal. "The misrepresentations here are not as to matters in the treaty, * * * but as to the contents of the deed drawn by one of them which the other could not read without his glasses, and who, at the same time, was urged to sign at once without going for his glasses." *Dorsett v. Lumber Co.*, 131 N. C. 254, 42 S. E. 612; 24 Am. & Eng. Enc. 318. There was competent evidence to be submitted to the jury, tending to sustain and, if believed, establishing plaintiff's contention. The defendant, however, insists that plaintiff must, before setting up the defense, return the money which he has received. Whatever may have been required if he had sued to cancel the instrument for fraud in the treaty, we do not think that he is required to return the money before setting up the plea of fraud in the factum. He is asking no equitable relief, but simply insisting that the paper writing, relied upon by the defendant, is not his act and deed, and, as we have said, if he is correct in this, the defendant's plea of accord and satisfaction has nothing upon which to stand. If the issue be found in his favor, and he recover damages, of course the amount paid him will be deducted. If, on the contrary, the jury find against his contention, the defendant's plea of accord and satisfaction is sustained, thus putting an end to the case.

We have not considered the exceptions in the record pointing to his honor's ruling upon questions of evidence, nor do we pass upon the controverted questions in respect to the plaintiff's right to recover upon his allegation of negligence. As the judgment of nonsuit does not state the reasons upon which it is based, we assume that his honor was of the opinion that the defendant was barred by his release. The controversy in this respect, as we have seen, can only be settled by a verdict of the jury and there must be a new trial.

MILLER v. ATLANTA & C. AIR LINE R. CO.

(Supreme Court of North Carolina. Nov. 21, 1906.)

1. CARRIERS—CARRIAGE OF PASSENGERS—ACCIDENTS FOR INJURIES—INSTRUCTIONS.

In an action for injuries to a passenger in a collision caused by the backing of cars against a standing caboose in which plaintiff was sitting, plaintiff testified that he obtained permission to ride on the caboose from the conductor, who said, "If you will wait, I will pull the train a little further up," to which plaintiff replied: "No. Much obliged. I will not put you to that trouble,"—after which, while the conductor was facing him, he went into the caboose. Defendant introduced a written statement signed by plaintiff shortly after the injury, in which the conductor, after having given him permission to ride in the caboose, told him "to wait a few minutes, and he would pull the caboose up to the station." Plaintiff also testified that when he signed the statement he was in great pain, and did not take time to read it. *Held*, that an instruction that plaintiff "admits that he asked the conductor if he could ride on that train * * * and was told by him that he could, but to wait until he got through his work, and he would pull the caboose up to the station," was error, as implying that plaintiff admitted that he was forbidden to enter the caboose until it was drawn up to the station, excluding from the jury plaintiff's right to have them pass upon his testimony, and adopt his version if found correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1330.]

2. SAME.

Where, in an action for injuries to a passenger in a collision caused by backing of cars against a standing caboose in which plaintiff was sitting, there was evidence that plaintiff had gone into the car with knowledge of the carrier's servant, an instruction that if the train of cars including the caboose was not coupled to the engine, the plaintiff was on the car at the time of the injury in his own wrong, and could not recover, was erroneous as making defendant's liability exclusively depend on whether the caboose, when plaintiff got into it, was coupled to the engine.

3. SAME—QUESTIONS FOR JURY.

In an action for injuries to a passenger plaintiff's contributory negligence under the evidence *held* a question for the jury under proper instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1346-1392, 1402.]

Appeal from Superior Court, Mecklenburg County; Peebles, Judge.

Action by Joseph Miller against the Atlanta & Charlotte Air Line Railroad Com-

pany. Judgment for defendant, and, from an order denying a new trial, plaintiff appeals. Reversed, and new trial ordered.

This action was brought to recover damages for an injury to the plaintiff's hand alleged to have been caused by the negligence of the defendant. There are numerous exceptions, but we need consider only one. The plaintiff testified that, on the day the injury was received, he was at Gastonia, and went to the station to take the freight train for Charlotte. He then said: "I found Capt. Clapp, the conductor of the local freight, standing there as I walked up. A freight train was standing at the crossing, and an engine was also at the crossing. Capt. Clapp was standing about 50 to 60 feet from the crossing. I asked Capt. Clapp if I could ride with him to Charlotte on the local freight. He replied, 'Certainly.' I said, 'thank you,' and started to go down to get on the caboose of the train where passengers rode. He said, 'If you will wait a little, I will pull the train up further.' I said, 'No, much obliged. I will not put you to that trouble,' and walked down to the caboose. When I spoke to him, and told him I would not put him to that trouble, he was standing facing me and looking at me. While he was facing me I moved on, I suppose, about 200 yards, and got in the caboose, on the rear of the train which was standing on the main line of the road. The train appeared to be coupled up, and ready to move off. The doors of the caboose were open. There was no one inside. Nothing but the seats, and everything of that kind pertaining to that kind of a train was there. The caboose was used as a passenger and conductor's car for the crew. When I got in the car I sat on a seat between the two doors. It was warm. I had a bundle of samples, and laid them down. I was sitting between the middle door of the caboose and the side doors. I was looking towards the side of the caboose, and was figuring on a piece of paper. When I got aboard the caboose the flagman of the train was just coming down the steps. He asked me if I were going to remain on the run going to Charlotte, and I told him I was. The flagman asked me to watch the car while he was out. I told him, 'all right,' I would do it. I suppose I had been on the caboose two or three minutes before this conversation occurred with the flagman. He gave me no warning whatever. After I had the conversation with him, and while I was sitting on the end of the bench between the two doors figuring, a collision took place, caused by the backing of some cars against the caboose, which came with such force that I was thrown to the door, my right hand caught the door, and it being a rolling door, was jerked and snut by the collision and my fingers on my left hand, on account of the same, were mashed into a pulp. The door cut my fingers at the end, and mashed them

into pulp. As soon as I could get myself together, I caught my left arm with my right hand, and tried to stop the flow of blood which rushed out at every pulsation. I wrapped a handkerchief around the fingers, and ran up to the ice cooler in the caboose, and turned the water on which intensified the pain. Just then the front door was opened, and the caboose was stricken again by the cars, and the shock came near throwing me under the cars. I caught around by the side, and held the best I could until I got myself, and tried to fasten the door. It had a latch on it, but it just flew back and forth as it had nothing on it to control the same. Any motion of the car would throw the latch out. I sat there and tried to brace myself in case of another accident. In a few minutes the cars came back again against the caboose, and threw me from the seat some distance on the floor, and I lay there until I saw the engine and tender going by on another track. I then got off the train, and when it started again I got on. My hip was injured. The latch to the door fell over a nail or little spike instead of a staple, and it flew back and forth with the movement of the train. There was no fastening to the side door. After I had the conversation with the conductor about riding with him on the train to Charlotte, I walked down by the side of the train which was all coupled up and ready to pull out, as it looked to me. There was no obstruction between the conductor and me, nothing to prevent him seeing me. I signed the paper when I came to Charlotte the night of the injury. When I spoke to the conductor and asked him if I could travel on his freight train, I said, 'Captain, can I ride with you to Charlotte?' and he said, 'Certainly.' I said, 'Much obliged,' and started to walk down and he said, 'If you will wait, I will pull the train a little further up,' and I said, 'No, much obliged. I will not put you to that trouble.' When the statement which you show me and which I signed was signed I was in very great pain. I signed that paper at night, and I don't think I took time to read anything. I was in so much pain."

Defendant's counsel then asked the witness: "I notice in the statement which you signed, you say, 'He then told me to wait a few minutes and I will pull the caboose to the station.'" The witness then proceeded: "No, he did not say that. He said, 'If you will wait.' He did it as a favor to me, and I appreciated it, and I told him I would not put him to that trouble." Question by the court: "You thought he was doing that as a favor to you?" Ans. "No, pulling the train up would be a favor. My impression is that the conductor said that if I would wait he would pull the train a little further up. Before I signed the statement, I did not say, 'I am not going to do anything further about this. It was my own fault.' I did not say to Capt. Clapp and Mr. Stahl that

it was my own fault, and I was not going to do anything further with the business. Capt. Clapp said: 'This is trouble. A man has got hurt.' I told him, 'I hope there will be nothing further about it.' I did not think there would be. I did not know I was so seriously hurt. When they asked me to make a statement, I wanted to exonerate Capt. Clapp. I did not think he was to blame. The engineer or the flagman ought to have notified me of the backing of the cars against the caboose. It was about 150 to 200 yards from where I saw Capt. Clapp down to the caboose. The engine was right at the station. It was a long train. The doors of the caboose were all open. The flagman had not closed the doors when I got on. He came in afterwards, and asked me if I was going to Charlotte and if I was, to remain in. When I went down to the caboose the train was all coupled up. Capt. Clapp did not tell me he was going to make up his train. He said, 'If you will wait, I will pull the train a little further up.' I sat down on the seat, and began to figure. The conductor did not tell me there was any danger. I went in the rear door of the caboose car. There was a partition across the middle. There were seats on each side. Passengers ride on any of the seats in there. They all sat in that section. The train got so rough in going to Charlotte that some of the train crew sat behind, and tried to brace themselves against the partition."

The rules of the company were introduced by the plaintiff and among them are the following: "Rule 610. When their trains are ready for the reception of passengers, they (flagmen or brakemen) must take positions at the car steps, and give all necessary assistance and information to passengers." "Rule 613. They (brakemen or flagmen) must prevent passengers from going upon platforms, and as far as possible, from getting on and off trains while in motion and from incurring other risks, or violating any of the rules of the company provided for their safety." There was testimony tending to contradict the witness Miller and to show that he left the conductor and went to the caboose which he entered, contrary to the directions he had received from the conductor, and that when told by the conductor that if he had followed his directions he would not have been hurt, he replied that he did not blame the conductor, and he had not been at fault.

The defendant introduced in evidence a written statement prepared shortly after the plaintiff was injured and signed by him, in which he gave the following account of the occurrence: "I went to the station and found that the local freight would be along in a few minutes, and was told by some one at the hotel that I could come over on that. Pretty soon the local arrived, and I asked the conductor if I could come over on his train, and he told me I could. He then told me to wait a few minutes, and he would pull the caboose

up to the station, but I told him I would walk down to the cab, and did so. Pretty soon one of the trainmen came to the caboose and asked me if I was going to remain in the cab and, after telling him I intended coming to Charlotte with them, he asked me if I would watch the cab a short time for him, and I told him I would. In a few minutes after he left, and while I was sitting on the bench near the side door of the cab, there was a very severe slack or jar of the train that threw me forward from where I was sitting, and I grabbed the door facing to break the fall, and the door caught my left hand, mashing and bursting the ends of my middle fingers. The doors was a sliding door on rollers, and was moved by some jar that threw me from my seat. In about 15 minutes the crew of the train came to the cab, and I told them what had happened. The pain was very painful until about 10 minutes after the accident when there was another severe jar which knocked me from seat to the floor, and after that I did not feel so much of the pain. I wasn't hurt by the last fall. I came on to Charlotte on the local train No. 64. I did not buy a ticket, but paid the conductor cash fare."

The court among other instructions gave the following one to the jury: (1) The plaintiff admits that he got on this freight train, that carried freight and passengers, 200 yards from the station. (2) He admits that he asked the conductor if he could ride on that train to Charlotte, and was told by him that he could, but to wait until he got through his work and he would pull the caboose up to the station. (3) If you find as a fact from the evidence that, at the time he got on the caboose, it was not hitched on and connected, coupled with the engine, he was on the car wrongfully, and he cannot recover in this action. (4) But if you find from the evidence that the car was coupled up in apparent readiness to go, why then your finding upon the first issue will depend upon other circumstances. The court then proceeded to charge at length as to the duty and liability of the defendant and the care required of the plaintiff under the different phases of the case as disclosed by the testimony. The plaintiff excepted to each of these instructions. The usual issues as to negligence, contributory negligence, and damages were submitted. The jury answered the first issue, as to negligence, "No." The court having overruled a motion for a new trial, and entered judgment on the verdict, the plaintiff excepted and appealed.

Brevard Nixon, for appellant. Geo. F. Bason, for appellee.

WALKER, J. It seems to us that the court erred in two respects. We do not think it can be reasonably inferred from the testimony that the plaintiff admitted, or intended

to admit, that the conductor told him to wait until he had finished his work, and the caboose had been drawn up to the station, in the sense that he was forbidden by the conductor to enter the caboose until this had been done, and that he was so forbidden is the clear implication from what is stated by the court, in the opening of its charge, to have been admitted. The jury might well find from the plaintiff's testimony and the written statement would not necessarily vary the finding, that the plaintiff admitted only that while the conductor did tell him to wait a few minutes and he would pull the caboose up to the station, he regarded it merely as a favor offered to him by an obliging conductor, and not as a denial to him of the right to enter the car, or even as a warning to him not to do so. This is made clear by what he said on the cross-examination, where he gave the following version of the facts: "When I spoke to the conductor, and asked him if I could travel on his freight train, I said, 'Captain, can I ride with you to Charlotte' and he said 'Certainly.' I said, 'Much obliged' and started to walk down, and he said, 'If you will wait, I will pull the train a little further up' and I said 'No, much obliged. I will not put you to that trouble.' When the statement which you show me was signed, I was in very great pain." We do not think the written statement materially conflicts with this testimony, although it may not be quite as full and explicit as to what did occur, and even if it does conflict the truth as to what was said and done was a matter solely within the province of the jury to determine. In *Tillett v. Railroad*, 118 N. C. 1035, 24 S. E. 111, it appears that the court charged the jury, upon evidence which in its general features was not unlike that in this case, as follows: "But if the statement was made by the conductor as simple information in response to a question, and was not intended as a direction or requirement, then no duty was imposed by such statement on the plaintiff to wait for the train to pull up." With respect to this instruction, among others relating to the same matter, the court, at page 1046 of 118 N. C., at page 114 of 24 S. E. said: "There was no complaint that the question whether the plaintiff was warned to wait until the car should be drawn up in front of the station, was not properly left to the jury on the last trial. A careful review of the whole statement shows that there was no error."

It is not contended that the plaintiff made any judicial admission in the case which would be binding and conclusive upon him, but it is simply deduced by the court from all the evidence that he did make the admission attributed to him. This statement of the judge certainly excluded from the consideration of the jury the right, which the plaintiff clearly possessed, to have them pass upon his testimony and to adopt his version, if they

should find it to be the correct one. In eliminating this view of the case from the consideration of the jury, by which the plaintiff was clearly prejudiced, there was reversible error. *Rumbough v. Sackett*, 141 N. C. 495, 54 S. E. 421.

We have decided frequently that it is not proper, after laying down a legal proposition, as applicable to a supposed state of facts, if found by the jury, to instruct them, as a deduction therefrom, that the plaintiff is or is not entitled to recover, but simply to direct them how to answer the issues by applying the law as stated by the court to the facts as they may find them to be, and this should be the invariable rule when the case is tried upon issues before a jury. In this case, though, his honor told the jury that if the caboose was not coupled to the engine, or as we understand him to mean, if the train of cars, including the caboose, was not coupled to the engine or in other words if the train was not "made up," the plaintiff boarded the caboose wrongfully, and was therefore on the car at the time of the injury in his own wrong and for this reason he could not recover. The liability of the defendant did not exclusively depend upon whether the caboose, when the plaintiff got on it, was coupled to the engine. If it was not, there were other facts, and other questions to be considered both in regard to the defendant's negligence and the plaintiff's contributory negligence. There was at least some evidence that the plaintiff had gone to the car, and entered it with the knowledge of the company, through its servants, who had charge of the train, if not with their implied consent and this was sufficient to carry the case to the jury, and besides even if he was at first to blame for boarding the car, the company might have been guilty of negligence in pushing the cars back against the caboose with unexpected and unnecessary violence and without the exercise of that degree of care which the situation of the plaintiff and the surrounding circumstances required of it. Whether the plaintiff was himself guilty of such negligence as proximately contributed to his injury, is a question to be determined by the jury upon the evidence under proper instructions from the presiding judge. It seems to us that the case, in the aspect of it now presented to us, is fully covered by the decision of this court in *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111, which bears a striking similarity in some respects to it. We have so recently discussed the liability of carriers with respect to passengers traveling in caboose cars (*Marable v. Railway*, at this term) 55 S. E. 355 that it is useless to enter upon the general inquiry as to the degree of care required of each under such circumstances.

The errors committed in the charge entitle the plaintiff to another trial.

New trial.

BOARD OF COM'RS OF TOWN OF SALEM v. WACHOVIA LOAN & TRUST CO.

(Supreme Court of North Carolina. Nov. 21, 1906.)

1. STATUTES—ENACTMENT—ENTRIES ON JOURNALS—CITY CHARTER.

Entries in the Senate Journal, showing that the charter of the town of Salem (Acts 1891, p. 729, c. 40) passed its second reading by a vote of "Ayes, 39; Noes, —, as follows," and its third reading by a vote of "Ayes, 34; Noes, —, as follows," each followed by a list of those voting in the affirmative, without reference to those voting in the negative, is a sufficient compliance with Const. art. 2, § 14, requiring the ayes and noes entered on the journals, and shows that no votes were cast in the negative in either case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 20.]

2. MUNICIPAL CORPORATIONS—ORDINANCES—ENACTMENT.

Under the charter of the town of Salem (Acts 1891, p. 746, c. 40, § 70), providing that the board of commissioners may borrow money or create a public debt only after they have passed an ordinance by a three-fourths vote of the entire board at two separate regular meetings, where there were seven commissioners elected as prescribed by the charter, and one has resigned, a passage of an ordinance for the issuance of bonds by a vote of five members of the board is sufficient.

Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3, overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 207.]

Appeal from Superior Court, Forsyth County; Ward, Judge.

Action by the board of commissioners of the town of Salem against the Wachovia Loan & Trust Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

The defendant entered into a contract with the town of Salem to purchase from the said town \$100,000 par value of its bonds, at the price of \$101,750. The bonds were a part of a total issue of \$125,000, issued pursuant to an election held on the 26th of June, 1906, under the provisions of the charter of the town of Salem, being chapter 40, page 729, of the Acts of 1891. On the tender of the bonds by plaintiffs, defendant refused to accept same, on the ground that said bonds were not of a valid issue of bonds, and did not constitute a legal obligation of the said town of Salem. Plaintiffs brought suit to enforce the contract, and the case was heard on the complaint and answer at the September term, 1906, of Forsyth superior court.

Manly & Hendren, for appellant. A. H. Eller and Peele & Maynard, for appellees.

BROWN, J. It is contended by the defendant that the bond issue is void for two reasons: First, because the charter of the town of Salem, authorizing the issue, was not passed by the General Assembly, and the ayes and noes entered on its journals, in accordance with article 2, section 14, of the Constitution of this state; second, because the ordinance directing the issue of the bonds

and submitting the question to a vote of the people was not passed by a three-fourths majority of the entire board of commissioners of the town, as required by the charter.

In respect to the first objection made to the validity of the bonds, it is admitted that the journals of the House of Representatives are entirely regular, and that the bill was passed by the House in strict conformity to the organic law. But on its passage by the Senate, it is contended that the negative votes were not recorded. The entries on the Senate Journal in respect to this bill are as follows: "Senate Journal, Senate Chamber, January 23rd, 1891. The bill passed its second reading. Ayes, 39; Noes, —, as follows." Then follows list of votes of those voting in the affirmative, without any reference to those voting in the negative. "The bill passed its third reading. Ayes, 34; Noes, —, as follows." Then follows a list of those voting in the affirmative, with no further reference to those voting in the negative. It is admitted that the case of *Debnam v. Chitty*, 131 N. C. 657, 43 S. E. 3, is an express authority sustaining defendant's contention. After much reflection, we are unwilling to follow the decision of the court in that case, in so far as it holds that the entries upon the journal do not indicate that there were no negative votes. In the dissenting opinion of Mr. Justice Clark, it is said: "The expression, 'passes by the following vote, Ayes, 94 (giving names); Nays, —,' is as express and intelligent declaration that there were no negative votes as if the word 'none' had been used. 'Nays, —,' after the words 'passes by the following vote,' and giving those voting aye, can convey no other meaning. Is it not hypercritical to say that 'Nays, —,' did not mean that there were no names in the negative?" This provision in our Constitution serves an important purpose in compelling each member present to publicly assume his share of the responsibility in the passage of such legislation, but more particularly in furnishing conclusive evidence whether the bill has been passed by a constitutional majority. In passing upon a similar question, the Supreme Court of Illinois says: "The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. * * * It must appear on the face of the journal that the bill passed by a constitutional majority." *Spangler v. Jacoby*, 14 Ill. 297, 58 Am. Dec. 571; *Cooley's Constitutional Limitations* (7th Ed.) 201. The entries upon the Senate Journal give the names of a large majority of the total membership of that body as voting for the passage of this bill upon the second and third readings, so that there can be no question of its passage by a constitutional majority. But the entries indicate further that the bill passed by a unanimous vote, and that there were no names to be recorded as voting in

the negative. This identical question was considered by the Circuit Court of Appeals, Fourth Circuit, in the case of *Commissioners of Onslow County v. Tollman* (C. C. A.) 145 Fed. 765, a case originating in this state. In his opinion, Judge McDowell, referring to *Debnam v. Chitty*, says: "After the most careful consideration that we have been able to give the subject, we find ourselves unable to adopt the construction given the clause in question by the learned Supreme Court of North Carolina." So are we unable to agree with our predecessors, and in that respect we overrule the decision referred to.

It is next contended that the ordinance under which the election was held to authorize said issue of bonds was not passed by the board of commissioners of the town of Salem, as prescribed by the charter. Section 70 of said charter reads as follows: "That under the powers hereby conferred upon the board of commissioners, they may borrow money or create a public debt only after they have passed an ordinance by a three-fourth vote of the entire board at two separate regular meetings. * * *" There were originally elected seven commissioners, as prescribed by the charter. One had resigned, leaving six members of the board at the time of the second passage of the ordinance. At the meeting of the board, when the ordinance was alleged to have been passed the second time, only five members of the board were present, all voting for the passage of said ordinance. It is argued by the defendant that the ordinance is not valid unless passed by three-fourths of the entire board; that the entire number is seven, and five is not three-fourths of seven; that in the construction of the language of the charter, there cannot be taken into consideration vacancies, however bona fide they may be, and the language means three-fourths of the entire board provided for by the charter. The authorities which the learned counsel for the defendant have called to our attention do not bear out his contention that the language of the charter should be construed as if it read three-fourths of the entire board elected. Such a provision is not uncommon in charters of municipal corporations, and the fact that the word "elected" was omitted after the word "board" is indicative to us that the Legislature intended that three-fourths of the entire membership of the board in existence at the passage of the ordinance should have power to pass such an ordinance. Wherever the special provision in such charters contains the words "entire board elected," or similar terms, it is invariably held that all the members elected must be taken into account. *Dillon on Mun. Corp.* § 281. We are unable to find any judicial decision which places the same construction upon the words "entire board," when the word "elected" does not follow. The term "board," when used in municipal charters, seems to have two meanings—one abstract, having reference to the

legislative creation, the corporate entity, which is continuous, and the other referring to its members, the individuals composing the board. The words "entire board," as used in the Salem charter, refer to the membership of the board, and were evidently inserted to guard against hasty municipal legislation by requiring three-fourths of all the members to concur. As the board—the corporate body—was composed of only six members when this ordinance was finally adopted, five of its members being present and voting for its passage, the requirements of the charter were fully complied with. So in a case where the power of a motion was conferred upon a municipal council to be exercised "by a vote of three-fourths of that body," this was held to give the power of removal to two-thirds of a legal quorum. Two-thirds of the members elected were not required. *Warnock v. Lafayette*, 4 La. Ann. 419. In South Carolina it is held that where, of 18 managers (a board constituted to try a certain election), appointed by the Legislature, 2 refused to qualify, 1 was disqualified, and 1 was dead at the time the board of managers convened, the remaining 14, being all the members in esse, properly constituted the board, and might act by a majority of the 14. *State v. Delleselline*, 1 McCord, 52. It is held in Missouri that an amendment is ratified by the "House," within the meaning of the Constitution of that state, when it is ratified by two-thirds of a legal quorum; that when a legal quorum was present, that was in law the "House." *State v. McBride*, 4 Mo. 308, 29 Am. Dec. 636. See, also, *Sanders v. Ellington*, 77 N. C. 255. In construing the meaning of the words, "with the concurrence of a majority of the justices of the peace," this court has held that, where a majority of the justices of the county are assembled, the justices were in legal session, and a majority of that majority could legally act. *Cotton Mills v. Commissioners*, 108 N. C. 678, 13 S. E. 271. We are of opinion, therefore, in this case that the words "entire board" mean all the members of the board in existence, and not all those originally elected. When the five members assembled they constituted a legal board, and a majority of that five had the right to pass any ordinary matter; but, as to borrowing money or creating indebtedness, such ordinances must receive the sanction of three-fourths of the then membership of the board, whether present or not.

Affirmed.

DRAWDY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Oct. 19, 1906.)

CARRIERS — INJURIES TO PASSENGER — GROSS NEGLIGENCE.

Whether it is gross negligence for one waiting at a station to go on the other side of the track, and recross after hearing the first

signal of the approach of a train, is a question for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1363.]

Appeal from Common Pleas Circuit Court of Colleton County; Dantzler, Judge.

Action by W. P. Drawdy, executor of M. A. Drawdy, against the Atlantic Coast Line Railroad Company. From an order overruling a demurrer, defendant appeals. Affirmed.

Huger Fitz Simons and Mordecial & Gadsden, for appellant. J. G. Padgett and Howell & Gruber, for respondent.

WOODS, J. The circuit judge overruled a demurrer to the foregoing complaint, interposed on the ground that it failed to state facts sufficient to constitute a cause of action "(1) in that it appears upon the face thereof that the injury complained of was not caused by the negligence of the defendant; and (2) that the contributory negligence on the part of the plaintiff's intestate was the proximate cause of the alleged injury."

There are several exceptions, but they all raise the question whether it is per se such negligence as will prevent a recovery for personal injuries or death for one to undertake to cross a railroad track at a crossing after he has heard one blast of the whistle of an approaching train. The statute not only requires that the signal shall be given at least 500 yards from the crossing, but that the ringing of the bell or sounding of the whistle shall be continued until the crossing is passed, or the train brought to a standstill. One of the purposes of requiring the signal to be continued is to give notice of the location of the train and the rapidity of its approach, especially when, as is alleged in this case, it cannot be seen, on account of a curve or other obstruction. If it is true, as alleged, that the only signal was one short sharp blast of the whistle, then the defendant violated the law. The statute provides that, if the continued signals prescribed are not given, "the corporation shall be liable for all damages caused by the collision * * * unless it be shown that in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law; and that such gross or willful negligence or unlawful act contributed to the injury." The instances are no doubt rare where it is not negligence to undertake to cross a railroad track in front of a train known to be approaching at ordinary speed. But whether it is gross negligence for one waiting at a station to become a passenger to go on the other side of the track, and recross after hearing the first signal of the approach of a train, presumed to be given at a distance at least 500 yards, depends on the distance to be covered by such passenger in

recrossing, and perhaps other circumstances. Kirby v. Railway Co., 63 S. C. 494, 41 S. E. 763. There are no particulars of the accident alleged in the complaint showing on their face gross or willful negligence on the part of the deceased. W. P. Drawdy, in attempting to cross the track. The question of negligence on his part is therefore for the jury.

The judgment of this court is that the judgment of the circuit court be affirmed.

HUTTO v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 15, 1906.)

1. JURY—LIST—PREPARATION—CANVASSING.

That the supervisors and not the jury commissioners prepared the lists from which names to fill the jury box were made up, but which list was canvassed by such commissioners in January, instead of December, as provided by the jury law of 1902, does not vitiate the panel.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 275.]

2. CARRIERS—PASSENGER WITH PASS—INJURY TO BAGGAGE.

Where plaintiff was traveling on a pass under an agreement thereon that the railroad company should not be liable for damage to property of such person by negligence of its agents or otherwise, such person could not recover for loss of baggage, except for willful misconduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1543, 1549.]

Appeal from Common Pleas Circuit Court of Barnwell County; Purdy, Judge.

Action by Rosa Hutto against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robert Aldrich, for appellant. E. T. La Fitte and J. F. Carter, for respondent.

JONES, J. The plaintiff brought this action to recover damages for the loss of a trunk and contents delivered to defendant as baggage on June 20, 1905, when she became a passenger on defendant's train from Denmark, in Barnwell county, to Calhoun, in Pickens county, and recovered judgment, from which defendant appeals.

After interposing a demurrer to the complaint for insufficiency, which was overruled, defendant challenged the whole array of jurors drawn for the term, on the ground that the list from which the names were taken to be placed in the jury box was prepared by Mr. E. C. Bruce, the supervisor, and not by the jury commissioners, composed of the county auditor, county treasurer, and clerk of court, as provided in the jury law of 1902. After taking testimony on the point, Judge Purdy overruled the objection, under the authority of Rhodes v. Southern Ry. Co., 63 S. C. 494, 47 S. E. 689. The testimony developing that the list was made up about the 1st of January, or early in January, instead of in December, as prescribed by

the act, this fact was also urged as an objection to the array, but was also overruled, under the principle of said case, as a mere irregularity not sufficient to vitiate the drawing of the jury.

1. Appellant's first exception questions these rulings. We approve the ruling of the circuit court. The evidence shows that, while the supervisor did prepare a list of names for the jury commissioners, the jury commissioners carefully revised the same, and made a selection, from which the jury box was made up. The Rhodes Case, to which reference has been made, decides that the fact that the clerk of the board of county commissioners prepared a list of the electors from the tax books, which was canvassed and revised by the proper officers, was a mere irregularity, and therefore an insufficient ground for quashing the array of jurors. In the same case it was held that leaving the list in the clerk's office and not in the jury box, as required by statute, and the fact that there were two lists instead of one, are mere irregularities. In State v. Smalls, 78 S. C. 519, 53 S. E. 976, it was again declared that the statutes which prescribed the time and manner of selecting jurors are usually regarded as directory, and hence there was not a fatal defect, in drawing grand and petit jurors, to assign as grand jurors those regarded to be best qualified for grand jury duty, and leaving the others drawn for the petit jurors, although the statute prescribed that "the persons whose names are first drawn, to the number required, shall be returned as grand jurors, and those afterwards drawn, to the number required, shall be jurors for trials." There is no suggestion in this case that the jurors selected were not good and lawful men qualified to sit as jurors, or that defendant's rights were in any wise injured or prejudiced by any conduct of the jury commissioners. The foregoing covers all the specifications of error as to matters brought to the attention of the circuit court and ruled upon, and hence the first exception is overruled.

2. The defendant alleged as a defense, and introduced evidence to prove, that plaintiff was not a passenger for hire, and that she and her baggage were being transported on a "free pass," bestowed as a gratuity, upon a special agreement printed on the pass, as follows: "The person accepting this pass agrees that the Southern Railway Company shall not be liable under any circumstances, whether by negligence of agents or otherwise, for any loss or damage to the property of the person using the same."

Appellant's second exception alleges that the court erred in refusing to instruct the jury that the plaintiff, under the terms and conditions of the pass upon which she was traveling, waived all right to recover for loss of property. At the request of appellant, the circuit judge charged the jury that, if

said baggage was carried without compensation, the appellant could only be liable as a gratuitous bailee—that is, for a failure to exercise slight care—or could only be answerable for gross neglect or bad faith. The jury were further instructed in these words: "The railroad company could stipulate upon what terms it would receive her gratuitously, upon what terms they would receive her with her trunk gratuitously, and, if she entered upon that contract, she was bound by it, except that having received her, and if it received her property (her trunk) then it would not be liable, unless it be shown that the railroad company was guilty of willful or wanton misconduct towards her, or showed a reckless disregard of her rights." It seems to us, therefore, that the circuit court instructed the jury somewhat more favorably for defendant than it contended for, and quite as favorably as any view of the authorities on this subject could possibly permit. Under the charge, the defendant was exonerated from all liability for loss of baggage carried gratuitously under the special contract mentioned, even though the loss resulted from the negligence of the defendant, whether ordinary or gross, unless so gross as to show a wanton or willful disregard of plaintiff's rights. There is some conflict among the authorities in the various jurisdictions as to whether such a contract as applied to a passenger injured by ordinary negligence, while traveling on a strictly gratuitous pass, is a protection to the company. The Supreme Court of the United States, in *Northern Pacific Railway v. Adams*, 24 Sup. Ct. 410, 48 L. Ed. 513 (citing cases, which was affirmed in *Boeing v. Chesapeake Beach R. R. Co.*, 24 Sup. Ct. 515, 48 L. Ed. 742), takes the view that such a contract by a passenger traveling gratuitously protects the company from injuries resulting from ordinary negligence; but no case has been cited, and we have discovered none, which holds that such a contract would protect a carrier from the consequences of its wanton and willful disregard of duty. A railroad company owes it to a bald trespasser to do him no willful injury, and to a mere licensee it owes the duty of exercising ordinary care. It would be contrary to public policy to sustain a contract in so far as it sought to exempt from willful misconduct. We have not referred to the case of *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 102, 54 S. E. 255, as the court held that the pass under consideration was not strictly a free pass. As the case before us does not call for our determination whether such a contract by a gratuitous passenger would exempt the company from negligence, we refrain from expressing an opinion on that point. We merely hold that appellant has no ground for complaint, as the charge exempted from liability except in cases of willful misconduct.

The judgment of the circuit court is affirmed.

DOYLE v. HILL.

(Supreme Court of South Carolina. Oct. 5, 1904.)

INSURANCE—ACTION ON PREMIUM NOTE—DEFENSES.

In an action on a note given for the first premium on a life insurance policy, evidence on the part of defendant that the policy was void because of a false answer to a question in the application is inadmissible, where the insurance company, after notice of such false answer, insisted that the policy was valid.

Appeal from Common Pleas Circuit Court of Oconee County; Dantzler, Judge.

Action by W. B. Doyle against J. B. Hill. Judgment for plaintiff. Defendant appeals. Affirmed.

J. E. Boggs and J. P. Cary, for appellant. R. T. Jaynes, for respondent.

JONES, J. The defendant gave his promissory note, dated July 16, 1902, to W. A. Barton, agent for the Travelers' Insurance Company, for \$118.61, payable December 1, 1902, which on its face was to secure payment of premium on policy No. 127,683, due July 21, 1902. Shortly after the policy was delivered to defendant he returned it to the insurance company, stating his objection by letter, which gave rise to considerable correspondence, in which the company endeavored to meet his objections, insisting on his retaining the policy and declining to surrender the note. The note was transferred after maturity to plaintiff, who brought this action thereon. The defendant, among other things, pleaded failure of consideration, and on the trial offered evidence to show that the application, which was made a part of the contract of insurance, contained the answer "No" to the question whether he ever had piles, which was a false statement by the medical examiner as to defendant's true answer, which was "Yes," the contention being that the policy was thereby rendered void, and hence that the note was without consideration. The circuit court, after admitting the testimony, later, on motion of plaintiff's counsel, struck it out on the ground that defendant could not offer parol testimony to vary or contradict the contract of insurance as written, including the application. The exceptions taken altogether and liberally construed allege error in the ruling above indicated. It is contended that the ruling was incorrect, for two reasons: (1) Fraud being charged, the rule excluding parol evidence does not apply. *Mason v. Telegraph Co.*, 71 S. C. 150, 50 S. E. 781. (2) It is competent to show that the note was without consideration; citing, among other cases, *McGrath & Byrum v. Barnes*, 13 S. C. 332, 36 Am. Rep. 687, and *Groesbeck v. Marshall*, 44 S. C. 544, 22 S. E. 743. There would be great force in appellant's contention if the testimony offered really tended to show that the policy was void and therefore that the

note was without consideration. On the contrary, the testimony offered tended to show a valid policy, and hence appellant was not prejudiced by the ruling. Assuming that an answer to the question materially affecting the risk and warranted to be true would justify a forfeiture of the policy on discovery that the answer was really false, the insurance company may waive the forfeiture, or be estopped to assert it. An insurance company, affected with knowledge of its agent and thus knowing the existence of a cause of forfeiture at the inception of the contract, is estopped to assert such forfeiture by accepting the premium, and delivering the policy as a valid contract of insurance. *Gandy v. Insurance Co.*, 52 S. C. 228, 29 S. E. 655. It would be anomalous to hold it reversible error to exclude testimony which, if admitted and found to be true, would necessarily defeat the purpose for which it was sought to be introduced.

The judgment of the circuit court is affirmed.

WILSON LUMBER CO. v. D. W. ALDERMAN & SONS CO. et al.

(Supreme Court of South Carolina. Oct. 15, 1906.)

1. DAMAGES—WILLFUL TORTS.

In an action based on a willful tort, plaintiff may recover, not only punitive, but also compensatory, damages.

2. APPEAL—HARMLESS ERROR.

Where, in an action for a willful tort, the court instructed that plaintiff could not recover unless a case of willfulness was established, the fact that the jury gave only compensatory damages was not prejudicial to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052, 4056.]

Appeal from Common Pleas Circuit Court of Florence County; Watts, Judge.

Action by the Wilson Lumber Company against D. W. Alderman & Sons Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wilson & Du Rant, S. W. G. Shipp, Gattleys & Ragsdale, and Walter H. Wells, for appellant. W. C. Benet and Wilcox & Wilcox, for respondent.

JONES, J. The complaint in this action alleged a willful tort by the defendants in destroying a section of railroad track on the land of Maggie Jones, in Florence county, whereby a number of plaintiff's cars were thrown from the track and wrecked with their contents of freight, and endangering the lives of the railroad crew, to plaintiff's damage \$50,000. The defendants interposed as a defense that the rails and ties were removed without any intention to injure plaintiff, but for the sole purpose of removing an unlawful obstruction on the exclusive right of way of D. W. Alderman & Sons Company, and of protecting the same against the

trespass of plaintiff in defiance of the injunction of the court in the case of *Alderman & Sons v. Wilson*. The jury first brought in the following verdict: "We find for the plaintiff the amount of actual damages and demurrage and costs of court expenses." Judge Watts instructed the jury that the verdict should express some specific amount as actual damages, and that the costs would follow the verdict. The jury retired and soon returned with the following verdict: "We find for the plaintiff the amount of \$1,000." Thereafter during the term defendants moved for an order dismissing the complaint and for leave to enter judgment in favor of defendants against plaintiff upon the ground: "That the foundation of the plaintiff's cause of action set out in the complaint is an alleged reckless, willful, wanton, and malicious tort alleged to have been committed by the defendants; and the verdict of the jury negatives the charge of recklessness, willfulness, wantonness, and malice, is a finding in favor of the defendants and against the truth of the said charge, and amounts to an acquittal of the defendants." Judge Watts refused the motion, and defendants' exceptions question the correctness of the court's action, raising the question whether in an action solely for a willful tort a verdict for actual compensatory damages alone can be awarded. We have no hesitation in answering this question in the affirmative, especially when, as in this case, the party complaining is the party against whom the verdict is rendered. In an action based upon ordinary negligence, plaintiff can only recover compensatory damages, but in an action based upon a willful tort plaintiff may recover not only punitive damages, but also compensatory damages, provided he proves a willful tort. *Proctor v. Ry.*, 61 S. C. 187, 39 S. E. 351; *Chiles v. Southern Ry.*, 69 S. C. 332, 48 S. E. 252. It is also well established that plaintiff is entitled to punitive damages as matter of right, and that it is not within the discretion of a jury to refuse such damages, when a case is made out which justifies a verdict for punitive damages. *Griffin v. Ry.*, 65 S. C. 127, 43 S. E. 445; *Dagnall v. Ry.*, 69 S. C. 115, 43 S. E. 97; *Beaudrot v. Ry.*, 69 S. C. 164, 48 S. E. 106. The appellants consider these as established rules, but build their contention on a misapplication of them. The fallacy in appellant's position is in assuming that a verdict for actual or compensatory damages in an action for willful tort is a special finding that there was no willful wrong, on the presumption that if there had been proof of willfulness the jury would have awarded also punitive damages. But a court has no authority to write into a verdict any special findings not fairly embraced in it, and especially cannot deduce from a verdict a special finding wholly inconsistent with its terms. This is a verdict for the plaintiff in an action for a willful tort upon explicit instructions that the plaintiff could

not recover unless a case of willfulness was established.

The following instructions were given at defendant's request: "(8) If the defendant's purpose in removing the track of the plaintiff was simply to protect the said right of way of D. W. Alderman & Sons Company, and to remove an unlawful obstruction therefrom, and it was done in such a manner as to convince the jury by the preponderance of the evidence that it was the purpose and intention of the defendants thereby to wreck the plaintiff's train, or injure its property or the persons of its servants and agents, the plaintiff cannot recover. (9) The foundation of this action is the wanton, willful, and malicious and intentional injury, or attempted injury, by the defendants of the property of the plaintiff, or the persons of its servants or agents, and this must be established by the plaintiff by the preponderance of the evidence, or it cannot recover. (10) The plaintiff cannot recover by showing that the acts of the defendants in removing the track of the plaintiff from the said right of way of D. W. Alderman & Sons Company was done in a negligent, or even in a grossly negligent, manner, unless such negligence was so gross as to show a wanton, willful, and malicious intention to injure the plaintiff's property or servants, or a reckless disregard of the ordinary instincts of humanity, or amounts to a reckless disregard of human life." Under such instructions we are bound to assume that the jury found that defendant's conduct was willfully wrong, assuming that the final verdict under the circumstances was intended to give only compensatory damages, the failure to give plaintiff punitive damages also was not prejudicial to defendants, and therefore was not such a verdict as defendants have a right to question on that ground. To grant defendant's motion would involve the anomaly of giving judgment for defendants when the verdict was for the plaintiff.

The judgment of the circuit court is affirmed.

FORD et ux. v. SOUTHERN RY.

(Supreme Court of South Carolina. Oct. 11, 1906.)

1. CARRIERS—ACTION BY PASSENGER—ALIGHTING AT WRONG STATION.

In an action to recover because defendant railroad company, through its agent, negligently caused plaintiff, a passenger, and her children to alight at the wrong station, an allegation that the conductor said: "This is your place to get off," and took out her baggage, is supported by testimony that a flagman, assisting the conductor, induced her to get off at such station.

2. SAME—INSTRUCTIONS.

Where plaintiff sued to recover because induced by the conductor to get off a train at the wrong station, though there was no allegation of negligence in the call of stations, the specific allegation that the conductor told her that it was the place to get off renders it immaterial

how the ordinary call of stations was made, and an instruction authorizing a recovery if the conductor did not call out the station, whereby plaintiff got off at the wrong station, was harmless error.

Appeal from Common Pleas Circuit Court of Lexington County; Hydrick, Judge.

Action by Alice and Furman Ford against the Southern Railway. Judgment for plaintiff, defendant appeals. Affirmed.

E. M. Thomson and W. H. Sharpe, for appellant. G. T. Graham, for respondent.

JONES, J. The plaintiff, Mrs. Alice Ford, with her seven infant children, on June 19, 1905, boarded defendant's train at Augusta, Ga., as passengers for Fredonia, Lexington county, S. C., and she alleges that defendant company, through its agent, negligently and willfully caused her and the children to leave the train at Ridge Spring, S. C., where she was compelled to remain without means or food until 3 o'clock that night before she could resume her journey, whereby she was distressed in mind and body and made ill, to her damage \$2,000. The jury rendered a verdict in favor of plaintiff for \$500, and from the judgment thereon defendant appeals upon one exception to the instructions given to the jury. The defendant requested the court to charge the jury: "If the plaintiff has failed to prove by the preponderance of the evidence that the conductor caused her to leave the train at Ridge Spring, as she alleges, your verdict must be for defendant company." Responding to this request, the court charged: "I say it must be for the defendant company as to the matter of punitive damages. If she has failed to prove by the preponderance of the evidence that the conductor caused her to leave the train at Ridge Spring, as she alleges, your verdict must be for the defendant on the matter of punitive damages, but I could not charge that proposition as to the other damages. If he negligently failed to call out the station, or if he did not, and she thinking that she had reached her destination got off at the wrong place, it would be a question for you to say whether her getting off was due to the negligence of the company in failing to call out the station, and hence I make that modification of that request." The specifications of error are: (1) That the request was correct and applicable. (2) That there was no allegation of negligence in failing to call out the station of Ridge Spring, and the charge, therefore, injected an issue foreign to the pleadings. (3) That, plaintiff's destination being Fredonia, defendant owed her no duty to call out the Ridge Spring station. (4) That the charge allowed recovery of damages if the conductor did not call out the station of Ridge Spring and plaintiff got off at the wrong station, thinking she had reached her destination.

While the exception seems plausible at first glance, its force vanishes on a view of the

whole record. The allegations of the complaint sufficiently appear from paragraph 7, which we quote as follows: "That, upon reaching the said Ridge Spring station, the conductor of said train, who was the agent and servant of the defendant, and acting within the scope of his authority as such, approached plaintiff Alice Ford, who was an absolute stranger, had never traveled over said railroad and knew nothing about the stations along it, and said to her, 'This is your place to get off,' and gathered up a package or basket that belonged to her, and she then and there told him that she wanted to get off at Fredonia, and thereupon the said conductor again said to her, 'This is your place,' and carried her said package or basket out of the car and placed it on the ground, telling her to get off the train, and caused her to leave said train at Ridge Spring, and from the statements and representations so made to her by said conductor she believed that she was at Fredonia, and did not know the contrary until after said train had left, when to her great astonishment she was informed that she was at Ridge Spring; that, immediately after inducing plaintiff Alice Ford to get off said train, the said conductor, who was the agent and servant of the defendant, and acting within the scope of his authority as such, caused said train to move off rapidly, carrying away her trunk and leaving her and her said infant children at Ridge Spring aforesaid, and thereby prevented her from reaching Fredonia on said train." While there is no allegation of negligence in the usual call of stations, the specific allegation is that the conductor said to her as the train reached Ridge Spring, "This is your place to get off," although he knew that her destination was Fredonia, thereby inducing her to leave the train at the wrong station. It was, therefore, wholly immaterial to her case how the ordinary call of stations was made, if the conductor, or any one authorized to aid in assisting passengers off the train, negligently or willfully misinformed her as to her station, and, ignorant of the error and relying on the information, she got off at the wrong station, to her injury. The allegation in the complaint that the conductor did the various acts which caused her to leave the train at the wrong station would be supported by testimony which tended to show that any agent of the defendant, whose duty it was to assist the conductor in putting passengers off the train, induced her to get off at the wrong station. The plaintiff and her daughter testified that it was the conductor who said, "This is your place to get off," and carried out a part of the baggage and assisted her off, whereas, the evidence on behalf of the defendant was to the effect that the conductor on reaching Ridge Spring immediately left the train to attend to a heavy shipment of peaches by express, leaving his

flagman to assist the passengers. The flagman testified that he carried out a part of plaintiff's baggage and assisted her off the train, but did not tell her anything about that being her station, but on the contrary called out "Ridge Spring," and that he did not know that Fredonia was her station. Inasmuch, however, as plaintiff's testimony charged the one who assisted her from the train as being the one who gave her the wrong information, and the testimony for defendant showed that the person who assisted her was the flagman, the evidence made it possible for the jury to take the view that plaintiff, being a stranger to the parties and engrossed with the care of her children, was mistaken in supposing it was the conductor who misinformed her, but that it was the flagman assisting the conductor who did so, and thereby caused her to leave the train at the wrong station. Under this view it would have been error to charge the jury unqualifiedly to the effect that plaintiff had no case unless she proved that the conductor himself caused her to leave the train, whereas, the real question was whether the defendant company by its agents wrongfully caused her to leave by giving misleading information as to her station. While possibly the circuit court was inexact in its modification of the erroneous request to charge in not distinguishing between negligence in failure to give the usual station call and negligence in giving misleading information as to a passenger's station, we cannot think the jury were thereby misled into an issue foreign to the case in view of the whole charge. The circuit court charged the jury explicitly: "The burden is upon the plaintiff to prove to your satisfaction by the greater weight of the evidence the allegations of her complaint." Again, the court charged: "The burden is upon her to make out her complaint by the preponderance of the evidence. She must prove it to your satisfaction that the railroad was guilty of negligence, etc." All of which shows that the court strove to confine the issues to those raised by the pleadings.

The judgment of the circuit court is affirmed.

WOODS, J. I concur, and think this remark should be made in addition to the reasons for affirmance stated by Mr. Justice JONES. There was evidence that the stations, including Ridge Spring, were called in the usual way, and there was no evidence whatever to the contrary. It is not, therefore, to be presumed that the jury found a verdict on an issue erroneously submitted to them, not only unsupported by any evidence, but opposed to all the evidence on the subject. The presumption is that they found against the defendant on the allegation which plaintiff offered positive evidence to support, namely, that she was misled by a special

call or direction of the conductor or brakeman to her to get off before she reached her destination.

HARRISON v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of South Carolina. Oct. 8, 1906.)

1. TELEGRAPHS — DELIVERY OF MESSAGE — SERVANTS.

An instruction that it is the duty of a telegraph company to employ competent and diligent servants for the delivery of messages intrusted to it, and if such an agent is negligent in the delivery of messages by which the addressee of the message suffers mental anguish, the company is responsible, is not error, though there was no allegation that the telegraph company had failed to employ competent messengers.

2. SAME—REGULATIONS—WAIVER.

Where, in an action against a telegraph company for delay in delivery of a telegram there was evidence of a waiver by defendant of its regulations as to office hours, an instruction defining waiver and stating that there could be a waiver of such regulations on the part of the company was not error.

3. SAME—PROMPTNESS IN DELIVERY.

A telegraph company is bound to deliver with reasonable promptness messages intrusted to it, and if the agent of the company the morning after a message was received found the message at his office and during office hours failed to deliver it promptly, the company is responsible for the resulting damages.

[Ed Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 33.]

4. SAME—ACTION FOR DAMAGES—INSTRUCTIONS.

Where, in an action for delay in delivering a telegram the court at length details the duty of the jury in regard to the facts in proof, that he also states that if the jury find for plaintiff they may award such damages as they conclude resulted from the negligence of the defendant is not error.

5. SAME—QUESTION FOR JURY.

Where there was some evidence that damage resulted to plaintiff by reason of the nondelivery of a telegram on Sunday morning, the issue was for the jury.

[Ed Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 76.]

6. SAME—PUNITIVE DAMAGES.

An instruction that if failure to deliver a telegram was from a disregard of the rights of plaintiff, so as to amount to willfulness the jury could award punitive damages was not error, where there was evidence offered on such subject.

[Ed Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 71.]

Appeal from Common Pleas Circuit Court of Edgefield County; Gage, Judge.

Action by P. B. Harrison against the Western Union Telegraph Company. Judgment for plaintiff, defendant appeals. Affirmed.

Evans & Finley, Barrett & Tompkins, and Mr. Wells, for appellant. McG. Slimkins and Sheppard Bros., for respondent.

POPE, C. J. The first trial of this action in this court resulted in a new trial because of errors in the charge of the circuit judge. 71 S. C. 336, 51 S. E. 119. It now comes be-

fore us after a trial which resulted in a judgment for the plaintiff upon the alleged errors in the charge of the circuit judge. The plaintiff alleged that he suffered greatly because of the negligence and willfulness of the defendant in its failure to promptly deliver a dispatch announcing the death of his father, Dr. E. J. Harrison, on the 18th April, 1903, which prevented the plaintiff from viewing the remains of his dead father and from attending his burial at Columbia, Va., on the 20th of April, 1903. The dispatch was in these words: "Columbia, Va., 13—P. B. Harrison, Johnson, S. C. Father died to-day 2:30. Funeral Monday, 11. [Signed] Kate Harrison." This telegram was transmitted and received by the defendant at its office at Johnston, S. C., at 8:15 p. m. on the 18th of April, 1903, but was not delivered by it to the plaintiff until, the plaintiff alleges, 10 o'clock Sunday morning, the 19th of April, while the defendant alleges that it delivered the said telegram to the plaintiff at 9:15 on said Sunday. The plaintiff claims that if he had received the telegram on Saturday night he could have gone to Columbia, Va., in time to see the dead body of his father and attend his burial. Testimony adduced at the trial left some doubt as to who received for the defendant the dispatch at its office on Saturday night. Also, as to whether Mr. Brown, the defendant's agent, or Mr. Norris, acting as its agent, received the dispatch at 8:15 o'clock on Saturday night. In the latter case proof was offered that Mr. Norris often received dispatches and sent telegrams for the defendant; on the other hand, it was testified to on the behalf of the defendant that Brown alone was its agent, and that Mr. Norris was not such agent, although it was admitted by the defendant that Mr. Norris sometimes received dispatches for the defendant. It was in proof that the printed instructions of the defendant to its agent authorized office hours of the defendant at Johnston, S. C., from 8 to 10 o'clock in the morning, and from 6 to 8 in the evening on week days, but the Sunday office hours were from 10 in the morning and 4 to 6 in the evening. It was in proof also that these hours were so authorized in the book of instruction for the defendant to its agents; but it was also in proof that the defendant and its agents at times disregarded these rules. C. J. Terrill testified that he had been the telegraph operator at Johnston. He said although in the rule book there is a statement given, authorizing office hours, that he had never known of that being observed or noticed, the observance of the rules is the exception rather than the rule; he had never known them to be noticed or to be observed at all. He was questioned as follows: "Q. At this time they were not observed? A. I do not think so, I am sure they were not. Q. About Mr. Norris, don't you know that he received and sent messages there for

the Western Union Telegraph Co.? A. Very frequently; yes, sir; almost habitually. Q. Was he recognized by the company? A. I do not know what he did about the company. I know it was upon and within the knowledge and consent of the powers there in Johnston." J. H. White, a witness, testified that he was a citizen of the town of Johnston, and had been there since 1881. He was questioned as follows: "Did they not have office hours? A. If they ever had any, I do not know it. Q. Did they observe any? A. If they have ever been observed, I do not know it. Q. Did you ever have any business with them around there? A. Yes, sir, I have at different times. Q. During this time? A. Yes, sir. Q. Have you ever sent messages at any time? A. I never had them to refuse to send a message at any time. Q. Would you ever go in there after 8 o'clock? A. Yes, sir. Q. 9 or 10 o'clock you would send them, and was it customary with them? A. They would always send one for me at any time. Q. After 8 o'clock? A. Yes, sir. Q. Would do that frequently or not? A. I do not know, I did it so many times." After all the testimony had been received, the judge charged the jury; the verdict was in favor of the plaintiff, whereupon the defendant appealed.

The first ground of appeal was abandoned at the trial before us. We will pass upon the remaining grounds in their order:

"(2) In that his honor erred in charging the second request of the plaintiff, to wit: 'It is the duty of such telegraph company to employ competent and diligent servants for the delivery of messages entrusted to it for delivery; and if such agent is not competent, and is negligent in the delivery of such message, by reason of which the addressee of such message suffers mental anguish or other damage, the company is responsible therefor.' The error being that said charge was not responsive to any allegation of the complaint, nor to any fact brought out in the testimony." We overrule the second ground of appeal, because the defendant admitted the charge in the complaint that it was a carrier of news over its telegraph lines. The business of telegraphing when done properly is through competent and diligent servants. Of course, in its business as a common carrier, the defendant is liable for its incompetence or negligence in the delivery of messages. All this assumes the competency and diligence of its servants; it is the defendant company who is responsible and, of course, it is responsible for its agents. There is no error here.

"(3) In that his honor erred in charging the fourth request of the plaintiff, to wit: 'While it is true that a telegraph company has the legal right to establish reasonable hours for the transmission and delivery of messages, and if such hours are reasonable, which is a question of fact for the jury, it is under no legal obligations to deliver a message outside of such hours, yet there can be

a waiver of such regulations on the part of the company; from here on out I will charge in my own language, as to waiver, and that is this: Waiver consists in that action of a person who possessed of a known right or privilege, created by law or by contract or by other ways for his benefit, yet it is by him purposely ignored and set aside.' The error being that the same was not responsive to any fact brought out in the testimony. There being no evidence whatever of waiver in the case." The testimony in this case, on both sides, related to office hours. Office hours were discussed in the first decision of this case. 71 S. C. 386, 51 S. E. 119. Also, in *Bonner v. Telegraph Co.*, 71 S. C. 303, 51 S. E. 117. Mr. Justice JONES, in his concurrence in this case, says as to fixing hours: "This, of course, includes the power to establish reasonable office hours. From which it follows that it is not the duty of a telegraph company to receive, transmit or deliver a message out of reasonable office hours, in the absence of circumstances showing an agreement to the contrary or showing a waiver of regulations." The facts established at the hearing tended to establish what is known in law as a waiver, and all that the circuit judge did was to define waiver. In doing so, he made no mistake. It seems to us from a scrutiny of the testimony that there was testimony of waiver here. We overrule this exception.

"(4) In that his honor erred in charging the fifth request of the plaintiff, to wit: 'That the law imposes on the defendant the duty to transmit and deliver with reasonable promptness all messages entrusted to it for transmission, and if the jury find as a matter of fact that the agent of the company came to its office at Johnston, S. C., the morning after the evening the said message was received, and found said message and during office hours, negligently failed to deliver with reasonable promptness the same to the plaintiff, whereby plaintiff suffered mental anguish or other damage, the company is responsible for such negligence and damage, and their verdict must be for the plaintiff.' The error being that the same was not responsive to any fact brought out in the testimony, and there was an entire absence of proof showing that any damage resulted to plaintiff through any negligence or failure on the part of defendant during its office hours on Sunday morning after the receipt of said message." We think the circuit judge properly defined the duty of the jury under the facts here set forth. This exception is therefore overruled.

"(5) In that his honor erred in charging the sixth request of the plaintiff, to wit: 'If the jury find for the plaintiff, they may award such damages as they conclude resulted from the negligence of the defendant.' The error being that said request does not state a sound principle of law. The defendant is only responsible for such damages as are di-

rect and proximate result of negligence on his part, and such only as a reasonable man would suffer under the circumstances." In the judge's charge he, at length, details the duty of the jury in relation to the facts in proof, and having done so correctly, we see no error here. This exception is overruled.

"(6) In that his honor erred in charging the jury as follows: 'If Norris was set to do the work of a telegraph operator by the company, or if he was allowed to do that work with the knowledge and consent of the company, and so held out to the public, then he was the company's agent, * * * etc.' The error being that there was no evidence whatever that Norris was the agent of the company, and that fact should not have been submitted to the jury. In that his honor erred in charging the jury as follows: 'Now next, if the telegram was received on Sunday morning, and was it delivered with reasonable promptness? If it was received on Sunday morning, and received means what that language implies, was it delivered with reasonable promptness? If it was not, then it has committed a wrong; and you go one step further and inquire, has its failure to deliver in a reasonable time caused damage to Harrison?' The error being that there was no evidence tending to show that any damage was caused to the plaintiff by reason of the delivery of the telegram on Sunday morning, and this issue should not have been submitted to the jury." So far as Mr. Norris' relation to the defendant is concerned, the jury were to decide whether the testimony showed the acts of an agent as defined by the court. There was some evidence of such agency. It was the jury's duty to dispose of the same, and they have done so. There was testimony that damage resulted to the plaintiff by reason of the nondelivery of the telegram on Sunday morning, and this issue should have been submitted to the jury. This exception is overruled.

"(7) In that his honor erred in charging the jury as follows: 'If the telegraph company at Johnston, at the time charged, had a rule for the transaction of business, if it fixed two hours betwixt which alone it did business, then ask yourselves, did it stick to the rule, or waive it?' The error being that there was no evidence of waiver on the part of the defendant and the charge was not responsive to any fact brought out in the testimony, and the issue should not have been submitted to the jury." The judge charged that the telegraph company at Johnston, in April, 1903, had a rule for the transmission of business, then it was the jury's duty to determine whether it stuck to the rule or waived it. There was evidence on this subject which we have heretofore quoted; therefore, there was no error in the judge's charge as here complained of. This exception is overruled.

"(8) In that his honor erred in charging the jury as follows: 'I charge you, if this

act was done a purpose, and done with such disregard of the rights of the plaintiff as to amount to willfulness, then the jury has the right to apply the whip to the back of the defendant company in order to punish them.' The error being that there was not a scintilla of evidence in the whole case tending to show willfulness on the part of the defendant, and the charge was therefore not responsive to any act brought out in the testimony, and this issue should not have been submitted to the jury." The charge as made by the circuit judge was that if the act by the agent or agents of the defendant was done purposely with a disregard of the rights of the plaintiff so as to amount to willfulness, then the jury could punish the company. There was testimony offered on this subject, and it was for the jury itself. Its solution was against the defendant. This exception must be overruled.

"(9) In that his honor erred in refusing defendant's motion for a new trial: (a) Because there was an entire absence of evidence tending to show that the plaintiff was damaged to any amount, nominal or actual, through any fault on the part of the defendant. (b) Because the uncontradicted evidence shows that the message was received after office hours of the defendant, had closed for business, and was delivered within a reasonable time after the opening of the office for business on the following morning, and there was no evidence to show a waiver on the part of the defendant company of its rights in the premises. (c) Because the plaintiff testified that it was possible for him to have reached Columbia, Va., in time to have seen his father in death, or to have attended his funeral, even had the telegram been delivered immediately upon the opening of the office at Johnston for business on Sunday morning—the morning train and the afternoon train reaching Richmond, through which point he had to go, at the same hour. (d) Because there was an entire absence of any testimony to show willfulness on the part of the defendant company or such reckless disregard of the plaintiff's rights as would presume willfulness, and this cause of action should not have been submitted to the jury."

(a) There was not an entire absence of evidence to show that the plaintiff was damaged through any fault of the defendant. This division is overruled.

(b) We do not see that it would be profitable for this court to consider the effect of testimony, that is work of the jury itself. This subdivision is overruled.

(c) The testimony in regard to the hours at which the plaintiff could have left Johnston and could have reached Columbia were given to the jury. They have been decided against the defendant. We overrule this subdivision.

(d) The jury was charged as to the effect of willfulness, or reckless disregard which would presume willfulness, and there was

some testimony on this point. It is the jury's duty to weigh this testimony. It has done so. This subdivision is overruled.

It is the judgment of this court, that the judgment of the circuit court be affirmed.

JONES, J. I concur in overruling all exceptions, but I think exception 8 and subdivision "d" of exception 9 should be overruled on other grounds than those stated by Chief Justice POPE. Exception 8 complains of the charge as to willfulness on the sole ground that there was no evidence of willfulness. While I may be prepared to agree with appellant's contention that there was no such evidence, it is clear that appellant can take no advantage thereof. There was no motion for nonsuit on that ground and no request to charge to that effect; on the contrary, the appellant specially requested the court to instruct the jury as to the law governing recovery for a willful tort. As the complaint charged willfulness, and appellant by its conduct apparently assumed that there was evidence on that subject, it would be highly unjust to the circuit court to impute to it reversible error under the circumstances. Subdivision "d" of exception 9 complains of error in refusing the motion for a new trial on the same ground; but as the record fails to disclose that the motion was made on such ground, there is no basis for the exception.

WOODS, J., concurs in the result.

STRICKLAND v. PHILLIPS.

(Supreme Court of South Carolina. Oct. 5, 1900.)

1. APPEAL—HARMLESS ERROR.

The exclusion of evidence technically relevant to an issue is not ground for reversal where the same facts were proved by the same witness without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4194-4196.]

2. SALES—ACTION FOR PRICE—DEFENSES—EVIDENCE.

In an action on a note given for the purchase of a steam engine, where the issue was whether plaintiff agreed to take back such engine and return the note if defendant would buy goods in which plaintiff was interested at a certain price, evidence that plaintiff was offered by another after the sale to defendant, without knowledge thereof, the same price defendant had paid, was relevant.

Appeal from Common Pleas Circuit Court of Greenville County; Dantzler, Judge.

Action by M. W. Strickland against J. M. Phillips. Judgment for plaintiff, defendant appeals. Affirmed.

B. M. Shuman, for appellant. Adam C. Welborn, for respondent.

JONES, J. In this suit upon a promissory note given by defendant to plaintiff for the purchase of a steam engine and boiler, in which defendant plead a discharge or payment by a return of the property under

an agreement, plaintiff recovered judgment for the sum claimed, and defendant appeals on exceptions to rulings of the court in excluding testimony alleged by appellant to be relevant, and in admitting testimony alleged to be irrelevant.

1. In Stephens' Digest of the Law of Evidence (3d Ed.), it is stated, "the word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other." This is as accurate a statement as the subject will permit. There is no final test as to the relevancy of evidentiary matter to the matter in issue, except the principles of logic; hence the general rule that facts logically relevant to the fact in issue are admissible, and facts logically irrelevant are inadmissible. From the necessity of the case it must be very largely left to the discretion and judgment of the trial court to determine what is relevant and what is not, and there is a growing disposition in courts generally, and it is the rule in this court, not to reverse the ruling of the circuit court in such matters, unless some abuse of discretion is shown, or it is made clearly to appear that the case or defense of the complaining party has been injured by the ruling. The defendant in his answer plead that the consideration of the note in suit was a steam engine and boiler sold defendant by plaintiff for \$250; that plaintiff thereafter agreed to take back the property and surrender the note if defendant would purchase a stock of merchandise belonging to the Saluda Mercantile Company, which was then embarrassed, and of which defendant was a stockholder and director, and that defendant was thereby induced to purchase and did purchase and pay for said stock in the sum of \$3,200, and that thereby said note was paid and discharged. The defendant testified in support of these allegations, but was flatly contradicted by the plaintiff with respect to the alleged agreement. With a view to render probable defendant's testimony as to the agreement, he offered to show that plaintiff was not only a director and stockholder in the embarrassed company, as alleged in the answer, but was personally liable as endorser on the notes in bank of said company, and, therefore, was particularly interested in effecting the sale of the stock of merchandise so as to pay said notes. The court ruled that the evidence was irrelevant, as it was not alleged in the answer. The ruling was probably technically erroneous under the principles stated as to relevancy, but as the record shows that the facts sought to be proven were already in evidence by the same witness without objection, and the probative force of the facts, slight at best, could not have been increased by repetition, appellant has in no wise been

prejudiced, and certainly the court did not abuse its discretion. This disposes of the first and second exceptions.

2. The third exception was not argued by appellant, but the point raised illustrates the rule stated as to relevancy. It complains that the court allowed testimony of an offer by another party to buy the stock of merchandise for the same price that defendant paid, after the sale to the defendant. The testimony admitted was that an offer of \$3,200 was made for the stock by another party previous to the sale to defendant, which was increased \$50 just after the sale to defendant, but without knowing that the sale had been made to defendant. The evidence was relevant, as the fact of an opportunity to sell the stock of merchandise to another on quite as favorable terms as was offered by defendant would have tendency to negative the claim of defendant that plaintiff had special interest to induce him to buy by canceling the note in suit.

The judgment of the circuit court is affirmed.

SKIPPER v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Oct. 8, 1906.)

COMMERCE—INTERSTATE COMMERCE—REGULATIONS.

Civ. Code 1902, vol. 1, §§ 1710, 2176, and Laws 1903, Act No. 1 (24 St. at Large, p. 1), requiring a carrier to trace freight shipped over it or a connecting carrier, and making the carrier liable for shipments over it and connecting lines unless it produces a receipt from a connecting carrier, and making a bill of lading prima facie evidence of liability for loss or damage to goods in transit, are not regulations of interstate commerce and unconstitutional.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 81, 84.]

Appeal from Common Pleas Circuit Court of Lancaster County; Buchanan, Special Judge.

Action by Eliza M. Skipper against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

Glenn & McFadden and T. Y. Williams, for appellant. Ernest Moore and D. R. Williams, for respondent.

POPE, C. J. The action here was brought against the defendant for \$382.20, as damages for the loss of certain contents from a trunk which was delivered to the defendant for transportation beginning at Chester, S. C., and ending at Englewood, Ill., said trunk containing the baggage belonging to three persons traveling on tickets issued by the defendant from said Chester, S. C., to Englewood, Ill. The answer of the defendant admitted that, on the 28th of July, 1904, the tickets were bought and paid for by the plaintiff over the defendant's line of railway from Chester, S. C., to Atlanta, Ga., and thence over other connecting lines of railway

to Englewood, Ill. The defendant also admitted receiving the plaintiff's trunk and the delivery to her of a check therefor, and that the contract was that the defendant would transport said trunk from Chester, S. C., to Atlanta, Ga., and deliver the same to its connecting lines over which the plaintiff was traveling. It further admits that said trunk was in apparent good order. As to what condition it was in when received by the plaintiff at Englewood, Ill., the defendant had no knowledge or information sufficient to form a belief. The defendant further alleges that said trunk was in good order when delivered by it to the Western and Atlantic Railway Company. The case came on for trial before special Judge O. W. Buchanan, at Lancaster, S. C. Both sides introduced testimony. The plaintiff's witnesses testified as to the number and value of the articles abstracted from the trunk, and that the trunk, when delivered at Englewood, Ill., had the lock broken, and as to the damages which resulted from the loss of such articles. The defendant's witnesses testified to the condition of the contracts evidenced by the tickets issued to the plaintiff by the defendant, and also to correspondence between the attorneys for plaintiff and railway authorities. After the charge of his honor, the jury returned the verdict of \$363.85 in favor of the plaintiff.

After entry of judgment on said verdict, the defendant appealed on 10 grounds, but the appellant confines its argument to certain constitutional questions of law. The points raised by the defendant resolve themselves into an attack upon the constitutionality of sections 1710 and 2176, vol. 1, Code of Laws of 1902, and of act No. 1 of the laws of 1903 of this state (24 St. at Large, p. 1). The contention of defendant is that each of said sections of the Code and said act of 1903 is unconstitutional, null, and void, because when applied to interstate carriers or carriage of baggage such as this, each and all of them impose a burden on interstate commerce, and thus violate the commerce clause of the federal Constitution. The following are copies of the sections and act referred to:

"Section 1710. When under contract for shipment of freight or express over two or more common carriers, the responsibility of each or any of them shall cease upon delivery to the connecting line 'in good order,' and if such freight or express has been lost, damaged, or destroyed, it shall be the duty of the initial, delivery or terminal road, upon notice of such loss, damage or destruction being given to it by shippers, consignee, or their assigns, to adjust such loss or damage with the owners of said goods within forty days, and upon failure to discharge such duty within forty days, after such notice, or to trace such freight or express, and inform the said party so notifying, when, where and by which carrier the said freight or express was lost, damaged or destroyed,

within said forty days, then said carrier shall be liable for all such loss, damage or destruction in the same manner and to the same extent as if such loss, damage or destruction occurred on its lines: Provided, that, if such initial, terminal or delivering road can prove that, by the exercise of due diligence, it has been unable to trace the line upon which such loss, damage or destruction occurred, it shall thereupon be exonerated from liability under this section."

"Section 2176. In case of the loss or damage to any article or articles delivered to any railroad corporation for transportation over its own and connecting roads, the initial corporation, or corporations first receiving the same, shall, in every case, be liable for such loss or damage, but may discharge itself from such liability by the production of a receipt, in writing, for the said article or articles from the corporation to whom it was its duty to deliver such article or articles in the regular course of transportation. In which event, the said connecting road or roads shall be severally so liable, but may in succession and in like manner discharge themselves respectively therefrom; but if any such corporation shall willfully fail or refuse, upon reasonable demand being made to it by any party interested in the production of such receipt, to produce the same, then it shall not be entitled to claim the benefit of such exemption in any action against the said railroad corporation to render it liable for such loss or damage."

Acts of 1903, 24 St. at Large, pp. 1, 2. "An act to further define connecting lines of common carriers and to fix their liabilities.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina, That all common carriers over whose transportation lines, or parts thereof, any freight or baggage or other property received by either of such carriers on a contract for through carriage recognized, acquiesced in or acted upon by such carriers, shall in this state, with the respect to the undertaking and matters of such transportation, be considered and construed to be connecting lines, and be deemed and held to be the agents of each other, each the agent of the others, and all the others the agents of each, and shall be held and deemed to be under a contract with each other and with the shipper, owner and consignees of such property for the safe and speedy through transportation thereof from one point of shipment to destination; and such contract as to the shipper, owner or consignee of such property shall be deemed and held to be contract of each of such common carriers; and in any of the courts of this state, any through bill of lading, waybill, receipt, check or other instrument issued by either of such carriers, or other proof showing that either of them has received such freight, baggage or other property for such through shipment or transportation, shall continue prima facie evidence of the subsistence

of the relations, duties and liabilities of such carriers as herein defined and prescribed; notwithstanding any stipulation or attempted stipulations to the contrary by such carriers, or either of them.

"Section 2. For any damages for injury, or damage to or loss, or delay of any freight, baggage, or other property sustained anywhere in such through transportation over connecting-lines, or either of them, as contemplated and defined in the next preceding section of this act, either of such connecting carriers which the person or persons sustaining such damages may first elect to sue in this state therefor, shall be held liable to such person or persons, and such carrier so held liable to such person or persons shall be entitled in a proper action to recover the amount of any loss, damage or injury it may be required to pay such person or persons from the carrier through whose negligence the loss, damage or injury was sustained, together with costs of suit."

The subject is not only intensely interesting in its consideration, but it is of great practical importance, for, as was well said by Mr. Justice Woods, in *Willett v. Railroad*, 66 S. C. 477, 479, 45 S. E. 93, "with the immense traffic and the resulting complicated business methods of modern American railroads and the connection of these railroads with one another, to impose upon the owner of property passing over connecting lines, the burden of making affirmative proof that the loss occurred on a certain one of these lines, would be practically relieving of liability railroads handling freight as connecting lines, for the owner could rarely make the required proof, and, when he could make it, in most instances the expense of doing so would be greater than the value of the goods." In considering the power of states to legislate upon the question of interstate commerce, the Supreme Court of the United States has held "that an attempt on the part of a state to prohibit a carrier, as to an interstate shipment, from limiting its liability to its own lines would be a regulation of interstate commerce and, therefore void." In construing sections 2317, 2318 of the Georgia Code of 1895 in the case of the *Central Georgia R. R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444. These two sections of the Georgia Code provide that, if the carrier to which application is made "shall fail to trace said freight and give said information in writing within the time prescribed therein, said carrier shall be liable for the value of the freight lost, damaged or destroyed in the same manner and to the same amount as if said loss, damage or destruction occurred on its line." Thus it is seen that the judgment against the initial line was rendered absolute and must be, therefore, considered as an infringement by the state of Georgia on the commerce clause of federal Constitution. In the text of this decision, *Railroad v. Murphey*,

supra, the United States Supreme Court has distinctly recognized and upheld its two former decisions in the *Chicago, Milwaukee & St. Paul Ry. Co. v. Patrick L. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688; and the *Richmond Ry. Co. v. R. A. Patterson Tobacco Company*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759. If the two sections of our Code, and the act of 1903, complained of are violative of the Constitution of the United States, of course they are void. The appellant here sought to obtain from the circuit judge a decision of the unconstitutionality of these provisions of our law. The circuit judge refused to hold them unconstitutional, and he now appeals to us to reverse the judge's decision.

The case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Patrick L. Solan*, supra, was an action to upset a section of the Code of Iowa which provided: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of persons, which would exist had no contract, receipt, rule or regulation been made or entered into." The jury found a verdict of \$1,000, which was appealed from, but the judgment was affirmed in 95 Iowa, 260, 63 N. W. 692, 28 L. R. A. 718, 58 Am. St. Rep. 430. Justice Grey, in delivering the opinion of the United States Supreme Court on an appeal from the Iowa court, said, page 135 of 169 U. S., page 290 of 18 Sup. Ct. (42 L. Ed. 688): "By the law of this country as declared by this court, in the absence of any statute controlling the subject, any contract by which a common carrier of goods or passengers undertakes to exempt himself from all responsibility of himself or his servants is void as against public policy, as attempting to put off the essential duties that rest upon every public carrier by virtue of his employment, and as tending to defeat the fundamental principles on which the law of common carriers was established to the securing of the utmost care and diligence in the performance of their important duties to the public." Justice Grey further says in his opinion: "The question of the right of a railway corporation to contract for exemption from liability for its own negligence is, indeed, like other questions effecting its liability as a common carrier of goods or passengers, one of those questions, not of merely local law, but of commercial law or of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the state in which the cause of action arises. But the law to be applied is none the less the law of the state, and may be changed by its Legislature, except so far as restrained by the Constitution of the state or by the Constitution or laws of the United States. * * * Railway corporations, like all other corporations and persons doing

business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measure by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate transportation are as much entitled, while within a state, to the protection of that state, as those who travel on domestic transportation. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if, by negligence in transportation, he should inflict injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they had been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits. * * * The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers to use the utmost care and diligence in the transportation of passengers and goods."

So in the case of *Richmond, etc., Co. v. R. A. Patterson Tobacco Co.*, supra, Mr. Justice White, as the organ of the court, in speaking of a contract, says on page 14: "Evidence thereof is but the instrument by which the fact that the will of the parties did meet is shown.

* * * It is of course, elementary that, where the object of a contract is the transportation of articles of commerce from one state to another, no power is left in the states to burden or forbid it, but this does not imply that, because such want of power obtains, there is also no authority on the part of the several states to create rules of evidence governing the form in which such contract, when entered into within their borders, may be made, at least until Congress, by general legislation, has undertaken to govern the subject. * * * Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation of the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proved, does not amount to a regulation of interstate commerce." Justice White therein refers to the case we have just quoted from so liberally—*Chicago, Milwaukee & St. Paul Ry. Co. v. Patrick L. Solan*.

It will thus be seen that it is perfectly legitimate for our Legislature, in absence of any national legislation, to make such rules and regulations as it may seem proper, provided it does not destroy or seriously hamper the subjects of interstate commerce. In the body of our statutes it will be observed that great care has been taken to leave the way open for the conduct of interstate commerce. We have only provided rules of evidence, and in doing this the decisions of the United States Supreme Court hold us perfectly justified. We, therefore, overrule all of these objections to the constitutionality of said statutes.

It is the judgment of this court that the judgment of the circuit court be affirmed.

JONES, J. I concur. There is a vital distinction between our statute and the Georgia statute, which was condemned in *Central of Georgia R. R. Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, as an unlawful interference with interstate commerce. The Georgia statute made the initial carrier absolutely liable if it failed within 30 days after application to inform the shipper in writing when, where, how, and by what carrier the freight was lost or damaged together with the names of witnesses to establish such facts, whereas, our statute, section 1710, provides that the carrier shall be excused from liability upon proof that, by the exercise of due diligence, it has been unable to trace the line upon which the loss or damage occurred. The Georgia statute prevented a carrier from availing itself of a valid contract exempting from liability for loss or damage occurring beyond its own line except upon an onerous condition, which in many cases it could not meet; whereas, the South Carolina statute excuses the carrier if the loss did not occur on its own line and it could not after due diligence comply

with the requirement of the statute. Section 2176 provides that the carrier may discharge itself from liability by the production of a receipt in writing for the articles from the connecting carrier, and the act of 1903 makes the bill of lading, etc., issued by the carrier for the freight, etc., prima facie evidence of liability for loss or damage to the goods in course of transportation.

The effect of these statutes as applied to interstate shipments is not to regulate interstate commerce, or to burden it, or materially interfere therewith, but to afford a reasonable protection to the shipper, in view of the great difficulty in the way of his proving where the loss occurred, and the relative ease and effectiveness with which the carrier might with reasonable diligence ascertain the facts and communicate to him.

WOODS, J., concurs in both the above opinions.

HIERS et ux. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Oct. 19, 1906.)

1. CONTINUANCE — REFUSAL — DISCRETION OF COURT.

Where a case has been continued at the instance of defendant, it is not an abuse of discretion at the subsequent term to order the case tried, where two witnesses are sick, where it is continued for a week at such term, and there was no showing as to the probable length of their illness, and the substance of their evidence was submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Continuance, §§ 64, 135, 147.]

2. CARRIERS—INJURY TO PASSENGERS—WANTONNESS.

Evidence that an engineer suddenly and violently backed his train without warning at a place where passengers might be expected to alight was some evidence of wantonness.

3. INFANTS—ACTIONS BY GUARDIAN AD LITEM—MARRIED WOMAN.

Under Code Civ. Proc. 1902, § 135, authorizing a suit by a married woman, and that "in no case need she prosecute or defend by guardian or next friend," does not authorize an action by a married woman who is a minor, by joinder with her husband as coplaintiff, but the suit must be brought by a guardian ad litem.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 196.]

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Colleton County; W. A. Holman, Special Judge.

Action by Martha C. Hiers and C. F. Hiers, her husband, against the Atlantic Coast Line Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Mordecai & Gadsden, for appellant. W. S. Smith and W. B. De Loach, for respondents.

WOODS, J. Martha C. Hiers, joining her husband with her as coplaintiff, alleged in her complaint that while she was on the

platform of defendant's car, from which as a passenger she was about to alight, the engineer suddenly and without warning backed the train so violently that she was thrown between the cars and on the bumper, and seriously injured. The defense was a general denial, and that the plaintiff, being an infant, could not maintain the action without the appointment of a guardian ad litem. The plaintiff recovered judgment, and the defendant appeals.

The appeal raises three questions: Was it abuse of discretion for the circuit judge to refuse defendant's motion for continuance? Was it error to refuse defendant's request to charge there was no evidence to sustain a verdict for punitive damages? Could the plaintiff, who was a minor, maintain this action without a guardian ad litem?

1. Motions for continuance are addressed to the discretion of the presiding judge, and in this case there was no abuse of discretion. The cause had been continued at a former term on defendant's motion, and at this term, when on the first call of the case a continuance was asked on the ground of the sickness of the conductor who was in charge of the train on which plaintiff was a passenger at the time of the alleged injury, and of the physician who, according to the plaintiff's testimony, attended her in the illness which resulted from the fall, the trial was postponed for a week, to allow the defendant to secure the presence of these witnesses. When the case was again called and the motion to continue renewed, defendant's counsel had before the court the substance of the testimony expected from these witnesses, and it was allowed to go to the jury as the evidence they would give if present. The conductor's statement was that no such accident as the plaintiff described occurred on his train, and it was a complete denial of her entire testimony as to the accident. The physician's statement was that he did not attend the plaintiff for injuries on account of the alleged accident, as she testified he did. While the defense might have been strengthened by the presence of these witnesses, yet the probable duration of the illness of the witnesses did not appear, and the defendant had the benefit of their flat contradiction of the testimony of the plaintiff. In these circumstances, it was not an abuse of discretion to refuse a continuance.

2. There was some evidence of wantonness on the part of the engineer in suddenly and violently backing the train without warning at the place where passengers might be expected to alight from the car, and there was no error in refusing a new trial for lack of such evidence. *Glover v. Railway Co.*, 57 S. C. 228, 35 S. E. 510; *Appleby v. Railway Co.*, 60 S. C. 49, 38 S. E. 237.

3. The interesting question is, whether a married woman, who is also a minor, may prosecute an action in which her husband is properly joined with her as coplaintiff with-

out a guardian ad litem. Section 135, Code Civ. Proc. 1902, provides: "When a married woman is a party, her husband must be joined with her, except that: (1) When the action concerns her separate property she may sue or be sued alone, provided that neither her husband nor his property shall be liable for any recovery against her in any such suit; but judgment may be enforced by execution against her sole and separate estate in the same manner as if she were sole. (2) When the action is between herself and her husband she may sue or be sued alone; *and in no case need she prosecute or defend by guardian or next friend.*" The clause which we have italicized clearly relates to the disability of coverture and not that of infancy; the meaning being that no guardian or next friend shall be necessary on account of coverture. This section, therefore, affords no support for the position that a guardian ad litem is not necessary on account of the disability of infancy, because the additional disability of coverture also exists. The section enacts nothing as to the disability of infancy, and hence does not throw any light on the question under discussion. Authorities are to be found under the old practice at common law and in equity holding the appointment of a guardian ad litem unnecessary when the husband was joined with the wife in prosecuting or defending the action. The reasoning was that the law looked on the husband as guardian or next friend, safeguarding the interest of the wife, and hence the appointment of another person for that purpose was unnecessary. *Cook v. Rawdon*, 6 How. Prac. (N. Y.) 233; *Welch v. Bunce*, 88 Ind. 382; *Foxwist v. Tremaine*, 2 Saund. 213; 14 Ency. P. & P. 1013. But, as said in the important case of *Cook v. Rawdon*, supra, "there is some confusion in the cases," and there is high authority, even under the old practice, for the view that a married woman who is also a minor can only prosecute or defend an action by a guardian ad litem appointed by the court, though the husband be joined with her in the action. 2 Daniel's Ch. Practice, 904; *Alexander v. Davis* (W. Va.) 26 S. E. 292. This view seems to be the view of the Supreme Court of the United States, also, in *O'Hara v. McConnell*, 93 U. S. 130, 23 L. Ed 840. These authorities show that, aside from any statutory requirement, it was at least doubtful whether a married woman, who was also a minor, by joining her husband could prosecute a suit without a guardian ad litem. But we think all doubt has been removed in this state by section 136, Code Civ. Proc. 1902, which provides: "When an infant is a party, he must appear by guardian who may be appointed by the court in which the action is prosecuted, etc." The statute makes no exception as to infants who are married, and it would be going too far for the court to undertake to do so, especially since a married woman's rights of person

and property have become so much more independent of her husband.

The reversal of a judgment on a question of procedure is always to be regretted, but in this instance a statute important for the protection of minors is involved, and the court cannot hesitate to enforce it.

It is the judgment of this court, that the judgment of the circuit court be reversed.

GARY, A. J., dissents.

SOUTHERN RY. CO. v. SIMMONS.

(Supreme Court of Appeals of Virginia. June 14, 1903.)

1. PLEADING—GENERAL DEMURDER—DUPLICATION.

An objection that a count of a declaration charges negligence on the part of defendant in the employment of its servants, and negligence on the part of the servants themselves, constituting two separate and distinct causes of action, cannot be taken by general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 503.]

2. SAME—FORM IN GENERAL—RULES OF RAILROAD COMPANY.

It is not necessary in a declaration where a reference is made to the rules, orders, and requirements of a railroad company that they should be set out in full, but it is sufficient to aver their legal effect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 30.]

3. RAILROADS—OPERATION—REGULATION OF INTERSTATE TRAFFIC—AUTOMATIC COUPLERS—STATUTORY PROVISION.

Act Cong. March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], providing that it shall be unlawful for any common carrier to use on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars, requires the use of couplers which can be coupled, as well as uncoupled, without men going between the ends of the cars.

4. DAMAGES—GROUNDS OF COMPENSATORY DAMAGES—DEPENDENTS OF DEFENDANT—EVIDENCE.

In an action for personal injuries, evidence that plaintiff has a wife and children is inadmissible on the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 496.]

5. WRIT OF ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The admission of evidence that plaintiff, in an action for personal injuries, had a wife and child dependent on him was not rendered harmless by the admission of other evidence that he was married, where there was no other evidence of the existence of a child dependent on him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4161.]

6. TRIAL—CORRECTION OF ERROR—ADMISSION OF EVIDENCE.

The error in admitting evidence that plaintiff, in an action for personal injuries, had a wife and child dependent on him was not cured by instructions as to the measure of damages, where the objectionable evidence was not explicitly withdrawn.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Trial, § 977.]

7. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a railroad employé had undertaken the business of coupling and uncoupling cars, it was his duty to exercise such care as reasonably prudent men would exercise under like circumstances, and, where he knew, or, by exercising such care as a reasonably prudent man would exercise under the circumstances could have known, that engines were backing cars on the track where he was about to couple cars, and he went in between the cars, and his failure to exercise reasonable care contributed to his injuries, he was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 706-709, 755.]

8. TRIAL—INSTRUCTIONS—CONFORMITY TO PROOF.

In an action for injuries to a railroad employé, an instruction that if he was guilty of contributory negligence, the jury must find for defendant, unless the conductor had knowledge of his dangerous position immediately before the accident and might, by the exercise of ordinary care, have prevented the accident, was erroneous, where there was no evidence of such knowledge on the part of the conductor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Trial, §§ 596, 603.]

9. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A railroad employé had the right to presume that the railroad company would conduct its business with reasonable regard to its rules prescribing his duties and with reasonable care for his safety while performing his duties in coupling and uncoupling cars.

10. TRIAL—ARGUMENTS OF COUNSEL.

Where there was a discrepancy between plaintiff's testimony as to his age and his statement previously made to defendant railroad company, and the court refused to permit defendant's counsel to comment on the discrepancy without first recalling plaintiff and giving him an opportunity to explain it, but afterwards plaintiff's counsel withdrew all objection to discussion of the question, but defendant's counsel refused to take advantage of this fact, the refusal of the court in the first instance was not ground for reversal.

11. SAME.

In an action for injuries to a railroad employé, it was improper for his counsel in argument to express the fear that the railroad employé who had testified for him against the company would lose their places, and to state that counsel for the railroad company rode in private and palace cars when they came to court, that the mind could not grasp the extent of the resources and possessions of the company, while plaintiff was a poor man with nobody but his wife and child, that the treasury of the company was so exhaustless that it would hardly feel the loss of the amount claimed, and that, in estimating damages, the jury should take into consideration the fact that exceptions had been taken by the defendant, and that it had been stated that if the verdict went against defendant, it would appeal.

Error to Circuit Court, Brunswick County.

Action by S. W. Simmons, Jr., against the Southern Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

A. P. Thom, W. L. Williams, E. R. Turnbull, Jr., and R. T. Thorp, for plaintiff in error. C. J. Faulkner and Buford, Palmer & Eggleston, for defendant in error.

KEITH, P. There was a judgment against the Southern Railway Company at the suit of

Simmons for injuries which he had sustained while acting as a brakeman in the service of the railway company, and engaged in coupling cars at Lawrenceville. To that judgment the railway company obtained a writ of error.

The railway company demurred to the declaration and to each count, and its first assignment of error is to the judgment of the circuit court in overruling its demurrer.

The objection made to the first count is that it not only charges negligence on the part of the company in the employment of its servants, but negligence on the part of the servants themselves; that the negligence of the company and that of its servants constitute two separate and distinct causes of action, and should not have been combined in one count.

In *Norfolk & Western R. Co. v. Ampey*, 93 Va. 121, 25 S. E. 227, this court said: The foundation of the objection to the declaration is that the first count "alleges three distinct grounds of negligence as the cause of the injury sustained by the plaintiff, either of which would of itself, independently of the others, constitute a sufficient ground for the action. In other words, the claim is that the count is bad for duplicity. The grounds so stated are: The negligence of the defendant in failing to exercise due care in selecting competent servants, in failing to provide a sufficient number of train hands, and in failing to supply and maintain suitable and safe machinery and instrumentalities for the conduct of the business of the defendant. They are conjunctively alleged as concurrent causes which, co-operating together, produced the injury. It is very questionable whether this constitutes duplicity. It is stated by eminent text-writers on the subject of pleading that no matters, however multifarious, will operate to make a pleading double, that together constitute but one connected proposition, or entire point. But even if this count were obnoxious to the charge of duplicity, the fault could not be taken advantage of on a general demurrer. The objection for duplicity relates to matter of form only, and does not go to the substance of the pleading. Being an objection to the form and not to the substance of the declaration, it could only be availed of, even at common law with all of its rigid rules of pleading, by special demurrer."

This assignment of error is not well taken.

The demurrer to the second count rests upon the omission of the count to state specifically the rules, orders, and requirements of the railroad company which are therein referred to, and because "the act of Congress referred to does not require the defendant, in the operation of cars engaged in interstate commerce, to employ cars provided with such couplers as will couple automatically without any necessity for brakemen ever going in between the cars. The only thing that the act required was that the couplings

should be of such a nature that after they had been fixed and were ready to be coupled that there should be no necessity for being in between the cars at the time when they came together. The allegation of the count imposes upon the company a duty which the law does not impose, and is, therefore, bad on demurrer."

We do not think that it is necessary, in a declaration where reference is made to the rules, orders, and requirements of a railroad company, that they should be set out in totidem verbis, it being sufficient to aver the legal effect of such rules, orders and requirements.

As to the second objection to the count, it seems to be disposed of by the opinion of Chief Justice Fuller in *Johnson v. Southern Pacific Company*, reported in 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363. That decision construes the second section of the act of Congress of March 2, 1893. c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], entitled "An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." The second section is as follows:

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

It will be observed that the declaration in this case gives the very language of the act of Congress, and avers that it "was the duty of the said defendant, as such common carrier, not to haul or permit to be hauled or used on its said line of railroad any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The railroad company made the same point in the *Johnson Case* that is insisted upon here by the plaintiff in error, and its view prevailed in the Circuit Court, the judgment of which in favor of the railroad company was affirmed in the Circuit Court of Appeals; but the Supreme Court of the United States, dealing with the subject, said: "We are unable to accept these conclusions" (speaking of the results in the lower courts), "as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction. The intention of Congress, declared in the preamble and in sections 1 and 2 of the act, was 'to promote the safety of em-

ployés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, those brakes to be accompanied with 'appliances for operating the train-brake system'; and every car to be 'equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,' whereby the danger and risk consequent on the existing system was averted as far as possible.

"The present case is that of an injured employé, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words 'any car' of the second section were intended to embrace, and do embrace locomotives. But it is said that this cannot be so because locomotives were elsewhere, in terms, required to be equipped with power driving-wheel brakes, and that the rule, that the expression of one thing excludes another, applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word 'car' would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed.

"The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car; but that the couplers on each, which were of different types, would not couple with each other automatically by impact, so as to render it unnecessary for men to go between the cars to couple and uncouple.

"Nevertheless, the Circuit Court of Appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of all railroad employés by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with

each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

"If the language used were open to construction, we are constrained to say that the construction put upon the act by the Circuit Court of Appeals was altogether too narrow."

After answering the objection, that the act was to be construed strictly because the common-law rule as to the assumption of risk was changed by the act, and because the act was penal, the opinion continues: "Tested by these principles, we think the view of the Circuit Court of Appeals, which limits the second section to merely providing automatic couplers, does not give due effect to the words 'coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars,' and cannot be sustained.

"We dismiss, as without merit, the suggestion which has been made, that the words 'without the necessity of men going between the ends of the cars,' which are the test of compliance with section 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling, and if read, as it should be, with a comma after the word 'uncoupled,' this becomes entirely clear.

"The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but, whatever the devices used, they were to be effectively interchangeable. Congress was not paltering in a double sense; and its intention is found 'in the language actually used, interpreted according to its fair and obvious meaning.'"

That case disposes of the second count of the declaration.

The next assignment of error arises upon an exception taken by the plaintiff in error to a question propounded to the defendant in error by his counsel.

"Q. Are you a married man? A. Yes, sir.

"Q. Have you any children?"

At this point defendant's counsel interposed, and said: "We do not see what that has to do with it, unless the gentleman is suing for some injury to his wife and children"; upon which counsel for plaintiff replied: "I think it is a perfectly admissible question to show that Mr. Simmons, who is a husband and a father, does not live for himself alone, and when he is incapacitated it seems to me that it is a relevant question upon the quantum of damages for the jury to know not only that he has to provide for himself through life hereafter, maimed as he is, but that he has a wife and child dependent upon him." And thereupon the court overruled the objection of the defendant, and permitted the plaintiff to state the

number of his children, which consisted of one, 12 or 13 years of age; and to this ruling of the court the defendant excepted.

The question seems to be settled by authority.

In *Stockton v. Frey*, 4 Gill (Md.) 406, 45 Am. Dec. 138, it is said that "in an action to recover compensation for injuries done to the person of plaintiff, by the negligence of the driver of a stage, which was thereby upset, the plaintiff cannot give in evidence, for the purpose of increasing the damages, that he had a wife and children."

In *Sedgwick on Damages* (8th Ed.) § 490, it is stated that damages cannot be augmented by proof that the person injured has a wife and several small children.

Pennsylvania Railroad Co. v. Roy, 102 U. S. 451, 26 L. Ed. 141, is a strong authority to the same effect. In that case, Mr. Justice Harlan, speaking for the entire court, said: "There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children; a son 10 years of age, and three daughters of the ages, respectively, of 14, 17 and 21. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict.

"The court, in a manner well calculated to attract the attention of the jury, withdrew from their consideration the evidence touching the financial condition of the plaintiff; but as nothing was said by it touching the evidence as to the ages of his children, they had the right to infer that the proof as to those matters was not withdrawn, and should not be ignored in the assessment of damages. For this error alone the judgment is reversed, and the cause remanded for a new trial."

It is claimed on behalf of defendant in error that the case should not be reversed upon this assignment of error, because there was other evidence admitted without objection to

the effect that the plaintiff was a married man; but there is no other evidence in the record of the existence of a child, dependent upon Simmons for support.

Nor do we think that this court is committed to the doctrine by reason of anything that was said in *N. & W. Ry. Co. v. Ampey*, supra, or in *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862. In the opinions in both cases, the fact that the person injured had others dependent upon him for support is adverted to; but it does not appear that any exception was taken to the admissibility of the testimony, and the propriety of admitting such testimony is not adverted to by the court in either case.

Nor do we think that the error in admitting this evidence is cured by the instruction given to the jury, which states that if the jury find for the plaintiff "they should ascertain his damages not to exceed the sum claimed in the declaration, to wit, \$50,000; and in estimating such damages the jury may allow such sum as they may believe from the evidence will be a fair compensation for such bodily and mental suffering as the plaintiff may have been caused by the said injury; and they may also allow such sum as may compensate him for the future loss of his earning capacity so far as the jury may believe from the evidence that he has suffered a loss of his earning capacity as a result of said injury; and they may also allow such sum as will enable him to relieve or nullify the inconvenience occasioned by the said injury if they believe from the evidence that he will in the future experience such inconvenience." The jury are not there told that in estimating his damages they are not to consider the fact that a child is dependent for its support upon the earning capacity of Simmons, and the jury would rightly and properly, upon the evidence before them, have taken that fact into consideration in their estimate of the damages suffered. We are of opinion that while the admission of improper testimony may be corrected by instructions given by the court to the jury, directing them to disregard it, its withdrawal from the jury should be in terms so direct and explicit as to leave no room to apprehend that the jury were not informed with respect to it. Where that is done, it is not to be presumed that the jury were "too ignorant to comprehend or too unmindful of their duty to respect instructions as to matters peculiarly within the province of the court to determine." *Penna. R. Co. v. Roy*, supra.

Numerous instructions were given to the jury, two of which we think were erroneous.

"The court instructs the jury that if they believe from the evidence that the plaintiff had undertaken the business of coupling and uncoupling cars, then it was the duty of the plaintiff, while coupling and uncoupling cars, to exercise such care as a reasonably prudent man would exercise under like circumstances; and if the jury believe from the evidence that

the plaintiff, Simmons, knew, or by exercising such care as a reasonably prudent man would exercise under the circumstances, could have known, that engines were backing cars on the track where he was about to couple cars, and that, under the circumstances, he went in between the cars, and that his failure to exercise such care contributed to his injuries, then the said plaintiff was guilty of contributory negligence."

Down to this point we think the instruction correctly propounded the law. But the court made the following addition to it: "And if they so believe, the jury must find for the defendant, unless they further believe from the evidence that Conductor Floyd had knowledge of the dangerous position of the plaintiff immediately before the accident, and might have, by the exercise of ordinary care, prevented the same." And this is the portion of the instruction which we think is open to objection.

Simmons was injured by going in between two cars, which were separated the one from the other by about three feet of space. Just as he got in between the cars, and was arranging the couplers, the engineer, acting under a signal from the conductor, backed the cars upon him, with the result that both of his legs were crushed. Now, if either the conductor or the engineer were guilty of negligence in backing the engine and cars so as to inflict the injury which Simmons sustained, he was entitled to recover; but there was no evidence, and in the nature of things could be no evidence, that the conductor or the engineer had knowledge of the dangerous position of the plaintiff immediately before the accident, and might, by the exercise of ordinary care, have prevented it. The theory of defendant in error's case upon this point was that when he was sent back to couple the cars, the conductor knew, or ought to have known, his position and governed himself accordingly, so as not to back the cars and catch him (Simmons) while engaged, in accordance with the rules of the company and the orders which he had received from the conductor, in preparing the cars to be coupled. That is the view of the case upon which defendant in error insists. Plaintiff in error, however, claims that in going in between the cars the defendant in error was guilty of contributory negligence; and that view of the case is presented in the introductory part of this instruction, and if it existed constituted a defense to the action. It was for the jury to say which of the two theories was sustained by the facts.

Whether the defendant in error was in a position of danger, in obedience to the orders of the conductor and in the discharge of his duties, or whether he was there, as plaintiff in error insists, as a result of his own contributory negligence, it is certainly true that there is nothing in the situation upon which to rest the doctrine of the last clear chance. If the railroad company, or

its agents, were guilty of negligence, defendant in error should recover; if defendant in error was guilty of contributory negligence, that should be an end to his action. Which of the two theories should prevail, was a question for the jury upon the facts; but certain it is that neither the conductor nor the engineer had such knowledge of the position of defendant in error as to render the railway company responsible for their failure to protect him from the consequences of his contributory negligence after his position of danger was known.

The instruction concludes as follows: "But the jury, in determining whether the plaintiff was guilty of contributory negligence, are instructed that the plaintiff had the right to presume that the defendant company would conduct its business with reasonable regard to its rules prescribing his duties, and with reasonable care for his safety while performing his duties;" all of which was entirely proper.

We are of opinion, therefore, that the instruction would have been correct had it omitted the words: "And if they so believe the jury must find for the defendant, unless they further believe from the evidence that Conductor Floyd had knowledge of the dangerous position of the plaintiff immediately before the accident, and might have, by the exercise of ordinary care, prevented the same."

Instruction C is open to the same objection, and if upon another trial the evidence upon this point should be substantially the same as that in the record under consideration, and Instructions A and C are again offered, they should be made to conform to the views herein expressed.

The fourth bill of exceptions arises upon the examination of S. W. Simmons, the plaintiff, as a witness in his own behalf. On his direct examination he testified that he was 39 years of age on the day before he was injured, and during the progress of the case a paper was introduced from which it appears that when he entered the service of the railway company he had made a conflicting statement as to his age. Counsel for the railway company undertook to criticise this apparent discrepancy in his argument before the jury; whereupon the point was made by counsel for the plaintiff that he should not be permitted to do so, as the discrepancy had not been brought to the attention of plaintiff when the paper was introduced in evidence, so as to afford him an opportunity of making an explanation; and this view was taken by the circuit court. Counsel for the railway company was told that he would be permitted to recall the witness and ask him any question he might desire with reference to the subject, but this he declined to do; and thereupon the court refused to permit counsel to continue his line of argument. It seems that the court at that point adjourned for two days,

and when argument was resumed counsel for plaintiff withdrew their objection, and stated that counsel could proceed to make any comments or criticism he might desire, in his argument before the jury; to which counsel for defendant replied that they did not desire to make any further criticism of the witness, but insisted upon their exception, which was signed and made a part of the record.

We confess our utter inability to discover any trace of merit in this exception, and are at a loss to understand why the record should have been incumbered by it.

Another exception was taken to the line of argument pursued by counsel for defendant in error before the jury. It seems that after the argument had been closed, and the jury had retired to their room to consider of their verdict, counsel for plaintiff in error stated to the court that counsel for defendant in error, in his closing argument, had made certain statements to the jury not based upon any evidence in the cause, and presented a memorandum in writing, setting forth what he claimed to be the statements so made. Among other things, it was stated that counsel had expressed the fear that the railroad employes who had testified against the company would lose their places, although there was no evidence on this point; that counsel for the railroad company rode in private and palace cars when they came to court, although there was no evidence on this point; that the mind could not grasp the extent of the resources and possessions of the Southern Railway Company, while Mr. Simmons was a poor man with nobody but his wife and child, and with no one to help him but his wife; that the treasury of the railway company was so exhaustless that it would hardly feel the loss of \$50,000, the amount claimed in the declaration; and that, in estimating damages, they should take into consideration the fact that exceptions had been taken by the defendant, and that it had been stated that if the verdict was against it, it would appeal.

The court, with respect to this memorandum, says that its language is that of counsel for the defendant, and is not the exact language used by plaintiff's counsel in addressing the jury; and that it would be impossible, without an accurate report of the argument, for the court to certify what the language used was. From all of which we infer that the language imputed to counsel is substantially that which had been used by him in argument.

Great latitude is allowed in arguments before juries, and we have no disposition to impose unreasonable conditions upon its exercise, or to hamper counsel in the slightest degree in the fullest and freest discussion of every fact and every view of the evidence which ought fairly and legitimately to influence the jury in arriving at a verdict. But the line of argument pursued in this case

could have no other motive or object than to excite and inflame the minds of the jury against one of the litigants, and thereby to heighten the damages to be awarded. It was in a high degree improper, and had the attention of the court been called to it, counsel would doubtless have been restrained within just and proper limits, and the jury have been admonished to free their minds from considerations aroused by appeals to their passions and prejudices, and to confine themselves to ascertaining, in the light of the evidence and of legitimate argument, what would be a fair and just compensation to the plaintiff for the injuries he had sustained. Such a line of argument, if proper objection be made to it at the proper time and the trial court fails to take proper steps to correct its ill tendencies, will constitute a sufficient ground for reversing a judgment rendered upon a verdict thus obtained.

For the errors in the admission of testimony and with respect to instructions A and C, the judgment of the circuit court must be reversed.

SPIES et al. v. ARVONDALE & C. R. CO. et al.

(Supreme Court of Appeals of West Virginia.
Oct. 30, 1906.)

1. DEEDS—GRANT ON CONDITION—CONDITION SUBSEQUENT.

In granting real estate upon condition, if the act upon which the estate depends must be performed before the estate can vest, it is a condition precedent; but where the performance of the act does not necessarily precede the vesting of the title, but may accompany or follow it, it is a condition subsequent.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, §§ 487-489.]

2. EQUITY—FORFEITURE—ENFORCEMENT.

Equity will never lend its aid to enforce a forfeiture, but will sometimes give relief against the consequences of a breach of a condition, and save an estate from forfeiture.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 69-71.]

3. SAME—DISMISSAL—EFFECT ON ANSWER.

When, in a suit in equity, an answer praying for affirmative relief is filed, and the bill is dismissed because equity is without jurisdiction, the dismissal of the bill carries with it the answer.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 829.]

4. SAME—CROSS-BILL.

Where the original bill is dismissed, the cross-bill goes with it, where the subject-matter of the cross-bill is simply defensive of the case made by the original bill.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 829.]

(Syllabus by the Court.)

Appeal from Circuit Court, Randolph County.

Bill by Henry Spies and others against the Arvondale & Cleveland Railroad Company and others. Decree for plaintiff, and the Arvondale & Cleveland Railroad Company, and the Welch Colony Railroad Company of

West Virginia appeal. Affirmed in part, and reversed in part.

Davis & Davis and Talbott & Hoover, for appellants. Dailey & Bowers, for appellees.

SANDERS, J. On the 16th day of January, 1892, Johnson N. Camden granted unto the Welch Colony Railroad Company of West Virginia a right of way over three tracts of land lying in Randolph county, known as "Lots Nos. 17, 20, and 21 of the Davenport Survey." The deed contained the following provision: "But this grant and all other rights and privileges under it to cease and be void and of no force or effect if the party of the second part shall fail or refuse to construct and operate its road through said land and to the line of the railroad of the West Virginia & Pittsburgh Railroad Company on Buckhannon river for three years from the date hereof." In the year 1901, Johnson N. Camden sold to Henry Spies the said three lots, and on June 6, 1904, he conveyed said lands to Spies. On the 28th day of January, 1904, Spies by written agreement sold said lands to Ida M. Butts, James McCormick and Harry T. Wilson, and put them in possession of same, but reserved the legal title. On the 31st day of October, 1902, an agreement was entered into between the Welch Colony Railroad Company of West Virginia and the Arvondale & Cleveland Railroad Company by which the former leased to the latter its tracks and right of way for the period of five years. The Welch Colony Railroad Company had laid upon the right of way over lot No. 20 a road with wooden rails, and this road the Arvondale & Cleveland Railroad Company was proceeding to repair, and was replacing the wooden rails with steel, when, on August 12, 1904, the plaintiffs, Henry Spies, Ida M. Butts, James McCormick, Harry T. Wilson, and the Pickens & Hacker's Valley Railroad Company, filed a bill in the circuit court of Randolph county, in which they alleged that the Welch Colony Railroad Company had never complied with the condition contained in the grant to it from Camden as to the construction of its road, and prayed for an injunction restraining the Welch Colony Railroad Company and the Arvondale & Cleveland Railroad Company from using any part of the land for railroad purposes, which injunction was issued. The defendants demurred and filed answers to plaintiffs' bill. In its answer the Arvondale & Cleveland Railroad Company, after averring that the provisions of the deed from Camden to the Welch Colony Railroad Company had been fully complied with by the latter company, alleged that, while it was proceeding with its work of laying track on the location of the Welch Colony road, the plaintiffs on two occasions tore up the track, and asked, by way of affirmative relief, for a counter injunction restraining the plaintiffs from interfering with its possession. This injunction was granted, but was, on the

final hearing of the cause, dissolved, at which time the court perpetuated the injunction awarded to the plaintiffs, and from the decree so adjudicating the defendants have appealed.

There was a demurrer to plaintiffs' bill. Should it have been sustained? This depends upon whether the condition reserved in the deed is precedent or subsequent. If precedent, the estate granted would not vest until the performance of the condition; but, if subsequent, the estate vested immediately, subject to be determined upon a noncompliance with the condition. In ascertaining whether a condition is precedent or subsequent, the intention of the party imposing the condition will be searched for, by considering the whole instrument, and not merely the terms of a part of it. Conditions subsequent, especially when relied upon to work a forfeiture, must be created by the express words of the grant, or by clear implication, and must be construed strictly. The law favors the present vesting of estates, even though they may be subsequently divested; and, in determining whether or not it is a condition precedent or subsequent, courts will lean to that construction which makes it subsequent rather than precedent. "But it is not always easy to determine whether the condition created by the words of a devise or conveyance is subsequent or precedent. The construction must depend upon the intention of the parties, as gathered from the instrument and the existing facts, since no technical words are necessary to determine the question." Washburn on Real Prop. (6th Ed.) § 941. In *Underhill v. Saratoga R. R. Co.*, 20 Barb. (N. Y.) 455, the court stated as a rule that "if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, and if the act may as well be done after as before the vesting of the estate, or if from the nature of the act to be performed and the time required for its performance it is evidently the intention of the parties that the estate shall vest, and the grantee perform the act after taking possession, then the condition is subsequent." *Jones v. Railroad Co.*, 14 W. Va. 514; *King v. Railway Co.*, 99 Va. 625, 39 S. E. 701; *Finlay v. King*, 3 Pet. (U. S.) 346, 7 L. Ed. 701; 2 Minor's Inst. 286; 13 Cyc. 689; *Jones on Real Property*, § 619. From the language of the deed from Camden to the Welch Colony Railroad Company it is clear that it was the intention of the parties that the easement granted should vest immediately in the railroad company, subject to be forfeited if the latter should fail to build the railroad, as therein provided, within three years. The right of way granted was for the purpose of the construction, building, and use of a railroad, which was to be completed within the time limited in the agreement. It was not necessary that the act upon which the estate depended should be done before the estate vested. This would have to be so, to make it a

condition precedent. The grantee had the right to the immediate possession of the property for the purpose of carrying out the terms of the grant, and for such purpose the easement granted vested immediately.

The condition being subsequent, the title to the right of way passed to the Welch Colony Railroad Company immediately upon the execution and delivery of the deed, and, having thus passed and vested, the plaintiffs claim that it was forfeited on account of a breach of or noncompliance with the condition reserved in the deed. A court of equity is without jurisdiction to enforce a forfeiture. It will never lend its aid to enforce a forfeiture, but it will sometimes relieve against the consequences of a breach of a condition and save an estate from forfeiture. *Pomeroy's Eq. Jur.* § 460, says: "There are, in fact, no exceptions to this doctrine. Those which appear to be exceptions are not so in reality." "Equity will not enforce a forfeiture. It will not divest a vested estate by enforcing a forfeiture for the breach of a subsequent condition. In such case the party is left to his legal remedy." *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363. Also see *Hukill v. Myers et al.*, 36 W. Va. 639, 15 S. E. 151; *Warner v. Bennett*, 31 Conn. 478; *Beecher v. Beecher*, 43 Conn. 556; *Oil Creek R. Co. v. Atlantic & Great Western R. Co.*, 57 Pa. 65; *Keller v. Lewis*, 53 Cal. 113; *White v. Railway Co.*, 13 Mich. 356; *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. 415, 28 L. R. A. 676, 50 Am. St. Rep. 871; *Marshall v. Vicksburg*, 15 Wall. (U. S.) 148, 21 L. Ed. 121; *Horsburg v. Baker*, 1 Pet. (U. S.) 232, 7 L. Ed. 125, 16 Cyc. 80; *Washburn on Real Prop.* (7th Ed.) § 963; 2 *Story, Eq. Jur.* § 1319. "A court of equity will not enforce a penalty or forfeiture, and therefore will not lend its aid to divest an estate for breach of condition subsequent." *Smith v. Jewett*, 40 N. H. 530. "A court of equity does not lend its aid to divest an estate for the breach of a condition subsequent." *Livingston v. Tompkins*, 4 Johns. Ch. (N. Y.) 415, 8 Am. Dec. 598. "A court of equity has no jurisdiction to enforce forfeitures. If the vendor in a land contract desires such relief, he must seek it at law or by entry for the breach of condition." *Fitzhugh v. Maxwell*, 34 Mich. 138. "A court of equity will not entertain a bill to enforce a forfeiture, nor to divest an estate for breach of condition subsequent, although it is brought on special grounds of removing clouds." *Railway Co. v. Neighbors*, 51 Miss. 412. Therefore it follows that the demurrer to the plaintiffs' bill should have been sustained.

It is contended that the counter injunction awarded upon the answer of the Arvondale & Cleveland Railroad Company should have been perpetuated, and that the court erred in dissolving it. A court of equity being without jurisdiction to enforce a forfeiture, the plaintiffs' bill should have been dismissed; and, this being so, the answer asking for affirmative relief would necessarily fall with it.

Where a court of equity has no jurisdiction to entertain the bill, no relief can be given upon an answer filed in the cause asking for affirmative relief. And again, the subject-matter of the answer is simply defensive of the case made by the original bill, and when this is so the dismissal of the bill carries with it the answer or cross-bill. "The general rule is that the dismissal of the original bill carries with it the cross-bill, as the latter is ordinarily considered merely an auxiliary of, and dependency on, the original bill." 5 *Ency. Pl. & Pr.* p. 162. *Piedmont, etc., Life Ins. Co. v. Maury*, 75 Va. 508; *Dows v. City of Chicago*, 11 Wall. (U. S.) 108, 20 L. Ed. 65; *Cross v. De Valle*, 1 Wall. (U. S.) 5, 17 L. Ed. 515. "This is certainly the case when the subject-matter of the cross-bill is simply defensive of the case made by the original bill." 5 *Ency. Pl. & Pr.* p. 663. *W. Va. Oil, etc., Co. v. Vinal*, 14 W. Va. 698; *Lowenstein & Bros. v. Hooker*, 71 Miss. 102, 14 South. 531.

The decree of the circuit court, in so far as it perpetuates the injunction granted upon plaintiffs' bill, is reversed, the injunction dissolved, and the bill dismissed for want of equity, and in all other respects it is affirmed, and the parties are left to their legal remedies.

DAVISSON v. SMITH et al.

(Supreme Court of Appeals of West Virginia Oct. 30, 1906.)

1. USURY—CANCELLATION OF DEED—USURIOUS CONSIDERATION.

A conveyance of land, founded upon compensation for the use of borrowed money in excess of the rate of interest allowed by law as the sole consideration therefor, will be set aside in equity.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 47, *Usury*, 194.]

2. SAME — CONVEYANCE AS COLLATERAL SECURITY.

When such conveyance is collateral to the loan, and notes for the full amount of the money lent, including interest thereon at the full legal rate, have been executed by the borrower, and payment thereof secured by a deed of trust, and before suit is instituted to set aside the deed the money borrowed and all legal interest thereon has been paid in money, the value of the real estate conveyed will not be treated as a credit on the debt, or the legal interest thereon, as of the date of the conveyance, and the borrower thereby limited to a recovery in money.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 47, *Usury*, § 194, 197.]

3. SAME—REMEDIES OF PARTIES.

In the enforcement of the statutes for the suppression of usury, courts do not disturb, overthrow, or annul contracts to an extent beyond the necessity of the case; but there is no restraint upon their power to treat principal and collateral transactions, entered into with intent to evade the law against usury, as a single transaction, when enforcement of the statute, liberally construed, renders such action necessary.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 47, *Usury*, § 191.]

4. SAME.

Since the statute of this state nullifies usurious contracts only to the extent of the interest stipulated for or taken in excess of the legal rate, when the payment of such excess, or the agreement to pay it, has been made by express agreement of the parties wholly collateral to the principal transaction, the proceeding for relief, either at law or in equity, may be limited to the collateral payment, delivery, transfer, conveyance, or agreement. When the illegal has been so separated from the legal part of the transaction, courts will not unite them, if relief can be given without doing so, nor is either of the parties entitled to have them treated as a single transaction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 191, 194, 197.]

5. SAME—DELAY IN SEEKING RELIEF.

Delay for a period of three years, after the payment of the debt and interest, in suing to set aside a conveyance, the sole consideration whereof is usurious interest, does not bar relief, as between the parties thereto, under the operation of either the statute of limitations or the principle of laches, although there has been an appreciation in the value of the land, not due to any outlay in money or labor on the part of the grantee.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, § 269.]

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County.

Bill by M. B. Davisson against T. B. Smith and others. Decree for plaintiff, and defendants appeal. Affirmed.

John Bassel, for appellants. J. E. Law, for appellee.

POFFENBARGER, J. Thomas B. Smith and Daniel S. Smith complain of a decree of the circuit court of Harrison county, made and entered on the 23d day of October, 1905, in the chancery cause of Marcellus B. Davisson against the appellants and the South Penn Oil Company, requiring said appellants to execute a deed reconveying to Davisson a one-half interest in and to all the oil and gas in and under a tract of 50 acres of land situated in said county; the court having found and determined that the sole consideration for the conveyance of said interest in the oil and gas to the appellants by Davisson was compensation for the use of money in excess of the legal interest thereon.

Davisson, being the owner of the tract of land, obtained from the appellants, on the 5th day of May, 1899, a loan of \$550, evidenced by his five promissory notes, payable one, two, three, four, and five years after date, with interest thereon from date, the first four of which were for \$100 each and the last one for \$150, and executed a deed of trust on the land to secure the payment thereof. On the 6th day of May, 1899, Davisson and his wife executed a deed conveying to the appellants one-half of the oil and gas in and under the tract of land. On the 19th day of February, 1900, the appellants executed to the South Penn Oil Company a lease on said land for oil and gas purposes, under which, at some time in the year 1904, said

company entered upon the land and began to develop it for oil and gas, and their operations resulted, on or about the 27th day of June, 1904, in the discovery of oil in paying quantities. Meanwhile Davisson, in June, 1901, having made a sale of the coal under the tract of land, had paid off his entire indebtedness to the appellants, including the interest thereon at the legal rate. At July rules, 1905, he filed his bill, setting up the facts hereinbefore stated, and charging that there was no consideration for the conveyance of the oil and gas to the appellants, other than the loan hereinbefore described, and that said conveyance was made as compensation for the use of the money borrowed in excess of the legal interest thereon, stipulated for in the notes and secured by the deed of trust. He prayed that the deed be canceled and annulled, that the lease executed by the appellants to the South Penn Oil Company be canceled, that an injunction be awarded inhibiting said company from delivering to the appellants any part of the oil produced from the premises, and that a receiver be appointed to take charge of the one-half of the royalty, or one-sixteenth of the oil produced, which was claimed by the appellants, as well as the cash rentals which might accrue from gas wells under the lease. The South Penn Company claimed protection as a bona fide purchaser for value without notice, and the appellants denied that the consideration for the conveyance was usurious interest, but claimed that, if the court should be of the opinion that it was, the measure of relief to the plaintiff would be a decree for money equal in amount to the value of the interest conveyed at the time of the conveyance thereof, with interest thereon from the date of the conveyance. The court, upon the hearing of the cause upon its merits and with the consent of the plaintiff, held the South Penn Oil Company to be a purchaser for value without notice, and set aside the deed as to the appellants Thomas B. Smith and Daniel S. Smith.

The denial by the appellants of the usurious character of the consideration is based upon the circumstances under which the loan was made. Davisson, having no means of his own, except a one-fifth interest in the land, desired to purchase the interests of his three brothers and a sister therein. It required about \$550 to accomplish this and pay delinquent taxes for which it was about to be sold. Unable to obtain the money elsewhere, he applied to the appellants, who, after much importunity on his part, not being money lenders themselves, agreed to let him have it; he agreeing to convey to them half of the oil and gas in the land. Pursuant to this understanding, the interests of the brothers and sister were conveyed to Davisson, paid for by him with money furnished by the Smiths, the notes and deed of trust executed and delivered, and the deed made conveying the oil and gas interest. Up-

on these facts and the oral testimony of the appellants is based the argument and contention that the appellants entered upon the transaction, not as lenders of money, but in the dual character of money lenders and purchasers of an interest in the land. The fact that they took the obligation of Davisson for all of the money they furnished him, together with the interest thereon at the full legal rate, amply justifies the finding and conclusion of the court below that they were not in any sense purchasers. It is perfectly apparent that they took the oil and gas for the use of the money furnished. No other benefits exchanged for it accrued to Davisson or to his brothers and sister, who owned four-fifths of the land at the time the agreement was made. Nothing but the use of the money could be regarded as consideration for the land, and, as full legal interest was provided for in the notes and the security taken, the interest represented by the value of the oil and gas, added to the interest stipulated for in the notes, made the transaction undoubtedly an usurious loan, and precluded the theory of a purchaser.

The principal complaint of the appellants is predicated upon the action of the court in depriving them of the title to the oil and gas, instead of giving a decree against them for the value thereof at the date of the conveyance, with interest. This objection is founded upon two different theories, one of which is that both the common-law and statutory remedies contemplate a money recovery in all cases in which a debtor sues to recover usurious interest, and the other that a conveyance founded on an usurious consideration is neither void nor voidable. For the first proposition the rule laid down by this court in *Davis v. Demming*, 12 W. Va. 246, is referred to. That was a general rule applicable under the circumstances which usually attend usurious transactions. Ordinarily usurious interest is paid in money. No expression in the opinion in which that rule was prescribed indicates that it was intended for universal application. Like all other general rules and principles, it is necessarily subject to such exceptions as peculiar circumstances necessitate. The right to recover property delivered as and for compensation for the use of borrowed money in excess of the legal rate of interest is affirmed by numerous decisions of the courts. Webb on Usury, at section 479, says: "In England it was settled long ago that an action of trover was maintainable against a usurious bailee, after demand and refusal, without offering or tendering the principal sum, or any part thereof, as the action was strictly legal, and the deposit void." To sustain this proposition a number of well-considered decisions are cited, in which both trover and replevin have been recognized as proper remedies for the vindication of the borrower's rights respecting personal property so delivered. These cases, however, arose under statutes which made the entire

contract void, not merely so much of it as related to the excessive interest. Though under our statute usurious contracts are void only as to the interest therein provided for in excess of the legal rate, the principle declared by the courts in those jurisdictions in which the entire contract is void seems to meet and overthrow the contention that the property given for an usurious consideration cannot be recovered under our statute. If property so given under a contract wholly void may be recovered, it logically follows that the property parted with as compensation for the use of money in excess of the legal rate, to which extent the contract is void under our statute, may also be recovered, and the borrower is not limited to the recovery of the value thereof at the time of its delivery.

A plausible argument of counsel for the appellants is that, if the real estate conveyed is to be regarded as the equivalent of a payment on account of the interest, it was the first payment made, and ought to be applied on the debt as a credit as of the date of the conveyance, and the money afterwards paid should be credited on the residue of the indebtedness to the extent necessary to satisfy it and the legal interest thereon, and that the recovery ought, therefore, to be, not of that which was first paid or given as interest, but of that which was last so given; no usurious interest having been paid, in the opinion of counsel, until after the debt and the legal interest thereon had been satisfied, and the real estate parted with having been conveyed before that stage of the transaction was reached. No authority is produced to sustain this claim, nor is it consistent with the terms in which the parties clothed their contract. That the oil and gas interest conveyed was intended to be not merely interest on the debt, but interest in excess of the legal rate, is perfectly apparent. It was not credited on the debt at the time. The conveyance having been made on the next day after the notes were executed, and the agreement therefor having preceded the execution of the notes, these instruments were given for the full amount of the principal and interest at the full legal rate. The conveyance, therefore, must have been for interest in excess of the legal rate *eo nomine*, which the statute declared to be void. Though the taking of a separate obligation for the excess of interest above the legal rate does not free the entire transaction from the taint of usury (29 Am. & Eng. Ency. Law, 484), still no reason for holding that the parties cannot determine, or have not determined, what particular payment or obligation shall represent, or be regarded as made on account of, the usurious interest, is perceived, and, moreover, there are well-considered decisions which assert, not only that it can be and is done, but also that the courts will recognize the binding force of such stipulations, and treat the particular payment as one of usurious inter-

est eo nomine. In *Stevens v. Fisher*, 23 Vt. 272, 274, Redfield, J., speaking for the court, said: "But the defendant received the money. If he received it as interest, eo nomine, whether it was in pursuance of any corrupt previous agreement or not is immaterial. It is none the less usury whether the agreement was contemporaneous with the lending or made subsequently; whether made before the receipt of the money or at the time; whether the money was paid in advance or reckoned into the note and paid with the principal sum. Whenever paid as usury and eo nomine, it creates an immediate right of action. The question whether, at the time of the loan or agreement to forbear payment, there was any agreement to pay and receive more than legal interest, was never important, except under the English statute of usury and others like it, where, such being the case, the party receiving the illegal interest, not only became liable to refund that, but forfeited the principal sum." In *Grow v. Albee*, 19 Vt. 540, 543, the said judge said: "But when, for aught which appears, the contract was not originally tainted with usury, and when no such taint enters into its renewal, the payment of money as usury, eo nomine, is the consummation of an unlawful payment, and may be recovered back, whether the debt is paid or not. It has no legal connection with the original contract or security whatever, and the right to retain it is in no way affected by any proceedings had in regard to the original security."

These cases arose under statutes which, like ours, did not forfeit the principal of the debt, but only avoided the contract as to the interest reserved or taken in excess of the legal rate. The difference between the legal and sequential effects of a statute which so provides and one which avoids the entire transaction, imposing severe penalties, is very great, and affords ample ground for discrimination in the interpretation and construction of contracts arising under them and the application of remedies and the modes and measures of relief. Under a statute destroying or forfeiting the principal and all interest, it is necessary to look beyond the written instrument, evidencing an apparently valid debt, to collateral undertakings, verbal or written, for the payment of additional interest in excess of the rate allowed by law, and consider them all as one transaction. Otherwise the statute could be evaded with impunity. 29 Am. & Eng. Ency. Law, 484. But, even there, a collateral verbal agreement to pay such excess is frequently held not to render the debt usurious, unless it be carried into effect by payment. *Butterfield v. Kidder*, 8 Pick. (Mass.) 512; *Kochler v. Dodge*, 81 Neb. 328, 47 N. W. 918, 28 Am. St. Rep. 518. The distinction between the effect of the two kinds of statutes is recognized in *Bowers v. Douglass*, 2 Head (39 Tenn.) 876, in the following clear and em-

phatic terms: "Here the note was for the actual amount of the loan. And inasmuch as, by our law, the effect of usury is only to avoid the contract to the extent of the excess beyond the legal rate of interest, it follows that there can be no valid objection to a recovery on the note. The collateral, independent, verbal agreement for usurious interest on the loan does not in any way affect the validity of the note. This latter agreement, though illegal and void, is in legal contemplation separate and distinct from the contract evidenced by the note. The case, therefore, is wholly unlike the case of *Hutchins v. Turner*. In the one case, the note itself was tainted with usury; in the other, the note is free from any such taint." To the same general effect, see *Roberts v. Coffin*, 22 Tex. Civ. App. 127, 53 S. W. 597. Nor has this court failed to notice the difference. In *Watterson v. Miller*, 42 W. Va. 108, 110, 24 S. E. 578, 579, Judge Brannon said: "True, Watterson made an oral promise to pay 2 per cent. more, but that was outside the papers under which the sale was to be made. All payments had been credited on the notes, and nothing was applied to illegal interest. Watterson did execute to Miller a note for \$50 illegal interest, but that was no lien on the land, and the sale was not to be made for it."

The principal and collateral transactions are plainly regarded by all courts as separate and distinct, except in so far as it is necessary to treat them otherwise in order to vindicate and enforce the law for the suppression of usurious transactions. Contracts as made are allowed to stand, and are enforced to the full extent of consistency with law, and are overthrown only to such extent as the enforcement of the law necessitates. As the parties to the deed in controversy here manifestly intended and agreed that the sole consideration of the conveyance of the oil and gas should be compensation for the use of money in excess of the legal rate, and the vice in the transaction can be eliminated without in the slightest degree altering that agreement, or disturbing the securities given for the principal of the debt and legal interest thereon, the court will not go out of its way to do more than give relief by undoing the usurious part of the transaction. Why should it? How can it, in view of the principle above stated, plainly deducible from the authorities?

A principle above adverted to, namely, that courts, in order to vindicate the law by uncovering and punishing usury, no matter in what form the transaction is clothed, will consider and act upon two separate contracts as one, when it is necessary to do so, would no doubt justify us in regarding the real estate conveyed as security for the debt, and, it having been paid, decreeing a reconveyance thereof, or canceling the deed. Though it represents nothing advanced that by the

terms of the contract was to be repaid, this circumstance does not differentiate this from other usurious transactions. There is never any stipulation for repayment, but the law steps in and enforces it, and, as soon as the debt is fully paid, sets aside the deed. As to so much of the transaction as is usurious, the law presumes that all payments and transfers have been coerced by the creditor and regards him as having fraudulently acquired them. *Harper v. Building Association*, 55 W. Va. 149, 157, 46 S. E. 817; *Barbour, Stedman & Herod v. Tompkins*, 58 W. Va. 572, 52 S. E. 707; *Moseley v. Brown*, 76 Va. 419; *Browning v. Morris*, Cowp. 294; *Thomas v. Shoemaker*, 6 Watts & S. 183.

To allow the appellants to retain the gas and oil, and pay a sum of money in lieu thereof, as and for its supposed value at the time the conveyance was made, would give them the status of purchasers for a good and valid consideration, contrary to the plain and emphatic denunciation of invalidity upon the contract as made by them, pronounced, not by the court, but by a statute which all courts liberally construe and rigidly enforce. By express provision it arms courts of equity with power to compel the lenders to discover upon oath the money or thing really lent, and all bargains, contracts, or shifts relative to such loan, and the interest or consideration of the same, and declares that, if it appear that more than lawful interest was reserved, the lenders shall recover his principal money or other thing with 6 per cent. interest only. Here money only was lent. That, with 6 per cent. interest, is all the appellants could demand. The outside transaction was plainly such a shift and device to cover the taking of unlawful interest as a court of equity has power to inquire into and relieve from. Its duty would be but poorly performed if it should now undertake to allow the lenders to keep the property by attempting to ascertain and decree against them the value thereof. That would be the adoption of an uncertain measure of restitution, without any reason or necessity for such a course. *Porterfield v. Colner*, 4 Grat. (Va.) 55, has no application to a case of this kind. The value of the land was put in issue in that case, to determine whether more than lawful interest had been taken.

The other proposition, namely, that a deed made in consideration of an usurious debt cannot be set aside, would cut off an important branch of equity jurisdiction in this state. It ignores the jurisdiction and power of courts of equity to declare deeds absolute on their faces to be in fact mortgages, and set them aside on payment of the debt. Interest on money involved in a transaction, whether usurious or legal, necessarily implies a debt due from the party paying, or obligated to pay, the interest, and, if a deed conveying land was, in point of fact, intended

by the parties thereto to be no more than a security for money due from the grantor to the grantee, it will be so treated in equity, and the rights of the parties thereto settled accordingly. *Sadler v. Taylor*, 49 W. Va. 104, 88 S. E. 583; *Vangilder v. Hoffman*, 22 W. Va. 1; *Hoffman v. Ryan*, 21 W. Va. 415; *Lawrence v. Dubois*, 16 W. Va. 443; *Matheney v. Sanford*, 26 W. Va. 386. This doctrine is not recognized at all in the early Massachusetts and Maine decisions, cited as supporting the proposition asserted by counsel for the appellant, namely, *Hale v. Jewell*, 7 Me. 435, 22 Am. Dec. 212, *Richardson v. Field*, 6 Me. 37, *Boardman v. Roe*, 13 Mass. 104, and *Flint v. Sheldon*, 13 Mass. 443, 7 Am. Dec. 162. They proceed upon the theory that a deed absolute on its face cannot be shown by parol evidence to be in fact a mortgage, for the reason, among others stated, that the effect of admitting such evidence for that purpose is to allow the terms of a written instrument to be contradicted by parol evidence. As the matter of interest could not be reached until after the ascertainment of a debt, and indebtedness could not be shown without violation of the rule against parol evidence, the courts declared the matter to be beyond their reach. As the cases all arose in courts of common law, the rulings were no doubt correct. However that may be, the equity courts of this state have never been hampered by difficulties of that sort, as will abundantly appear from an examination of the decisions above mentioned and others of the same class, which may be readily found.

As the subject-matter of this suit belongs to the exclusive jurisdiction of the equity courts, the statute of limitations is not applicable. *Newman v. Kay*, 57 W. Va. 98, 49 S. E. 926, 68 L. R. A. 908. Nor do we perceive any circumstances which will justify the application of the principle of laches. There has been an appreciation in value, and a lapse of time, but the appellants have done nothing which in any material respect has contributed to the increase in value. They have spent no money on the property, and have not been in any sense prejudiced by the delay. On the contrary, they have profited by rentals accruing from the lease. Moreover, the peculiar nature of this transaction precludes strictness in the application of the doctrine of laches. Tested by equity principles, the deed might be treated as a mortgage, and equities of redemption are not barred, except by the lapse of long periods of time. "Once a mortgage, always a mortgage." Moreover, the possession of the appellee, until about one year prior to the institution of this suit, was complete and uninterrupted. As between him and the South Penn Oil Company, laches would, no doubt, bar relief. *Societe Fonciere et Agricole des Etats Unis v. Milliken*, 135 U. S. 304, 10 Sup. Ct. 823, 34 L. Ed. 208. The

decision just cited clearly marks the distinction.

As no error in the decree is perceived, it will be affirmed.

GRANT et al. v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—CERTIORARI.

This case is controlled by the decision of this court in *King v. State*, 50 S. E. 64, 122 Ga. 153, approved and followed in *Bennett v. State*, 53 S. E. 815, 125 Ga. 10, and in *Blassingame v. State*, 54 S. E. 180, 125 Ga. 293.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2707.]

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Will Grant and others were convicted of crime, and bring error. Affirmed.

Edgar J. Oliver and Twiggs & Oliver, for plaintiffs in error. L. Kenan, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

LIGHTNER v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

FORNICATION—EVIDENCE.

The evidence in this case fails to support the verdict, and a new trial should have been granted upon that ground.

(Syllabus by the Court.)

Error from City Court of Dawson; Chas. R. Crisp, Judge.

C. L. Lightner was convicted of misdemeanor, and brings error. Reversed.

W. H. Gurr and Jas. G. Parks, for plaintiff in error. M. J. Yeomans, Sol., for the State.

ATKINSON, J. The defendant was tried for a misdemeanor, there being two counts in the accusation; one charging him with fornication, and the other with adultery and fornication. Upon the trial it appeared that the defendant, a white man, traveling with his child, and a mulatto woman, whom he claimed to be his nurse, spent nights at residences along the way. On two occasions the three slept in the one room. On one of these occasions there were two beds, and both appeared the next morning to have been occupied. This was at the residence of a negro. On the other occasion, there was but one bed, while a pallet was made before the fire for the woman. This was at the residence of white people. At this house it was proposed by the wife of the host to let the woman sleep on a pallet in the kitchen, but the defendant "preferred that she occupy the same room with him and the baby." Upon the foregoing evidence the defendant was found guilty. He

moved for a new trial, and, the motion being overruled, the defendant comes to this court, assigning error upon the judgment overruling his motion for new trial.

The evidence at best affords ground for suspicion of the guilt of the accused. There is no direct evidence showing criminal intercourse between the defendant and the woman, and the circumstances are not such as to exclude every other reasonable hypothesis than that of the guilt of the accused. The verdict should have been set aside upon the ground, contained in the motion, that there was no evidence to support it.

Judgment reversed. All the Justices concur.

CHAPPLE v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

FALSE PRETENSES—EVIDENCE.

There was a variance between the contract alleged in the accusation and that proved, and the verdict was not supported by the evidence.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Alex Chapple was convicted of swindling, and brings error. Reversed.

L. M. Hunt, for plaintiff in error. R. W. Moore, Sol. Gen., for the State.

LUMPKIN, J. An accusation alleged that the defendant did commit the offense of cheating and swindling, for that on the 24th day of October, 1905, he "did, after having contracted with Waller Bros., a firm composed [of] B. H. Waller and G. C. Waller, to perform for them certain services as a wage hand, at and for the sum of \$9.00 per month, and to work for said Waller Bros. under said contract a sufficient length of time to pay in full the sum of \$110.00 procured of them under said contract, said \$110.00 having been procured with intent not to perform said contract, to the loss and damage of the hirer in the sum of \$54.00; said labor not having been performed or said money returned to said hirers, and no cause having been given for nonperformance of said contract." The evidence of one of the hirers in regard to the contract was as follows: "The firm of Waller Bros. did make a contract with Alex Chapple during the year 1905. The contract was that we paid a fine here in court for his wife (the fine was \$75), and he came to us and told us he would pay us \$110 and work it out if we would pay the fine and not let her go to the chaingang. We took the contract for \$110, and he was to commence that day—the next day (that was on the 24th of October, I believe)—and work for \$9 a month and we feed him, until he paid the \$110, and when he had to have clothes and such things as that, I paid for them, too. He commenced the 25th day of October, and worked until the 26th day of

June. At the end of that time he had taken up about \$10 or \$12 worth, and he lost 28 days' time, at \$9 a month. He took up \$10 or \$12—not less than \$10, nor more than \$12." A comparison of these statements will show that there was a variance between the contract alleged and that proved, and a verdict of guilty was not supported by the evidence.

Judgment reversed. All the Justices concur.

DANIEL v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

HOMICIDE—INSTRUCTIONS—BURDEN OF PROOF.

In the trial of a murder case, it is erroneous to charge: "If a person receives a wound, which was willfully and unlawfully inflicted by another, under such circumstances that it will be murder if death ensued, and death actually results, the burden is then upon him who inflicted it to show that it did not cause the death."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 274.]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Carroll Daniel was convicted of voluntary manslaughter, and brings error. Reversed.

Fort & Grice, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

COBB, P. J. The accused and three others were indicted for murder. The accused was placed on trial and convicted of voluntary manslaughter, and he assigns error upon the refusal of a new trial.

It appears from the evidence that the accused and at least two of the other persons fired upon the deceased. Two wounds were found upon the body, one upon the arm and one in the thigh. The evidence authorized a finding that the wound in the arm was inflicted by the shot fired by the accused, and that the wound in the thigh resulted from the shot fired by one of the others. Death resulted from the wound in the thigh. The judge charged the jury that "if a person receives a wound, which was willfully and unlawfully inflicted by another, under such circumstances that it would be murder if death ensued, and death actually results, the burden is then on him who inflicted it to show that it did not cause the death; but the evidence to do this may come from the state's evidence." The evidence was entirely sufficient to establish that the death resulted from the wound in the thigh. There was little or no evidence to show that death resulted from the wound in the arm. The effect of the instruction was, therefore, that unless the accused made it appear, either from the state's evidence or otherwise, that death did not result from the wound in the arm, the accused would be guilty. We think this was an error so prejudicial in its nature as to require the reversal of the judgment.

The burden was upon the state to show, beyond a reasonable doubt, not only that the accused inflicted a wound under such circumstances that, if death ensued, the accused would be guilty of murder, but also, to a like degree of certainty, that death actually resulted from the wound inflicted. Until this was done, the burden was not shifted to the accused.

The motion for a new trial contains numerous grounds, but we do not deem it necessary to enter into a discussion of the other assignments of error. Many of them are based upon the theory that the instructions were not adjusted to the evidence, and upon another trial the judge will no doubt see that his charge is relieved from this criticism.

Judgment reversed. All the Justices concur.

SEALE v. STATE.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. COMMERCE—REGULATION—CONSTITUTIONAL LAW.

The decision in *Hennington v. State*, 17 S. E. 1009, 90 Ga. 390, as affirmed by the Supreme Court of the United States in *Hennington v. Georgia*, 16 Sup. Ct. 1086, 163 U. S. 299, 41 L. Ed. 166, is, upon review, adhered to and reaffirmed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 80.]

2. SUNDAY—RUNNING TRAINS ON SUNDAY.

The evidence authorized the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

J. N. Seale was convicted of violation of the Sunday law, and brings error. Affirmed.

The record discloses that J. N. Seale, the plaintiff in error, was superintendent of transportation of the Southern Railway Company, which company, as a common carrier chartered under the laws of Virginia, has a line of railroad running through the states of Virginia, North Carolina, South Carolina, and into and through the state of Georgia. Seale was indicted as such superintendent in the superior court of Habersham county for the offense of having unlawfully, on the 24th day of May, 1903, the same being the Sabbath, commonly known as Sunday, run a freight train on said road in said county. The evidence supports the foregoing, and further discloses that the train in question was an interstate train, running from Greenville, S. C., to Atlanta, Ga., and carrying freight from one state into another; that the train carried only dead freight, and none of the classes of freight which the statute of Georgia authorizes to be carried on Sunday. Pen. Code 1895, § 420, provides as follows: "If any freight train, excursion train or other train than the regular trains run for the

carrying of mails or passengers, shall be run on any railroad on the Sabbath day, the superintendent of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable to indictment in each county through which such train shall pass, and shall be punished as for a misdemeanor. The foregoing provisions shall not extend to: 1. A train which has one or more cars loaded with live stock, and which is delayed beyond schedule time. Such train shall not be required to lay over on the line of road during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where such animals may be fed and watered, according to the facilities usually afforded for such transportation. 2. A freight train running over a road on Saturday night, if the time of its arrival at destination, according to the schedule by which it started on the trip, be not later than eight o'clock Sunday morning. 3. Special fruit, melon, and vegetable trains, the cars of which contain no other freight except perishable fruits, melons, vegetables, fresh fish, oysters, fresh meats, live stock and other perishable goods of a like character, and which trains shall be loaded and leave the station from which they start in this state before the hour of midnight on Saturday night previous to the Sunday on which they are operated. No company shall be compelled to run the trains mentioned in this paragraph, and all freight trains or cars thus loaded and coming into this state may run to any point of destination in this state or continue their run through the state on Sunday." Since the adoption of that Code, the Legislature passed an act (see Acts 1897, p. 38) amending the section just quoted by adding a fourth class of exceptions to the general provisions of the law, as follows: "The foregoing provisions shall not extend to * * * trains on railroads where the line of said railroad begins and ends in another state, and does not run a distance greater than three miles through this state." An act was passed (see Acts 1899, p. 88), amending the act of 1897, by substituting the word "thirty" for the word "three," thus extending the exemption to interstate trains on roads that do not "run a distance greater than thirty miles through the state." Van Epps' Code Supp. § 6749.

Upon the trial of the case the defendant requested the court to charge as follows: "(1) I charge you that if you believe, under the evidence, the Southern Railway Company was an interstate railroad, or common carrier doing an interstate business, and that the train in question was one carrying freight from one state into another, and if you further believe that the statute of Georgia, under which defendant is indicted, if enforced, would have the effect to hinder such interstate business being done by an interstate railroad, then I charge you that the statute of the state is inoperative, because it

would thereby affect interstate commerce, and contravene the commercial clause of the federal statute. (2) If you believe, from the evidence in this case, that the defendant was superintendent of the transportation of the Southern Railway Company, and that the Southern Railway Company was an interstate railroad, doing interstate business, and that a freight train being pulled by engine No. 368 left Greenville, S. C., destined for a point in another state, and in order to reach such point had to pass through the county of Habersham, and in so doing ran a part of the distance in said county on Sunday, I charge you that the statute of Georgia regulating the running of freight trains on Sunday is inapplicable to such interstate trains, and it would be your duty to find the defendant not guilty. (3) If you believe, from the evidence, that the Southern Railway Company, at the time the freight train in question was run, was an interstate railroad and common carrier, and at the time in question was carrying freight from one state into another in the regular discharge of its duty as such common carrier, then I charge you that sections 420 and 421 of the Penal Code of 1895 of Georgia, as amended by Acts 1897, p. 38, and Acts 1899, p. 88, are not applicable to the case at bar. Such interstate railroad is not subject to a state statute which in any way hinders or interferes with the interstate commerce being done thereby. The statute as to such interstate railroads contravenes section 3 of article 1 of the federal Constitution, which provides that Congress shall have exclusive power to regulate commerce with foreign nations and among the several states." Each of the foregoing requests to charge was refused by the court. The defendant was convicted, and it moved for a new trial upon the grounds (1) that the verdict is contrary to evidence; (2) that the verdict is contrary to law; and (3) that the court erred in refusing requests to charge above mentioned. This court overruled the motion, and the movant excepted.

Jno. J. Strickland, for plaintiff in error.
W. A. Charters, Sol. Gen., for the State.

ATKINSON, J. In *Hennington v. State*, 90 Ga. 396, 17 S. E. 1009, it was held that section 4578 of the Code of 1882 (Pen. Code 1895, § 420), in making it a misdemeanor to run a freight train upon any railroad in this state on the Sabbath day, was a regulation of internal police, and not a regulation of commerce, and was, therefore, not in conflict with the provision in the Constitution of the United States delegating to Congress the power to regulate commerce among the several states. This decision was rendered in 1892, and upon writ of error to the Supreme Court of the United States the ruling was affirmed by that court. *Hennington v. State of Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166. It was said by that court that there was nothing in the legislation in question that suggests that it was enacted

with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who on the Sabbath day were in the territorial jurisdiction of the state; that, while the statute affects interstate commerce in a limited degree, it is not for that reason a needless intrusion upon the domain of federal jurisdiction, nor strictly a regulation of interstate commerce, but is an ordinary police regulation, designed to secure the well-being and promote the general welfare of the people of the state, and is not invalid by force alone of the Constitution of the United States; and that it is to be respected in the courts of the Union until superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. There has been no legislation by Congress on this subject, and therefore the ruling of this court, as affirmed by the Supreme Court of the United States, is the law of the land at the present time. We have been requested to review and overrule the decision of this court above referred to. We decline to do this, for two reasons: (1) We are entirely satisfied with the reasoning of the learned Chief Justice who rendered the opinion in that case. (2) The conclusion reached by him was affirmed by the Supreme Court of the United States; and, until that court sees fit to overrule the decision made by it, we are bound to follow it.

Since that decision was rendered an act has been passed by the General Assembly (Acts 1897, p. 38), declaring that the law prohibiting the running of freight trains on Sunday should not apply to a train carrying freight on a line of railroad which begins and ends in another state, and does not run a greater distance than three miles in this state; and the amending act has been amended by extending the distance in this state to 30 miles (Acts 1899, p. 88). It was argued that, even if the *Hennington* Case was correctly decided, it is controlling only upon the statute as it existed at the time that decision was rendered, and that the effect of the amendatory acts just referred to is to make a discrimination against those railroads whose lines in Georgia are longer than 30 miles. It is unnecessary for us to determine in the present case whether the effect of these amendatory acts is to bring about such a discrimination as would either render the amending acts void, or have any effect upon the original statute, or in any way impair the force of that statute with reference to trains not embraced within the terms of the amending acts. A careful examination of the assignments of error which are contained in the motion for new trial discloses that none of them were sufficient to raise a question of this character for decision by the lower court. The questions decided by the lower court were those which were raised by the three requests to charge which are embodied in the statement of facts and the

general grounds. It is clear that the only question raised in the first and second requests is whether the statute of Georgia under which the accused was indicted is applicable to an interstate train. In the third request reference is made to the amending statutes above referred to, but the effect of the request is simply to raise the question as to whether the statute as amended is such a regulation of interstate commerce as would be rendered void when attempted to be applied to an interstate train. There is nothing in the request which, properly construed can in any view raise the question as to the validity of the amending acts, or as to the effect of the amending act upon the original act. The judge was simply requested to instruct the jury that the law of Georgia as it now stands; that is, the section of the Penal Code, as amended by the two acts above referred to—was a regulation of interstate commerce, and therefore void so far as it embraced an interstate train. Whether the statute as amended was obnoxious to any provision of the state Constitution, or any provision of the Constitution of the United States other than the commerce clause, is not involved at all in any question made by the present record. If the section of the Penal Code as it stood at the time that the *Hennington* Case was decided was not a regulation of interstate commerce, there was nothing in the amendatory acts which would change its character in this respect. The evidence was sufficient to authorize the verdict, and we see no reason for reversing the judgment refusing to grant a new trial. Judgment affirmed. All the Justices concur.

TAYLOR v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW — BILL OF EXCEPTIONS — SUFFICIENCY.

A bill of exceptions, assigning error upon a refusal of the judge of the superior court to sanction a petition for certiorari, has attached thereto as an exhibit a copy of the petition for certiorari and the various entries thereon. The certificate of the judge follows the exhibit so attached. *Held*, that the exhibit is sufficiently identified by such certificate, notwithstanding no entry of the judge identifying the same appears thereon.

2. SAME—EVIDENCE AT FORMER TRIAL—INACCESSIBILITY OF WITNESS.

A witness is not shown to be inaccessible, within the meaning of Pen. Code 1895, § 1001, so as to authorize evidence as to what was the testimony of such witness on a former trial, when it merely appears that the witness is absent from the county and when last heard from was within the limits of the state. See, in this connection, *Pittman v. State*, 17 S. E. 856, 92 Ga. 480 (2).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1233.]

3. INTOXICATING LIQUORS—ILLEGAL SALE — INDICTMENT.

An indictment under Pol. Code 1895, § 1548, and Pen. Code 1895, § 451, which avers that the accused "did sell and barter for valu-

able consideration" liquors of the character referred to in the sections above cited, is sufficiently definite as to the consideration for the sale. It is not incumbent upon the state to allege the precise consideration paid. *Shuler v. State*, 54 S. E. 689, 125 Ga. 779 (3).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, §§ 258-262.]

4. SAME—EVIDENCE.

The evidence authorized the judgment of conviction, and the judge did not err in refusing to sanction the petition for certiorari. *Billups v. State*, 33 S. E. 659, 107 Ga. 766; *Burden v. State*, 47 S. E. 562, 20 Ga. 198, and cases cited.

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

Neal Taylor was convicted of crime, and brings error. Affirmed.

J. B. & Noel P. Park, for plaintiff in error.
J. E. Pottle, Sol. Gen., and Jas. Davison, Sol., for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

SMITH v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

HOMICIDE—ASSAULT WITH INTENT TO KILL—INDICTMENT.

Where an indictment charged the defendant and others with the offense of murder, for that they "unlawfully, feloniously, willfully, and of their malice aforethought did kill and murder by shooting [a named person] with certain guns and pistols, which the said [defendants] then and there held, and giving [the person named] then and there a mortal wound, the said [named person] then and there died," this was sufficient to furnish a basis for a conviction of assault with intent to murder against one of the defendants; and a motion in arrest of judgment, on the ground that under such indictment a verdict of guilty of assault with intent to murder cannot be sustained, was properly overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 237-249.]

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Grant Smith was convicted of assault with intent to murder, and brings error. Affirmed.

Fort & Grice, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

LUMPKIN, J. The defendant was indicted for murder, and convicted of assault with intent to murder. It was not contended that the indictment did not sufficiently charge the offense of murder, but a motion in arrest of judgment was made on two grounds: (1) Because no assault was alleged; (2) the indictment did not sufficiently allege an intent to kill.

It is unnecessary to discuss the first contention, further than to mention that the indictment accused the defendant and others of killing and murdering the deceased by shooting him with certain guns and pistols,

held by them, and giving to him a mortal wound. It is clear that this included a charge of an attempt to commit a violent injury on the person of another, which constitutes an assault. Pen. Code 1895, § 95.

Neither can the second contention be sustained. The substantial allegations of the indictment are stated in the headnote. It is contended that the charge that the defendant and others "unlawfully, feloniously, willfully, and of their malice aforethought did kill and murder by shooting" does not contain a sufficient allegation of an intent to murder. Under an indictment for murder, a defendant may be found guilty of a lesser offense, if it be one involved in the offense of murder and is sufficiently charged in the indictment. "The lesser offense must either necessarily be included in a general charge of the greater, or, if it may or may not be, then the averments of the indictment describing the manner in which the greater offense was committed must contain allegations essential to constitute a charge of the lesser." *Watson v. State*, 116 Ga. 607, 43 S. E. 32. See, also, *Thomas v. State*, 121 Ga. 331, 332, 49 S. E. 273. Pen. Code 1895, § 1035, declares that, "upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense charged in the indictment, but, if the evidence warrants it, guilty of an attempt to commit such offense, without any special count in the indictment for such attempt." The word "attempt" is more comprehensive than the word "intent," implying both the purpose and an actual effort to carry that purpose into execution. 2 *Bishop's New Crim. Proc.* (4th Ed.) § 80, subsec. 4. In *Johnson v. State*, 14 Ga. 55, it was said: "In crimes which require force as an element in their commission, there is no substantial difference between an assault with intent, and an assault with attempt, to perpetrate the offense." Murder is defined in Pen. Code 1895, § 60, to be "the unlawful killing of a human being, in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied." The indictment charged the commission of murder by violence. If the words "of their malice aforethought" were not sufficient to include an intent, where a killing was alleged, the added word "willfully" certainly was so. In *King v. State*, 103 Ga. 263, 30 S. E. 30, it was held that an allegation that the accused did "willfully, knowingly, absolutely, and falsely swear in a matter material to the issue and point in question," and that this testimony was false, and the accused knew it to be false at the time he so swore, and did thereby commit willful, intentional, and corrupt perjury, sufficiently averred an intention to swear falsely. In construing the statute which defines murder, the Supreme Court of California, speaking through Sawyer, J., said that "there is a 'willful killing,' within the meaning of

the statute, wherever there is simply a specific intent, a design or purpose formed, to take life." *People v. Pool*, 27 Cal. 572, 585. The words "with specific intent to kill and murder," in an indictment for murder, have been held equivalent to alleging that the killing was willful. *State v. Townsend*, 68 Iowa, 741, 24 N. W. 535. The Appellate Court of Indiana said that, in an action against a railroad company for killing stock, an allegation in a complaint that the killing was "willfully and willingly" done is sufficient to show an intentional killing. *Chicago R. Co. v. Nash* (Ind.) 27 N. E. 564. The indictment contained a sufficient charge of murder and included a charge of assault. The words "unlawfully, feloniously, willfully, and of their malice aforethought" sufficiently charged the intent to murder.

Several cases are relied on by counsel for defendant in error, such as *Patterson v. State*, 85 Ga. 131, 133, 11 S. E. 620, 21 Am. St. Rep. 152, where it was said that: "Where death takes place from unlawful violence, malice includes an intention to kill. Code 1882, § 4321. But, where death does not take place, there may be malice in giving the wound, but utter absence of intention to kill. The law will impute the intention to kill where there is a killing, but not where there is none." This was said in discussing a charge in regard to the facts which would raise a presumption of an intention to kill, and not in regard to the sufficiency of an indictment charging murder. The decision in that and similar cases has reference to the sufficiency of evidence to show the intent. In the present case the attack is made upon the sufficiency of the indictment to sustain the finding. The two things involved are different. One is a rule of pleading, the other a rule of evidence. Here the indictment does allege an unlawful and violent assault on the part of the accused, "willfully and of their malice aforethought," resulting in death. The same distinction will be observed by comparing the present case with that of *Gallery v. State*, 92 Ga. 463, 17 S. E. 863, and *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652. See, also, *Chelsey v. State*, 121 Ga. 340, 342, 49 S. E. 258. In the Mississippi cases relied on by counsel for plaintiff in error (*Moore v. State*, 59 Miss. 25; *Scott v. State*, 60 Miss. 268), the indictments were framed under the statutes of that state, and included no charge of assault.

Judgment affirmed. All the Justices concur.

BELL v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW — APPEAL — REVIEW — INSTRUCTIONS.

An attack upon a specified portion of the court's charge cannot prevail, where it appears that the correctness of such charge is not questioned, the only criticism upon it being that it fails to present another theory of the defense,

when such ground is certified with the qualification that "both defenses and the law applicable thereto were presented to the jury."

2. HOMICIDE—EVIDENCE.

No other errors of law are complained of. The evidence authorized the verdict, and the judgment of the court below refusing a new trial must be affirmed.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

Andrew Bell was convicted of murder, and brings error. Affirmed.

Bell was convicted of the murder of Bose Mathews, and assigns as error the overruling of his motion for a new trial. Witnesses for the state testified in substance as follows: The difficulty between Bell and Mathews arose at a church over some money which defendant claimed that Mathews owed him. One Gilbert paid the money to avoid any further trouble. Witness heard Mathews say to Bell: "You have got your money. I hope you and me will be good friends." Ed Mathews, brother of deceased, was approaching just at that moment, and defendant, in reply to deceased, cursed him, and, drawing his pistol, began firing at Ed Mathews, and then turned and shot deceased, inflicting a fatal wound. Ed Mathews shot once or twice after being fired upon by Bell. The defendant presented and insisted upon two distinct defenses: That he did not fire the shot that killed Mathews, but that said shot was fired by deceased's brother; and, second, that, if he did fire the fatal shot, it was in self-defense in resisting an assault made upon him by Ed Mathews and deceased—and introduced testimony to support his contentions. There were many witnesses, both for the state and for the defendant, and some portions of their evidence were decidedly conflicting.

W. C. Davis, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

BECK, J. (after stating the foregoing facts).

1. The only criticism made in the motion for a new trial upon the court's instructions to the jury was confined to the following extract from the charge: "His [defendant's] contention is that the deceased's brother made an assault upon him with a deadly weapon, and the deceased was on this occasion aiding and abetting him in an effort to take his [defendant's] life, and, while he was thus aiding and abetting his brother by holding him, he [defendant] fired the shot that took the life of the deceased"—the objection being that "one of defendant's theories of defense was thereby excluded." The judge certified this ground of the motion, but qualified his certificate by the addition of the following: "I add the following note to my certificate to the above assignment: Two distinct defenses were presented and insisted upon by defendant's counsel. One was that he did not fire the shot that took the life of the deceased. The other was that, if he did fire the fatal

shot, it was fired in self-defense. In presenting the latter defense in my charge, it was done upon the supposition that he fired the fatal shot. Both defenses and the law applicable thereto were presented to the jury." The criticism upon the charge has no force, when considered in light of the judge's note qualifying his certificate. It is not denied that the portion of the charge quoted states correctly one theory of the defense. From the judge's certificate it affirmatively appears that the other theory was presented to the jury; and this statement is borne out by an inspection of the charge itself, which is in the record. The court could not state both theories at the same time. The statement of one, followed by instructions as to the law applicable to it, did not amount to an exclusion of the other, when the latter was given a place in the charge, and the jury were properly instructed in regard to it.

2. The verdict of guilty was amply supported by the evidence of several eyewitnesses to the tragedy. No error of law other than that dealt with above was complained of, and the judgment of the court below refusing a new trial must be affirmed.

Judgment affirmed. All the Justices concur.

CARTER v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. VAGRANCY—EVIDENCE.

On who wanders and strolls about in idleness, with no lawful purpose or object whatever, an habitual loafer, idler, and vagabond, who is able to work, has no property, no reasonably continuous employment, and no regular income, is a vagrant, within the meaning of Pen. Code 1895, § 453, par 3; and this is true, notwithstanding such person may have a fixed place of abode, where he usually lodges. Especially would such person be a vagrant when his loafing and loitering was about poolrooms, barrooms, dives, lewd houses, and other places of like character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Vagrancy, § 1.]

2. SAME.

The evidence, though conflicting at some points, was sufficient to authorize the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Loomis Carter was convicted of vagrancy, and brings error. Affirmed.

Jno. R. Cooper, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

BALKCOM v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—APPEAL—NEW TRIAL.

There being evidence sufficient to authorize the verdict, and no errors of law being com-

plained of, the judgment of the court below refusing a new trial is affirmed.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Howard Balkcom was convicted of crime, and brings error. Affirmed.

Nottingham & McClellan and S. W. Hatcher, for plaintiff in error. Wm. Brunson, Sol. Gen., for the State.

BECK, J. Affirmed. All the Justices concur.

LIGHTNER v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—NEW TRIAL—TIME OF OFFENSE—EVIDENCE.

An accusation in a city court was filed on January 9, 1906, and alleged that the offense charged was committed on January 8, 1905. The accused was tried in April, 1906. The only evidence as to the time of the commission of the offense was a statement by the prosecutor that the accused stopped at his house "on Sunday night in January of this year"; that the offense was committed the following morning. Held, that it did not affirmatively appear that the offense was committed before the filing of the accusation, and a new trial should have been granted upon the ground that the verdict was contrary to the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1270.]

(Syllabus by the Court.)

Error from City Court of Dawson; Chas. R. Crish, Judge.

C. S. Lightner was convicted of crime, and brings error. Reversed.

W. H. Garr and Jas. G. Parks, for plaintiff in error. M. J. Yeomans, Sol., for the State.

COBB, P. J. Judgment reversed. All the Justices concur.

YOUNG v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—NEW TRIAL.

The grounds of the motion for a new trial, assigning no error on any ruling of the court, but only complaining of the verdict on the ground that it was contrary to law, evidence, and the weight of evidence, and without evidence to support it, and the evidence being amply sufficient to support the verdict, there was no error in overruling the motion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2363-2367.]

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Albert Young was convicted of crime, and brings error. Affirmed.

See 54 S. E. 82.

Jno. R. Cooper and Hines & Vinson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

STOCKS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

CRIMINAL LAW—EVIDENCE—CERTIORARI.

The evidence authorized the verdict, and there was no error in overruling the certiorari from the city court of Greene county, which alleged that the verdict was contrary to law and the evidence and without evidence to support it. [Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 8074.]

(Syllabus by the Court.)

Error from Superior Court, Greene County; H. G. Lewis, Judge.

William Stocks was convicted of crime, and brings error. Affirmed.

Jas. B. & Noel P. Park, for plaintiff in error. Jos. E. Pottle, Sol. Gen., and Jas. Davison, Co. Sol., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

ALLEN v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

FORGERY—EVIDENCE.

The determination of the question of defendant's guilt depended upon whether or not the signing of the prosecutor's name to the written order alleged in the indictment to have been forged, and the making and signing of which the accused admitted, was done with intent to defraud the prosecutor. The jury found against the defendant upon this vital issue, and returned a verdict of guilty. No errors of law were complained of, there was some evidence to support the finding, and, the trial judge having approved it, this court will not disturb the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Paul Allen was convicted of forgery, and brings error. Affirmed.

Williams & Harper, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—EVIDENCE.

There was no error of law complained of. The evidence authorized the judgment of conviction rendered by the trial judge, and no sufficient reason appears for reversing the judgment. (Syllabus by the Court.)

Error from City Court of Valdosta; O. M. Smith, Judge.

Frances Williams was convicted of crime, and brings error. Affirmed.

S. M. Varnedoe, for plaintiff in error. Jas. M. Johnson, Sol., for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

STARR v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—APPEAL—REVIEW.

The evidence authorized the verdict, no errors of law are complained of, and the judgment of the court below will not be disturbed. (Syllabus by the Court.)

Error from City Court of Reidsville; C. L. Morgan, Judge.

Joe Starr was convicted of crime, and brings error. Affirmed.

Collins & Grey, for plaintiff in error. H. H. Elders, Sol., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

TOLIVER v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—JURISDICTION—CITY COURTS—FELONY.

Larceny from the house of goods exceeding \$50 in value is a felony, and the offense is not within the jurisdiction of a city court. The only evidence on the subject of value showing affirmatively that the watch, the subject of the alleged larceny from the house, was of the value of \$65, the city court of Valdosta was without jurisdiction, and the judgment of the court finding the defendant guilty should have been set aside.

(Syllabus by the Court.)

Error from City Court of Valdosta; O. M. Smith, Judge.

Levi Toliver was convicted of larceny, and brings error. Reversed.

S. M. Varnedoe, for plaintiff in error. Jas. M. Johnson, Sol., for the State.

ATKINSON, J. Judgment reversed. All the Justices concur.

SWIFT v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

FALSE PRETENSES—EVIDENCE.

The evidence not being sufficient to show beyond all reasonable doubt that the representations relied on as a foundation for the accusation of cheating and swindling were false, the court erred in not granting a new trial. (Syllabus by the Court.)

Error from City Court of Douglas; C. T. Roan, Judge.

A. C. Swift was convicted of swindling, and brings error. Reversed.

Rogers & Helth, A. J. McDonald, and C. A. Ward, for plaintiff in error. W. D. Dickerson, Sol., for the State.

ATKINSON, J. This was a prosecution for swindling and cheating. The prosecutor claimed that the accused represented to him that a certain number of ties had been cut under a contract entered into between them, and that on the faith of those representations various amounts of money had been advanced by the prosecutor to the defendant. It was also contended that these representations were false as to the number of ties, and the prosecutor was thereby defrauded and cheated on account of the advances made in excess of the number of ties cut. The evidence as to the number of ties actually cut is not sufficient to show beyond all reasonable doubt that the representations of the accused were false. Such being the case, the accused should not have been convicted under the accusation. The court erred in not granting a new trial.

Judgment reversed. All the Justices concur.

ANTHONY v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. INFANTS—CRIMINAL RESPONSIBILITY.

As was expressly ruled in *Vinson v. State*, 52 S. E. 79, 124 Ga. 19, "a minor who has arrived at the age of criminal responsibility may be convicted, under the act of 1903, of the fraudulent practices made penal by that act, although a contract of service made by him may not be civilly enforceable."

2. MASTER AND SERVANT—FRAUDULENT CONTRACT—INTENT—EVIDENCE.

While proof that the minor left the service of his employer in obedience to parental authority will suffice to rebut all presumption of fraudulent intent (*Howard v. State*, 55 S. E. 239, 126 Ga. 358), yet the bare fact that the minor told his employer that he had yielded to the command of a stranger to go to work for him can afford the minor no excuse, in the absence of a satisfactory showing that he did so under fear of duress, rather than voluntarily and with the purpose of defrauding his employer in accordance with a previously formed intent.

3. SAME.

The evidence in the present case was such as to authorize the conviction of the accused, even upon the assumption that he was a minor, which is not made to appear in the record otherwise than inferentially.

(Syllabus by the Court.)

Error from City Court of Miller; C. O. Bush, Judge.

Dinkum Anthony was convicted of crime, and brings error. Affirmed.

W. J. Geer and Z. D. Harrison, for plaintiff in error. N. L. Stapleton, Sol., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

SIMMONS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. APPEAL—OBJECTIONS TO EVIDENCE.

No question for decision is raised by assignment of error upon the overruling of an objection to the admission of evidence, unless it appears that the grounds of the objection were urged before the court below on the trial of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2639.]

2. VAGRANCY—INSTRUCTIONS.

Where, upon the trial of one for the offense of vagrancy, it was charged in one count of the accusation that the defendant is a "professional gambler living in idleness," the court did not err in refusing a request to charge the following: "Under the law of vagrancy, the gist of the offense is the failure or the refusal of the offender to work, when work is necessary to support himself."

3. SAME—EVIDENCE.

No error of law is made to appear in the other grounds of the motion, and, there being some evidence to support the verdict, the judgment refusing a new trial will not be disturbed.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Judson Simmons was convicted of vagrancy, and brings error. Affirmed.

Bushee & Bushee, for plaintiff in error. W. V. Harvard, Sol., and E. F. Strozier, for the State.

BECK, J. Judgment affirmed. All the Justices concur.

DORSEY v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

HOMICIDE—INVOLUNTARY MANSLAUGHTER.

Under one phase of the testimony, the law of involuntary manslaughter in the commission of an unlawful act was involved in this case, and it was erroneous for the judge to fail to instruct the jury on this subject.

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

J. T. Dorsey was convicted of voluntary manslaughter, and brings error. Reversed.

The accused was indicted for murder and convicted of voluntary manslaughter. He assigns error upon the refusal of the judge to grant a new trial. The transaction resulting in the death of the deceased, as shown by the evidence, was in substance as follows: The accused and the deceased, on the night of the killing, were both drinking, and it appears that they had had some controversy about taking a drink of whisky. This quarrel was trivial in itself, but, in order to avoid any further trouble, Kesse, a witness, carried the accused across the street and endeavored to persuade him to let the matter drop. In conversation with Kesse the accused said that he intended to kill the de-

ceased unless he went back to town, and this threat was made more than once. The accused and the deceased met again, the accused this time being accompanied by his kinsman, Chunk Dorsey; and the three, with Kesee, went up the street. Trouble again arose between the accused and the deceased, and also between the deceased and Chunk Dorsey; but this was quieted. Kesee, believing that no further trouble was to be anticipated, left the deceased and the two Dorseys, and returned to town. The deceased had with him a billiard cue, cut down so that it was used as a walking stick. The evidence does not disclose the exact character of this stick; but the judge, in a note to the motion for a new trial, says: The stick was introduced in evidence, and identified as the one used; and it was the large end of a billiard cue, about four feet long and an inch or more in diameter at the larger end. The deceased used an insulting epithet to the accused, and menaced him by drawing his hands from his pockets and holding them in a fighting attitude. It does not appear that the deceased had any weapon. The accused thereupon struck the deceased with the billiard cue, and knocked him down. The deceased arose and struck the accused several licks, apparently with his fists, and the accused again struck the deceased with the billiard cue, knocked him down, and rendered him unconscious. From the effect of these blows, the deceased died the following day.

Thompson & Bell and H. H. Dean, for plaintiff in error. W. A. Charters, Sol. Gen., and L. M. Johnson, for the State.

COBB, P. J. (after stating the foregoing facts). The judge instructed the jury fully on the law of murder, voluntary manslaughter, and homicide resulting from reasonable fears by the slayer, as well as homicide resulting from mutual combat. The charge contained no reference whatever to the law of involuntary manslaughter. One of the assignments of error is based upon the failure of the judge to instruct the jury upon this subject, and this assignment is strenuously insisted upon by counsel. The weapon used was before the jury, and it was for them to determine, by an inspection of the weapon, whether it was one likely to produce death. The jury should have been fully instructed as to their duties in reference to this question, and the law applicable to any phase of the case resulting from their finding as to the character of the weapon should have been embraced in the instructions of the judge. If they found that the weapon used was one likely to produce death in the manner in which it was used, then, if the accused was not justified under some rule of law in using the weapon in the manner and at the time at which he used it, he would be guilty of murder or of voluntary manslaughter, according to whether they believed that the blow was struck from malice or as a re-

sult of passion not brought about by words alone. If the jury should find that the weapon was one which would not ordinarily produce death, and therefore was not a deadly weapon, and the circumstances demonstrated to the satisfaction of the jury that there was no intention to kill, then, even though the blow was not justified, the accused would be guilty only of the offense of involuntary manslaughter; the grade of which he would be convicted to be determined by whether the blow was inflicted as a result of an unlawful act, or whether, under the circumstances, he was justified in striking a blow, but in administering it did not use due care and circumspection. Under one view of the evidence, the law of involuntary manslaughter in the commission of an unlawful act was certainly involved. It is not altogether clear that the lower grade of involuntary manslaughter was really involved in the case. The failure of the judge to instruct the jury upon the higher grade of involuntary manslaughter was such an error as constrains us to reverse the judgment refusing a new trial. See *Taylor v. State*, 108 Ga. 389, 34 S. E. 120; *Farmer v. State*, 112 Ga. 80, 37 S. E. 129; *Chapman v. State*, 120 Ga. 865, 48 S. E. 350; *Jordan v. State*, 124 Ga. 780, 53 S. E. 331.

We do not deem it necessary to discuss at length the other assignments of error, for none of them alone would have required a reversal of the judgment, and any error that may have been committed in the instructions or in the admission of evidence will no doubt be corrected on another trial.

Judgment reversed. All the Justices concur.

WILLIAMS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. PARENT AND CHILD — ABANDONMENT OF CHILD.

"Under repeated rulings of this court, in order to constitute the crime of abandonment as defined in Pen. Code 1895, § 114, it is necessary that the child shall be not only deserted, but left in a destitute condition. If, notwithstanding the desertion, the wants of the child be provided for by others, the statutory crime of abandonment is not made out." *Mays v. State*, 51 S. E. 503, 123 Ga. 507, and citations.

[Ed. Note.—For cases in point see Cent. Dig. vol. 37, Parent and Child, §§ 176, 177.]

2. SAME—EVIDENCE.

The evidence in this case established the fact of desertion, but not destitution. A new trial should therefore have been granted.

(Syllabus by the Court.)

Error from City Court of Eastman; W. M. Clements, Judge.

Charlie Williams was convicted of abandoning his child, and brings error. Reversed.

J. P. Highsmith, for plaintiff in error. Chas. W. Griffin, Sol., for the State.

COBB, P. J. Judgment reversed. All the Justices concur.

McCRIMMON v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW — DISQUALIFICATION OF JUROR—REVIEW.

When, in a criminal case, after verdict, an attack is made upon a juror upon the ground that he was not impartial, the trial judge occupies the place of a trier, and his finding that the juror is competent will not be reversed, unless under all the facts the discretion of the judge is manifestly abused. No abuse of discretion appears in this case. *Jones v. State*, 44 S. E. 877, 117 Ga. 710 (4); *Sullivan v. State*, 48 S. E. 949, 121 Ga. 183 (4).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3056.]

2. SAME—NEW TRIAL.

A new trial will not be granted in a criminal case because of the relationship within the prohibited degrees of a juror to the accused, although such relationship was unknown to the accused or his counsel until after verdict. *Downing v. State*, 89 S. E. 927, 114 Ga. 30, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2223.]

3. HOMICIDE—VOLUNTARY MANSLAUGHTER.

There was evidence authorizing a finding that the accused was guilty of the offense of voluntary manslaughter, and the judge did not err in refusing to set aside the verdict convicting him of this offense.

(Syllabus by the Court.)

Error from Superior Court, Coffee County; T. A. Parker, Judge.

James McCrimmon was convicted of voluntary manslaughter, and brings error. Affirmed.

Rogers & Heath, L. C. Harrell, Levi O'Steen, and E. S. Fuller, for plaintiff in error. Jno. W. Bennett, Sol. Gen., and Quincey & McDonald, for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

MOSS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. HOMICIDE—MUTUAL COMBAT—INSTRUCTIONS.

The theory of mutual combat was presented by the evidence, and a charge thereon was not inappropriate.

2. CRIMINAL LAW—INSTRUCTIONS.

An instruction to the jury that "there is nothing in this case that you are to consider in arriving at a verdict, except the law and the evidence and the statement of the defendant," is not too restrictive in scope, when from the context it is apparent that the court only intended an admonition that the jury were not to be influenced by matters extraneous to the trial.

(Syllabus by the Court.)

Error from Superior Court, Pulaski County; J. H. Martin, Judge.

Hardy Moss was convicted of murder, and brings error. Affirmed.

Fort & Grice, for plaintiff in error. E. D. Graham, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

EVANS, J. Hardy Moss, Carroll Daniel, Monroe Smith, and Grant Smith were jointly indicted for the murder of Will Gilbert. The defendants severed on the trial, and the jury returned a verdict of guilty, with a recommendation to life imprisonment in the penitentiary, against Hardy Moss. He moved for a new trial, which being refused, he sued out a bill of exceptions complaining of the overruling of his motion.

1. Several of the grounds of the motion complain that the court erred in charging the principle stated in Pen. Code, 1895, § 73: "If a person kill another in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given"—because there was no evidence of mutual combat or mutual intention to fight. Looking at the evidence from the standpoint of this criticism, we find these facts testified to: There was a "frolic" at the house of one Hudson. During the festivities the deceased struck a woman over the head with a pistol. From this assault considerable confusion resulted, during which the codefendants of the accused were cursing and quarrelling with the deceased. One witness was positive that the accused was in the house at this time. One of the guests took hold of the deceased and carried him out of the house, closely followed by all of the defendants. When they had proceeded about 35 yards from the house, the deceased asked Grant Smith, "What have I done to you boys?" and Grant replied, "You ain't the only damn man here." Several other words passed between the accused and Grant Smith, the purport of which is not narrated. At this point the accused ran to the house and quickly returned with his gun. Just as he rejoined the others, Grant Smith fired his pistol at the deceased, who fired at Grant Smith. Then the accused fired at the deceased with a gun, inflicting the mortal wound. Afterwards the other defendants fired at the deceased with pistols, and the deceased also fired again. It also appeared that, when the accused ran for his gun and was returning to the place of the homicide, the accused said, with an oath, that "he would kill him," evidently referring to the deceased. The defendant in his statement said that on the day of the homicide he had purchased the gun which he had with him. "When I first got to the frolic, I went in the house, and stayed a few minutes, and come out on the porch and set down. A few minutes before I went back in the house they got to rowing. I picked up my gun and put it under my arm and started home, not having any words with them. When I got up

the path going on home, Will walked up. When he got right against me, he said, 'I will kill every one of you God damn sons of bitches!' and Will shot Grant, and put into shooting at the crowd, and shot this hole through my coat. I just raised my gun and shot him. I didn't intend to kill him because I was not mad with him at all." The codefendants of the accused testified in his behalf that the deceased shot first. When it is considered that all the defendants were armed; that some of them had a quarrel in the house with the accused, and, when the accused was being taken away by a peace-maker, all of them closely followed; that the altercation of words was continued on the outside of the house, pending which the accused quickly armed himself and returned to the scene before the shooting began; that the deceased was armed also; that the accused asserted that the deceased threatened the whole crowd before the shooting—we think it was proper to charge on the law of mutual combat.

2. The court charged as follows: "Gentlemen of the jury, there is nothing in this case that you are to consider in arriving at a verdict, except the law and the evidence and the statement of the defendant." It complained that this charge excluded from the consideration of the jury the argument of counsel, the number of witnesses, their manner of testifying, and their interest or want of interest in the case. We do not think this charge so restrictive in its scope as is contended in the assignment of error. When considered in connection with its place in the general charge, it is apparent that this instruction was but an admonition to the jury not to be affected by any extraneous influence. The evidence warranted the verdict, and we see no reason for ordering a new trial.

Judgment affirmed. All the Justices concur.

KELLY v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. OBSCENITY—INDICTMENT.

It is not necessary, in an indictment for using profane, obscene and vulgar language in the presence of a female, to charge that the language was used of or to another.

2. SAME—EVIDENCE.

The evidence authorized the verdict, and no sufficient reason appears for granting a new trial.

(Syllabus by the Court.)

Error from Superior Court, Baker County; W. N. Spence, Judge.

W. H. Kelly was convicted of using profane language in the presence of a female, and brings error. Affirmed.

Benton Odum and A. S. Johnson, for plaintiff in error. W. E. Wooten, Sol. Gen., and I. J. Hofmayer, for the State.

COBB, P. J. Kelly was indicted for using profane, obscene, and vulgar language in the presence of a female; the language used being, "Have sexual intercourse with me." A demurrer to the indictment was filed upon the ground that it was not alleged that the language was used to or of another. The demurrer was overruled, and the defendant excepted. After a trial the accused was found guilty, and moved for a new trial on the general grounds. This motion was overruled, and to this judgment he excepted.

It is not necessary to allege that profane and vulgar language used in the presence of a female was used of or to another. "One who uses vulgar and obscene language in the presence of a female is guilty of a violation of the law, whether the language is used to or of another or not." *McIntosh v. State*, 116 Ga. 545, 42 S. E. 793. The evidence amply authorized the verdict. It is contended that the language set out is not vulgar or obscene. It appeared that the words were used to a female, and there can be, under the evidence and circumstances under which they were used, no doubt of their vulgarity and obscenity. *Dillard v. State*, 41 Ga. 278. It was further contended that the bad character of the female furnished sufficient provocation for the use of the language, and therefore it did not appear that the words were used without provocation. The evidence was in conflict as to the character of the female. In addition to this, bad character of a female cannot be taken as a license for the use of obscene and vulgar language to such female. See *Brady v. State*, 48 Ga. 311.

Counsel contends that the evidence is insufficient to authorize the verdict, for the reason that it nowhere appears that the prosecutor is a female. There is no distinct statement to this effect by any witness. The prosecutor is sworn in the case as Mary J. Hair, and is referred to by witnesses as Mrs. Hair. The accused, in his statement, when speaking of the prosecutor, used the personal pronouns "she" and "her." When all the circumstances in evidence are taken into consideration, the jury were fully authorized to find, to the exclusion of a reasonable doubt, that the prosecutor was a female. See, in this connection, *Jolce v. State*, 53 Ga. 50.

Judgment affirmed. All the Justices concur.

FITZGERALD v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW — CONTINUANCE — ABSENCE OF WITNESSES.

Where a grand jury returned in open court a special presentment against a defendant on the 20th day of March, charging him with keeping open a tippling house on the Sabbath day, he having been arrested and bound over some weeks before for the offense, and such presentment was entered on the minutes, and no effort was made by him to secure subpoenas and obtain the presence of two certain witnesses until

March 27th, when subpoenas were issued, and he caused other subpoenas for the same witnesses to be issued on March 28th, too late to be served in time to procure the presence of the witnesses at the trial on March 30th, the witnesses residing in other counties, and no reason being shown for the delay, or why he had not caused them to be served and procured their presence in due time, there was no abuse of discretion in overruling a motion to continue the case on account of their absence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1836, 1837.]

2. SAME.

This case differs from that of Rumsey v. State, 55 S. E. 167, 128 Ga. 419, in which it was shown that the attendance of the absent witnesses could not be procured before the trial by the use of due diligence.

(Syllabus by the Court.)

Error from Superior Court, Wilcox County; J. H. Martin, Judge.

Perry Fitzgerald was convicted of violating the liquor law, and brings error. Affirmed.

E. H. Williams and J. L. Bankston, for plaintiff in error. E. D. Graham, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

WALKER v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence was cumulative and impeaching in its character, and the discretion of the judge, exercised in refusing to grant a new trial upon this ground, will not be controlled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2328-2330.]

2. SAME—EVIDENCE.

The other rulings complained of were not erroneous for any of the reasons assigned. The evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Vienna; D. L. Henderson, Judge.

Martha Walker was convicted of crime, and brings error. Affirmed.

Watts Powell, for plaintiff in error. W. V. Harvard, Sol., and E. F. Strozler, for the State.

COBB, P. J. Judgment affirmed. All the Justices concur.

DUNAWAY v. HODGE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—SENTENCE—FINE—DISCHARGE ON PAYMENT—REASONABLE TIME.

Where a misdemeanor convict is sentenced by the court in the alternative, directing service upon the chain-gang for the term of 12 months and to be discharged upon the payment of a fine, it is the duty of the court, in the exercise

of its discretion, to prescribe a reasonable time within which to pay the fine. If the court fails to prescribe such reasonable time, the law will allow the convict a reasonable time within which to pay.

(a) Where the court, by inadvertence, prescribes two limits of time within which to pay the fine, which are so conflicting as to be irreconcilable—as, for instance: (1) "The defendant may be discharged at any time before the end of sentence;" (2) "five days given to pay this fine"—such conflict will render ineffectual the attempt to prescribe a definite time, and neither provision should be regarded. In such case the law will declare what is a reasonable time.

(b) Under the facts in this case, the alternative fine and costs were tendered within a reasonable time, and should have been accepted, and the prisoner discharged, upon the payment thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fines, § 20.]

Evans and Beck, JJ., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Washington County; B. L. Rawlings, Judge.

Habeas corpus on the petition of A. P. Dunaway against Peter Hodge. On denial of the application, petitioner brings error. Reversed, on conditions.

Sibley & McWhorter, for plaintiff in error. Marvin L. Gross and Evans & Evans, for defendant in error.

ATKINSON, J. This is a writ of habeas corpus, brought against the authorities of Washington county, for the discharge of Matthew Willingham from their custody. It appears that Willingham had been convicted of a misdemeanor in the superior court of Washington county. After his conviction the court imposed a sentence upon him as follows: "Whereupon it is ordered that the said Matthew Willingham be, and is hereby, sentenced to work in the chain-gang on the public works, or on such other works as the county authorities of said county may employ the chain-gang, for the term of 12 months from the date of reception in said chain-gang. The defendant may be discharged at any time before the end of sentence on payment of the sum of \$100, all cost, to the proper officers. Five days given to pay this fine. This 7th day of September, 1906." After five days expired, to wit, on the 22d day of September, 1906, the said Willingham, through his representative, the plaintiff in the case, made a legal tender of the fine and all costs to the proper officers, and demanded the discharge of the defendant from the custody of the county authorities. The demand was refused, and the prisoner held in custody. Upon hearing the application for discharge of the prisoner, the court denied the application, and the plaintiff excepted, and assigns error on the refusal.

Under the contentions of the parties, the whole case turns upon the construction of the sentence of the court. It is contended by the plaintiff in error that the tender of the fine and costs should have been accepted,

and the prisoner discharged, and by the defendant in error that the limit of time provided in said sentence for the payment of the fine, being five days only, had expired, and that it was not the right of the accused after that time to pay the fine and be discharged. Pen. Code 1895, § 1084, provides that "every fine imposed by the court under the authority of this Code shall be paid immediately, or within such reasonable time as the court may grant." While this section is not mandatory with reference to fines which are within the discretion of the court, as in cases of alternative punishments after conviction of misdemeanor, yet it may be borne in mind with a view of determining the policy of the law. In misdemeanor cases it is within the discretion of the court as to whether a fine shall be imposed, to operate as a discharge from prison or work on the chain-gang. It is but reasonable that the court should have like discretion to grant time to the convict within which to pay.

It affirmatively appears from the sentence that it was not the intention of the court in any event to require the immediate payment. The court, in the exercise of its discretion, undertook to provide a definite future time within which the defendant should be permitted to pay the fine and be discharged. Unfortunately, in specifying that time, the court made two distinct provisions, which were directly opposed to each other—one to the effect that the defendant might be discharged at any time before the end of the sentence, on payment of the fine, and the other to the effect that the defendant should have only five days within which to pay the fine. The most reasonable view to take of the case is that the court intended to exercise its discretion by allowing a definite time within which to pay the fine, but by inadvertence, while entering up the judgment, embraced therein the two antagonistic provisions above referred to. In such case, one provision destroys the other, and neither should be held effective. 1 Black on Judgments (2d Ed.) p. 9, c. 1, § 3. In the case of *Gage v. Downey*, 94 Cal. 241, 29 Pac. 635, it was held: "Where a court inadvertently determines two matters standing in such opposition as to be incapable of an harmonious construction—as, for instance, that the same property belongs absolutely to each of two persons—the decision is of no effect." The fact that the court attempted to extend the time for the payment of the fine indicates affirmatively that it was its purpose to grant a reasonable extension. Having failed to specify the particular number of days which the court had in mind to fix the limit of the reasonable time, the matter is left for the law to say what would be a reasonable time.

The facts disclose that within 15 days after the fine was imposed a legal tender of the fine and all costs was made to the proper authorities. We hold that as a matter of law this tender was within a reasonable

time, and, under the alternative sentence of the court, should have been accepted, and the prisoner discharged. In the case of *Broomhead v. Chisolm*, 47 Ga. 393, this court says: "If the court may grant reasonable time where the fine is peremptory (Code 1868, § 4565), much more should reasonable time be allowed where the fine is alternative." The Code provision referred to there was in the Code of 1868, and should have been section 4561; but it was substantially the same as that to which we have referred in the beginning of this opinion. In the same case the court held: "The judge before whom a prisoner is convicted, in passing an alternative sentence of fine or imprisonment, should fix some reasonable time within which the fine must be paid. If he fail to do so, the convict has at least a reasonable time within which to pay the fine. Where the imprisonment is for four months from the 12th of March, and the fine of \$50 is paid on the 2d of April, the time is not unreasonable." We think that decision controls this case. It was a matter of discretion with the trial judge as to whether he should impose a sentence in the alternative. When, in the exercise of that discretion, he did impose an alternative sentence, the law required him to give reasonable time within which to pay the fine; and whether the judgment be silent as to an intent to grant time, or it show affirmatively, as in the present case, that there was an intent to grant time, though by mistake no definite time was fixed, the law would allow the defendant a reasonable time within which to pay.

Judgment reversed, with direction that defendant be permitted to pay his fine and costs of court, and then to be discharged; otherwise, to be held in custody. All the Justices concur, except EVANS and BECK, JJ., who dissent.

WALL v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. HOMICIDE—VOLUNTARY MANSLAUGHTER—EVIDENCE.

Where one without malice, and not under such circumstances as would justify or excuse the killing, voluntarily kills another, being impelled so to do by that sudden violent impulse of passion supposed to be irresistible, produced by some actual assault upon the person killing, or an attempt by the person killed to commit a serious personal injury upon the person killing, or by other equivalent circumstances sufficient to justify the excitement of such passion, then the homicide would be voluntary manslaughter. The evidence in this case discloses such facts as would authorize the jury to conclude that the accused took the life of the deceased under such circumstances as to make him guilty of the offense above named.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 68.]

2. CRIMINAL LAW—MOTION FOR NEW TRIAL—JURY—OBJECTIONS.

The objection to a juror that his name does not appear in the jury box, being an objection proper defectum, must be made when the juror

is put upon the accused, and, if not then urged, will not afterwards avail as a ground of motion for a new trial. The evidence submitted, seeking to impeach the juror, discloses no reason why he should not have served, except that his name was not in the jury box. The court having so found, it was not erroneous for the court to refuse to grant a new trial on the ground of the disqualification of the juror.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2223.]

3. SAME—MENTAL INCOMPETENCY OF JUROR.

The mental incapacity of a juror is not ground of objection propter defectum, and may be urged after verdict as a ground, if not known to the accused at the time of accepting him, and may constitute a good ground of a motion for new trial. In such case the judge, upon hearing the motion for new trial, will hear evidence, and, in the light of the evidence, it is his duty to pass upon the competency of the juror. The evidence introduced relative to the mental condition of the juror Platt in the present case was sufficient to authorize the court to find him competent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2231-2234.]

4. SAME.

Where a juror is sought to be impeached after verdict, upon the ground that he was prejudiced against the accused, the judge, in passing upon the motion for new trial, will hear evidence upon the ground of impeachment, and if the evidence sustains the ground of impeachment, a new trial should be granted. But, in this case, the evidence upon that question is sufficient to justify the court in holding the juror competent, and there was no error in refusing to grant a new trial upon that ground. As to whether the voir dire act of 1856 (Acts 1855-56, p. 231), where the disqualification of the juror resulted from the formation "or" expression of an opinion, has been changed by subsequent legislation, so as to make the disqualification result from the formation "and" expression of opinion, it is not necessary here to decide.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2384-2386.]

5. HOMICIDE—INSTRUCTIONS.

There was no such error in the various extracts from the charge of the court on which error is assigned, or in the refusal of requests to charge, or in any other ruling of the court, as would authorize a judgment of reversal for any reason assigned. The evidence authorized the verdict, and having received the approval of the trial judge, the judgment, refusing a new trial, will not be reversed.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

J. S. Wall was convicted of murder, and brings error. Affirmed.

Austin Branch and J. R. Lamar, for plaintiff in error. J. S. Reynolds, Sol. Gen., and Salem Dutcher, for the State.

ATKINSON, J. 1. The defendant was not convicted of murder, and it is not necessary to discuss the case upon that theory. He was not acquitted, and we may at once inquire if there was error in failing to acquit. It is contended that he should have been acquitted, first, because the accused shot in self-defense; second, because he shot under the fears of a reasonable man that the deceased was about to commit a felony upon

his person. The establishment of either of these defenses ought to accomplish his acquittal. But the jury are the judges of the facts, and upon evidence sufficient to support their finding they have found that the deceased did not shoot in self-defense, or under the fears of a reasonable man. The presiding judge has approved that finding, and we see no ground to set his judgment aside. The defendant was convicted of voluntary manslaughter, and the main question is: Does the evidence support this conviction? It is not disputed that he took the life of the deceased by means alleged in the indictment. The killing was voluntarily accomplished by shooting. If the shot was fired, not with what the law defines as "malice," and not under such circumstances as would justify or excuse the killing, but as the result of that sudden violent impulse of passion supposed to be irresistible, produced by some actual assault upon the person killing, or by an attempt by the person killed to commit a serious personal injury on the person killing, or by other equivalent circumstances, sufficient to justify the excitement of such passion, then the homicide would be voluntary manslaughter. Upon this theory of the case the evidence is conflicting, but, in our opinion, there is sufficient evidence to support the verdict. From the testimony of one of the witnesses for the state, there were opprobrious, unprovoked words addressed by the accused to the deceased. The insult was resented by an actual and violent battery, followed by the retreat of the accused, pursued by the deceased in a violent manner, until the firing was accomplished, and the deceased staggered and fell. The jury may have been of the opinion that the battery was disproportioned to the offense given, and that the pursuit of the defendant afterwards by the deceased was unjustified and amounted to the "actual assault" contemplated in the law of voluntary manslaughter, and they may have found that the assault did produce sudden and irresistible passion in the breast of the accused which impelled him to fire the fatal shot. The jury are the exclusive judges of the emotions and passions of the accused at the time of the fatal encounter, and if, under the evidence in this case, they were of the opinion that the defendant inflicted the mortal wound impelled by passion such as described, produced in the manner indicated, without any mixture of malice, and not under circumstances which would justify or excuse the homicide, the only proper verdict was that finding the defendant guilty of voluntary manslaughter. See, in this connection, *Jenkins v. State*, 123 Ga. 527, 51 S. E. 598; *Williams v. State*, 125 Ga. 304, 54 S. E. 108.

2. The motion for new trial, among other things, complained that A. L. Anderson was a qualified juror, as appeared from the jury

list of the county, and that A. A. Anderson appeared in his place and was accepted as a juror, and that A. A. Anderson was not in the jury box. This ground is supported by the affidavits of counsel and the accused, both of whom swore that they did not know of this substitution until after the verdict. In reply the state introduced affidavits of certain persons, in effect as follows: (a) Affidavit of A. L. Anderson to the effect that he was summoned by the sheriff, under that name (a copy of the summons being attached to this affidavit), and that whenever his name was called it was called as A. L. Anderson, and that he answered to that name; that he was acquainted with B. C. Wall, the father of the accused, and had been acquainted with him for two years; that he met him and spoke to him in the courthouse before he was sworn as a juror; that at the time he was placed upon voir dire, B. C. Wall, the father of the accused, was sitting with the accused and his counsel. (b) An affidavit of B. W. Anderson, the father of A. L. Anderson, to the effect that his full name was Artemus Lazenby Anderson, that he was 23 years of age, and had lived in Richmond county all his life. From these affidavits, the judge could find that the juror who appeared and was selected was A. L. Anderson, and not A. A. Anderson, and that the accused knew him to be A. L. Anderson at the time he was selected. Under such circumstances, the only objection to the juror was that his name was not in the jury box; and this, being proper defectum will not avail as a ground in the motion for new trial. See *Jordan v. State*, 119 Ga. 443, 46 S. E. 679, and cases cited on page 446 of 119 Ga., and on page 681 of 46 S. E.

3. The motion for new trial makes complaint that John A. Platt, who served on the jury and participated, was not competent mentally to act as a juror, and said incompetence was unknown to defendant and his counsel, nor had the defendant and his counsel any opportunity for discovering or any reason for suspecting said incompetence until after the verdict. Certain affidavits were attached, pro and con, upon the subject of the juror's mental condition. From the evidence introduced on this subject, the judge was authorized to find that the juror was mentally competent; and therefore there was no abuse of his discretion in overruling this ground of the motion for a new trial. See, in this connection, *Hicks v. State*, 126 Ga. 80, 54 S. E. 807. While citing this case the writer does not mean to recede from his dissent as noted in the case cited. The facts of the cases are different in several respects, only one of which need be mentioned. In the present case, the evidence was sufficient to support the finding of the judge that the juror was competent, while in the case cited it was and is the opinion of the writer that the evi-

dence demanded a finding by the judge that the juror was not competent.

4. In the motion for new trial, the defendant complains that George S. Street served as a juror and participated in the verdict while he was not a qualified juror, because his mental condition was not fair and impartial between the state and the accused, and because there was prejudice and bias resting in his mind against the accused, which prejudice and bias was altogether unknown and unsuspected by the accused and his counsel, and they had no reason to suspect the same until after the verdict. Affidavits were submitted pro and con upon the question of his bias, prejudice, and partiality. The Penal Code of 1833 provided that one who had seen the crime committed, and had formed "and" expressed an opinion as to the guilt of the accused, was an incompetent juror. This seems to have been true, also, under the voir dire act of 1843 (see Acts 1843, p. 137). By the act of 1856 (Acts 1855-56, p. 231), the disqualification resulted from the formation "or" expression of an opinion. This was the law at the time that the Code of 1863 was adopted. The provision in that Code restores the word "and," and leaves the law as it stood prior to the act of 1856. Whether this was a deliberate change back to the old law, or simply an inadvertent use of the word "and" when there was an intention simply to codify the act of 1856, need not be decided in this case. The witness swore that he did not see the crime. This fact was, however, in issue, as there was an affidavit by a party who said that Street had admitted that he saw the crime committed. Street swore positively that he had neither formed nor expressed any opinion in regard to the guilt of the accused. There was no issue on this question. His answer on the voir dire was that he had not formed "and" expressed, and his affidavit read on the motion for new trial was that he had not formed "or" expressed, an opinion. The judge was required, therefore, to hold that he was a competent juror, without reference to whether the disqualification was the formation and the expression of an opinion, or the formation "or" expression of an opinion. Under this view it is unnecessary to determine the question as to whether the act of 1856 has been changed by subsequent legislation.

5. There are numerous assignments of error upon various extracts from the charge of the court. There were also a number of assignments of error upon the refusal to give in charge certain requests duly presented to the judge, and also exceptions to other rulings of the court. These requests, so far as legal and pertinent, were all in substance covered by the general charge. Even if any of the extracts from the charge upon which error is assigned are subject to the criticism made upon them, or if there was error in

any of the other rulings made, the error therein was not in any instance of such a grave nature as to require a reversal of the judgment of the court below.

Judgment affirmed. All the Justices concur.

DUBLIN v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—DELAY IN PROSECUTION—ACQUITTAL.

The accused was arraigned at the June term, 1906, of a city court, upon an accusation charging him with a misdemeanor. He interposed a special plea in bar, which averred that during the September term, 1905, a demand for trial was duly entered upon the minutes, but he was not tried during that term, although there was a jury impaneled and qualified to try him; that at the next succeeding term, to wit, the March term, 1906, he was present in court ready for trial, insisting on a trial, but was not tried; that there was a jury impaneled and qualified to try him at that term; that he moved for a discharge and acquittal, but the judge refused to grant it, upon the ground that there would be an adjourned term of the court at which he would be tried; that the adjourned term was not held, and the March term was finally adjourned on the third Monday in May. Held that, under the facts alleged in the special plea, the accused was entitled to an acquittal and a discharge, and it was error to strike the plea on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1297.]

(Syllabus by the Court.)

Error from City Court of Sylvester; Frank Park, Judge.

Porter Dublin was convicted of a misdemeanor, and brings error. Reversed.

The accused was arraigned in the city court of Sylvester, at the June term, 1906, upon an accusation charging him with a misdemeanor. He interposed a special plea in bar, the averments of which were, in substance, as follows: The accusation was pending in the city court at the September term, 1905, and during that term the accused in writing demanded a trial; the demand being in the terms of the statute. This demand was by order of the court placed upon the minutes. At that term there was a jury impaneled and qualified to try the accused, but he was not tried. At the next regular succeeding term, to wit, the March term, 1906, there was a jury impaneled and qualified to try the accused. The accused was present, ready for trial, and insisting on a trial, but was not tried. The March term began on the fourth Monday in March, was in daily session for about two weeks, and was then adjourned until the third Monday in May. The accused, through his counsel, stated to the presiding judge in open court that he insisted on a trial, calling attention to the demand above referred to. The judge refused to grant a discharge or allow a trial, stating that an adjourned term would be held, at which all cases in which demands had been made would be tried. The adjourned term was not in fact held, and the March term was finally adjourned on the

third Monday in May. These facts are pleaded as reasons for an absolute discharge and acquittal of the offense charged in the accusation. Upon the special plea being filed, the judge passed the following order: "Upon reading of the plea and oral motion to discharge the defendant, the same is hereby overruled." The accused excepted. The trial proceeded, and the accused was convicted. In his bill of exceptions he assigns error upon the ruling above referred to, upon the refusal to grant a new trial, and upon the overruling of a demurrer.

Payton & Hay, for plaintiff in error. J. H. Tipton, Sol., for the State.

COBB, P. J. (after stating the foregoing facts). Both counsel for the state and for the accused, in their briefs, treat the order of the judge as in effect striking the plea upon demurrer, and we will so consider it. The eighteenth section of the fourteenth division of the Penal Code of 1833 provided that any person charged with an offense not capital might "demand a trial at the term when the indictment was found, or at the next succeeding term thereafter," and that if a trial was not had at the term when the demand was made, or at the next succeeding term, the accused should be absolutely acquitted and discharged of the offense, provided that at both terms there were juries impaneled and qualified to try the accused. Cobb's Dig. p. 836. In *Denny v. State*, 6 Ga. 491, the section of the Penal Code above referred to was construed to authorize a demand for trial at the first, second, or any subsequent term. In *Jordan v. State*, 18 Ga. 532, Judge Lumpkin expressed a doubt as to whether the ruling in *Denny's Case* was a sound construction of the Code, either upon principle or policy. In *Price v. State*, 25 Ga. 133, it was held that a demand for trial must be made not later than the second term: the decision in *Denny's Case* being in terms overruled. In *Watts v. State*, 28 Ga. 231, the ruling in *Price's Case* was followed and approved. This decision was rendered in 1858. In 1859 (Acts 1859, p. 60) the General Assembly amended the eighteenth section of the Code of 1833, so as to authorize in terms a demand for trial to be entered at the term when the indictment or presentment was found or at any subsequent term thereafter. This was the state of the law at the time the Code of 1863 went into effect. The eighteenth section of the Code of 1833 appears in that Code with some changes. Under the provisions of that Code the demand may be entered as a matter of right at the first or second term, and at any subsequent term by special permission of the court. Code 1863, § 4534. Such is the law at the present time. Pen. Code 1895, § 958.

It appears from the averments of the plea that a demand for trial was entered according to the terms of the Penal Code above re-

ferred to. As a matter of fact, it appears from the record that this demand was entered at the second term of the court; but this is immaterial, as, no matter at what term it was entered, if it was entered and allowed by the court, the accused is entitled to all of the rights accorded by the provisions of the statute. When the demand was entered, whether as a matter of right at the first or second term, or by special permission of the court at a subsequent term, the state, by the terms of the statute, was bound to try the accused at the term when the demand was entered or at the next succeeding term. Trial or acquittal are the only alternatives. *Durham v. State*, 9 Ga. 306; *Kerese v. State*, 10 Ga. 95. If the accused makes a motion for a continuance in the case, and the same is granted, or does any other act showing affirmatively that he consented to a postponement of the case until a subsequent term, a waiver of his right to insist upon the demand will result. *Walker v. State*, 89 Ga. 482. If there is a mistrial in the case, or if the accused is convicted and a new trial granted, the accused will not lose his rights under the demand; but he will be entitled to a trial or discharge at the next succeeding term. *Gordon v. State*, 106 Ga. 121, 32 S. E. 32, and citations. It has been held that it is not even incumbent upon the accused, in order to save his rights under the demand, to make any response to a question from the court as to whether there were any other jury trials to be had. He may remain silent, allow the jury to be discharged, and then insist upon his demand. The demand upon the minutes is notice to the judge and prosecuting officer of its existence. *Dacey v. State*, 15 Ga. 293. In reference to the general subject of the rights of the accused under a demand duly entered, see *Hunley v. State*, 105 Ga. 636, 31 S. E. 543; *Stripland v. State*, 115 Ga. 578, 41 S. E. 98; 4 *Michie's Ency. Dig. Ga. Rep.* 17 et seq.

The facts alleged in the special plea must be taken to be true. They show that a demand for trial was duly entered upon the minutes, that the accused was not tried at the term at which the demand was made, that he was not tried at the next succeeding term thereafter, and that there were juries qualified and impaneled to try him at both terms. His right to a discharge and acquittal under the terms of the statute seems to be complete. It is said, though, that he ought to have moved for a discharge and acquittal at the second term, and his failure to do so resulted in a waiver of any right he might have under the demand. He called attention to his demand during this term. He insisted upon it. The judge refused to try him, and refused to discharge him, for the reason that an adjourned term of the court was to be held, at which he and others in the same situation were to be tried. Under these circumstances the judge was authorized to re-

fuse his discharge. But the failure to hold the adjourned term was not chargeable to any act of the accused. When that term finally adjourned without a trial, he was entitled to be discharged. It would certainly be anomalous to hold that, when his right to a discharge resulted from a failure to hold the term, this right would be waived by his failure to move for his discharge, when no opportunity was given him to make this motion. He could not make the motion until the succeeding term. When he made it at a succeeding term, he was entitled to an order discharging and acquitting him of the offense charged in the accusation. The judge erred in striking the special plea.

Judgment reversed. All the Justices concur.

DYAS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

CRIMINAL LAW—VENUE—EMPLOYMENT—ADVANCES—FRAUD.

The venue for a prosecution, under the act of 1903 (Acts 1903, p. 90), for cheating and swindling, is in the county where the advance is received. It follows that where the accusation lays the venue in one county, and the evidence discloses the advance to have been received in another county, the evidence does not support the verdict, and a new trial should be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 224.]

(Syllabus by the Court.)

Error from City Court of Americus; Chas. R. Crisp, Judge.

John Dyas was convicted of swindling, and brings error. Reversed.

G. C. Webb and G. R. Ellis, for plaintiff in error. Allen Fort, Jr., Sol., for the State.

ATKINSON, J. In the city court of Americus the defendant was convicted under an accusation charging him with the offense of cheating and swindling, under the act of 1903 (Acts 1903, p. 90). The venue was laid in Sumter county. Upon the trial the evidence disclosed that while the agreement to labor was made in the county of Sumter, where the labor was intended to be performed, the written contract to labor was executed in the county of Lee; that the application for the advance was made in the county of Lee, and the advance was actually made and received in that county. Obtaining the money with the intention not to perform the contract, where loss to the hirer results, is the gist of the offense. That was the criminal act of the defendant which damaged the prosecutor. This, having been accomplished in Lee county, fixed the venue of the offense there, and the court in Sumter county was without jurisdiction. A new trial should have been granted.

Judgment reversed. All the Justices concur.

GORDON v. JOHNSON, Marshal.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW — SENTENCE — CONSTRUCTION — RELEASE — SUBSEQUENT ARREST — HABEAS CORPUS.

The mayor pro tem. of the city of Cordele, sitting as recorder, found an accused person guilty of violating a municipal ordinance, and sentenced him to be confined in the chain-gang for 6 months, and, if there should be no chain-gang to which he could be delivered, to be confined in the guardhouse for 60 days, with direction, however, that the defendant could be released on payment of \$500. The sentence further ordered and directed that, upon the payment of \$100, the other \$400 should be suspended during good behavior. The defendant paid \$100 and was released from imprisonment. Subsequently, by direction of the recorder, who from evidence heard in another case thought that the defendant was not behaving well, the city marshal arrested the defendant and held him for the purpose of requiring the payment of the additional \$400, or of reincarcerating him as provided in the original sentence. *Held*: (1) Construing the entire sentence together, it gave a right to the defendant to be released upon the payment of \$100. (2) The recorder had no authority to suspend the payment of \$400, and, after the payment of the \$100 by the defendant and his discharge from custody, at some later time, when he thought the defendant was not behaving properly, to direct his rearrest, and that he be put to work upon the chain-gang or imprisoned as provided in the original sentence, unless he should pay the additional \$400. (3) Where, after paying the \$100 provided in the sentence, the accused was released, and was afterwards rearrested, as indicated in the preceding note, such custody was unlawful, and he was entitled to be discharged by writ of habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2501, 2521, 2557.]

(Syllabus by the Court.)

Error from Superior Court, Crisp County: Z. A. Littlejohn, Judge.

Habeas corpus of A. W. Gordon against T. H. Johnson, marshal. From a judgment denying the writ, the petitioner brings error. Reversed.

W. F. Hall and L. J. Blalock, for plaintiff in error. E. F. Strozler, for defendant in error.

LUMPKIN, J. 1. In this case the recorder, in shaping the proceedings, seems to have had in mind probation laws, or else the method which was formerly practiced in England, under what was known as "the ticket of leave system," when that country sent convicts to Australia and granted some of them tickets of leave upon certain conditions. But, about 1840, the colonies declined to receive more of the convicts, and, after the trial of the plan at home, it was substantially abolished, or at least changed to the license system dependent on conduct during imprisonment. The facts are sufficiently stated in the headnotes. The effect of the sentence, taken as a whole, was that the accused should be released from imprisonment, upon the payment of \$100. He paid that amount and was rightfully released. The city recorder had no authority of law to

55 S.E.—314

add \$400 to the fine, and provide that it should be indefinitely suspended during good behavior, but that the collection of it might be enforced by imprisonment, at the mere direction of such recorder. The charter of Cordele is quite liberal, but it confers no such authority as this. Indeed, it has been held that a judge of the superior court has no authority to suspend the execution of a sentence imposed in a criminal case, except as incident to a review of the judgment. *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175. The facts of this case illustrate clearly why such a proceeding cannot be upheld. The defendant had paid the amount which entitled him, under the sentence, to be set free. An additional amount of \$400 as a fine was imposed, not to be collected certainly, but to be suspended "during good behavior." Who was to judge of this good behavior, and what should constitute it, can only be surmised. Somewhat more than a month after this sentence the same defendant was again accused of keeping whisky on hand for illegal sale, which was the offense of which he had formerly been convicted. On the trial of that case the evidence did not authorize a conviction, and the recorder discharged the defendant; but apparently he was of the opinion that the evidence showed that the defendant's behavior was not good, and he accordingly directed the marshal to enforce the sentence in the former case. In other words, the court seems to have convicted him of bad behavior, which was not an offense with which he was charged, or for which he was or could have been tried. Being thus of the opinion that the defendant's good behavior had ceased, the recorder withdrew an indefinite suspension of the right to collect the additional \$400 mentioned in the original sentence. The defendant may or may not have been exercising "good behavior." But there is no law authorizing such a proceeding, or the enforcement of the collection of the additional \$400 by imprisonment.

Judgment reversed. All the Justices concur.

PARK v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. HOMICIDE—DYING DECLARATIONS.

The evidence was sufficient to show prima facie that the dying declarations offered in evidence were made while the person making them was in articulo mortis and was conscious of his condition, and they were properly admitted. *Findley v. State*, 54 S. E. 108, 125 Ga. 579.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 432.]

2. SAME.

Where a proper foundation was laid by the evidence for the admission of a dying declaration, the fact that, while it was being made, an interruption took place and it was not then completed, but a short time thereafter and during the same day the dying person completed the statement, and substantially repeated what he had already said, would not render such dy-

ing declarations inadmissible, it appearing prima facie that he was still in the article of death and conscious of the fact, and it not being shown that either his bodily condition or his mental apprehension thereof had changed for the better.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 439.]

3. SAME.

Where a witness who testified to a dying declaration stated that while it was being made he asked the dying person one or two questions, this was not sufficient to show that the declaration was not voluntarily made, or to render it inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 439.]

4. SAME.

That a witness who testified to a dying declaration stated that he did not remember every word the deceased said did not render his testimony inadmissible, where he remembered and stated substantially the entire declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 452.]

5. CRIMINAL LAW—OBJECTIONS TO EVIDENCE.

Where certain evidence of a witness, which was of considerable length (covering nearly two pages of writing), was objected to as a whole, and much of it was admissible, there was no error in overruling the objection, even if a small part of such evidence may have been inadmissible. In such a case, it is the duty of the objecting party to point out that portion of the evidence which is inadmissible and object to it. *Johnson v. State*, 54 S. E. 184, 125 Ga. 243.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1637.]

6. HOMICIDE—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

After a conviction of voluntary manslaughter, newly discovered evidence of a witness who would testify that "some time before the killing" the deceased saw the defendant and his brother passing, and spoke of them to the new witness, with whom he was at the time, using a vile epithet in referring to them, and saying that he would be willing "to wear jean pants, eat dry bread, and drink branch water to get to kill them," did not require the grant of a new trial. This evidence would only be cumulative of other evidence introduced on the trial, tending to show the animus of the deceased toward the accused, and that the former was the assailant. Besides, it did not appear with any degree of definiteness how long before the homicide the statement was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 687.]

7. CRIMINAL LAW—DILIGENCE.

Where a witness was present at the time of a encounter which resulted in a homicide, and this fact was known to the defendant, and the witness was accessible, but apparently no effort was made to ascertain what evidence he would give or to have him present as a witness on behalf of the defendant, it did not furnish any ground for a new trial that, after conviction, the defendant made inquiry of the witness and discovered that he would testify to certain facts beneficial to such defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2319.]

8. SAME—SELF-SERVING DECLARATIONS.

There was no error in rejecting evidence that "immediately after the shooting, less than five minutes," the accused, who had committed a homicide, told a witness that he was looking into the barrel of the pistol of the deceased when he (the accused) fired the first shot. Such statement appears to have been in the nature of a narrative of a past transaction. to have been

self-serving in its character, and not to have been free from the suspicion of afterthought, nor was it ever shown whether it was made at the scene of the homicide or elsewhere. *Warrick v. State*, 53 S. E. 1027, 125 Ga. 133 (4).

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 816, 817.]

9. HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.

The evidence authorized a charge on the subject of manslaughter.

10. SAME—JUSTIFIABLE HOMICIDE—MUTUAL COMBAT.

The presiding judge charged on the subject of justifiable homicide, as contained in section 70 of the Penal Code of 1895, and in connection therewith charged in regard to the doctrine of reasonable fears, as contained in section 71. He also charged the jury with respect to mutual combat and the defense which could arise under section 73 of the Penal Code of 1895, and in connection therewith charged in regard to the fears of a reasonable man. Under the evidence there was no error in doing so; nor, in view of the entire charge, does it appear that there was such a confusion of the various sections as was calculated to injure the defendant.

11. SAME.

The evidence authorized a charge on the subject of mutual combat and mutual intention to fight.

12. SAME.

A careful consideration of the entire charge, and of the context in which the charges complained of were used, fails to show that there was error harmful to the accused, or calculated to mislead or confuse the jury.

13. CRIMINAL LAW—TRIAL—FORMS OF VERDICT.

Where the presiding judge fully instructed the jury as to the law of the case, and as to the forms of verdict, there was no error in preparing and allowing the jury to carry out with them written forms of verdicts, it appearing that a form appropriate to every finding which could be legitimately made under the evidence and the law was given to the jury, and it not being made to appear that this was done in such a manner as in any way to affect or influence their finding, but, on the contrary, the presiding judge warning them that this was done merely to enable them to shape into proper form whatever verdict they might find.

14. HOMICIDE—EVIDENCE.

The evidence fully supported the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from Superior Court, Pike County; *E. J. Reagan*, Judge.

J. S. Parks was convicted of manslaughter, and brings error. Affirmed.

B. F. McLaughlin, J. F. Redding, B. L. Tisinger, and E. N. Owen, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., E. F. Du Pree, and S. Y. Allen, for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

EVANS v. MAYOR, ETC., OF CITY OF FORSYTH.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. MUNICIPAL CORPORATIONS—POLICE REGULATIONS—CRIMINAL PROSECUTIONS—CERTIORARI.

Where a petition for certiorari, complaining of a judgment of a mayor and aldermen, recited that the judgment was rendered on "the

— day of —, 190—," and that the petition was presented within 30 days from the rendition of the judgment, and it was duly verified and sanctioned, this was sufficient to show *prima facie* that the application was brought in due time; and it was error to dismiss the certiorari on the ground that the petition did not show on its face the date of the judgment.

2. SAME—DISMISSAL.

If the answer to the writ untraversed (or with a traverse not sustained) shows that in fact more than 30 days had elapsed after the judgment and before the application for the writ of certiorari, the writ should be dismissed for that reason.

3. SAME—APPEAL—RECORD—AMENDMENT.

A motion for this court to cause the clerk of the superior court to send up a transcript of the answer to the writ of certiorari will not be granted, where it appears that the presiding judge dismissed the case because of what appeared or failed to appear in the petition alone as to the date of the judgment.

4. CRIMINAL LAW — POWER OF SUPREME COURT.

This court has no authority to require the judge of the superior court to certify to additional facts transpiring during the hearing of a cause and not appearing in the bill of exceptions or the record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2904.]

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

George Evans, Jr., was convicted of a violation of an ordinance of the city of Forsyth. From an order denying the writ of certiorari, he brings error. Reversed.

R. L. Berner and J. M. Fletcher, for plaintiff in error. Cabaniss & Willingham, for defendant in error.

LUMPKIN, J. A petition for the writ of certiorari is to some extent analogous to a bill of exceptions. Bonds v. Berdett, 113 Ga. 114, 38 S. E. 304. A petition must be verified in the first instance by an affidavit; a bill of exceptions, by the certificate of the presiding judge. If a bill of exceptions states that it was presented and certified within 30 days after the judgment, and is certified, this statement is taken as *prima facie* correct. If the date of the judgment sent up in the record conflicts with this statement, the record controls. Merritt v. Gill, 59 Ga. 459; Southern Ry. Co. v. Flemister, 120 Ga. 524, 48 S. E. 160. Here the petition for certiorari, duly verified and sanctioned, fails to state the exact date of the judgment excepted to, but did allege that the application was made within 30 days from the date of the judgment. The presiding judge dismissed the certiorari on the express ground that the petition did not show the date of the judgment. This was error.

After the answer is filed, it controls, and must be looked to for the facts of the case. Allegations in the petition must be verified by the answer, to be considered. Manning v. Mayor and Council of Gainesville, 125 Ga. 239, 53 S. E. 1002. If no traverse should be

filed to the answer, or if one should be filed and not be sustained, and such answer should show that the statement of the petition is erroneous, the answer would control. No answer was specified or sent up in the record. We are asked to have a transcript of it sent up now. But we deem it unnecessary to do so, as the judgment of the court shows that it was not based on the answer, but on the petition alone. We are also asked to require the presiding judge to certify as to certain statements or admissions claimed to have been orally made by counsel to him. But there is no provision of law for doing so.

Judgment reversed. All the Justices concur.

CRESS v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. HOMICIDE—INSTRUCTIONS.

Where, in a trial of one under an indictment charging him with the offense of murder, the evidence discloses facts and circumstances which make it proper that the court should charge the jury the law of murder, of voluntary manslaughter, and of justifiable homicide, it was error for the court to charge unqualifiedly that, "If the weapon used was one which in its nature was not likely to produce death, the jury might infer a want of malice, and in such a case it would be voluntary manslaughter." Such a charge being open to the criticism that it tended to exclude from the consideration of the jury the defense of justifiable homicide. And the harmful effect of such a charge was not removed when the court, in a subsequent part of his general charge, gave to the jury instructions embracing the law of justifiable homicide. Such instructions were in conflict with the charge quoted, but were not explanatory nor qualificative thereof.

2. CRIMINAL LAW—APPEAL—BENEFICIAL ERROR.

An error beneficial to a party affords him no ground for complaint.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3088.]

3. SAME—INSTRUCTIONS.

Where the trial judge has once, in his general charge, fully and correctly stated the law of reasonable doubt, it is not necessary that he should repeat his instructions upon this subject in connection with each new proposition laid down.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1922, 1991.]

4. SAME—NECESSITY OF REQUEST.

The failure of the court to charge the jury upon the subject of the impeachment of witnesses does not constitute reversible error in the absence of a request in writing for such charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1996.]

(Syllabus by the Court.)

Error from Superior Court, Walker County; Moses Wright, Judge.

Tom Cress was convicted of murder, and brings error. Reversed.

Cress was indicted for the murder of Kane, and found guilty of voluntary manslaughter, and he assigns error upon the refusal of the court to grant him a new trial. The state's evidence shows that a party of soldiers from

Fort Oglethorpe were assembled at a club-room run by Beacon, where all had been drinking. Cress and two others, who were together, had some difficulty with the bartender, and went outside, telling the bartender that if he "wanted any part of them, he could get it." The bartender went to Kane and said, "Kane, I want you to see fair play;" and Kane said, "Certainly," and he and one other immediately went out, and got into a difficulty with Cress, in which difficulty Kane struck Cress a hard blow in the face. Kane returned to the club, but Cress did not return. Later in the evening Kane, together with several others, left the club and started back to the quarters, when they passed Cress and Jones sitting on the steps of Freihn's clubhouse about 50 yards from Beacon's. Kane stopped near by for some purpose, and state's witnesses passed on and waited for him. After waiting some time, witnesses went back and found Kane staggering around unconscious from a blow on the head. Cress and Jones had disappeared. Kane's skull was fractured in two places by a violent blow. A stone could have caused the wound. Kane died next day without having regained consciousness. There was no further proof of the kind of weapon used. A witness for the defendant stated that, after the first difficulty at Beacon's, Cress and witness went back to the quarters, but after a while returned to Freihn's place and sat down on the steps. While they were sitting there, Kane and several others passed by, but Kane returned to where they were sitting and said, "What in the hell are you doing there?" and struck witness on the face. Cress told him not to do that, and then Kane struck Cress and threw his hand to his hip pocket and said, "Damn you, I have got you." Cress picked up a rock and threw and hit Kane on the head. The evidence for both the state and the defendant was voluminous, but the foregoing contains the substance of that which bears upon the questions made by the motion for a new trial.

John W. Bale and Chas. R. Jones, for plaintiff in error. W. H. Ennis, Sol. Gen., and W. B. Shaw, for the State.

BECK, J. (after stating the facts). 1. The first ground of the amended motion for a new trial is as follows: "Because the court erred in charging the jury as follows: 'If the weapon used was one which in its nature was not likely to produce death, the jury might infer a want of malice, and, in such a case, it would be voluntary manslaughter; but, if the killing was done upon a sudden heat of passion provoked by words or abusive language, then, nothing else appearing, the killing would not be voluntary manslaughter, but would be murder, if the weapon used showed an intent upon the part of the accused to take human life,' said charge being erroneous, and excluding from the consideration of the jury the defense of justifiable homicide set up by

the accused." The exception to the charge appears to be well taken. There was evidence in the case from which the jury would have been authorized to find that the homicide was justifiable. They might have found, if they had believed the evidence introduced by the defendant, that the weapon used was one which in its nature was not likely to produce death, and they might have found from this and other facts in the case that the defendant did not act with malice, but that he struck the deceased with a rock to prevent the latter from making an unlawful and violent assault upon him, and yet they are instructed by the court that, if they find that the weapon used was one which in its nature was not likely to produce death, want of malice might be inferred, in which case the killing would be voluntary manslaughter. This portion of the charge limited the jury absolutely to one verdict, even if they found that the accused had acted without malice and used a weapon not likely to produce death, without reference to the facts and circumstances testified to by witnesses in the case, which would have rendered the use of such weapon justifiable. And the error was not cured by giving, in another part of the charge, the law of justifiable homicide. Having given erroneous instructions in one part of the charge, the harmful effects were not removed by a correct charge in conflict therewith, the jury's attention not being called thereto with directions as to which of the conflicting instructions they should select as a guide. *Florida, C. & P. Ry. Co. v. Lucas*, 110 Ga. 121, 35 S. E. 283.

2. The court having charged the law of justifiable homicide, his failure to charge the law of "urgent danger, as contained in section 73 of the Penal Code," was not error of which the accused could complain. If such failure was error at all, it was one beneficial to plaintiff in error, and affords him no ground for complaint. *Atkins v. Paul*, 67 Ga. 97; *Partee v. Georgia Railway Co.*, 72 Ga. 347.

3. The court in his general charge had correctly and fully stated the law of reasonable doubt. That he did not repeat it in charging upon certain particular phases of the defendant's contentions does not constitute error. *McDuffie v. State*, 90 Ga. 789, 17 S. E. 105.

4. The principle stated in the fourth head-note has been frequently ruled by this court. Judgment reversed. All the Justices concur.

HUDGINS v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. CRIMINAL LAW—ARREST OF JUDGMENT—DEFECTIVE ACCUSATION—MASTER AND SERVANT—ENTICING AWAY SERVANT.

An accusation under section 122 of the Penal Code of 1895, which charges that the

accused did by offering higher wages persuade and decoy, and did attempt to persuade, entice, and decoy by offering higher wages, the servant of a named person, "after he had actually entered the service of his employer, to leave his employer during his term of service," knowing that he was so employed, sufficiently sets forth a contract of employment between the servant and the master, as against a motion in arrest of judgment on the ground that the accusation failed to allege what the contract was and whether it was verbal or written.

2. FRAUDS, STATUTE OF—CONTRACT OF EMPLOYMENT.

A contract of hiring for a year, to begin in presenti, is not within the operation of the statute of frauds.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, § 67.]

3. MASTER AND SERVANT—ENTICING AWAY SERVANT.

The evidence authorized the verdict, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

J. J. Hudgins was convicted of enticing away a servant, and brings error. Affirmed.

Hudgins was arraigned in a city court upon an accusation charging that he did "by offering higher wages entice, persuade, and decoy, and did then and there attempt to entice, persuade, and decoy by offering higher wages Frank Mathews, the servant of W. H. Baker, after he had actually entered the service of his employer, to leave his employment during the term of service, knowing that said Frank Mathews was so employed." The accused filed a plea of not guilty, and after a trial the jury rendered a verdict finding him guilty of the offense charged. A motion in arrest of judgment was filed on the ground that the accusation did not set forth any contract between the employer and the servant, and it did not appear from the accusation whether the contract was oral or written. This motion was overruled, and the accused excepted. A motion for a new trial was also filed, which, in addition to the general grounds, contained a special assignment of error upon the ground that the court erred in admitting the following testimony of W. H. Baker: "Last October I hired Frank Mathews from him and his mother at \$2 per week for 12 months, or longer if he wanted to work longer. I was at Mr. Hudgins' the 18th or 20th of April of this year, and saw Frank Mathews at work in Hudgins' field. I then told Hudgins I had a contract with the boy." The objection to this testimony was that no contract was alleged in the accusation. This motion was overruled, and the accused excepted.

C. J. Lester and L. W. Shurman, for plaintiff in error. L. E. Patterson, Sol., for the State.

COBB, P. J. (after stating the foregoing facts). During the existence of slavery it was neither necessary nor important that

the negro should be instructed as to the binding obligation of a contract. When he emerged from this condition, and immediately, without any instruction on the subject, became clothed with full contractual powers, it is not surprising that he could be induced by unscrupulous white men to flagrantly violate the obligations of contracts into which he had entered. It may be that while the Constitution of 1865 was in force, and prior to the adoption of the fourteenth amendment to the Constitution of the United States, the General Assembly had power to declare that the violation of a contract by a negro should be a crime, without making such an act by a white man penal. The General Assembly, however, seemed to have had no desire to make such a discrimination, nor was it deemed in furtherance of a wise public policy that every breach of a contract should be declared a crime. To prevent as far as possible the disastrous effects resulting from servants being enticed to violate their contracts of employment, in 1866 a statute was enacted which declared it a crime for a person to employ the servant of another during the term for which he was employed, knowing that the servant was so employed and that his term of service had not expired, and also making it a crime for any person to entice, persuade, or decoy, or to attempt to entice, persuade, or decoy, any servant to leave his employment by offering higher wages, or in any other way, during the term of service, knowing that the servant was so employed. Code 1868, § 4428; Acts 1866, p. 153. As the servant class of this state was made up largely of negroes, the effect of this statute was, not to punish the negro who violated his contract, probably through ignorance that such an act involved any moral obliquity, but to punish the persons (generally white persons) who brought about the wrong resulting from the servant leaving his employer. That portion of the statute which made it a crime to employ the servant of another was, in 1873, amended by making it applicable to cases only where the servant was under a written contract attested by one or more witnesses. Acts 1873, p. 20. The act of 1866, as thus amended, was embodied in the Code of 1873, as well as in the Code of 1882, appearing in each Code as section 4500. In 1883 the section of the Code just referred to was further amended by adding the words "cropper or farm laborer," after the word "servant," wherever it appeared in the section, and, in that portion of the statute relating to enticing away the servant of another, adding the words, "whether under an oral or written contract." Acts 1882, p. 60. In the Penal Code of 1895 that portion of the statute above referred to which relates to the employment of the servant, cropper, or farm laborer of another is embraced in section 121. The remaining portion of the law is embraced in section 122, in the following language: "If any person shall, by offering higher wages

or in any other way, entice, persuade, or decoy, or attempt to entice, persuade or decoy any servant, cropper or farm laborer, whether under a written or parol contract, after he shall have actually entered the service of his employer, to leave his employer during the term of service, knowing that said servant, cropper or farm laborer was so employed, he shall be guilty of a misdemeanor."

It is under this section that the accusation in the present case was preferred. The ingredients of the offense defined in this section are: A contract by which one person is bound to render service to another as a servant, cropper, or farm laborer, which contract may be either in parol or in writing; the enticing away of a servant so bound, by offering higher wages or in any other way; knowledge on the part of the person who entices that the servant is so employed; and the actual leaving by the servant of the employment before the term of service has expired. These ingredients must appear in an indictment or accusation charging one with the violation of this section. The accused went to trial without demurring to the accusation. The objection to its sufficiency is raised for the first time by a motion in arrest of judgment. It is now urged that the accusation does not with sufficient definiteness indicate that there was a contract of employment between the alleged servant and his alleged employer. The accusation will not now be scrutinized with that degree of particularity which a special demurrer would have required. It is only to be determined at this stage of the case whether the words of the accusation allege in substance a contract. It alleges that Mathews was the servant of Baker and that "he had actually entered the service of his employer." There cannot be an employment without a contract. The relation of servant usually, if not always, arises as a result of a contract. As against a motion in arrest of judgment, a contract of service sufficiently appears. Even if the accused was entitled to be informed more definitely as to the terms and conditions of such contract, he should have attacked the accusation through the medium of a special demurrer. The only special ground in the motion for a new trial complained of the admission of the evidence referred to in the foregoing statement of facts, upon the ground that no contract of service was alleged in the accusation. What has been said disposes of this assignment of error. See, in this connection, *Bryan v. State*, 44 Ga. 328; *Hightower v. State*, 72 Ga. 482; *Broughton v. State*, 114 Ga. 34, 39 S. E. 866; *McAllister v. State*, 122 Ga. 744, 50 S. E. 921.

2, 3. The general grounds of the motion for a new trial remain to be disposed of. There was evidence from which the jury could find that a contract of service had been entered into between Baker and

Mathews, who was a minor; such contract having been made both with the minor and his mother, who, so far as the record discloses, was entitled to his custody and authorized to make contracts for service to be performed by him. The evidence on some of the points in the case is circumstantial in its nature. The circumstances are such as to authorize a finding that the accused knew that Mathews was in the employ of Baker, that he offered him higher wages than he was receiving, and that, as a result of this offer, he left the employment of Baker, where he was actually at work, and entered the service of the accused. It is contended, though, that the contract of service appearing in the evidence was not to be performed within a year from the time it was made, and that neither Mathews nor his mother was bound thereby, by reason of the fact that it was within the operation of the statute of frauds, and that for this reason no crime was committed by the accused in enticing Mathews to leave the service of his employer; the effect of Mathews' conduct being simply to take advantage of a defense which he or his mother might have made at any time that the employer sought to enforce the contract against him or his mother. We will not undertake to determine in the present case whether the statute of frauds would be applicable as a defense to one charged with a violation of the statute under consideration. Under the view we take of the case, the contract was not within the operation of the statute. The evidence of Baker on this subject is set forth in the statement of facts. A reasonable construction of this evidence is that the term of service was to begin at once, and continue for one year, or longer if the servant so desired. There was a binding contract for one year's service, to begin at once. Whether this should continue any longer after the expiration of the 12 months was a matter to be determined by the employé or his mother. There was no effort to make a binding contract for longer than 12 months. Is such a contract within the operation of that provision of the Code which enumerates, among those promises which are required to be in writing, "any agreement (except contracts with overseers) that is not to be performed within one year from the making thereof"? Civ. Code 1895, § 2693 (5). A contract of hire for a year, to begin in present, is not within the operation of the statute of frauds. 1 *Smith's Leading Cases* (9th Ed.) 600, and cases cited; *Pollock on Contracts* (Text-Book Series), top page 224; *Broom's Common Law* (9th Ed.) 391. If the contract had contemplated a year's service to begin at a future date, it would have been otherwise. We see no reason for reversing the judgment.

Judgment affirmed. All the Justices concur.

PLANTERS' COTTON OIL CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. TELEGRAPHS—FAILURE TO DELIVER TELEGRAM.

In a suit for damages against a telegraph company for failure to deliver a telegraphic message, it is necessary for the plaintiff to show that the message was in fact delivered for transmission. This is not accomplished by proof that the plaintiff's agent, in an attempt to deliver the message for transmission, used the telephone, calling upon the telephone company for a connection with the office of the telegraph company, and, upon being answered by one supposed to be in the telegraph office, asked, "Is that the Western Union Telegraph office?" and, upon being assured in the affirmative, repeating to the person so answering the message intended to be sent; it not appearing that the agent of the plaintiff recognized the voice of the person who answered him as being the voice of one of the agents of the telegraph company, and it not being otherwise known to him or shown that the person to whom he was talking was the agent of the telegraph company.

2. SAME—EVIDENCE.

The evidence was not sufficient to support a verdict in favor of the plaintiff, and the jury properly found, under the direction of the court, in favor of the defendant. There was not sufficient error upon any ruling of the court to reverse the judgment for any reason assigned.

(Syllabus by the Court.)

Error from City Court of Richmond County; W. F. Eve, Judge.

Action by the Planters' Cotton Oil Company against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. H. Fleming, for plaintiff in error. W. H. Barrett, Geo. H. Fearons, and Dorsy, Brewster & Howell, for defendant in error.

ATKINSON, J. This was an action for damages arising from an alleged failure of the Western Union Telegraph Company to transmit and deliver a message. Under the view we take of the case, the controlling question is as to whether or not the defendant ever received the message from the plaintiff for transmission. If the defendant did not receive the message for transmission, of course it could not be held liable for any damage to the plaintiff on account of the failure to communicate the matter to the person for whom the message was intended. It appeared on the trial that Mr. Wallace, who was the manager for the plaintiff, desiring to send a message to Ravenel & Co., of New York, being at his residence, telephoned the message to the stenographer in his office, who reduced it to writing. The stenographer testified that he "wrote it off and telephoned it to the Western Union office." The stenographer also testified that it had been their "custom to deal with the defendant over the telephone. The place of business of the plaintiff is * * * about two or three miles from the office of the defendant. We received and sent all messages over the telephone, and at the end of the

month the defendant would send a bill." The message intended to be sent was a reply to a message from Ravenel & Co., which the stenographer testified he "had received over the telephone from the Western Union office." The stenographer testified further: "When I called up the telephone, I asked for the Western Union Telegraph Company's office. On such occasions I always ask, 'Is that the Western Union office?' and they say, 'Yes,' and I say: 'This is the Planters' Cotton Oil Company. Take a message'—and they take it down and repeat it over to me. After taking down the message, he repeated it back to me, and it was all right." The same witness further testified: "I know Mr. Tetrea, Mr. Deas, and Mr. Britton, who are employed in the Augusta office of the Western Union Telegraph Company. On the day I sent this message to Ravenel & Co., I did not talk to Mr. Tetrea about the message, nor to Mr. Britton, so far as I know. I don't know who it was I telephoned the message to. I called up the telephone, and the person at the other end said that was the Western Union Telegraph Company. Except the statement that came to me over the 'phone that day, I didn't know that the party answering worked for the Western Union Telegraph Company. I didn't recognize the voice that answered the telephone that day. It was a voice that I was not accustomed to as coming from the telegraph office. The person seemed rather slow in taking the message, and I knew that it was not Mr. Tetrea, because he was very swift in taking down a message, and I had to repeat it over one or two times." The foregoing is substantially the evidence offered by the plaintiff referring to the delivery for transmission of the message. The defendant introduced several witnesses, but they did not strengthen the plaintiff's case upon that point. Among them were employes of the defendant who were on duty the time it is claimed by the plaintiff the message was telephoned from the office of the plaintiff to the office of the defendant, and each of them testified that he did not receive the message over the telephone. Upon the conclusion of the evidence, the court directed a verdict in favor of the defendant. The plaintiff made a motion for a new trial, which was overruled, and the defendant excepted, assigning error upon that judgment.

There was not sufficient evidence to support a verdict for the plaintiff. The stenographer attempted to deliver over the telephone the message intended to be transmitted. He did not see or otherwise recognize the person to whom he was speaking over the telephone, and it was impossible for him to say in fact that he was conversing with the agent of the defendant. He did not know even that he was talking into any telephone in the office of the defendant. His whole information upon that point was based upon hearsay evidence, which, although admitted

without objection, was incompetent to prove the fact. See *Eastlick v. Southern Ry. Co.*, 116 Ga. 48, 42 S. E. 499. The telephone operator may not have connected him with the Western Union office. If such connection was in fact made, the higher and better evidence would have been the testimony of the operator of the telephone company. There is no proof that the person who answered the plaintiff's agent at the other end of the line was the defendant's agent. The sayings of that person, under the repeated rulings of this court and the well-settled law, would not be admissible against the defendant until the fact of agency had been established. There was nothing, therefore, to show that the plaintiff's stenographer communicated with either the telegraph office or any agent of the defendant in that office. The plaintiff wholly fails to show a delivery of the message to the defendant, and there is no theory upon which the defendant could be held responsible for the damages claimed.

Judgment affirmed. All the Justices concur.

LANIER v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

CRIMINAL LAW—EVIDENCE—DECLARATIONS OF ACCUSED.

Any statement or declaration made by the accused contemporaneously with or when first required by the circumstances to account for his possession of goods alleged to have been recently stolen is admissible. The evidence repelled in this case being a part of the *res gestæ*, explanatory, when considered in connection with other proven facts and circumstances, of defendant's possession of the property alleged to have been stolen, was admissible for consideration by the jury, and the ruling of the court to the contrary was error.

(Syllabus by the Court.)

Error from Superior Court, Walton County; J. W. Arnold, Sr., Judge.

S. P. Lanier was convicted of larceny, and brings error. Reversed.

Napier & Cox and Foster & Foster, for plaintiff in error. S. J. Tribble, Sol. Gen., for the State.

BECK, J. Lanier was tried upon an indictment charging him with the larceny of a bale of cotton belonging to Wright. Defendant admitted that he got the bale of cotton charged in the indictment, but denied that he stole the same, and undertook to show that it came into his possession fairly and honestly. The jury found the defendant guilty, and recommended that he be punished as for a misdemeanor. Defendant made a motion for a new trial, which was overruled, and he excepted, and assigns as error the order overruling said motion.

The only ground of the motion for a new trial which it is necessary for us to consider is the one complaining that: "The court erred in rejecting evidence offered by movant

as follows: On cross-examination of the witness Blasingame, he (defendant's counsel) asked, 'Didn't you pass along and tell Sam Lanier about Buck Wright (the prosecutor) having had a bale of cotton stolen?' This question was objected to by the Solicitor General, whereupon movant's counsel stated to the court that he expected to prove that on the morning after said cotton was alleged to have been stolen, and before any one was accused of the theft, the witness Blasingame was passing movant's house, and told him that Buck Wright had a bale of cotton stolen, and immediately movant replied: 'Buck Wright has had no cotton stolen. I have the bale of cotton here'—pointing to three bales of cotton there in his (Sam Lanier's) yard, in a few feet of the road, where any one passing by could see it. Movant proposed to make the above proof by the witness Blasingame, and so stated to the court, and the court ruled that said evidence was inadmissible and rejected it." The court erred in repelling the evidence offered, and in sustaining the objection made by the Solicitor General to the question propounded to the witness Blasingame. The statement which the defendant offered to prove by the witness that he had made on the morning after the cotton was charged to have been stolen was made pending his possession, and was explanatory thereof. "The possession being continuous, its *res gestæ* were continuous, and the statement was embraced therein." *Lovett v. State*, 80 Ga. 257, 4 S. E. 912. "Any statement or declaration made by the accused contemporaneously with or when first required by the circumstances to account for his possession of goods recently stolen is admissible." 18 Am. Eng. Ency. of Law, 492. "On a trial under an indictment for larceny, the acts and declarations of the defendant in reference to the property alleged to have been stolen, while holding it in her hands and showing it to others, are admissible in evidence as explanatory of her possession." *Smith v. State*, 103 Ala. 40, 16 South. 12.

Judgment reversed. All the Justices concur, except EVANS, J., disqualified.

SHULER et al. v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. CRIMINAL LAW—EVIDENCE—OPINIONS.

Where the defendants were on trial under an indictment charging them with riot, it being a material subject of inquiry as to what was the natural effect of certain words used by one of the defendants upon the minds of bystanders, it was error for the court to permit a witness to testify, over timely objection made by counsel for defendants, that said words "had the worst kind of effect." The witness should have been limited in his testimony to stating facts and circumstances, and should not have been permitted to state mere opinions and conclusions of his own.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1035, 1040, 1042.]

2. RIOT—EVIDENCE.

What one of two joint defendants said, in the absence of the other defendant, some 30 minutes or more after the occurrence alleged to have constituted the riot, was not of a character to throw any light upon the question of the guilt of either, and was therefore irrelevant, and its admission in evidence was error.

3. CRIMINAL LAW—INSTRUCTIONS.

That portion of the charge of the court which was excepted to on the ground that it intimated what had been proved was open to this criticism, and was repugnant to the statute forbidding the trial judge to express or intimate his opinion as to what has or what has not been proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1731, 1732, 1755.]

(Syllabus by the Court.)

Error from Superior Court, Decatur County; W. N. Spence, Judge.

Nathan Shuler and others were convicted of riot, and bring error. Reversed.

R. G. Hartsfield and E. D. Longley, for plaintiffs in error. J. J. Hofmayer, Sol. Gen., pro tem., and W. E. Wooten, Sol. Gen., for the State.

BECK, J. Judgment reversed. All the Justices concur.

ROSENTHAL v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. CRIMINAL LAW — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

The record discloses that there was direct evidence tending to prove that the defendant did certain proprietary acts in furtherance of the operation and maintenance of a gaming-house. A conviction, therefore, did not depend wholly upon circumstantial evidence. In such case it was not erroneous for the judge to refuse to charge upon the law of circumstantial evidence. *McElroy v. State*, 53 S. E. 750, 125 Ga. 37; *Smith v. State*, 54 S. E. 127, 125 Ga. 296.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1883.]

2. SAME.

Two defendants being jointly accused of the offense of keeping and maintaining a gaming house, and the evidence being wholly circumstantial as to one and direct as to the other, it was not erroneous for the judge in his charge to distinguish the two, and with reference to one instruct the jury upon the law of circumstantial evidence, and with reference to the other refuse to charge the law of circumstantial evidence. By so distinguishing, the judge did not, in this case, express any opinion prejudicial against the defendant.

3. GAMING—INSTRUCTION.

The words, "If the defendant did anything which contributed to the maintenance or keeping of the gaming house," fairly construed in connection with the whole charge, referred to some act of proprietorship in the keeping of a gaming house, and it was not erroneous for the court to use such language in the instructions to the jury upon the elements of the offense.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

55 S.E.—32

Julius Rosenthal was convicted of crime, and brings error. Affirmed.

See 52 S. E. 82.

Twiggs & Oliver, for plaintiff in error. W. W. Osborne, Sol. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

ABRAMS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. MASTER AND SERVANT—CONTRACT FOR LABOR—FRAUD—EVIDENCE.

An allegation in an accusation framed under the act of 1903 (Acts 1903, p. 90), making it illegal for a person to procure money or other thing of value on a contract to perform services with intent to defraud, that the defendant did obtain from the prosecutor an advance of a certain sum of money, is not sustained by proof that the prosecutor paid to a third person the amount of the defendant's debt to such third person, secured by mortgage, took a transfer of the mortgage, and subsequently, as transferee, foreclosed the same.

2. SAME—BURDEN OF PROOF.

Before a prosecution can be successfully maintained under this act, the burden is upon the state to show that loss or damage was actually sustained by the hirer. Where it appears that advances were made, and that the person to whom the advances were made performed a certain amount of services, but the value of such service is not made to appear, the prosecution fails to carry this burden of proof.

(Syllabus by the Court.)

Error from City Court of Sparta; F. L. Little, Judge.

Gus Abrams was convicted of swindling, and brings error. Reversed.

The offense with which the accused was charged was a violation of the act approved August 15, 1903, "to make it illegal for any person to procure money, or other thing of value, on a contract to perform services, with intent to defraud," etc. Acts 1903, p. 90.

The accusation alleged that the accused, after fraudulently entering into a contract with W. O. Garrett to perform for him services as a share cropper during the year 1906, intending at the time to defraud him by not rendering the services contracted for, did obtain from him advances on the contract, consisting of corn, meat, flour, tobacco, and meal, to the amount of \$14, and the further sum of \$76.14 in money, to his loss and damage in the sum of \$90.14, no part of which has been returned to him; the contract not being performed, and no cause having been given for the nonperformance of said services. The trial resulted in the conviction of the accused, and the question presented by her motion for a new trial is whether or not the evidence was sufficient to support the verdict of guilty. The prosecutor testified: The contract was that the defendant was to farm with me on halves, she and her children to do the work, and I made her advances on that contract. She

wanted me to "pay up" what she owed at the bank first, and I straightened up that, and then let her have provisions after she moved to my house. The amount I advanced to her in money at the bank was, I believe, \$76.14, and the provisions advanced to her amounted to about \$14. The bank, as security for the debt due by her to it, held a mortgage on a mule, a buggy, and some cows, and "I had that paper transferred to me. That property that she had mortgaged to the bank was levied on and sold." It brought only \$37. The cost of sale amounted to \$8.19, "so that I only got \$29.81, and that amount deducted from the \$76 leaves the amount she now owes me in addition to the \$14 for provisions that I furnished." The accused "didn't carry out the contract. She didn't stay as she promised. She left. She stayed awhile and left. I did not give her any cause for leaving," and "she didn't give me no reason, except she said I tapped the bell when it got time for her to go to work after dinner to let her know what time to start; * * * said she was not going to work by no such as that. She was not going to have no bell rung where she stayed at; was going to boss her own business. * * * She moved to my house somewhere about the 1st of January. She stayed there until about the 1st of March. * * * She did some work during those months. Her family did some work. The boys worked some." There was other testimony corroborating that of the prosecutor as to the making of the contract; the accused having agreed to work a one-horse farm on halves on his place, "provided he would take up that paper"—the mortgage held by the bank, which he had transferred to him, and which he subsequently foreclosed.

L. M. Hunt, for plaintiff in error. R. W. Moore, Sol., for the State.

EVANS, J. (after stating the facts). Loss or damage to the hirer is an essential ingredient of the offense defined in the act of August 15, 1903 (Acts 1903, p. 90). *Millinder v. State*, 124 Ga. 452, 52 S. E. 760. The accusation alleges that loss and damage occurred to the prosecutor in the sum of \$90.14, which was made up of two items—\$76.14 in money and \$14 in provisions. The proof failed to sustain the charge that \$76.14 in money was advanced to the defendant. The prosecutor's testimony disproves this charge; because, if he had advanced the money to the defendant, the payment of it to the bank by the prosecutor would have been as the defendant's agent, and the defendant's debt to the bank would have been extinguished. Instead of treating the money paid to the bank as belonging to the defendant, and as having been advanced to her, the prosecutor treated the money as his own, and took a transfer of the mortgage to himself. His own conduct shows that he was not advancing money to her, but was purchasing a se-

cured debt due by the defendant. See *Hirsch v. Meldrim*, 124 Ga. 717, 52 S. E. 813.

Provisions of the value of \$14 were proved to have been procured by the defendant on the faith of the contract. But it appeared that the defendant and her family did some work for the prosecutor between January 1st and the time she left, two months later. The value of this work was not shown, and it cannot be said as matter of law that the hirer sustained actual loss or damage. By the second section of the act, among other requisites to be established as affording a presumption of fraudulent intent is the "loss or damage to the hirer." If the service rendered by the defendant was sufficient to compensate for the provisions (no other loss or damage having been shown), then the prosecutor suffered no injury. While it is true that the breach of an entire contract may defeat a recovery for the value of the service actually rendered, when the action is predicated upon the contract, this principle of law is not applicable to cases of this kind. By the terms of the act the loss or damage to the hirer must be actual, and this is not shown by proving a state of facts which would negative a recovery on the contract because of a breach thereof. It may be that the value of the service rendered was more than the equivalent of the provisions advanced under the contract. Be this as it may, the burden was on the state to prove that the service rendered was of less value than the advances made to the accused, and the state did not successfully carry this burden. A new trial must be had.

Judgment reversed. All the Justices concur.

BINYARD et al. v. STATE.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—CERTIFICATION.

The Supreme Court is without jurisdiction to pass upon the merits of any bill of exceptions the recitals of fact in which are not duly certified to be true. *Civ. Code* 1895, § 5526; *Cade v. Du Bose*, 54 S. E. 697, 125 Ga. 832, and citations.

(a) Exceptions pendente lite must be, not only tendered within the time prescribed by statute, but, if "allowed" in the trial court (*Civ. Code* 1895, § 5526), also "certified to be true by the judge and ordered to be placed on the record" (*Civ. Code* 1895, § 5541). *Howard v. Chamberlin*, 64 Ga. 684, 694; *Nacoochee Co. v. Davis*, 40 Ga. 309.

(b) Merely granting leave to file a paper, or ordering that it be made a part of the record, does not amount to a certificate verifying the case. *Jackson v. State*, 43 S. E. 255, 116 Ga. 834; *Williams v. State*, 48 S. E. 149, 120 Ga. 488. So an indorsement, entered upon a bill of exceptions and signed by the presiding judge, to the effect that the exceptions were "filed" on a specified day, cannot be regarded as the legal equivalent of a certificate that the recitals of the bill of exceptions are true.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, Criminal Law, §§ 2836, 2297.]

2. SAME—EVIDENCE—NEW TRIAL.

The evidence for the state made out the charge as laid in the accusation, and there was no error in overruling the motion for a new trial, in which the only complaint made by the accused was that the evidence did not warrant the verdict of guilty.

(Syllabus by the Court.)

Error from City Court of Savannah; L. M. Norwood, Judge.

Isaac Binyard and others were convicted of crime, and bring error. Affirmed.

Geo. W. Owens, for plaintiffs in error. W. W. Osborne, Sol. Gen., and Garrard & Mel-drim, for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

BOWDEN v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. CRIMINAL LAW—IMPEACHMENT OF VERDICT.

As a matter of public policy, a juror cannot be heard to impeach his verdict, either by way of disclosing the incompetency or misconduct of his fellow jurors, or by showing his own misconduct or disqualification, from any cause. Civ. Code 1895, § 5338; Hill v. State, 16 S. E. 976, 91 Ga. 154; Coleman v. Slade, 75 Ga. 63; Dyson v. State, 72 Ga. 206.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2392, 2394.]

2. SAME—NEW TRIAL.

In view of the counter showing made by the state, the trial judge did not err in holding that the juror whose disqualification the accused sought to establish was not so deaf as to render him incompetent to serve on the jury.

3. HOMICIDE—EVIDENCE—INSTRUCTIONS.

There was evidence warranting the conclusion that the accused suddenly approached the deceased with a gun, and pointed it at him with intent to kill him, in a spirit of revenge for a past grievance, real or fancied, and that the deceased thereupon attempted to draw his pistol in order to defend himself, but was shot down before he could do so. Accordingly, it was proper for the court to instruct the jury to the effect that, if the killing occurred under these circumstances, the fact that the deceased undertook to draw his pistol could not be pleaded by the accused as a justification for the homicide, as the killing would be murder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 145, 146, 149.]

4. SAME—EVIDENCE.

There was no abuse of discretion on the part of the lower court in refusing to grant a new trial on the theory that the verdict was unsupported by the evidence and was for that reason contrary to law.

(Syllabus by the Court.)

Error from Superior Court, Laurens County; H. G. Lewis, Judge.

C. W. Bowden was convicted of murder, and brings error. Affirmed.

Howard & Baker, Greene F. Johnson, and John B. Cooper, for plaintiff in error. Joseph E. Pottle, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

MARTIN v. CITY OF GAINESVILLE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. MUNICIPAL CORPORATIONS—BOUNDARIES—CONTRACTION.

The corporate limits of the city of Gainesville having been prescribed by an act of the Legislature (Acts 1877, p. 163), they would not be contracted by mere acquiescence of the city council in a survey which fixed and marked limits of less extent than those prescribed and established by the said legislative act, even though such survey had been authorized by an ordinance of the city council and acquiesced in for a period of 80 years. Norrell v. Augusta Railway & Electric Co., 42 S. E. 486, 59 L. R. A. 101, 116 Ga. 818; 20 Am. Eng. Ency. of Law, 1150.

2. TRIAL—OBJECTIONS TO EVIDENCE.

A part of the evidence introduced to prove the making of a certain survey and marking the lines thereof by posts being competent and admissible, it was not error to overrule an objection based on the ground that the evidence was illegal, which went to the whole of the evidence, and did not point out that part which was illegal and inadmissible. The proper practice is to point out the inadmissible portion and object to it specifically. Ray v. Camp, 36 S. E. 242, 110 Ga. 818.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 223-225.]

3. EVIDENCE—HEARSAY.

It being a material subject of inquiry as to whether or not a building was within the limits of a certain survey, it was error for the trial court to permit a witness, over proper objections made, to testify that the surveyor had told him that the building was included in the lines fixed by that survey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1175-1189.]

4. MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCE.

Before the defendant can be convicted of a violation of an ordinance of the city of Gainesville, it should be made to appear by competent and sufficient evidence that the act alleged to have been done in violation of such ordinance was within the limits of said city as prescribed in its charter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 1410.]

(Syllabus by the Court.)

Error from Superior Court, Hall County; J. J. Kimsey, Judge.

G. W. N. Martin was convicted of a violation of an ordinance of the city of Gainesville, and brings error. Reversed.

H. H. Dean, for plaintiff in error. J. G. Collins, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

CRAWFORD v. RONEY.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. APPEAL—REVIEW—OBJECTIONS WAIVED.

A plaintiff who acquiesces in a ruling that a case is subject to nonsuit, and introduces additional evidence to save the case, will not thereafter be heard to say that the additional evidence was unnecessary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3612.]

2. CORPORATIONS—ACTION ON SUBSCRIPTION—EVIDENCE.

In a suit by a corporation against a stockholder for an unpaid subscription to stock, proof of the subscription and of a call duly made makes a prima facie case for the recovery of the amount embraced in the call.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 412.]

3. SAME — INDIVIDUAL LIABILITY OF STOCKHOLDERS.

A corporation purchasing its own shares, which are not fully paid, cannot charge the shareholders with individual liability for the unpaid portion of the subscriptions, unless they, upon a sufficient consideration, expressly or impliedly promise to pay the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 219, 224, 1530.]

4. APPEAL — RECORD — EVIDENCE—DOCUMENTARY—BRIEF OF EVIDENCE.

Where either party introduces a document, record, or similar evidence, the opposite party may read as evidence introduced by the party who offers it so much of the balance as is relevant; but in the preparation of the brief of evidence after trial only such portions should be embraced therein as were actually read or considered at the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2607-2610.]

5. EVIDENCE—EXPERT TESTIMONY—BOOKS OF ACCOUNT—EXPLANATION.

When books of account have been introduced in evidence, an expert bookkeeper may be permitted to testify that he has examined the books and reached given results from the entries therein, to aid the jury in their investigations; the question as to what are the proper deductions to be made from the entries being at last solely for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2326.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by T. C. Crawford, trustee in bankruptcy, against H. C. Roney. Verdict for plaintiff for less than the amount claimed, and he brings error. Reversed.

Crawford, as trustee in bankruptcy of the Augusta Debenture Company, hereinafter referred to as the "Company," sued Roney, alleging: The company is a corporation under the laws of Georgia and has been adjudicated a bankrupt. The defendant and 19 others were subscribers to the capital stock of the company; the par value of the shares being \$100 and the defendant having subscribed for 10 shares and become liable thereon in the sum of \$1,000, of which \$100 has been paid and \$900 is still unpaid. The company is insolvent, and it is necessary that all stock subscription shall be paid. A demand for the amounts due has been made upon the defendant, and he has refused to pay. At different times the company has purchased shares of its stock; the remaining shareholders agreeing to such purchases, and thereby becoming liable for the amounts unpaid on such shares. The defendant in each instance was one of the shareholders then liable, and the amount of his liability is \$818.18. Demand for payment of this sum has been made, and payment refused. An answer was

filed in which the defendant admitted that he was a subscriber for 100 shares of stock as alleged, and averred that he had paid his subscription in full, and denied any further liability thereon. All liability on account of the purchase of shares by the company is expressly denied. In an amendment to the answer the defendant admitted a liability of \$56.32 on his subscription, and pleaded a tender of that sum. At the conclusion of the evidence for the plaintiff the court granted a nonsuit, but before the order was entered reopened the case and allowed the plaintiff to introduce further evidence. The plaintiff excepted pendente lite to the grant of the nonsuit. After other evidence for the plaintiff was admitted there was no further motion for nonsuit, but the court directed a verdict for the plaintiff for \$56.32. A motion for new trial by the plaintiff was overruled, and in a bill of exceptions he assigns error upon this judgment, as well as upon the exceptions pendente lite, above referred to.

Wm. H. Barrett, for plaintiff in error.
C. Henry Cohen, H. C. Roney, and Jos. B. Cumming, for defendant in error.

ATKINSON, J. (after stating the facts). 1. The plaintiff cannot now be heard to say that the ruling that the case was subject to nonsuit was erroneous. He acquiesced in that ruling as correct, and sought to avoid its consequences by the introduction of additional testimony. If he had desired to except to the ruling that the case was subject to nonsuit, he should have allowed the order of nonsuit to be entered and excepted to that judgment. *Glover v. Railway Co.*, 107 Ga. 84, 32 S. E. 876, and citations.

2. It appeared from the uncontradicted evidence that the defendant had subscribed for 10 shares of the capital stock of the company, that there had been a call by the company for the payment of all subscriptions, and that the defendant had paid \$100. It is contended by counsel for plaintiff in error that this made a prima facie case, and cast the burden upon the defendant to show payment. On the other hand, it is contended by counsel for the defendant in error that it is incumbent on the plaintiff to show that the call was not responded to, and that no payment has been made. As we understand the contention, it is that there is a presumption arising from the call itself that payment has been made, and that the plaintiff must overcome this presumption. Mere proof of a stock subscription will not ordinarily make a case of liability; for, while by such subscription one promises to pay, the time of payment is to be fixed by a call, which is the demand fixing the time of payment and the proportion of the subscription to be paid. *Cook on Stockholders* (3d Ed.) § 105. After a call duly made a fixed liability on the contract of subscription both as to time and amount arises, and mere proof of this liability makes a prima facie case for recovery.

If, as between the corporation and a shareholder, a presumption of payment arises merely from the fact of a call, then such a presumption would arise in every case of debtor and creditor where the creditor makes a demand for payment. The general rule is, as between debtor and creditor, that proof of a liability which is fixed and certain as to amount and time of payment, and lapse of the time allowed for payment, will cast upon the party liable the burden of showing payment or discharge. A stock subscription upon which a call has been duly made is, as between the corporation seeking payment thereof and a subscriber of stock, within the general rule. As to a subscriber for stock who is seeking relief as a stockholder against the officers of the company and others, it may be that there would under some circumstances be a presumption of payment resulting from a call. Such seems to have been the ruling in *Doe v. Transportation Co.* (C. O.) 78 Fed. 62, which is cited in 26 A. & Eng. Enc. L. (2d Ed.) 926.

3. Whether a corporation, when not prohibited by statute or by its charter, may, under a general power to acquire property, become the purchaser of its own shares, need not be determined in this case. But see, in this connection, *Robinson v. Beall*, 26 Ga. 17; *Hartridge v. Rockwell*, R. M. Charl. 200; 7 Am. & Eng. Enc. L. 818 et seq.; 1 Cook on Stockholders, §§ 309, 311; 2 Thomp. Corp. § 2050 et seq. The banks of this state are now prohibited by law from using any part of the capital stock in the purchase of their own shares (Civ. Code 1895, § 1968), and the president and director so using the capital of the bank are indictable as for a felony (Pen. Code 1895, § 211). This statute was in effect when the case of *Robinson v. Beall*, supra, was decided, but no reference is made to the same. The record does not disclose what are the powers of the company in respect to its right to purchase its own shares. But whether it had express power so to do, or the power was claimed under a general authority to acquire property, becomes immaterial to the consideration of the present case. If a corporation duly authorized to purchase its own shares buys such shares upon which the stock subscription is only partially paid, and releases the subscriber from further payment, it in effect assumes the payment of so much as is unpaid. But it cannot impose this liability upon the remaining shareholders individually by mere resolution of its directors or shareholders. Such liability will only arise from the consent of the shareholders, express or implied. If a shareholder votes for such resolution, he will be estopped to deny the right of the corporation to purchase the shares, but an individual liability resulting from such purchase will only attach when he expressly agrees to be so bound, or such a state of facts is shown as would in law establish a

promise on his part, supported by a sufficient consideration. Neither the evidence admitted nor that which was rejected showed affirmatively that the defendant had become bound on the subscription for the shares which were purchased by the company.

4. The fourth headnote needs no elaboration. See, in this connection, Civ. Code 1895, § 5241; *Waller v. State*, 102 Ga. 684, 28 S. E. 284; *Vischer v. Railroad Co.*, 84 Ga. 537; *Jones v. Grantham*, 80 Ga. 477, 5 S. E. 764; 4 Mich. Dig. Ga. Rep. 636 et seq.

5. What is established by the entries in books of account is, of course, a question for the jury; but we see no reason why they should not be aided in their investigation by the testimony of one experienced in such matters, setting forth the character of his examination and its results. When the books are in evidence, the testimony of such a witness cannot be otherwise than helpful, but the jury are not in any sense bound by the results obtained by him.

There were other questions argued by counsel, but under the view we have taken we do not think they are now ripe for decision.

Judgment reversed. All the Justices concur.

PERKINS v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. CRIMINAL LAW—NEW TRIAL—MOTION IN VACATION.

This case is controlled by the previous rulings of this court, in which it is held that there is no law authorizing the making of a motion for a new trial in vacation, that an extraordinary motion so filed is a mere nullity, that it is erroneous for a judge of the superior court to take jurisdiction of such a motion, and that when he does so, and undertakes to decide it upon its merits, the judgment will be reversed. *Collier v. State*, 41 S. E. 261, 115 Ga. 17; *Jinks v. State*, 41 S. E. 590, 115 Ga. 243; *Johnson v. State*, 42 S. E. 758, 116 Ga. 535; *Brinkley v. Buchanan*, 55 Ga. 342; *East Tenn. R. Co. v. Whitlock*, 75 Ga. 77; *Ferrill v. Marks*, 76 Ga. 21.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2345–2352.]

2. SAME.

The motion for a new trial in this case, purporting to be based on extraordinary grounds, appears to have been made and decided in vacation, and nothing was done in respect to it either at the term when the trial was had or at any subsequent term, so as to give it vitality, under the ruling in *Blalock v. Waggoner*, 8 S. E. 48, 82 Ga. 122.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2345–2352.]

3. SAME—APPEAL—REVIEW.

The judgment is accordingly reversed, and direction is given that the motion itself and the action of the judge thereon be hereafter, in the superior court of Effingham county, ignored and treated as a mere nullity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2345–2352.]

(Syllabus by the Court.)

Error from Superior Court, Effingham County; P. E. Seabrook, Judge.

Will Perkins was convicted of crime, and brings error. Reversed.

Twiggs & Oliver, Edgar J. Oliver, and C. T. Guyton, for plaintiff in error. Livingston Kinder, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. Judgment reversed, with direction. All the Justices concur.

FIELD v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. INDICTMENT—DEMURRER.

A demurrer to an indictment on the ground that it charges the accused with "two distinct offenses of an entirely different nature in one and the same count" is too indefinite to be considered, unless the demurrer discloses to what different offenses of a dissimilar nature reference is intended to be made.

2. CRIMINAL LAW—EVIDENCE—RELEVANCY.

In the absence of proof connecting the accused with an article of personal adornment picked up at the scene of the crime shortly after its commission the fact that it was there found is wholly irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 793.]

3. SAME—NEW TRIAL.

A complaint, in a motion for a new trial, that error was committed in admitting certain evidence over the objection of the accused presents no question for decision, unless the grounds of objection urged against the evidence at the time it was offered are set forth.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2365.]

4. SAME—STATEMENT OF ACCUSED.

The prisoner is entitled to have his statement to the jury considered by them in its entirety, unaffected by any disparagement of it by the court or intimation to the effect that it is, in part, unworthy of belief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1780—1789.]

5. SAME—ALIBI—BURDEN OF PROOF.

That the jury were informed that the defense of alibi, relied on by the accused, involved the impossibility of his being at the scene of the alleged crime did not place upon him the burden of showing more than that he was not, in fact, there present at the time of its commission; nor did the court err in charging the jury upon the assumption that they were not, under the evidence submitted concerning his whereabouts, bound to reach the conclusion that this defense had been conclusively established.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1833—1837, 1852.]

6. SAME—WEIGHT OF EVIDENCE.

A correct instruction as to the degree of certainty of guilt requisite to a conviction in a criminal case is not open to criticism because the court did not include therein an exposition of the law concerning the source from which such certainty can alone arise.

(Syllabus by the Court.)

Error from Superior Court, Bartow County; A. W. Flite, Judge.

Henry Field was convicted of burglary, and brings error. Reversed.

John T. Norris, for plaintiff in error. Saml. P. Maddox, Sol. Gen., for the State.

EVANS, J. The indictment charged the accused with the offense of burglary, for that he did feloniously and burglariously break and enter the dwelling house of Jim Scrutchins with intent to commit a larceny, and did steal and carry away therefrom \$16 in money, the property of Jim Scrutchins and of the value of \$16, then and there being found. The accused demurred to the indictment on the ground that it charged him "with two distinct offenses of an entirely different nature in one and the same count." The demurrer was overruled, the trial resulted in a verdict of guilty of the charge of burglary, and the court declined to grant the accused a new trial.

1. On the argument here, counsel for the plaintiff in error explained that his contention was that the indictment set forth in one count, not only a charge of burglary, but also the charge that the accused had committed the statutory offense of larceny from the house. With the merits of this contention, we cannot undertake to deal, for the reason that the demurrer does not set forth what "two distinct offenses of an entirely different nature" the accused sought to insist were included in one and the same count, and therefore his demurrer was not sufficiently specific to raise the objection now before us. Wells v. State, 118 Ga. 557, 45 S. E. 443 (3), cited and followed in Sowell v. State, 126 Ga. 105, 54 S. E. 916.

2. Complaint was made in the motion for a new trial that the court erred in admitting proof that a certain scarf pin was, shortly after the burglary, picked up within a few feet of the door of the house alleged to have been burglariously entered, proof not having first been made that the pin was ever in the possession of the accused. He was indicted under the name of Henry Field, and all the witnesses who professed to know him either called him by that name or referred to him as the person on trial. A witness, who did not undertake to state whether or not he was acquainted with the accused, testified that just before the house was broken into he saw "Son" Field with a pin precisely like that found after the burglary. This witness did not identify the accused as the person who had been seen wearing the pin, nor state that the accused was ever called, or was known as, "Son" Field. This was the only testimony offered by the state for the purpose of connecting the accused with the pin picked up at the scene of the crime. Obviously the state failed to lay the proper foundation for the introduction of the evidence objected to, and it should, for this reason, have been excluded.

3. It appears that the testimony of another witness, concerning the finding of tracks leading from the burglarized house, was objected to by the accused, but, in his motion for a new trial, he fails to state what objections were urged against the admission of

this testimony at the time it was offered, so we cannot undertake to say whether the court below did or did not err in admitting it.

4. In his charge to the jury the presiding judge gave them this instruction: "When you go to make your verdict in this case, don't view the evidence in detached portions, but take the whole of it, along with such part or parts of the statement, if you believe any of it, if none, discard it entirely, if any, say how much, take it along with the evidence and determine what the truth is." The plaintiff in error insists that this instruction contained an unguarded expression of doubt on the part of the court as to there being any truth at all in the defendant's statement. After expressly cautioning the jury not to view the evidence in detached portions, his honor used language which might have been understood as conveying the idea that the prisoner's statement need not be looked to as a whole, nor accepted as true, since only a portion of it was worthy of belief, if it was entitled to any credit at all. The instruction had a tendency to disparage the statement of the accused, considered in its totality, because of the apparent assumption of the court that the jury would necessarily conclude that a part only of what the accused said in his defense could properly be considered in connection with the evidence taken as a whole. As has been repeatedly observed, it is always best, in charging upon the effect of the prisoner's statement, to use the language of the Code. The statement of the accused in the present case set up the defense of alibi, and, under the law, he was entitled to have his entire statement considered by the jury, unaffected by any disparaging intimation by the court that all he said in his defense could not reasonably be accepted as true.

5. The court correctly informed the jury that the defense of alibi, interposed by the accused, involved "the impossibility of his being at the scene of the alleged crime." Penal Code, 1895, § 992. To so charge did not impose upon the accused the burden of showing more than that he was not present at the scene of the crime at the time of its alleged commission, nor could the jury have understood to the contrary, because the court added: "In other words, he contends that he is not guilty because of the fact that he was not at the scene of the alleged crime." As to the contention of the accused that none of the witnesses introduced to sustain his defense had been in anywise contradicted or impeached, and therefore there was no evidence which authorized the court to charge the jury upon the assumption that they might find this defense was false, we need only say that there was testimony offered by the state which tended to discredit the statements of these witnesses as to how the accused was dressed, and where he had been

seen during the day on which the burglary was committed.

6. The only other criticism made on the charge of the court is that he instructed the jury that "reasonable and moral certainty is what the law requires to authorize a conviction," which instruction was erroneous because the court did not include therein a statement to the effect that certainty must arise out of the evidence delivered from the witness stand. The charge excepted to was, in and of itself, a complete and correct exposition of the law, and was not objectionable because the court did not, in charging as to the degree of certainty required, caution the jury that in passing upon the defendant's guilt they must be governed by the evidence.

Judgment reversed. All the Justices concur.

GOODIN et al. v. STATE.

(Supreme Court of Georgia. Nov. 7, 1906.)

1. HOMICIDE—INSTRUCTIONS.

All of the defendants being charged in one count of the indictment with the offense of murder, "for that at said time and place, and acting with malice aforethought, they did unlawfully kill A. [the deceased] by shooting him with a pistol," and, there being evidence to authorize the instructions, the court did not err in charging the jury that, if it appeared from the evidence, to their satisfaction and beyond a reasonable doubt, either of the defendants killed A. by shooting him with a pistol, "and the other defendants, acting with a common purpose and in concert with each other, were present, aiding and abetting the act to be done, and participating in it, they would be authorized to find that the defendants killed him."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, § 637.]

2. CRIMINAL LAW—NEW TRIAL—GROUNDS.

Grounds of a motion for a new trial, to the effect that the verdict is contrary to certain specified charges of the court, are equivalent to saying that the jury found contrary to law, and are included in the general ground that the verdict is contrary to law. *Athens Mfg. Co. v. Rucker*, 4 S. E. 885, 80 Ga. 291; *Seaboard Air Line Railway v. Bradley*, 54 S. E. 69, 125 Ga. 193.

3. SAME—REPETITION OF INSTRUCTIONS.

Where the trial judge has once in his general charge fully and correctly stated the law of reasonable doubt, it is not necessary that he should repeat his instructions upon this subject in connection with each new proposition laid down.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1922, 1991.]

4. HOMICIDE—INSTRUCTIONS.

Where, in a prosecution for murder, there is some evidence of an altercation and mutual combat between the accused and the deceased, it is proper to charge section 73 of the Penal Code of 1895.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Homicide, §§ 649-656.]

(Syllabus by the Court.)

Error from Superior Court, Spalding County; E. J. Reagan, Judge.

J. W. Goodin and others were indicted for murder. Certain defendants were found guilty of manslaughter, one defendant was

acquitted, and the convicted defendants bring error. Affirmed.

Landers Goodin, John Wesley Goodin, Arthur Goodin, and Newton Goodin were indicted for the murder of Biles. The indictment contained four counts, and charged each of said defendants as principal in the first degree with the commission of the alleged crime, and further charged Landers Goodin as principal in the first degree and the others as principal in the second degree. Geneva Biles, for the state, testified in substance as follows: The difficulty began at a dance at the home of Biles. Newton Goodin and one Sanson got into a quarrel about their partners, and Goodin cursed Sanson. Biles told them that, if they were going to quarrel, they must get out of the house. John Goodin said: "No, they are not. They are going to fight it out right here"—and immediately thereafter John, Landers, and Arthur Goodin assaulted Biles and began cutting him. Biles went into an adjoining room and said he was going to get his gun. John, Arthur, and Newton Goodin went out of the house, but Landers stayed in the hall, and said he "was going to kill the damn son of a bitch before he left." Biles got his gun and went out of the house. The Goodins were lined up in the yard. John had a pistol and a knife. Just as Biles reached the ground, John Goodin fired. Biles fired next, and then several shots were fired. Witness pulled Biles back into the house, and he fell into witness' arms, saying: "They have killed me. Landers Goodin has shot me through the heart." Biles was shot in the side, and died in a few moments. Other witnesses for the state corroborated the material parts of this testimony, and testified, further, that all four of the Goodins were shooting when Biles was hit. Clements, for the defendant, testified in substance as follows: "The first I saw of the difficulty, Newton Goodin and Sanson had a fuss. Biles caught Newton and was choking him. John Goodin pulled Biles off Newton, and told him not to do that. Biles struck John Goodin, and told him that if he did not leave there 'he would settle with him.' John and Newton Goodin went out of the house and were going away. Biles got his gun and followed them. When he reached the porch, he asked where was John Goodin, and said he was going to kill him (Goodin). He then shot at John Goodin. This was the first shot fired. Putnam shot Landers Goodin." Defendants in their statement corroborated the material parts of the above testimony, and further stated that John Goodin fired the shot that killed Biles. John Goodin was shot in the head, and Landers was shot in the neck. There was much other conflicting testimony. The jury found John, Landers, and Newton Goodin guilty of voluntary manslaughter, and acquitted Arthur

Goodin. Error is assigned on the refusal to grant a new trial.

J. J. Flynt and T. E. Patterson, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., W. P. Bloodworth, and J. W. Shell, for the State.

BECK, J. 1-3. The principles of law announced in the first three headnotes need no elaboration.

4. The court did not err, as will at once appear from a careful reading of the evidence, in giving in charge to the jury section 73 of the Penal Code of 1895, and in charging the law of voluntary manslaughter. The altercation and difficulty which resulted in the fatal shooting of the deceased began in his house. According to evidence for the state, one of the defendants there had an altercation with a third party. The deceased interfered and said, "If you are going to fuss, you must get out of doors," to which another one of the defendants replied with an oath: "No, they are not. They are going to fight it out right there. Just move them chairs. I will kill him." Immediately others of the defendants stabbed the deceased, upon which he turned and went into another room, saying that they had cut him and he was going to get his gun, came out of the room, went out of the house, and, when he got out, armed and prepared for combat. "They [the defendants] were lined up. John Goodin was between some buggies at the edge of the road, and said, 'By God, I ain't done nothing to leave here for,' and Arthur [Goodin] was next, and Newt [Goodin] was next, and Lander [Landers Goodin] back, and went down to the edge of the porch to the east end; and when we [witness and deceased] got out, we didn't hardly get on the ground, and John Goodin fired, and Tony [the deceased] fired, and then there were several shots fired. * * * When we came in the house Tony fell in my arms and said: 'They have killed me. Landers Goodin has shot me through the heart.'" Another witness for the state testified: "Landa [Landers Goodin] had a knife in his hand at the time. They got after Landa to get him to move out of the house. He said that he wouldn't do it; that he came there to kill the damn son of a bitch, and he wasn't going to leave till he was killed. He stood in the hall awhile; and, when he said that, Tony [the deceased] said that he would get out, and he got his gun and went out doors. Then the shooting took place. John Goodin fired. Tony Biles fired." When this evidence is considered, together with that set out in the statement of facts, it is manifest that it was a question for the jury to decide whether or not the fatal rencounter had in it the elements of mutual combat. Certainly the evidence authorized the finding that it had. That being true, it follows that the judge did not err in charging upon the subject of mutual combat;

and it is equally plain that, in charging the law of voluntary manslaughter, he was only doing that which was required under the issues made by the testimony in the case. *Glover v. State*, 105 Ga. 597, 31 S. E. 584; *Davis v. State*, 114 Ga. 104, 39 S. E. 908. Judgment affirmed. All the Justices concur.

BEARD v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov. 21, 1906.)

1. EVIDENCE—MENTAL CAPACITY—OPINION—NONEXPERTS.

On an issue as to plaintiff's mental capacity at the time he signed a release, a nonexpert was competent to express an opinion that plaintiff at the time he signed the release did not have sufficient mental capacity to understand his act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 22, 42.]

2. SAME—INJURIES—PHYSICIAN—OPINION.

Where a physician had treated plaintiff, and knew the conditions with which he was dealing, and there was no controversy regarding the manner in which plaintiff sustained his injury, the physician was properly permitted to testify that in his opinion the fall described by plaintiff would produce the mental condition in which he found him, and that a blow on the outer skull, leaving no sign, might be sufficient to break the inner skull, giving his reasons, and describing the effect on the mind of a person sustaining such injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2336.]

3. SAME—PRESUMPTIONS—INSANITY.

When insanity is once shown to exist, there is a presumption that it continues, open to testimony showing a restoration of mental soundness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 87.]

4. SAME—LETTERS.

While proof that a letter was addressed, stamped, and mailed is sufficient to raise a presumption that it was received by the addressee, the receipt of a letter purporting to be signed by a person is not evidence that it was written by him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 91, 92.]

5. SAME—BEST AND SECONDARY EVIDENCE—NOTICE TO PRODUCE.

Where plaintiff resided in another town some 70 miles from the place of trial, service of notice upon him at the trial to produce the originals of certain letters sought to be introduced in evidence was too late.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 646.]

6. WITNESSES—CROSS-EXAMINATION—CONTENTS OF LETTERS.

Where plaintiff admitted receiving certain letters from defendant which were not produced, and that copies shown him were correct, defendant was entitled to ask him on cross-examination regarding the contents of the letters.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 958, 960.]

7. EVIDENCE—BEST AND SECONDARY—ADMISSION OF COPY.

Where a person to whom a letter was addressed admitted its receipt, and that the copy shown him was a correct transcript of the origi-

nal, which was not produced, the copy was admissible against him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 561, 566.]

8. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a railroad conductor by falling down the steps of a depot platform at night, as he was going to his train, evidence as to plaintiff's contributory negligence held to require submission of that issue to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1089-1132.]

9. SAME.

Where a railroad conductor fell down the steps of a depot platform at night, as he was going to take charge of his train, the negligence of the railroad company in failing to have the platform lighted did not absolve the conductor from the duty of exercising ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 801, 802.]

10. SAME—INSTRUCTIONS—CARE REQUIRED OF SERVANT.

In an action for injuries to a conductor by falling down the steps of a depot platform at night, in the absence of a light, an instruction that, though plaintiff's lantern was blown out, he was entitled to proceed to his train, "if he thought he could safely make the journey by exercising ordinary care," was erroneous; the standard of plaintiff's duty being, not what he thought he could safely do, but what a reasonably prudent man under the circumstances would do.

11. SAME.

Such error was cured by a subsequent charge that, if plaintiff, after his light had blown out, continued toward his train, and used ordinary care in approaching and finding the steps, and he could not find them by exercising such care because of the fact that defendant provided no light, or, if plaintiff would have been prevented from falling by a railing around the steps, and the absence of these, or either of them, was the proximate cause of plaintiff's injury, the jury should find him not negligent.

12. APPEAL—EXCEPTIONS—ABANDONMENT.

Where an exception is not assigned for error nor noted in the brief, it will be treated as abandoned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3086, 3087.]

Appeal from Supreme Court, Guilford County; Ferguson, Judge.

Action by C. H. Beard against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action is prosecuted for the recovery of damages sustained by the plaintiff while in the employment of defendant by reason of alleged negligence. The defendant denies that it was guilty of negligence, and alleges that plaintiff was injured by reason of his own negligence. For further defense defendant sets up a release executed by plaintiff. In reply to this new matter plaintiff avers that at the time of the execution of the release he did not possess sufficient mental capacity to make the contract, and that the release was procured by fraud and undue influence. For the purpose of ascertaining the truth in regard to these several allegations, appropriate issues were submitted to the jury, all of which were found in accordance

with plaintiff's contention. The facts, as they are related to the exceptions, are set forth in the opinion. From a judgment upon the verdict, defendant appealed.

King & Kimball, for appellant. J. A. Barringer, for appellee.

CONNOR, J. The record contains 38 assignments of error. Several of them become immaterial by reason of the verdict upon the first issue, which was directed to the execution of the release. The jury found that plaintiff did not, for a valuable consideration, "release and absolve the defendant from all liability on account of the injury." In view of the testimony and his honor's instruction, this finding involves the conclusion that plaintiff did not possess sufficient mental capacity to understand its effect upon his legal rights when he signed the release. The second issue, therefore, as his honor instructed the jury, became immaterial, and the several exceptions to the rulings bearing upon it need not be considered. *Sprinkle v. Wellborn*, 140 N. C., at page 181, 52 S. E., at page 566, 3 L. R. A. (N. S.) 174. It is but just to the persons who were present, and witnessed the execution of the release, to say that we find no evidence of fraud or undue influence practiced upon plaintiff. He testified that he did not know or understand what he did, and had no recollection that he ever signed the release. There was ample evidence, both upon his own examination and other witnesses, that plaintiff was in no fit mental condition to be intrusted with the duties which he undertook to discharge. Much of his testimony is difficult to understand or reconcile. This, however, was the duty and province of the jury. The release recites a consideration of \$1, and contains no stipulation or promise as to employment, although there is evidence that such was the real consideration. The court permitted Mrs. Beard to testify that, in her opinion, plaintiff did not, at the time he signed the release, have "sufficient mental capacity to enable him to have reasonable judgment as to the effect of it and what it purported to be." We cannot commend the form of the question, but do not think it sufficiently obscure to constitute reversible error. Evidently she used the word "judgment," which is criticised by defendant, as synonymous with "understanding." It was competent for the witness to express an opinion. *Bost v. Bost*, 87 N. C. 477; *Horah v. Knox*, 87 N. C. 483. Dr. Hanes, who had attended plaintiff, was permitted to testify that in his opinion the fall described by plaintiff would produce the mental condition in which he found him; also that a blow on the "outer skull," leaving no sign, might be sufficient to break the "inner skull," giving his reasons, and describing the effect upon the mind of a person sustaining such an injury. We do not think that defendant's exception to this testimony can be sustained. The witness was not expressing an opinion upon a hypothet-

ical case. He had treated plaintiff, and knew the conditions with which he was dealing. There was no controversy regarding the manner in which plaintiff sustained the injury. The exception does not present the question as in *Bowman's Case*, 78 N. C. 509, or *Summerlin v. Railroad*, 133 N. C. 550, 45 S. E. 898. It is rather within the principle announced in *Jones v. Warehouse Co.*, 137 N. C. 337, 49 S. E. 355.

We have carefully examined his honor's instruction regarding the quantum and character of mental capacity requisite to make a valid contract, and find that it is in accordance with the decisions of this court and standard authorities. *Sprinkle v. Wellborn*, supra, where the cases are collected. His honor was clearly correct in saying that when insanity is once shown to exist, there is a presumption that it continues, open, of course, to testimony showing a restoration of mental soundness. There was evidence that at times plaintiff was mentally unsound—non-sane. We have examined the other exceptions to rulings bearing upon this issue, and find no error.

It appears that after the injury sustained by plaintiff he again entered into defendant's employment; that some time thereafter he was discharged. Defendant claims that he was discharged because of the use of morphine and whisky. It also claims that plaintiff's mental condition is attributable to injuries received several years before the one complained of. There was a large quantity of evidence bearing upon these contentions. Among other testimony regarding the discharge of plaintiff, defendant proposed to introduce two letters purporting to be signed by plaintiff, which he denied writing or sending. Defendant's witness, assistant superintendent, testified "that he received in due course through the mail the letter," etc. The letter was, upon plaintiff's objection, excluded. We concur with his honor's ruling in this respect. While it is well settled that where it is shown that a letter was addressed, stamped, and mailed, there is a presumption that it was received by the addressee, it cannot be that the receipt of a letter purporting to be signed by a person is any evidence that it was written by such person. No authorities are cited to sustain the exception. Defendant offered to introduce copies of two letters addressed to the plaintiff by its assistant superintendent. In respect to these copies, the record states: "The plaintiff having testified, after examining the papers, that he received the original, of which there were copies, and it being admitted that the defendant, on the convening of the court in the afternoon on which the trial of the case was begun, had notified the plaintiff to produce the original in court." It was also admitted that plaintiff resided about two miles from Mt. Airy—the trial being had in Greensboro; that a train left Greensboro at 4:30 o'clock in the afternoon for Mt. Airy,

returning the next morning at 12 o'clock. Plaintiff and his wife were in Greensboro attending the court. The offer to introduce the copies was made in the afternoon of the second day of the trial. The copies were excluded by the court. There is no admission or finding regarding the distance between Greensboro and Mt. Airy. We take note of the fact that it is some 70 miles. The case was argued upon the theory that the court excluded the copies because the notice to produce the originals was not sufficient in point of time. We concur in this view. "Generally, if the party dwells in another town than that in which the trial is had, a service on him at the place where the trial is had, or after he has left home to attend the court, is not sufficient." Greenleaf, Ev. § 563. Certainly, the plaintiff was not called upon to go himself or send his wife away from the town in which his case was being tried to find and produce the letters. No reference is made to them in the pleadings, nor was there anything in the case to suggest to the plaintiff the probability that they would be called for. The defendant did not offer to ask the plaintiff on cross-examination regarding the contents of the letters, as it may have done. *Kalk v. Fielding*, 50 Wis. 339, 7 N. W. 296. Whether, upon plaintiff's admission that he had received the original letter, of which the paper writing shown him was a copy, this did not entitle defendant to read the copy without having given the notice, is not raised in the argument. It would seem, however, that such admission relieved the defendant of the duty of giving the notice. The authorities are not entirely in harmony, but, upon the reason of the thing, if the person to whom a letter is addressed, and who admits its receipt, admits that the copy shown him is a correct transcript of the original, that, as against him, it should be admissible. The purpose of requiring the original, being the best evidence, is met. It does not appear whether the "copy" was a letterpress copy, which is really a duplicate original. We have examined the "copies" offered in evidence, and, in the light of the elimination by the jury of the release, they do not appear to be material to either of the issues. They referred to the reasons of the defendant's agents for discharging the plaintiff, and their substance was fully brought out in the examination of the witnesses. Several physicians were examined in regard to the plaintiff's mental condition and habits and the causes thereof. The learned counsel for the defendant say that the introduction of the copies could have done the plaintiff "no possible injury." Their rejection was harmless error.

We are thus brought to consider the main question presented by the appeal. At the conclusion of all the evidence defendant moved for judgment of nonsuit, and to the refusal

of the motion excepted. The testimony disclosed the following case: Defendant maintained a freight depot at Winston, "consisting of two parts, connected by one floor; the west end, warehouse building and rooms in which the employes work, the east end consisting of a wide platform covered by a shed. In the floor, on the side next to the railroad track, were steps leading down from the platform to the track. These steps were cut into the platform about three feet. A railing had been placed around the steps, but was gone at the time of the injury. Plaintiff was employed by defendant as freight conductor. On the night of June 28, 1903, being dark and stormy, he received orders to take charge of a freight train going to Greensboro. He got his waybills from the freight office, and with a lighted lantern was going to his train, standing on the track. The lights along the platform were out. As he came out of the freight office, the wind blew his lantern out. He did not return to light it, but continued along the platform, feeling his way with his feet. He was going south to reach the steps which he usually used for the purpose of going to his train. He says that he "never hardly used the steps" cut into the platform. In his efforts to use them on the night in question, he lost his footing and fell, striking his head against the track. In his own language he describes the fall: "It was a very bad night, rainy, wind blowing, very dark, no light on the platform anywhere. I was feeling my way, and fell head foremost down through the hole, and struck my head against the rail and wheel together. I remember hitting my head between the wheel and the track. It seemed to cover my whole head. I don't remember anything else until the next day at dinner time. There was no railing at all, nothing to protect me whatever, simply a hole and a pair of steps. I was just feeling along with my feet. There was no light anywhere." Upon cross-examination he says that he usually got his waybills by going around the other way. "When I fell, I had started down. I knew the steps were there, do not know how many, think more than three." Defendant contends that upon these facts his honor should have held, as a question of law, that plaintiff was guilty of contributory negligence. It is clear that it was negligent to permit the platform to be in darkness while plaintiff was required, in the discharge of his duty, to pass along it. This is especially so when we recall that the steps cut into the platform some 2½ or 3 feet, and that the railing had been removed. Defendant says, however this may be, it supplied the plaintiff, with a lantern, and that when blown out by the wind it was his duty to return to the freight office and relight it. The principles of law governing the case are well settled. If it can be said that the plaintiff's duty to return to the office and light his lantern was so manifest and his failure to do so clearly negligent, so that two reasonable minds

could come to but one conclusion in regard thereto, the authorities sustain defendant's contention. On the other hand, if measured by the standard of conduct which would control the reasonably prudent man under similar circumstances, his conduct is capable of more than one reasonable inference. The decision of the question was properly left to the jury. Plaintiff was not injured by reason of falling into a hole, the existence of which was unknown to him. There was no negligence in the position or construction of the steps, but it was the duty of defendant to have and maintain sufficient light along the platform and near the steps, or to have a railing, so that their employees could use them with reasonable safety. This was a positive duty, the failure to perform which makes the defendant liable, unless the danger in using them was so manifest and obvious that no prudent man would do so in the absence of lights. In passing upon this question his honor was compelled to take into consideration the whole evidence, and fix the standard of duty, applying the legal test of prudence. It cannot, we think, be said that, using his senses, members, and knowledge of surrounding conditions, as described by plaintiff, he was manifestly regardless of his safety. Common observation teaches us that many persons, clearly within the pale of ordinary prudence, feel their way along steps in the dark. We can hardly think that by doing so they can be said to be clearly and obviously negligent. While it may have been wise for the plaintiff to return and relight his lantern, yet, in view of the fact that the train of which he was ordered to take charge was ready to move, and the time for its departure had arrived, that it was late at night, and that the same wind which blew out his lantern would probably do so again, we think that he was entitled to have his conduct in this respect submitted to the jury.

The defendant excepted to the following instruction given by his honor: "Although the plaintiff's lantern was blown out, he had a right to proceed onto his train, if he thought he could safely make the journey to the same by exercising ordinary care on his part. It was the duty of the defendant to provide a light near enough the steps, which was to be sufficient to enable the plaintiff on a dark night to see his way to the said steps and down the same safely. If the defendant failed to furnish said light, and this was the proximate cause of the injury, the jury will answer the third issue 'Yes.'" This instruction was given in response to plaintiff's request, and, if not modified or explained in other parts of the charge, is erroneous. The standard of duty is not what plaintiff thought he could safely do, but what a reasonably prudent man, under the same circumstances, would do.

When his honor reached the fourth issue, involving plaintiff's conduct, he said: "I charge you if the plaintiff, after his light

had blown out, continued onward to his train, and used ordinary care in approaching and finding the said steps, and he could not find them by exercising such care because of the fact that the defendant offered to him no light on the said platform by which he could see the steps, or if the plaintiff would have been prevented from falling down the steps by the railing having been placed around the steps, and these, or either of them, were the proximate cause of the said injury, the jury will answer the fourth issue 'No.' 'Ordinary care' is the care of a prudent man, mindful and careful of his own safety, and it is for you to find from the evidence whether the plaintiff was in the exercise of care in going in the dark after his lantern was blown out, or did ordinary care require that he should relight his lantern before going forward toward the steps inside the platform." To this instruction defendant excepted. The criticism of the language is that it "withdraws from the consideration of the jury whether the plaintiff was or was not negligent in proceeding down the stairway after the wind had extinguished his light, without distinguishing for the jury the relative degree of care requisite to constitute ordinary care in the two cases." The standard of duty imposed upon plaintiff is the same in both cases. He must exercise ordinary care, or that care which the ideal prudent man would have exercised under the existing conditions. What would constitute such care on the part of a person walking along the platform properly lighted, or doing the same thing in the dark, would, of course, differ essentially. If, after his light was extinguished, plaintiff had exercised no more care to avoid injury than before, he could not be said to exercise ordinary care. This demand upon him he met by "feeling his way along with his feet"—a most natural mode of avoiding the hole in the floor—and going down the steps when he reached them. He appreciated the necessity for caution, and says that he exercised it, and in this the jury found with him. If he had walked briskly along the platform when dark in the same manner as if lighted, we apprehend the judge would not have hesitated to enter judgment of nonsuit. The defendant's negligence in not having light did not absolve him from the duty of acting, under the circumstances, as a prudent man. The real pivotal question in this case is, whether it was plaintiff's obvious duty to return to the freight office and relight his lantern. Suppose that he had done so, and it had, by the same cause, been again extinguished. Must he refuse to perform the duty imposed upon him to take the train out, or was it not his duty to try, by the exercise of ordinary care, to reach his train by using the way provided for doing so?

The error pointed out in the plaintiff's prayer, applied to the third issue, directed to defendant's negligence, and was harmless. When his honor instructed the jury in regard

to the plaintiff's duty, he avoided the error.

We have examined the entire record with care. The case is, in many respects, peculiar. The testimony in regard to plaintiff's mental condition and the causes producing it is conflicting and far from satisfactory. His honor submitted the questions debated fairly, and the jury have settled the facts. The defendant excepted to his honor's instruction in regard to the measure of damage, but the exception is not assigned for error, nor noted in the brief. We therefore treat it as abandoned.

There is no reversible error. The judgment must therefore be affirmed.

ROBERTS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Nov 27, 1906.)

MASTER AND SERVANT—INJURIES INFLICTED BY YARDMASTER—SCOPE OF EMPLOYMENT.

Where a servant of a railroad made a mistake in switching a train, and thereafter, but within a short time, the yardmaster spoke to him about the mistake, and a quarrel ensued, in which the yardmaster struck the servant, the test of the railroad's liability for the assault was not whether the act was done by the yardmaster while he was on duty or engaged in his duties, but whether it was done within the scope of his employment, and in the prosecution and performance of the business given him to do.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1217-1225.]

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by T. J. Roberts against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The evidence shows that plaintiff, an employé of the defendant, on its yard at Charlotte, was assaulted by one Bradley, the yardmaster, and plaintiff's superior. Plaintiff's account of the difficulty tended to show that plaintiff, having made some mistake in switching a train on to the wrong track, went into the office; and some time thereafter, and within a short time, Bradley, the yardmaster, came in and spoke to plaintiff about the mistake, and plaintiff called Bradley a "swell head," and the assault was then committed. Bradley's account was that he spoke to plaintiff about the mistake when it was made; and then he (Bradley) went into the office. That later, plaintiff came in, and commenced to quarrel with witness, and the fight followed. Bradley further testified that the assault was not at all serious, and both he and the plaintiff were off duty when it occurred. Plaintiff contended that though Bradley's successor may have been then on the yard and in charge, that Bradley had still continued to work, and was engaged in his duties at the time of the assault.

Plaintiff asked the court to charge that on the testimony, if believed, the jury should

answer the first issue as to a wrongful assault "Yes," which was declined, and the plaintiff excepted. The plaintiff further asked the following special instructions: "That if the jury find from the evidence that Bradley, the servant of the defendant, while in the discharge of the work of the defendant company, assaulted the plaintiff, they will answer the first issue 'Yes.' Refused, except as given in the general charge, and plaintiff excepts. That if the jury find from the evidence that the plaintiff was assaulted by Bradley, the servant or employé of the defendant, while the plaintiff was on duty doing the work of the defendant company, and that such assault was made by the servant Bradley in consequence of a dispute which arose over the manner in which plaintiff's work was being done or had been done, the jury will answer the first issue 'Yes,' although the jury may find that Bradley had been relieved for the time by the arrival of another yardmaster." Refused, except as given in the general charge, and plaintiff excepts. "That if the jury find that Mr. Blackwood had relieved Mr. Bradley from his duty as yardmaster before the difficulty commenced between the plaintiff and defendant's employé, Bradley, the defendant is nevertheless liable in damages for the assault of Bradley on the plaintiff, unless Bradley had actually quit his duties before he made the assault upon the plaintiff, about the defendant's business, and before he had actually gone off duty for the defendant, the jury will answer the first issue 'Yes.'" Refused, except as given in the general charge, and plaintiff excepts.

The court, among other things, charged the jury that where a servant does a wrong to a third person, the master must answer for the act if it was committed in the course and scope of the servant's employment, and in furtherance of the master's business. And, on the request of plaintiff, further charged that the defendant company is responsible in damages for the wrong done plaintiff by the employé of the defendant while such employé or servant was acting within the scope of his employment. And, in response to a prayer of the defendant, the court charged that if the jury find from the evidence that Bradley had been relieved from duty by the day yardmaster, Blackwood, before the fight occurred, the answer to the first issue should be "No." The plaintiff excepted to the refusal of the court to give his prayers for instructions and to the prayer given at the request of the defendant.

The jury answered the first issue as to wrongful assault "No." Judgment on the verdict for the defendant, and plaintiff excepted and appealed.

Morrison & Whittock, for appellant. W. B. Rodman and L. C. Caldwell, for appellee.

HOKE, J. (after stating the case). The court, among other things, charged the jury as follows: "The court further charges you that where a servant does a wrong to a third person the master must answer for the act if it was committed in the scope and course of the servant's employment, and in furtherance of the master's interests." This is a correct general principle which has been frequently applied to different cases in this and other jurisdictions, and, on the facts disclosed by the testimony, are as favorable as plaintiff had any right to ask. *Jackson v. Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Pierce v. Railway*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316. And the charge of the court below in giving the defendant's prayer for instructions, while not, under all circumstances, a definite or precise test of responsibility, as applied to the facts of this case, is in accord with the best-considered decisions. *Palmer v. Railway*, 131 N. C. 250, 42 S. E. 604.

Nor was any error committed in refusing plaintiff's prayer for instructions. They all embody the idea that if the assault was committed by Bradley while engaged in the performance of his duties, the company is, in any event, responsible. The court is confirmed in this interpretation of the prayers by the statement in the brief of plaintiff's attorney in connection with them, as follows: "We think that the true test is whether or not Bradley was still engaged in and about the duties pertaining to his position when the assault was committed." And we hold that this is not the correct principle. The test is not whether the act was done while Bradley was on duty or engaged in his duties; but was it done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do? As held in *Sawyer v. Railroad* (N. C. at the present term) 54 S. E. 793, quoting from *Wood on Master & Servant*, § 307: "The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to be authorized by him. By 'authorized' is not meant authority expressly conferred; but whether the act was such as was incident to the performance of the duties intrusted to him by the master even though in opposition to his express and written orders." And again from the same author at section 288: "An employer who leaves to an employé to do certain acts for him according to the employé's judgment and discretion is answerable for the manner or occasion of doing it; provided it is done bona fide and within the scope of the servant's express or implied authority and not from mere caprice or wantonness, and wholly

outside of the duties conferred upon him." The distinction here dwelt upon is very well stated in *Mott v. Ice Co.*, 73 N. Y. 543, as follows: "For the acts of a servant in the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the latter is responsible whether the act be done negligently, wantonly, or even willfully. The quality of the act does not excuse. But if the employé, without regard to his service, or to accomplish some purpose of his own, act maliciously or wantonly, the employer is not responsible." And the general doctrine on the subject is fully considered in the case of *Daniel v. Railroad*, 136 N. C. 527, 48 S. E. 816, 67 L. R. A. 455.

The error in plaintiff's position, as contained in the prayers for instructions, is that they make the responsibility depend on whether the act was done by Bradley, the yardmaster, while engaged in his duties; and leave entirely out of consideration the questions whether the act was done in the scope of Bradley's employment, and in prosecution and furtherance of the powers entrusted to him, and whether it was not an independent tort on the part of Bradley; in which case, the employer is not responsible. *Jaggard*, vol. 1, 279. The same author says, at page 279: "The question of what is or is not an independent tort of the servant cannot, it seems, be referred to any definite rule, but is ordinarily a question of fact for the jury." Applying these rules to the facts of the case before us, there has been no error committed which gives the plaintiff any ground of complaint.

While the testimony differs considerably on the merits of the controversy as between plaintiff and Bradley, there is no substantial difference as to the facts which do or do not tend to inculcate the defendant company. Both plaintiff and defendant testify that the conduct of plaintiff in changing, or failing to change, the switch had passed at the time of the quarrel. Whether plaintiff went into the office, and Bradley afterwards came in; or Bradley went into the office, and was later followed by plaintiff, does not affect the question in this aspect of the case. Both statements show that the conduct of plaintiff about the switch as a physical act was a closed incident; and that, at the time, Bradley was neither directing plaintiff about his work nor giving him instructions about it for the future; nor even physically correcting him about it in the past. It was simply a quarrel that two employés had about a past event in which Bradley was clearly acting of his own mind and will as an independent agent, and in which plaintiff is not at all free from fault. There is no error, and the judgment below is affirmed.

No error.

CREIGHTON et ux. v. BOARD OF WATER COM'RS OF CITY OF CHARLOTTE.

(Supreme Court of North Carolina. Nov. 27, 1906.)

1. EMINENT DOMAIN—ASSESSMENT OF COMPENSATION—EVIDENCE—VALUE.

In an action for damages by reason of the appropriation of land by a municipality, it was proper to permit plaintiff to testify that the land was good meadow land, and how much hay he got from it from year to year.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 356, 807.]

2. SAME—VALUE—EXISTING EASEMENTS.

In an action for damages because of the appropriation of land by a municipality for water supply purposes, it was proper to admit evidence showing that the land at the time of the appropriation was burdened with an easement in defendant to dig, ditch, and lay water pipes.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 807, 808.]

3. SAME—DEED CREATING EASEMENT.

In an action to recover damages because of the appropriation of land by a municipality, for water supply purposes plaintiff's complaint referred to a deed granting an easement to lay water pipes through the land, and alleged that defendant had taken and controlled the land conveyed, by virtue of its charter, and the answer alleged that by virtue of a certain statute defendant was vested with all the rights and franchises of the corporation which was the grantee in the deed in question. *Held*, that a contention that such deed was inadmissible in evidence because no connection was shown between defendant and the grantee was of no merit.

4. SAME—ISSUES AND PROOF.

The existence and contents of the deed were sufficiently disclosed in the pleadings to warrant the admission of the same in evidence under the rule requiring that in setting up an easement resting in a written deed in bar of all or a part of the relief, defendant must set up the same in his pleading.

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by H. L. Creighton and wife against the board of water commissioners of the city of Charlotte. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Civil action to recover damages, heard before Bryan, J., and a jury at June term, 1906, superior court, Mecklenburg county. There is allegation and evidence tending to show that defendants, under and by virtue of power given in its charter, in the exercise of the right of eminent domain, has entered upon certain lands of plaintiff, and seeks to appropriate same and impose an easement thereon for the necessary and public purposes contemplated by the statute. Plaintiffs, in accordance with the provisions of the law, instituted this proceeding to recover damages sustained by reason of the acts of defendant; and, on issues determinative of different features of this controversy, there was verdict and judgment for plaintiff, and defendant excepted and appealed.

Hugh W. Harris, for appellants. Maxwell & Keerans, for appellee.

HOKE, J. (after stating the facts). The objections urged to the validity of this trial are to the rulings of the court on questions of evidence. Defendant excepted: (1) To the admission of evidence indicated in the following question and answer: "Q. Now, Mr. Creighton, state to the jury what sort of meadow land it is, or rather was, before the dam was erected, and the water was placed over the meadow land [which is admitted, I believe, in the pleadings]. A. I have been working with it about 30 years, and it was certainly good meadow, just as fine as anybody's meadow in the country. Q. Can you state the value of the hay you got off it from year to year? A. I never weighed it just exactly how many pounds. I would get 4 to 6 to 8 two-horse loads." This testimony was offered and admitted to show the character and quality of the land appropriated, and was clearly competent; tending to establish a relevant fact to aid the jury in determining therefrom the market value of the land, one of the principal questions in dispute. We think the exception is without merit. *Brown v. Power Co.*, 140 N. C. 341; 52 S. E. 954.

Defendant further excepts because the trial court excluded a deed offered by defendant in mitigation or reduction of damages. The deed was executed by plaintiffs in November, 1887, and conveyed to Charlotte City Waterworks, four acres of the land included in the controversy, and granting to the city waterworks a privilege or easement as follows: "And it is agreed that the party of the second part, its successors and assigns may dig, ditch, and lay pipe for the purpose of conducting waters through the same across the lands of the parties of the first part with the right to so conduct provided that the party of the second part shall pay any and all damages done to growing crops of the parties of the first part or their tenants caused by reason of digging said ditches." In excluding this deed, we think there was error which entitles the defendant to a new trial. We see no reason why, in ascertaining the damage done, to the land by the easement now to be imposed upon it, the jury should not be allowed and required to consider the existence of easement formerly granted and now held by defendant, covering a portion of the same land, and imposing a burden upon it of like kind but less in degree or quantity. The real damage done to the land is the difference between the burden now sought, and the one already imposed upon the land by plaintiff's former deed. There is also well-considered authority for this position. *Crowell v. Beverly*, 134 Mass. 98.

It is urged by plaintiff, in support of the ruling: (1) That no connection is shown between the present defendant and the Charlotte City Waterworks, the grantee in the deed; this company being, at that time, a private corporation, and entirely distinct from the present defendant. The answer is

that plaintiff's complaint, in section 2, makes specific reference to this same deed, and alleges that the present defendant has "taken hold and controls the land conveyed in same by virtue of its charter, etc. And section 3 of the defendant's answer avers in admission of this allegation: "That under and by virtue of said act of the Assembly, the defendant became vested with all the rights and franchises, privileges and easements, and all the powers and duties of the said municipal corporation of the city of Charlotte, pertaining to its waterworks, and of the "Charlotte City Waterworks Company," a corporation duly created by an act of the General Assembly of North Carolina, ratified the 10th day of March, A. D. 1881." Again, it is urged that the ruling is correct, because the rights and privileges conveyed in the deed are not set up and claimed in the answer; and this in accord with the recognized principle that the right to an easement as a defense to an action must be pleaded specially, and cannot be taken advantage of under the general issues for which plaintiff cites us to 7 Amer. & Eng. Pl. & Pr. pp. 258, 259. We agree with plaintiff that, as a general proposition, this position is well taken. It is true, that at common law, matter in mitigation of damages, for which purpose plaintiff claims to have offered this deed, could or should not have been pleaded, but was given in evidence under the general issue; and, in the absence of specific requirement to the contrary, we are of opinion that, under the Code, facts in mitigation, as a general rule, not being issuable matter, are not required to be set up by plea; and the weight of authority, we think, justifies the statement of Cyc. on this subject (volume 13, p. 182) that "Matters in mitigation of damages may, in most jurisdictions, be shown under an answer containing a general denial only, and need not be specially pleaded"—citing authorities from California, Michigan, Massachusetts, and other states. But in setting up an easement, particularly one which rests in a written deed, this is not strictly matter in mitigation. While it may not go to the entire demand so as to afford full protection to the extent of the right sought to be acquired, it is a bar to relief pro tanto; and the same reasons which require that such a right should be set up when claimed in bar of all relief exist when it is offered in bar of part of the relief; though, in terms, it may be offered in reduction of damages.

We do not think, however, that the position is available to plaintiff on the facts of the case before us; for we hold that the rights referred to by the deed in question are sufficiently set forth in the pleadings to permit that the same should be received in evidence for the purpose for which it was offered. In section 3 of the answer already quoted, defendant alleges that it holds "all the rights, franchises, privileges, and easements of the Charlotte City Waterworks,"

grantees in this deed. While this might not ordinarily be sufficiently definite and precise, it is rendered so, we think, by the positive allegation in section 2 of the complaint that defendant, under its charter, has "taken, holds, and controls the land by virtue of this very deed," made to the Charlotte City Waterworks. The existence and contents of this deed are therefore fully disclosed in the pleadings. The allegation of section 3 of the answer, otherwise, perhaps, too general, becomes definite and precise as to this particular claim, and the deed should have been received in evidence.

For this error, there will be a new trial on all the issues.

New trial.

BILES v. SEABOARD AIR LINE RY. CO. (Supreme Court of North Carolina. Nov. 13, 1906.)

1. MASTER AND SERVANT—RULES OF EMPLOYMENT—ABROGATION—EFFECT.

A rule of an employer established for the safety of employes which is habitually violated to the knowledge of the employer, or vice principals, or which has been frequently and openly violated for such length of time that the employer could by the exercise of ordinary care have known the facts will be deemed abrogated in determining the question of negligence on the part of an employé violating it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 287.]

2. TRIAL—MOTION FOR NONSUIT—CONSTRUCTION OF EVIDENCE.

On a motion for a nonsuit or direction of a verdict for defendant, the evidence of plaintiff must be accepted as true, and construed in the light most favorable to him.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 374.]

3. MASTER AND SERVANT—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

In an action against a railroad for injuries to a brakeman thrown off the pilot of an engine because of the absence of a bar to which the brakeman could hold, he testified that to perform his duties he was required to stand on the pilot, that all engines he had previously worked on had a step on the pilot and a hand hold, that he did not know that the hand hold was lacking on the pilot when he got on it, that he was instructed by the engineer and conductor to stand on the pilot, that other employes did so when employed in similar work, that in consequence of the engine making a jolt, he was thrown on the track and injured, and that he was thrown because the pilot did not have the hand hold. Held, that the brakeman was not guilty of contributory negligence at a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1124.]

4. SAME—DEFENSE—STATUTES.

Under Private Laws 1897, p. 83, c. 56, §§ 1, 2, giving to a railroad employé a right of action for injuries caused by any defect in machinery, way, or appliance, and providing that any agreement made to waive the benefit of the statute shall be void, a railroad cannot defeat an action for injuries to a brakeman caused by a defect in the pilot of an engine on the ground that he assumed the risk, where the brakeman did not know of the defect, and did not have any opportunity to discover it while performing his work in the manner directed by his superiors.

Appeal from Superior Court, Anson County; Moore, Judge.

Action by David Biles against the Seaboard Air Line Railway Company. The three ordinary issues in actions of this character were submitted. There was verdict and judgment for plaintiff, and defendant excepted and appealed. Affirmed.

J. D. Shaw, Murray, Allen & Adams, and Jerome & Amfield, for appellant. I. A. Lohckart and H. H. McLendon, for appellee.

HOKE, J. This case was before the court on a former appeal, and will be found reported in 139 N. C. 528, 52 S. E. 129.

The facts supporting the claim of plaintiff are substantially similar to those disclosed in the former appeal. There was much testimony on the part of defendant contradicting the evidence offered by plaintiff; but the jury have accepted the plaintiff's version of the occurrence, and we find no error which gives the defendant any just ground of complaint. There was some additional testimony offered on the present trial as to the existence or non-existence of a rule on the part of the defendant, forbidding the plaintiff to take a position on the pilot of the engine. This was submitted to the jury and found against defendant under the following charge (after correctly charging as to the effect of such a rule if the same existed): "If the jury find from the evidence that the rule which was offered by the defendant was habitually violated, to the knowledge of the defendant, or of those who stood towards the plaintiff in the position of vice principals, or if the jury find from the evidence that the rule was so frequently and openly violated for such a length of time that the defendant could, by the exercise of ordinary care, have ascertained that it was being violated, the court charges you that if you find these to be the facts, the rule is considered in law as being abrogated, and would have no effect upon the acts of the plaintiff." This charge is in compliance with our former decision, and we still think it declares the correct doctrine on the question.

The only objection seriously urged upon the argument here was that the judge should have instructed the jury that on the entire evidence, if believed, they should assume the issue as to contributory negligence in favor of the defendant. This would be, in effect, to sustain defendant's motion to nonsuit; and as said by Douglas, Judge, in *Coley's Case*, 129 N. C. at page 413, 40 S. E. 197, 57 L. R. A. 817: "It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence for the plaintiff must be accepted as true, and construed in the light most favorable to him." Applying this rule to the facts before us, we are of opinion that the position contended for by defendant cannot be sustained. The plaintiff, among other things, testified as before, that he was an employé, working on a freight train of de-

fendant, and was known as the "front train hand;" that on the night of November 29, 1902, as this train was going into the yard at Hamlet, N. C., he was injured by having his foot run over and crushed by the engine of the train on which he was working; that it was a part of plaintiff's duties at such times to keep a look out in front of the engine that he might change the switches, when required, for the proper moving of the train and to protect his train from loose cars which might be on the track; and in order to be ready to perform his duties efficiently the proper placing was on the pilot of the engine; that all the engines plaintiff had ever worked on to this time had a step on the pilot for the use of the train hand, and also a hand hold running around the beam of the pilot by which he could hold on with reasonable safety; and plaintiff was instructed, both by the engineers and conductors of freight trains, who had charge of the same, to take this position on the pilot when engaged in his duties. That all other hands did so when engaged in the work, and that an employé could not properly perform this duty, as it was required of him, in any other position.

Stating the evidence on this point by question and answer in the redirect examination, the evidence appears as follows: Q. "When you entered a yard to change those switches, or perform those duties you had to perform, would the engineer stop for you to do it? A. No, sir; he would not stop for me to get off or on. They would not have a man they would have to stop for. They would curse him and turn him off." Witness further testified that on the night in question, as the train entered the yard at Hamlet, plaintiff had gone forward and changed the switch, and came back to take his usual position on the pilot, the engine running along the track about as fast as a man could walk; that plaintiff got on the engine, putting his foot on the step provided for the purpose; and, after having taken this position, the engine made some jolt or eccentric movement caused by a depression of the track, or otherwise, and plaintiff was thrown on the track in front, and his foot run over and crushed, as stated; that plaintiff was thrown because this engine did not have the usual hand hold along the pilot beam; that it was on all the engines that plaintiff had ever worked on before, and plaintiff did not know it was lacking here when he got on, or he would not have done so. If this statement is accepted as true, the plaintiff, on general principles applicable to cases of this character, would have a clear right of action, and there would seem to be no case of contributory negligence presented. Certainly the judge could not hold, as a matter of law, that plaintiff was guilty of contributory negligence. Apart from this, it will be noted that there is no carelessness imputed to plaintiff here in his personal conduct except that of working on in the presence of a

defective appliance or machine; which, as stated in a former opinion, has been usually dealt with under the head of assumption of risk; and this defense, under our statute on the subject, as construed by the courts, has been eliminated in cases of this character. The statute (Private Laws 1897, p. 83, c. 56, § 1), provides that whenever an employé of a railroad company, operating in the state, is injured or killed by reason of the negligence of another employé, or by reason of any defect in machinery, way, or appliance, he shall have a right of action. Section 2 provides that any contract or agreement, expressed or implied, made by employé to waive the benefit of the general section shall be null and void. In *Coley's Case*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817, the court held that assumption of risk, being in its nature a contractual defense, was not open to defendant in a case of this kind and a verdict and judgment for plaintiff was sustained.

A reference to the facts of *Coley's Case*, stated in the opinion of the Chief Justice, on page 534, will show that the cause was one in all its essential features exactly similar to the one before us; the only difference being that in *Coley's Case* the employé had taken the usual and customary position on the rear of a shifting engine which was moving backwards, and was thrown on the track and injured by reason of a defective engine in not having a grab iron by which employés engaged in that duty were accustomed to hold on and save themselves, while in the case before us the defect was in front of the engine which was moving forward. In that case, too, a recovery was sustained, though the defect was known and observed; while here, the plaintiff testified that he did not know of the defect; and the testimony does not disclose that he had any opportunity to notice the absence of the hand hold till the emergency was upon him. In both cases, however, the employés had taken, or were endeavoring to take, the position they were required to take in the proper performance of their duties. As said in the present case, on the former appeal, this construction of the statute "does not at all import that in cases of the kind we are now considering the plaintiff is absolved from all care on his own part. Except in extraordinary and imminent cases, like those of *Greenlee* and *Thaxter*, he is still required to act with that due care and circumspection which the presence of such conditions require. And, if apart from the element of assumption of risk, the plaintiff, in his own conduct, has been careless in a manner which amounts to contributory negligence, his action must fail." We are referred by defendant to a large number of cases which seem to hold that it is negligence per se to take a position on the pilot of an engine, and more especially on that portion of it popularly known as the cowcatcher. But an

examination of the facts of these cases will, in every instance, disclose that the injured person seeking redress had voluntarily taken such a position; and was either not an employé of the train at all, or was not required to take such a position in the necessary and proper performance of his duty. Thus, in *Warden v. R. R.*, 94 Ala. 277, 10 South. 276, 14 L. R. A. 552, the plaintiff was a brakeman who had voluntarily taken his position on the pilot when no duty required him to do so. Said *McClellan, Judge*: "It does not appear that he had any duties to perform, or that any of his duties could not be performed on the pilot cross beam or cow catcher, or that it was in any sense necessary for him to be on the cross beam in front of the engine at any time." In *R. R. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, plaintiff was not an employé as a train hand, but had voluntarily taken a position on the pilot of an engine when he had been warned against riding on the pilot and forbidden to do so. The distinction is well brought out in a case from the Georgia Reports quoted in one of the briefs: (*R. R. v. Myers*, 112 Ga. 237, 37 S. E. 439), as follows: "That such employé and others of his class had been in the habit of riding on the locomotive, and that he, at the time of the catastrophe, was so doing with the knowledge of the conductor and engineer, and that this was in pursuance of a custom known to the officials of the company, did not render the above rule inapplicable, unless it further appeared that the deceased was on the locomotive in obedience to some order which he was bound to obey, or in the discharge of some duty which it was incumbent on him to perform." As we have heretofore seen, the plaintiff's evidence was to the effect that he was, at the time of the injury, on the pilot of the engine by order of his superiors, and in the necessary performance of his duties; and having been injured by reason of a defective machine, and being guilty of no carelessness on his own personal conduct, his right of action is established.

There is no error in the record to the prejudice of defendant, and the judgment below is affirmed.

No error.

WALKER, J. I concur in the conclusion of the court and also in the opinion, except as to the application of the doctrines of assumption of risk and contributory negligence and the true construction of the act of 1897. When an employé enters into the service of his employer, he assumes all of the ordinary risks of the master's business when carefully conducted, and he does not assume any risks arising out of the employer's negligence. When the employer is once convicted of negligence which proximately caused injury to his employé, he is liable for the consequential damages, and cannot relieve himself of this liability unless he is able to sat-

Isfy the jury by the greater weight of the evidence, the burden being upon him, that the employé by his own negligence contributed to the injury. When we get into the domain of negligence, we have necessarily passed beyond the region of assumption of risk. The first is tortious and has nothing to do with the contract of employment, the second is wholly contractual in its nature. When the employé enters into the service, he contracts to take upon himself all the risks which are incident to the employment and which his employer can not avoid by the exercise of care. The risks which the employer can prevent by the use of care are not within the terms of the contract, and the liability of the master depends upon principles wholly unconnected with the law of the contract. The very fact that the employer's negligence is, when generally considered, a breach of the duty impliedly enjoined by the contract, and therefore in a sense is a tort arising out of the contract, for which the employer is liable, but proves that the employé by the contract does not assume any such risk as that brought about by the employer's negligence. As a clear illustration of the difference between the two principles, let us consider the case of a fellow servant. Before the act of 1897, if a servant was injured by the negligence of a fellow servant, the master was not liable, as that was regarded as one of the ordinary risks of the service which the servant assumed, upon the ground that the master with the exercise of ever so much care, could not foresee that one of his servants would be negligent and thereby injure his fellow servant. The servant was therefore held to have assumed this risk as one incident to the service, and which he had impliedly by his own contract agreed to assume. But, if the master was shown to have been negligent in selecting the offending servant, and associating him with the others in his employ, he was held liable for an injury to a fellow servant proximately resulting from the negligence of the delinquent servant, precisely because this risk, newly created, was not within the implied contract of assumption, as the master's own negligence had concurred with that of the servant in producing it. We might present examples indefinitely, which would thus point the distinction between the two doctrines, and which would demonstrate beyond question that the line separating them is plainly and distinctly marked. Upon no scientific principle, therefore, can it be said that when a peril is caused by the negligence of the master the servant assumes it. On the contrary, he is entitled to recover his damages unless the master can convict him of contributory negligence. The act of 1897 (Revisal of 1905, § 2646) abolished assumption of risk, so far as it related to the negligence of a fellow servant, but no farther. It then left the liability of the employer for furnishing or maintaining defective machinery, ways, or appliances to his employés to be deter-

mined by the general principles of the law of negligence, and certainly did not intend to make the employer liable absolutely and at all events, and in all cases, without regard to any question of negligence. This I understand to be the construction which the act has received from this court. In a certain class of cases, where the master, being a railroad company, neglects a primary duty to the servant and puts in his hand defective and unsafe appliances, by which the servant is injured, the master is held liable because of his neglect of a plain duty, which cannot be delegated (*Railroad v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755), and he will not be heard to plead his servant's contributory negligence, unless he can show that the servant knew that the situation was so obviously dangerous as to charge him with reckless indifference to his own safety, the chances of danger and probable injury being manifestly greater than those of safety. *Elmore v. Railway Co.*, 132 N. C. 865, 44 S. E. 620. But these are exceptional cases and as to all not within the exception, the general law of negligence applies. The difference between assumption of risk and contributory negligence is well stated and illustrated in *Railroad Co. v. Fort*, 17 Wall. 553, 21 L. Ed. 739; *Hough v. Railroad Co.*, 100 U. S. 213, 25 L. Ed. 612; *Railroad Co. v. Herbert*, supra; *Railroad Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605, and it was discussed and applied by this court in *Avery v. Railroad Co.*, 137 N. C. 130, 49 S. E. 81.

There have been expressions in some of the decisions of this court to the effect that assumption of risk is but a species of contributory negligence, but I think this confounds two things as distinct in their nature as they can possibly be, and is apt sooner or later to introduce confusion and uncertainty into the law. This case can well be decided upon principles in the law of negligence and seems to be governed by the case of *Springs v. Railway Co.*, 130 N. C. 186, 41 S. E. 100. In that case the plaintiff had stood on the pilot of the engine while in the performance of his duties, and while the train was in motion, although it appeared that he was acting under orders in doing so. He frequently stepped on and off the pilot while the train was moving, without objection from the company, or any of its servants in authority over him; and once while stepping from the pilot, his foot was caught between the slats, and he was thrown to the ground and injured. The court held the company liable under the circumstances—citing *Thomas v. Railroad Co.*, 129 N. C. 392, 40 S. E. 201; *Cogdell v. Railroad Co.*, 129 N. C. 398, 40 S. E. 202, and *Coley v. Railroad Co.*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, as covering all the points made in the case upon the question of negligence and contributory negligence.

BROWN, J., concurs in concurring opinion.

HAYNES v. NORTH CAROLINA R. CO.
(Supreme Court of North Carolina. Nov. 27, 1906.)

1. MASTER AND SERVANT—ACTIONS—ADMISSIBILITY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad for the death of a locomotive engineer whose train ran onto a siding and collided with cars standing thereon, by way of meeting the defense of contributory negligence, based on an alleged violation of a rule requiring decedent, when approaching the switch, in the absence of a light at the switch, to slow down until he could control his engine, plaintiff sought to show that the rule had been so habitually violated as to nullify it, and that such violation was essential to the operation of the trains in accordance with prescribed schedules. *Held* that, as sustaining such contention, it was proper to admit evidence showing the length of decedent's run, the schedule prescribed, the number of switch lights, their usual condition, and the length of time which would be consumed in conforming to the rule to stop.

2. SAME—QUESTIONS FOR JURY.

In an action against a railroad for the death of a locomotive engineer, whose train ran upon a siding and collided with cars standing thereon, *held*, under the evidence, a question for the jury whether a rule, requiring a locomotive engineer, when approaching a switch, in the absence of a light at the switch, to slow down and bring the engine under control, had been nullified by habitual violations and by the promulgation of schedules rendering it impossible to observe such a rule.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1030.]

3. SAME—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULES.

The violation by a servant of a known rule laid down by the master for the protection and safety of the servant does not bar a recovery where the rule has been violated so openly and frequently and for such a length of time that the master could, by the exercise of ordinary care, have ascertained its nonobservance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 763.]

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by Bettie W. Haynes, as executrix, against the North Carolina Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action brought by the plaintiff executrix for the recovery of damages sustained by reason of the death of her testator on account of the alleged negligence of defendant's lessee. Plaintiff's testator was, on the night of June 9, 1904, in the employment of Southern Railway Company, the lessee of defendant, in the capacity of locomotive engineer and, in the discharge of his duty, was in charge of the engine, attached to, and forming a part of, passenger train No. 40, operated by said lessee, which ran from Greenville, S. C., to Charlotte, N. C., and thence, over the main line of defendant company, through the city of Salisbury to Spencer, N. C. On the said night, June 9, 1904, while making said run at about the hour of 12 o'clock, said engine and a portion of the cars left said track and ran onto a side track, in the shifting

yard of defendant, in the city of Salisbury, known as the "Icehouse Siding," where it collided with two box cars standing on said siding, inflicting injuries upon said testator, causing his death. Plaintiff alleged that the said engine left the main track and ran on the siding and into the box cars by reason of the negligence of defendant's lessee, assigning three acts of negligence: (1) In failing to furnish a clear track and a safe roadbed upon which to run the engine and cars. (2) In failing to keep the switch at the siding in such repair, so adjusted, securely set, and locked as to keep disconnected said siding from the rail of the main track. (3) In failing to keep the switch rail of said siding, connecting the same to the rail of the main track, in such repair and so adjusted as to permit the engine to run over the said main track without running off the same and onto the siding. Defendant denied that it was negligent in either of the respects specified, and for further defense alleged that plaintiff's testator came to his death by his own negligence, specifying particularly the acts contributing thereto. (1) That he was running his engine, at the time it left the track and collided with the box cars on the siding, through the city of Salisbury at a rate of speed in violation of the ordinance of the said city. (2) That he was running said engine at said time at a rate of speed in violation of the rules of the company, which were well known to him, and which required him to run his engine at such rate of speed that he would have it under his control, whereas he was running at a rapid and reckless rate of speed. (3) That at said time he was violating a rule of the company which required that whenever a danger signal was shown on the line of said road, the engineer in charge of said train should stop and examine the cause thereof. That at the said time there was shown a danger signal at said switch or siding which was plainly visible for a distance sufficient to enable him to stop the train. (4) That at said time, he was violating a rule of the company which required him to stop his train, if the signal which was provided for that purpose did not show the track clear. That by each of the said acts of negligence he contributed to his injury and death. Plaintiff replied to the new matter set forth in the answer alleged to constitute contributory negligence on the part of her testator: (1) That, if her testator was running said engine through the city of Salisbury in violation of the ordinances of said city, he was obeying the orders of the agents and officers of defendant's lessee, with their full knowledge and consent. That it was frequently necessary to run said trains through said city at a rate of speed prohibited by said ordinances in order to maintain the schedules promulgated and enforced by said company. That her testator was not at said time running

his engine in violation of said ordinances. That, if he was running said engine in violation of the rules of defendant's lessee, he was doing so by its direction and in accordance with the uniform habit and custom of the engineers of defendant's lessee to run the trains at the place of the said siding and switch at as high rate of speed as her testator was running said train at the time of the collision. That such speed was necessary to enable her testator and other engineers to maintain the schedules promulgated by said company. That the rules referred to in the answer were and had been been abrogated and rendered nugatory by the officers of the defendant's lessee, and that defendant was estopped from setting up or relying on said rules in this action, etc. That, if her testator attempted to run said train by the said switch and siding when the signal light was absent, his conduct in so doing was in conformity with the uniform custom and habit of her testator and all other engineers of said lessee company engaged in running over this line of railway from Greenville to Spencer, which custom and habit was for a long time known to, and acquiesced in by, the officers of said company, and was necessary to maintain the schedules of said company. Upon the foregoing pleadings, his honor submitted to the jury the following issues: "(1) Was the plaintiff's testator killed by the negligence of the Southern Railway Company, as alleged? (2) Was the plaintiff's testator guilty of contributory negligence, as alleged? (3) What damages was plaintiff entitled to recover?" There was a verdict for the plaintiff and judgment thereupon, from which defendant appealed. The testimony pertinent to the exceptions is set forth in the opinion.

W. B. Rodman and L. O. Caldwell, for appellant. Burwell & Canaler, for appellee.

CONNOR, J. (after stating the case). The well-prepared briefs and arguments in this appeal present the merits clearly, and in the light of the pleadings the decision turns upon two questions. (1) Has the defendant, as a matter of law, successfully met the presumption of negligence raised by the fact that the switch was misplaced by reason whereof the engine attached to train No. 40 collided with the box cars on the siding? (2) Was there any competent evidence tending to show that the rule introduced by defendant governing plaintiff's testator in the management of the engine was, by reason of its habitual violation, known to defendant's lessee, or by the prescribed schedules, abrogated?

It appearing that the engine, while approaching Salisbury, left the main track at the Icehouse Siding and went upon the side track, colliding with the box cars, the presumption arises that the switch was defective either in its construction, was out

of repair, or that, by some means, it was set to the siding instead of the rail of the main track. In either case the track was not clear, in the sense of being safe. We find no evidence that the switch was defectively constructed or was not in proper repair, but there is evidence, practically uncontradicted, that the switch was set to the siding, hence the engine, by the law of its construction and operation, could not do otherwise than, by following the rail, go upon the siding. This was inevitable. It was the duty of the defendant's lessee to use reasonable care to provide and maintain a safe switch, and to keep it properly adjusted. The fact that it was not so adjusted and set to the main track, where, according to the regular schedule, train No. 40, going north, was expected to pass over it, raises a presumption that defendant's agents or servants, intrusted with that duty were negligent, and casts upon defendant's lessee the duty of "going forward" with proof to the contrary. This is conceded. At the request of defendant his honor, upon this point, instructed the jury: "The defendant is not an insurer of the life of its employés; the defendant is not under the law required to guarantee that its employés shall be free from danger. The only duty that the defendant owed to the employé was to exercise that reasonable care which a man of ordinary prudence, under similar circumstances, would exercise to furnish the employés with a safe roadbed and a clear track. What would a man of ordinary prudence, under similar circumstances, do towards furnishing his employés with a safe roadbed and a clear track? The court charges you that the only duty that the defendant owed to the plaintiff was to exercise that care which a man of ordinary prudence would exercise under similar circumstances to keep the switch set to the main line. If the jury should find from the evidence that the death of plaintiff's testator was caused by the derailment, which derailment was caused by the train or engine running into an open switch, then if the jury should find from the evidence that the switch was left open, or set to the side track, by an employé of the company, who was not engaged at the time of the changing of the switch in working for the company, you will answer the first issue 'No.' If the jury should find from the evidence that the switch was set to the side track by some person engaged in working for the company, and should further find from the evidence that, at the time this person, whomsoever it was, was not actually on duty, but that it was done by an employé from a reckless and evil disposition, you will answer the first issue 'No.'" There was evidence tending to show that the switch was in good condition, worked all right, that, immediately after the accident, it was found with the lever latched down, the switch set to the side track and the lock gone; that a

train passing over it would not throw the switch; that on the morning after the accident, about 10 o'clock, the lock was found, about 102 feet from the switch, in a garden on the side of the track; that the switch was fastened by a standard switch lock which could only be unlocked by a standard switch key. The regulations of the road required an employé to sign for a switch key, and when he left the service of the road to return it. That whoever took the lock off must have unlocked it, and must have had a key, that being the only way to do it. There was testimony in regard to the shifting of cars on the siding on the evening and night of the day of the accident and of the persons about the switch. That some of those in the employment of defendant's lessee in charge of the shifting crew had left the employment and were not present at the trial. There was also evidence in regard to the passing of trains over the switch during the early part of the night. His honor fairly, and we think under proper instructions, submitted the question bearing upon defendant's negligence to the jury. We have examined the prayers for special instructions, which were refused, and concur with his honor in declining to give them. While the complaint states plaintiff's contention, in respect to the alleged breach of duty on the part of defendant, in several aspects, we think that they all amount to the general allegation that there was a failure to furnish a clear track. The evidence points only to a change, either negligently or purposely, of the switch. It is difficult to perceive how this could have been done by any one other than some person having a key. His honor correctly told the jury that if done maliciously, even by an employé, defendant was not liable.

The real contest in the trial below and in this court was directed to the alleged contributory negligence of plaintiff's testator. It appears that the switch is supplied with a switch lamp having four lenses, with two opposite each other. The white and red lenses are at right angles to each other—when the switch is set for the main line it shows white up and down the main line and the red shows crosswise the track. When it is set for the side track, the red shows up and down the main line and the white crosswise. The lamp sets on a two-pronged fork, 19 feet high, 8 feet north of the track. There is also a switch target to indicate the position of the switch by day, the lamps by night. The box cars were on the siding about 375 feet from the switch with which engine No. 40 collided, turning over and killing the engineer. For the purpose of showing negligence by plaintiff's testator, defendant introduced a rule book, a copy of which was furnished to him and which he carried in his pocket. The rules relied upon are:

"Rule 531. When fixed signals are obscured

by fogs or storms, they must approach them at such a rate of speed as to be able to stop within the distance at which their indication can be distinguished. Should they be unable to see the indication of a signal without encroaching upon the danger point, protected by it, they must stop clear of such point and send the fireman ahead to ascertain the indication and be advised thereof by him before proceeding."

"Rule 533. In approaching sidings and yards they must be especially careful as to the indication and position of all switches.

"Rule 534. They will be held accountable for passing a switch which is not in the right position for them. The absence of switch lights should be taken as a danger signal in accordance with the general rules.

"Rule 535. If the signal is missing, or does not show good light, from any main track switch, they must report the fact by wire to the superintendent from the first open telegraph office at which they stop."

There was evidence tending to show that, on the night of the accident, the lights had gone out. Plaintiff contended that, while these rules had been promulgated and were known to her testator, they had been, for all practical purposes, or controlling the conduct, of engineers on defendant's road, abrogated and overruled: (1) By habitual violation known to defendant's lessee. (2) By the promulgation and maintenance of schedules, which rendered it impossible to observe the rules. For the purpose of making good this contention, plaintiff introduced Mr. Fogus, who testified that he was an engineer and had run fast trains over defendant's road—was then running from Greenville to Spencer, No. 35 Fast Mail. That No. 40 was a first-class train, having precedence over second-class and inferior trains. He was asked the number of switches between Greenville and Spencer. He answered 140. That the distance between Greenville and Spencer was 154 miles. That the schedule of No. 35 was 4 hours and 52 minutes, having 12 stops: No. 40 had 4 hours and 49 minutes, having 13 stops. That he was on the road every other night. A good part of the switch lights were out. It depends on the weather how many were out, usually from 10 to 15, sometimes more, sometimes less. On stormy nights one-third to one-fourth would be out. Did not stop train when lights were out. Could not maintain the schedule and observe the rules in regard to switch lights which were out. In regard to the time lost by stopping at switch lights, it would depend upon the location of the switch. If down grade, not more than two or three minutes, if at the foot of a long grade, five or six, average four or five minutes, about one-half to one hour on an entire run. In response to the question: "Assuming the jury should find from the evidence the facts to be that as many as from 10 to 15 of the switch lights,

on an average, were out, from Greenville to Spencer, every night for a year prior to the 8th day of June, 1904, and that train No. 40 and similar first-class trains ran over the said track between said points, have you an opinion, satisfactory to yourself, as to whether said train could have been run between said points and kept their schedule, and at the same time obeyed the rule of the Southern Railway requiring said trains to stop at each of said switches, where said lights were out, and if you have such an opinion, state what it is?" To which he responded: "I have an opinion. I do not think that they could obey that rule and hold the schedule. When the switch light is out, you can see the target about two telegraph poles away by an electric light. A train running 35 miles an hour up grade I could stop in 150 yards; down grade it would take double that time; on medium grade 200 yards. Telegraph poles 90 feet apart. Would report at end of run, number of lights out on run. Had done so six or seven months when Haynes was killed." Jas. C. Wallace, introduced by plaintiff, testified that he worked on Southern Railway from 1890 to 1899. Fireman and engineer. Ran from different points, including Greenville to Spencer. Had frequently observed switch lights out. Knew the rules. Had seen the switch light out, and in bad condition many times when running as fireman with Mr. Tankersley as engineer. Could never tell that he paid any attention to lights being out by the way that he handled brakes. He seemed to be anxious to make schedule. Ran with other engineers when switch lights were out. They did not stop trains or pay any attention to them. Has run a passenger train as engineer from Charlotte to Spencer. Switch lights often out. Did not stop for them. Did not slacken speed. Did not have time. Was violating rules. Was discharged from service October, 1899. There was evidence that the usual speed of first-class passenger trains passing the switch at Icehouse Siding was 35 miles an hour. The defendant introduced Mr. Tankersley, an engineer, who testified that, when approaching switches, with danger signal or when no light was shown, he always stopped, contradicting plaintiff's witnesses; that he found but few lights out—not more than two or three, never more than four or five—on the run. When he approached a switch at which the light was not burning he observed the target, and, if it was all right, would go ahead. There was other testimony bearing upon the custom of engineers in passing switch when lights were out. All of this testimony was objected to by defendant, and to its admission, exception was duly taken. We have deemed it best to discuss the several exceptions directed to its admission together.

The plaintiff, by way of meeting the defense of contributory negligence, based upon an alleged violation of the rule requiring her testator, when approaching the switch, in the ab-

sence of the white light, which indicated that the switch was properly set, to slow down until he could control his engine, sought to show, as we have seen, that the rules had been so habitually violated as to nullify them, and that such violation was essential to the operation of the trains in accordance with the schedules prescribed. For this purpose the testimony was competent. The only way in which plaintiff could maintain her contention, if at all, was by showing such a number of violations, during such a space of time and under such circumstances known to defendant's officers and agents, as would substitute the practice for the rule. Whether the testimony, if found to be true, measured up to the required standard to work the result to which it was directed is another question. In the same way it was material and relevant to plaintiff's contention to show the distance between Greenville and Salisbury, the schedule prescribed, the number of switch lights, their usual condition, the length of time which would be consumed in conforming to the rule to stop, etc. The value of the testimony, the knowledge and capacity of the witnesses, their temper and bias, if any, was for the jury. Assuming that the light was out, or, as expressed by some of the witnesses, that the switch showed "a dead light," the rule imposed upon plaintiff's testator the duty of treating it as a danger signal and directed him how to act. The evidence was plenary that he knew of the rule and, if in force, was under obligation to obey it. Mr. Giles testified that he was conductor on No. 40 on the night of the accident. That the engine ran into the switch at 12:30 o'clock, when running 35 or 40 miles an hour, which was the usual speed for first-class trains at that point. He got off and went to engine, returned to the switch in two or three minutes to learn the cause of the wreck. Found switch set for side track, lock gone, and light out—everything else in good condition. Other witnesses for defendant testified to substantially same facts in regard to condition of switch, etc. If the testimony taken as a whole was fit to be submitted to the jury for the purpose of basing a finding that the rule was not, in respect to plaintiff's testator, alive and in force, the sole remaining question is whether there is error in his honor's rulings in regard to the instructions to the jury.

In *Biles v. Railroad*, 139 N. C. 523, at page 532, 52 S. E. 129, at page 131, Mr. Justice Hoke says: "The violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and enforced, and does not obtain when a rule is habitually violated to the knowledge of the employer or of those who stand to the employer as vice principals, or when a rule has been violated so frequently and openly, and for such a length of time, that the employer could, by

the exercise of ordinary care, have ascertained its nonobservance. Under such circumstances the rule is considered as waived or abrogated." Citing Thompson on Neg. § 5404; Beach, Cont. Neg. § 373. "Knowledge on the part of the master of such habitual violation need not be shown by direct evidence that the officers saw it practiced, but notice may be inferred from circumstances, as from its notoriety, long standing, and that it was known to the company's employees." 20 Am. & Eng. Enc. 109; Barry v. Hannibal & St. J. R. R., 98 Mo. 69, 11 S. W. 309, 14 Am. St. Rep. 610. "Where an engineer placed his engine upon the main track of the road contrary to its prescribed rules, and it appeared the rule had been habitually violated by engineers for a period of at least one year, it was held that the question of defendant's negligence in not enforcing its rule was for the jury, and a finding of negligence by them was warranted." Whittaker v. D. & H. Co., 126 N. Y. 544, 27 N. E. 1042. Sanborn, Cir. Judge in Northern Pac. R. R. v. Nickels, 50 Fed. 722, 1 C. C. A. 630, discussing this question says: "To hold that the defendant company could make this rule on paper, call it to plaintiff's attention, and give him written notice that he must obey it and be bound by it one day, and know and acquiesce, without complaint or objection, in the complete disregard of it, by the plaintiff and all its other employees associated with him, on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty towards the plaintiff because he disregarded this rule, would be neither good morals nor good law." Louisville & N. R. R. v. Reagan (Tenn.) 33 S. W. 1050; Tex., etc., Ry. Co. v. Leighty (Tex. Civ. App.) 32 S. W. 799; Wright v. So. Pac. (Utah) 46 Pac. 374; Tullis v. Lake Erie & W. R. R. Co., 105 Fed. 554, 44 C. C. A. 597. There is another view of the question regarding disobedience of the rules pressed upon our attention in the argument. Plaintiff says that it is shown by the testimony that between Greenville and Spencer there were 140 switches; that frequently as many as 10 or 15 of the lights were not burning; that engineers were required by the rules to report and the evidence shows, did report, this to the superintendent of the company, whose duty it was to attend to such matters; that the officers and agents therefore knew of the conditions existing in this respect; that in the light of such conditions, they promulgated and maintained a schedule for No. 40, and other fast mail trains, requiring a rate of speed which could not be maintained without violating the rule; that, thereby, they not only knew of such habitual violation but, by imposing duties upon the engineers, the performance of which rendered such violations necessary, abrogated the rule; that, by reason of this condition, the defendant is estopped from setting up and enforcing the rules to prevent a recovery for injuries sustained by its own negligence

in failing to furnish a clear track and switch lights. The same contention was presented and discussed in Hall v. Ch. B. & N. Railroad Co., 46 Minn. 439, 49 N. W. 239, in which Mitchell, J., says: "The next point urged is that the plaintiff was himself guilty of contributory negligence in not reducing the speed of his train while running through the yard, so as to have it completely under control as required by the rule, which counsel claims means that the speed must not be greater than that at which the engineer can stop his train within the distance that he can see danger ahead. This rule, like many of the others, does not command the doing or not doing of a particular specific act, but is one calling for the exercise of judgment and diligence on the part of the engineer, and must be construed in that view and considered in connection with the other rules of the company and responsibilities imposed upon engineers. It would seem that the construction which plaintiff himself put upon this rule is a reasonable one; that is, that he should have his train so under control that he could stop it before reaching the danger point, if the proper signals were seasonably given him. But, even if the rule, if standing by itself, might mean what defendant claims, yet, as to plaintiff, it was clearly modified by the schedule of time, according to which these trains were required to be run, and were actually run, presumably with the knowledge and at the direction of the defendant's governing officers. The plaintiff could not conform to the time table and, at the same time, keep his train under complete control, in the sense in which defendant claims that term is used in the rules. If compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his employé, negligence cannot be imputed to the employé for not following the general rule." The opinion from which we have made this citation is a strikingly able one and much that is said in it is applicable to this appeal. It is cited by Judge Bailey in his work on Personal Injuries, § 3455. The same doctrine is applied in Penna. R. R. v. Raney, 89 Ind. 453, 46 Am. Rep. 173. Elliott, J., writing for the court, says "When the orders given to an engineer by the government or superior officers of the company require him to run in a different manner from that prescribed in the rules, and other trains of the class of that placed in his charge are so run with the knowledge and by the direction of the governing officers, then negligence cannot be imputed to the engineer, although he does not follow the general rules. In this instance there was evidence fully justifying the jury in finding that the orders embodied in the schedule in the direction of the appellant's officers, and involved in the usual practice of the company, annulled and rendered ineffective its general rules. * * * The engineer was not guilty of contributory negligence in not seeing the condition of the switch. While,

under the rules of the company, it was his duty to exercise great care and vigilance, he was not chargeable with negligence because he did not see what men could not have seen.

* * * In addition to this, he knew he was entitled to a clear track, and he had no reason to suppose that it had been made dangerous by the culpable negligence of others." Chicago, etc., R. R. Co. v. Flynn (Ill.) 40 N. E. 332. These authorities, which meet our approval, amply sustain plaintiff's contention in this respect. The evidence in regard to the schedule distance and number of switches was uncontradicted. Two witnesses testified to the number usually not lighted and two others swore to a much smaller number. The uncontradicted testimony shows that No. 40 was running at the usual speed when it reached the switch and just about schedule rate of speed. We think that there was evidence proper to be submitted to the jury upon both aspects of the controversy.

His honor, in charging the jury upon the second issue, gave the instructions asked by defendant respecting the duty of the engineer to keep a careful watch and look out for obstacles and defects in the track and condition of the switches and his duty to take precaution to protect his train. Among other instructions, he said to the jury: "That, under the rules of the company, it was the duty of the plaintiff, in approaching yards, to be especially careful as to the location of switches, and if the jury should find from the evidence that the deceased, by being specially careful, could have seen that the switch light was out, in time to have stopped the train, you will answer the second issue 'Yes,' if the rule was alive and enforced." His honor had, before this, instructed the jury in regard to the duty imposed by the rule and what must be shown before it could be treated as abrogated. In his general charge he adopted the language used by us in *Biles v. Railroad*, supra.

The defendant took a number of exceptions to the refusal to give instructions regarding the condition of the roadbed. There was no controversy in regard to the roadbed. The answer to the first issue depended upon the view which the jury took of defendant's testimony in regard to the condition of the switch, the persons who used it during the day and night of the accident, and persons who had the key, etc. These were peculiarly questions for the jury. It is not for us to conjecture how, or by whose agency, the plaintiff's testator, while in the discharge of his duty, relying upon defendant's lessee, his employer, to furnish him a clear track, was carried to his death by an open switch and a "deadlight." It is not clear to our minds why, in the defendant's shifting yard, with so many of its employes moving about, having ample opportunity to watch and see the condition of the switch and that the light was out, it was left to the engineer to save himself, and his train loaded with passengers, from destruction. Doubtless the jury

thought that the man who threw the key into the garden was the one who negligently left the switch set to the siding, and, after seeing, when too late, the terrible disaster resulting from his negligence, divested himself of the evidence of his guilt and when the trial came was not to be found. To say the least of it, much of the testimony was unsatisfactory and the absence of two persons who had an opportunity to know something of the management of the shifting engine on the day and night of the disaster, justified the jury in finding that the defendant had not satisfactorily removed the burden which the law cast upon it. The engineer is dead. The conductor says that, in two or three minutes after the accident, he went to the switch—it was set to the siding and the light was out. It devolved upon the defendant's lessee to explain this condition of its track. It was its duty to use reasonable care to keep the rail to the main track and to keep a light burning. It failed in both.

Upon a careful examination of the entire record and the several exceptions made by defendant, we do not discover any error of which it can complain. The judgment must be affirmed.

MORRISON v. TEAGUE et al.

(Supreme Court of North Carolina. Nov. 27, 1906.)

1. MARRIAGE—LICENSING OFFICERS—ISSUING LICENSE—AGE—REASONABLE INQUIRY.

In an action to recover a penalty under Revisal 1905, § 2090, for issuing a marriage license for the marriage of relator's daughter, under the age of 18 years, without the written consent of relator, and without having made reasonable inquiry before issuing the license as required by law, where the evidence as to the issuance of the license was uncontradicted, the question of "reasonable inquiry" was one of law.

2. SAME.

In an action under Revisal 1905, § 2090, for penalty for issuing marriage license for marriage of relator's daughter, under the age of 18 years, without having made reasonable inquiry before issuing the license, the uncontradicted evidence showed that defendant, as register, took the word of the prospective bridegroom and his friend as to the age of the woman, and made no further inquiry of any one; that the register did not know either the bridegroom or his friend, and the register's suspicions seemed to have been aroused, inasmuch as he inquired why they applied for a license in that county when the girl lived in an adjoining county. *Held*, that defendant failed to make reasonable inquiry as to the age of relator's daughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Marriage, § 35.]

Appeal from Superior Court, Alexander County; Bryan, Judge.

Action by the state, on the relation of W. P. Morrison, against G. C. Teague and others, to recover penalty under section 2090, Revisal 1905, for issuing marriage license for the marriage of relator's daughter, under the age of 18, without the written consent of relator, and without having made reasonable inquiry before issuing the license as required by law. From the verdict and

judgment rendered, relator appealed. New trial granted.

R. B. Burke, L. C. Caldwell, Z. V. Long (Harry P. Grier, on brief), for appellant. J. L. Gwaltney (J. H. Burke and R. Z. Linney, on brief), for appellees.

BROWN, J. The plaintiff testified that his daughter Ina May was 17 years, 4 months, and 6 days old when she was married to Ross Kennedy, her first cousin, who resided in Nebraska, and that she had the appearance of a well-developed woman; that she lived in Iredell county with plaintiff, some 12 miles from Taylorsville and 8 miles from Statesville. The defendant Teague, register of deeds of Alexander county, issued the marriage license, upon the application of Ross Kennedy and under it the marriage was duly solemnized in said county. At the time the application was made for the license the young lady was not present, and, as there is no evidence that the register knew her, we think her physical appearance may be considered as irrelevant. What transpired at the time Kennedy applied for license appears solely in the testimony of witness Matherson, as follows: "I live in Taylorsville. In April, 1905, I was in the office of the register of deeds, Mr. Teague, with Mr. Long, when he asked Mr. Teague about issuing the license. Teague said he had no written permission; said he inquired of Kennedy and a man with him about the girl's age; said he knew neither of them, but issued the license, and made no further inquiry of any one." Cross-examined: "Teague said he made inquiry of them why they applied for license in Taylorsville. He said they said the girl lived in an adjoining county, and that it was nearer to Taylorsville than it was to Statesville; that he inquired of both, said they appeared to be nice decent men. He said they both said they knew her age, and she was over 18 years of age, and said Kennedy swore she was." Defendants offered no evidence.

Plaintiff requested the court to charge the jury, as matter of law, that defendant Teague, in any view of the evidence, failed to make reasonable inquiry as to the age of plaintiff's daughter. Refused. Plaintiff excepted. The court instructed the jury that, the evidence being uncontradicted, he held, as a matter of law, that the defendant had made reasonable inquiry as to the age of Ina May Morrison, and, if the jury believed the evidence, they would answer the third issue, "No," and the fourth issue, "Nothing." Plaintiff excepted. The learned counsel for the defendant, Mr. Gwaltney, most earnestly contended in his argument that, upon a fair interpretation of the words "reasonable inquiry," the charge of his honor should be sustained. Notwithstanding, we find ourselves unable to reconcile his view with very recent decisions of this court. We agree with counsel that, upon the evidence in the record, the question was one of law, and that his honor was correct in so holding. The uncontradicted evidence shows that the regis-

ter took the word of the prospective bridegroom and his friend as to the age of the young lady, and made no further inquiry of any one; that the register did not know either Kennedy or his friend. The register's suspicions seem to have been aroused for he inquired why they applied for license in Taylorsville as the girl lived in Iredell. Nevertheless he made no further inquiry.

We think that, under our decisions, his honor should have given the plaintiff's prayer for instruction, and that he erred in the instruction he gave. The subject is fully discussed by Mr. Justice Connor in *Furr v. Johnson*, 140 N. C. 158, 52 S. E. 664; *Trolling v. Burroughs*, 133 N. C. 312, 45 S. E. 662.

Possibly on the next trial defendant may offer evidence which will tend to prove that he made reasonable inquiry. In this record there is none.

New trial.

SINGER MFG. CO. v. SUMMERS et al.
(Supreme Court of North Carolina. Nov. 21, 1906.)

1. PROPERTY—OWNERSHIP—RIGHT TO FOLLOW PROPERTY OBTAINED BY FRAUD—RECOVERY FROM WRONGDOER OR THIRD PERSON.

One whose property has been obtained from him by actionable fraud may follow and recover it from the wrongdoer or from any one to whom the property has been transferred otherwise than in good faith and for valuable consideration, so long as the owner can identify or trace it; and the principle is applicable, not only to specific property, but to money and choses in action and their proceeds.

2. INJUNCTION—PROTECTION PENDING LITIGATION AS TO TITLE.

Where an agent deposited the principal's money in a bank, and, with intent to embezzle it, obtained a cashier's check in his own name, and indorsed it to a third person, the agent being insolvent, and the third person a nonresident, in an action by the principal against the bank and the other parties to the check to recover the deposit, it was proper to restrain payment of the check until the rights of the parties could be determined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 96, 97.]

3. BILLS AND NOTES—HOLDER IN DUE COURSE—TIME OF NEGOTIATION.

Revisal 1905, § 2202, provides that, where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. Held that, where a cashier's check was issued May 18, 1904, and indorsed May 23, 1906, the time was not unreasonable under the statute.

4. SAME—CONSIDERATION—PRE-EXISTING DEBT.

Under the express provisions of Revisal 1905, § 2173, in relation to negotiable instruments, an antecedent debt constitutes value.

5. SAME—ACTION—BURDEN OF PROOF.

Under the express provisions of Revisal 1905, § 2208, in relation to negotiable instruments, when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, § 1676.]

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Action by the Singer Manufacturing Com-

pany against G. A. Summers and others. From a judgment in favor of plaintiff against defendant Summers and in favor of the other defendants, plaintiff appeals. Reversed.

From the facts, as stated in the record, it appears that, on May 17, 1904, G. A. Summers, then acting as agent of the plaintiff company, deposited in the City National Bank of Greensboro a sum of money belonging to the plaintiff company amounting to \$1,306.89; that this deposit was made in his own name, and, on the 18th of May, 1904, the said Summers, adding other money to this, obtained a cashier's check from the defendant bank for the sum of \$1,824, and that this was done by Summers with intent to embezzle and misappropriate the plaintiff's money so deposited; that on May 23, 1906, the plaintiff indorsed this check to F. D. Fuller, residing in Sylvatus, Va., the consideration claimed being a debt of \$328 then due by Summers to Fuller, the remainder of the purchase money being paid in cash. There were circumstances from which the plaintiff claimed that the purchase of this check on the part of Fuller was neither in good faith nor for value. The defendant denied the fraud, claiming that the check was negotiated in good faith, and the defendant Fuller was a holder of the same in due course. There were facts which showed that Summers was insolvent and that Fuller resided in the state of Virginia. The cause was submitted to the jury on the following issues: (1) Did the defendant Summers embezzle and fraudulently misappropriate \$1,396.99 of the moneys of the plaintiff company and fraudulently use the same in the purchase of a cashier's check of May 18, 1904, issued by the National Bank of Greensboro at \$1,823? (2) Did the defendant F. D. Fuller, at the time he took the check have knowledge of that fraud and take the check in bad faith? At the request of the defendant, the court, among other things, on the second issue charged the jury as follows: "The burden of proof is upon the plaintiff to show that Fuller had knowledge of the fraud alleged and took the check in bad faith or without value, and, if the plaintiff fails to satisfy the jury by the greater weight of evidence, they should find the issue in favor of the defendant Fuller, and answer the issue, 'No.'" The court, in the body of the charge, in substance, repeated this position, and the plaintiff excepted. The jury, under the charge of the court, and on the testimony, answered the first issue, "Yes," and the second issue, "No." On the verdict, there was judgment for the defendant, and plaintiff excepted and appealed.

King & Kimball, for appellant. John A. Barringer and W. P. Bynum, Jr., for appellee.

HOKE, J. (after stating the case). It is well established that when a man's prop-

erty has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrongdoer as long as he can identify or trace it, and the right attaches, not only as to the wrongdoer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration. *Edwards v. Culberson*, 111 N. C. 342, 16 S. E. 233, 18 L. R. A. 204, citing *Pomeroy's Eq. Jurisprudence*, as follows: "In general, whenever the legal title to property, real or personal, had been obtained through actual fraud, * * * or through any other circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity imposes a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein, and a court of equity has jurisdiction to reach the property, either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser in good faith and without notice, acquires a higher right and takes the property relieved from the trust." See, also, *Wilson v. Scott*, 3 Lans. (N. Y.) 308. The principle applies, not only to specific property, but to money and choses in action. It is said by Lord Mansfield in the case of *Clark v. Shee* and another, *Firts Cowper's Reports*, p. 200: "Where money or notes are paid bona fide upon a valuable consideration they shall never be brought back by the true owner, but where they come mala fide into a person's hands, they are in the nature of specific property, and if their identity can be traced and ascertained the party has the right to recover." And as said by Andrews, Judge, in *Newton v. Porter*, 69 N. Y. 133, 25 Am. Rep. 152: "It is immaterial in what way the change has been made—whether money has been laid out in land or land laid out in money—or how the legal title to the converted property may be placed, equity only stops the pursuit when the means of ascertainment fails, or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the cases so as to protect the rights of the true owner." This case is in apposite authority in support of the principle as applied to the facts of the case before us. The verdict of the jury having established a clear right in the plaintiff against the defendant Summers, we think that, upon this finding and the other facts of the case, it is equally clear that the payment of the check should be restrained until the rights of the parties are finally determined. The facts show that Summers is insolvent and Fuller a nonresident of the state. *Pomeroy's Eq. Rem.*, vol. 1, § 265; *Parker v. Grammer*, 62 N. C. 28; *McCless v. Meekins*, 117 N. C. 34, 23 S. E. 99. In *Parker v. Grammer* it is held: "Where

there is reason to apprehend that the subject of the controversy in equity will be destroyed or removed, or otherwise disposed of by the defendant pending the suit, so that the complainant may lose the fruit of his recovery, or be hindered or delayed in obtaining it, the court, in aid of the primary equity, will secure the fund by the writ of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause." And this principle is now embodied in our statute on the subject. Revisal 1905, § 806.

The property in controversy being represented by a cashier's check, a negotiable instrument, the rights of the plaintiff and defendant will largely depend upon our statute on negotiable instruments. Revisal 1905, vol. 1, c. 54. Under this statute, these checks, whether certified or otherwise, are classed with bills of exchange payable on demand, and, if negotiated by indorsement for value without notice, and within a reasonable time, a holder can maintain the position of a holder in due course. Chapter 54, Revisal 1905, §§ 2335, 2336. As pertinent to this inquiry, sections 2201, 2202 of this chapter are as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face. (2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact. (3) That he took it for good faith and value. (4) That, at the time it was negotiated to him, he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Section 2201. "Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course." Section 2202. And section 2343 of the same chapter provides that, in determining what is a reasonable or unreasonable time, regard is to be had to the nature of the instrument and the facts of the particular case. What constitutes reasonable time will vary under the facts and circumstances of different cases, and this statute expresses as definite a rule as could well be established or considered desirable. On the facts of this case we think, and so hold, that, so far as time is concerned, this negotiation was undoubtedly within a reasonable time.

Again, it will be noted that the defendant Fuller, according to the claim made by him, purchased and paid for this check partly in a pre-existing debt due from Summers to himself. Many of the courts have heretofore denied that such an indebtedness was sufficient consideration to constitute one a holder for value within the meaning of the law merchant, our own among the number. *Brooks v. Sullivan*, 129 N. C. 190, 39 S. E. 822. But the statute on this question, section 2173, enacts "that an antecedent or pre-existing debt constitutes value and is deemed

such whether the instrument is payable on demand or at a future time." If defendant's statement is accepted no objection can be made, therefore, to the consideration because same was in part a pre-existing debt, this being declared sufficient by the express terms of the statute. We think, however, there was error in the charge of his honor on the second issue as to the burden of proof which entitled the plaintiff to a new trial.

This issue is not very well framed to present the question as to whether defendant Fuller was a holder in due course. It would seem to be desirable that the issue should be drawn so as to present the question affirmatively and in more precise terms. "Was defendant Fuller a purchaser of the check in good faith, for valuable consideration and without notice of any infirmity in the instrument or defect in the title of Summers?" But, in whatever form presented, the burden of the issue is not on the plaintiff, as stated by the court, but on the defendant. By section 2208 of said chapter 54, it is enacted: "Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." The evidence and the verdict on the first issue established that the title of defendant Summers, who negotiated the note to defendant Freeman, was defective. This having been established, the burden was on the defendant, claiming to be a purchaser in good faith for value and without notice, to make this claim good by the greater weight of the evidence. The statute in this respect only enacts the law as it has always existed, which puts the burden in such case on the person claiming to be a holder in due course. *Bank v. Burgwyn*, 108 N. C. 62, 12 S. E. 952; *Eaton & Gilbert Commercial Paper*, p. 393.

For this error in the charge there will be a new trial on the second issue, and it is so ordered.

New trial.

CHARLES HOLMES MACH. CO. v. CHALKLEY et al.
(Supreme Court of North Carolina. Nov. 27, 1903.)

1. SALES—REQUISITES OF CONTRACT—MEETING OF MINDS—SUBJECT-MATTER OF SALE.

An owner of a half-hide measuring machine advertised it for sale as an "S. measuring machine," and, in correspondence with a prospective purchaser, agreed to sell an S. measuring machine, as described in the advertisement. The prospective purchaser, however, referred to it in his letters as an "S. whole-hide measuring machine," which he subsequently claimed was worth much more than the agreed price, and agreed to buy a whole-hide measuring machine.

Held, that the minds of the parties did not meet on the article sold, so as to sustain a claim of the purchaser for damages for breach of the contract after he had kept the machine and sold it.

2. SAME—CONVERSION OF GOODS—LIABILITY.

Where the minds of a prospective purchaser and a prospective seller do not meet on the subject-matter of an attempted sale by correspondence, but the purchaser keeps the article and converts it to his own use, he is liable for its value.

Appeal from Superior Court, Wilkes County; Council, Judge.

Action by the Charles Holmes Machine Company against B. D. Chalkley and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The plaintiff brought this action to recover the sum of \$225, it being the balance due on the purchase price of a remodeled scouring and setting machine, and the possession of a Sawyer measuring machine, or, if the same cannot be had, then for \$250, the value thereof and \$100 for its detention and deterioration; all of which property it alleges was sold at one and the same time to the defendant. There was no dispute about the sale of the scouring and setting machine, and defendant admitted his liability for the amount of the balance due on the price of that machine, but he averred in his answer that he had not bought the Sawyer measuring machine, which was a side or half-hide measuring machine, whereas he contracted to purchase of the plaintiff and the latter agreed to sell to him a whole-hide measuring machine, and he sets up a counterclaim for the difference in the price of the two machines, as damages; the amount of the said difference being \$650. The contract was made by correspondence. The plaintiff advertised for sale a Sawyer measuring machine, and the defendant, referring to the advertisement, inquired by letter for the price of the machine, describing it as a "Sawyer Whole-Hide Measuring Machine." In the correspondence which followed, the plaintiff agreed to sell a Sawyer measuring machine, as it is described in the advertisement, at \$250, and the defendant to buy a whole-hide measuring machine at that price. The correspondence was lengthy but this is the substance of it, so far as it is material to this case. The defendant received the measuring machine and sold it for \$250, the price he gave for it. It is admitted that the plaintiff is entitled to recover the full amount of its claim, unless the defendant can recover on his counterclaim. The court charged the jury that if they found the facts to be as set out in the correspondence, they should return a verdict in favor of the plaintiff for the full amount of its claim. The defendant excepted. The issue and answer thereto were as follows: "What amount, if any, is the plaintiff entitled to recover of the defendant? Ans. The sum of \$475, with interest from August 15, 1902, until paid. Judgment was

entered on the verdict, and the defendant appealed.

W. W. Barber, for appellants. Finley & Hendren and F. D. Hackett, for appellees.

WALKER, J., (after stating the case). The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium*, or meeting of two minds in one, and the same intention and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable. *Wald's Pollock on Contract* (3d Ed.) 3. It is necessary that the parties should be assured by mutual communication or negotiation that a common intention exists, and that they mean the same thing in the same sense. *Id.* (1st Ed. 1881) p. 5. It must be remembered, though, that this common intention is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence. *Id.* (3d Ed.) p. 4. Nor is the contract to be ascertained by what either one of the parties thought it was, but by what both agreed it should be. *Prince v. McRae*, 84 N. C. 674. The law proceeds not upon the understanding of one of the parties but upon the agreement of both. *Lumber Co. v. Lumber Co.*, 137 N. C. 436, 49 S. E. 946, where the authorities are collected. Subject to this rule, if the treaty of the parties is based upon a material mistake of fact of such a character that there is no mutual assent to one and the same thing, then no contract comes into existence as, in contemplation of the law, there has been a failure to agree. *Tiffany on Sales*, p. 108. In this case, the difference between the parties is as to the subject-matter of their contract, or as to what was sold by the one and bought by the other. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense. They must have contracted *ad idem*." *Utley v. Donaldson*, 94 U. S. 29, 24 L. Ed. 54. It has also been said that "as mutual assent is necessary to the formation of the contract, it follows that an error or mistake of fact in that which goes to the essence of the agreement, and therefore excludes such assent, prevents the formation of the contract, since each party is really assenting to something different, notwithstanding the apparent mutual assent." 24 Am. & Eng. Enc. (2d Ed.) p. 1034. And this doctrine of course applies to a mistake of the parties as to the subject-matter, as is there stated. In a case much like this one, it was held that the contract must be on the one side to sell, and on the other side to accept one and the same thing. *Thornton v. Kempster*, 5 Taunton, 786 (1 E. C. L. 265). Where there is a mistake as to the subject-matter of the sale, it affects the substance of the contract by eliminating its essential element, the mutual assent of the parties, upon the principle em-

bodied in the maxim of the civil law (Cum in corpore dissentitur, apparet nullam esse acceptionem). *Gardner v. Lane*, 94 Mass. 39. So in the case of *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560, the same court uses language peculiarly applicable to the facts of this case: "If the defendant was negotiating for one thing and the plaintiff was selling another thing, and their minds did not agree as to the subject-matter of the sale, there would be no contract by which the defendant would be bound, though there was no fraud on the part of the plaintiff. This rule is in accordance with the elementary principles of the law of contract." The following cases are also in point. *Wheat v. Cross*, 81 Md. 99, 1 Am. Rep. 28; *Sherwood v. Walker*, 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531; *Cutts v. Guild*, 57 N. Y. 229; *Calkins v. Griswold*, 11 Hun (N. Y.) 208; *Sheldon & Barton v. Capron*, 3 R. I. 171; *Ketchum v. Catlin*, 21 Vt. 191; *Spurr v. Benedict*, 99 Mass. 463.

Let us now apply the principle thus established to the facts of this case. The correspondence plainly shows, as his honor held, that the parties were mutually mistaken as to what was being sold. The plaintiff advertised for sale the very machine which was shipped to the defendant, it being the one and the only one it proposed to sell at \$250. The defendant accepted the proposal, but not according to the terms in which it was made. The plaintiff proposed to sell one thing and the defendant to buy another and quite different thing. There is no other construction to be placed upon the correspondence between the parties. There was a mutual mistake as to an essential matter and the minds of the parties have therefore not met in one and the same intention. There is no fraud alleged in this case, but nevertheless it results that there was no contract. The defendant though, has received and converted to his own use the machine shipped to him, and as it was not his property, but belonged to the plaintiff, he is liable for its value, which is admitted to be \$250; that being the amount realized from the sale of it by him. *Tiffany on Sales*, pp. 108, 109. In this view of the case, the counterclaim, as a matter of course, must fail.

It does not appear that there is any machine known in the trade as a "Whole-Hide Measuring Machine," though there may be one of that kind. Assuming that there is, the defendant says in his counterclaim that it is worth \$900, and seeks to recover the difference in the price of the two machines. The defendant was conducting a tannery at Stanton, N. C. and intended to use the machine in his business and may be presumed to have had knowledge of the value of such machines. It seems that he expected to buy a machine worth \$900 at the much reduced price of \$250. The great disparity between the real value of the machine, which the defendant thought he was buying, and the price

at which the plaintiff's machine was advertised for sale, it would seem was sufficient to excite his inquiry as to whether he and the plaintiff really understood each other, if not to induce the belief that there was a mistake. But however this may be, they did not agree, and there was no sale by which the defendant acquired title to something he did not get, but which, as he alleges, he should have received.

No error.

DAVIS v. NORTHWESTERN R. CO.
(Supreme Court of South Carolina. Oct. 19. 1906.)

1. MASTER AND SERVANT—INJURY TO SERVANT—APPLIANCES.

In an action by a servant for personal injuries "safe and suitable" appliances mean reasonably safe and suitable, and, when used in the charge, do not require the master to furnish absolutely safe appliances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1150.]

2. SAME.

In an action for injuries to a railroad employé one part of an instruction that the railroad is liable if the cars furnished were unsafe and if that was the proximate cause of the injury, so modifies another part to the effect that the railroad would be liable if it furnished cars that a railroad would not ordinarily use, that the whole is proper.

3. SAME—KNOWLEDGE OF DEFECTS.

In an action for injuries to a railroad employé, an instruction that if the appliances furnished were unsuitable and unsafe, were not reasonably safe and suitable, although the plaintiff might have known these facts, yet that would be no defense under the Constitution was substantially in the language of Const. art. 9, § 15, to the effect that the knowledge by an employé injured of the defective or unsafe condition of machinery would be no defense, etc.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1182, 1185.]

Appeal from Common Pleas Circuit Court of Clarendon County; Watts, Judge.

Action by Carter Davis against the Northwestern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Joseph H. Rhame, for appellant. W. C. Davis, for respondent.

JONES, J. The plaintiff recovered judgment in this action for damages for alleged negligence of defendant in furnishing unsafe and unsuitable cars and appliances, whereby he was injured while unloading cross-ties as an employé of defendant.

1. The exceptions assign error in the charge to the jury. The first and second exceptions complain because the court charged plaintiff's seventh and eighth requests as follows: "(7) I charge you that it is the duty of the railroad to provide safe and suitable machinery for the use of its operatives; and if it delegates this duty to another it is responsible to its servants for any injury caused by the negligence of any person to whom the performance of this duty has been intrust-

ed. (8) I charge you that it is the railroad's duty to provide safe and suitable machinery and appliances for the work in hand, and the employé has the right to assume that the master has discharged its duty in this respect, and is not bound to exercise care in ascertaining whether the master has so acted." The error alleged is that the charge made it the duty of the railroad company to furnish its employé with absolutely safe and suitable appliances. The universally accepted meaning of the words "safe and suitable" appliances in reference to the duty of the master to the servant is "reasonably safe and suitable." It is perfectly manifest that the jury could not have been misled into supposing that they were used in the sense claimed by appellant, for a reading of the whole charge shows that the court iterated and reiterated, over and over again, that the master's duty was to furnish reasonably safe and suitable appliances. This is also shown in the extract from the charge quoted in the third exception, which was very properly abandoned.

2. The fourth exception complains of this charge: "If you find that the alleged truck cars were not such cars as railway companies would ordinarily use for hauling cross-ties, that they were unsafe, insecure, and dangerous in the conduct of such business, and that such unsafe, insecure, and dangerous condition was the proximate cause of, and contributed to, plaintiff's injury, and he sustained any injury thereby, then the railroad is responsible in damages to the plaintiff."

It is objected that the first clause of the charge, "If you find that the alleged truck cars were not such cars as railway companies would ordinarily use for hauling cross-ties," tended to lead the jury to the conclusion that they might infer negligence on the part of defendant, if they found that the cars used by defendant on that occasion were not such as railway companies would ordinarily use for hauling cross-ties. It is true that the test of a master's duty in furnishing appliances is whether he furnished such as were reasonably safe and suitable, and not whether they are of the character ordinarily in use (*Jennings v. Edgefield Mfg. Co.*, 72 S. C. 411, 52 S. E. 113), but the quoted charge shows that the first clause was so modified by the clauses following as to make the liability of the railroad to depend upon whether the cars furnished were unsafe and proximately caused the injury.

3. The defendant made the following request to charge: "(5) The jury is further instructed: That, where an employé, after having the opportunity of becoming acquainted with the risks and dangers of his situation, and as such employé accepts them, he cannot complain if subsequently injured by such exposure; and if such were the conditions existing with reference to the plaintiff at the time of the alleged injury, he cannot recover

damages of the defendant for same." To which the court responded: "I charge you that, with this modification: He does assume the risks and dangers incident to the situation; but if he was injured by the carelessness and negligence of the defendant railroad in failing to furnish him with reasonably safe and suitable appliances, and to keep the same in reasonably safe and suitable repair, then I charge you that any knowledge by an employé of an unsafe or unsuitable appliance shall be no defense to an action for injury caused thereby."

The defendant also made the following request to charge: "(6) The jury is instructed as matter of law: That if the jury find that the plaintiff, at the time of the alleged accident and injuries received by him, was an employé of the defendant, he is as much charged with knowledge of the ordinary risks of the work and service in which he was engaged as the defendant; and if the jury further find that on that occasion the plaintiff was injured, and that he was injured through his failure to exercise that knowledge of the ordinary risks of his employment which he is presumed to have had, then he is not entitled to recover of the defendant damages for such injuries." To which the court responded: "I charge you that, with this addition: But, if the appliances and machinery and so forth furnished by the defendant railroad company were unsuitable and unsafe, were not reasonably safe and suitable, although the plaintiff might have known these facts, yet that would be no defense under the Constitution and laws of our state in an action of this sort; if the party was injured by reason of machinery which was unsafe and unsuitable, although he had knowledge of that fact, that would be no defense on the part of the railroad, if the railroad was careless and negligent in furnishing him unsafe and unsuitable machinery to do his work with, and that was the direct and proximate cause of his injury."

It is contended with reference to these instructions that they tended to lead the jury to believe that if the injured employé had knowledge beforehand that the appliances were unsafe or unsuitable, such knowledge would constitute no defense, that the jury might conclude that the appliances were not unsafe, but merely unsuitable, and in that event would be debarred from considering whether plaintiff had knowledge thereof and the effect of such knowledge. This fine-drawn point is made upon the use of the disjunctive "or" instead of the copulative "and" between "safe" and "suitable" in this one instance, which hardly could have misled the jury, especially when it was followed and explained by the sixth instruction quoted above, which should have removed all doubt in the mind of the jury, if any existed, as to the meaning of the fifth instruction. It would greatly harass the practical adminis-

tration of the law for the appellate court in reviewing charges to the jury to become hypercritical or a stickler for the technical rules of philology in every phrase and clause, and reverse verdicts for some loose expressions or some silent misuse of a word, when the general import of the charge stated the law. Any portion of a charge to which exception is taken should be fairly construed with reference to the clear tenor and import of the whole, and as an effort to explain the law of the case to men of ordinary or average education and intelligence. The average jurymen has little knowledge and less concern about fine distinctions, but generally has a desire and capacity for sufficient information to enable him to do substantial justice between the parties. The court was endeavoring to qualify defendant's requests to charge with instructions as to the provisions of Const. art. 9, § 15, to the effect that the "knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby," etc. As declared in *Youngblood v. R. R. Co.*, 60 S. C. 19, 38 S. E. 232, 85 Am. St. Rep. 824, and *Bodie v. Ry. Co.*, 66 S. C. 317, 44 S. E. 948, "the object of this provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employé by showing that he did not act with due care in voluntarily operating the machine after knowledge of its defective condition." Here this court used the word "suitable" as meaning "safe or not defective," and such is its meaning when applied to appliances, the question under consideration being whether a personal injury resulted from the character or condition of the appliance, and not a question relating merely to the fitness, utility or adaptability of the appliance to accomplish the ends for which it was employed, without regard to the safety of operatives. As applied to the subject in hand, a suitable appliance must necessarily be an appliance reasonably safe and proper, or reasonably free from defects which render it dangerous to operate it. The charge, therefore, was substantially in the language of the Constitution.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

RUDDELL v. SEABOARD AIR LINE RY.
(Supreme Court of South Carolina. Oct. 11, 1906.)

1. RAILROADS—ACCIDENT AT CROSSING.

Whether one injured on a way across a railroad track had a right to be there, and whether the way was used by the public with the consent of the company, were questions for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1153.]

2. SAME.

That a railroad company dug a hole on its premises close to a frequented path, leaving it

open, is some evidence of wanton disregard of those using the path.

3. APPEAL—REVIEW—NEW TRIAL.

The Supreme Court will not reverse an order refusing a new trial on the ground that the verdict was contrary to the preponderance of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3950.]

4. NEW TRIAL—VERDICT—PREJUDICE.

A verdict in an action against a railroad company and its agent for a joint tort against the company alone, where the evidence was much stronger against the agent, is not ground for setting the verdict aside as due to prejudice.

5. NEW TRIAL—REMARKS OF JUDGE.

Remarks of court that, while a judge has power under the law to set aside a verdict and grant a new trial, it should never be done except in clear cases of abuse, or where it is manifest that the jury acted from prejudice or oppression, do not show an erroneous conception of the power of the judge to set aside unjust verdicts.

Appeal from Common Pleas Circuit Court of Hampton County; Holman, Special Judge.

Action by W. G. Ruddell against the Seaboard Air Line Railway and C. A. Brinkley. Verdict for plaintiff. Defendant railway appeals. Affirmed.

Lyles & McMahan and Jas. W. Moore, for appellant. W. S. Smith and W. B. De Loach, respondent.

WOODS, J. The plaintiff recovered judgment for \$4,999 on account of personal injuries alleged to have been received from falling into a hole defendant had dug on its right of way, within a few feet of a path which was one of the main thoroughfares of the town of Fairfax, and along which plaintiff was walking in the nighttime, in ignorance of the existence of the hole. The complaint charged negligence, recklessness, willfulness, and wantonness on the part of the defendant as the proximate cause of the injury, in making the hole and allowing it to remain open and unprotected, when the defendant knew, or ought to have known, of the danger to those using the path. The appeal is from an order of the special circuit judge refusing a new trial.

1. The first point is that the plaintiff was not injured at a crossing or traveled place, or place where he had a right to be. There was evidence to the effect that the accident happened while plaintiff was walking in a path in general use by the public, and that he had no notice of the dangerous hole. The rule applicable to this branch of the case is thus stated in *Matthews v. Railway Co.*, 67 S. C. 499, 508, 46 S. E. 335, 338, 65 L. R. A. 286: "While a railroad company cannot lose its right of way by alienation or prescription, because of the public's interest in its holding it for public purposes, it may impose upon itself as a private corporation duties and obligations to the public or to individuals by inviting them to use the right of way, or indicating its willingness that it should be used by the public or particular

individuals. In such circumstances the duty devolves on the railroad company to exercise ordinary care to avoid injury to those using the right of way. This rule is not peculiar to railroads, but is of general application. * * * It is, of course, always a question for the jury to determine whether the way was so plain and so constantly used, with the acquiescence and consent of the owner, as to imply an invitation to the public to enter."

2. The defendant next submits that a new trial should have been granted because there was no support in the evidence for punitive damages. We should be very slow to grant a new trial on this ground, when there was no motion for nonsuit, nor request to charge that the claim for punitive damages was entirely unsupported by the evidence. But, aside from this, it was for the jury to say on this issue, also, whether in view of all the circumstances the hole was so left open and insufficiently lighted, in close proximity to a frequented path, as to indicate reckless or wanton disregard of the safety of those who might use the path without notice of the danger. We do not say there was wantonness or recklessness on the part of the defendant, but there was evidence from which the jury might infer it, and therefore it was not error of law for the circuit judge to refuse a new trial on this ground. The first exception, therefore, must fail.

3. In the second and third exceptions defendant submits a new trial should have been granted because the verdict was contrary to the preponderance of the evidence as to the fact of injury to the plaintiff, and as to contributory negligence. The mere preponderance of evidence against the verdict, as has often been held, does not warrant this court in reversing a judgment of the circuit court refusing a new trial. *Davis v. Southern Railway*, 68 S. C. 447, 47 S. E. 723; *Bodie v. Railway*, 66 S. C. 303, 44 S. E. 943.

4. In the next place, it is insisted the verdict should have been set aside because the fact that the finding was against the railroad company, and not against its agent, who was directly responsible for the digging and proper guarding of the hole, shows that the verdict was due to prejudice or partiality; the evidence of negligence and wantonness being much stronger against him than against the railroad company. There was no error of law in refusing the motion on this ground, because the liability of the railway company and Brinkley, its agents and co-defendant, was joint and several. *Schumpert v. Railway and Hutchinson*, 65 S. C. 332, 43 S. E. 813; *Gardner v. Railway Company and Pierson*, 65 S. C. 341, 43 S. E. 816; *Carson v. Railway, Anwood, and Miller*, 68 S. C. 55, 46 S. E. 525.

5. Lastly, the defendant contends the judgment should be set aside because the following language by the circuit judge in his

decree refusing the motion for a new trial shows that he had an erroneous conception of his power to give relief against an unjust verdict by granting a new trial: "While a judge has power under the law to set aside verdicts and grant new trials, this should never be done except in clear cases of abuse, or where it is manifest that the jury acted from prejudice or passion. It is a wise provision of law that vests the power in judges to grant new trials. This power must rest somewhere, and the judge who presides at the hearing is in a better position to understand the case and apply the evidence than any other person or tribunal. There being evidence to support the finding of the jury, I will not set aside the verdict." It led to the promotion of justice that circuit judges should have a wide latitude in granting new trials absolutely, when verdict is altogether wrong and new trials nisi when it is excessive. Indeed, the usefulness of trial by jury and the respect in which it is held depend in a great measure on the firm and independent exercise by the circuit judges of this power to set aside wrong verdicts, whether due to prejudice or mistake. In this case, while the language above quoted and some other expressions in the decree seem rather strong in stating the limits of judicial discretion in granting new trials, yet, when the whole context is taken altogether, it is obvious the circuit judge meant nothing more than a new trial should not be granted when the material facts are in dispute, unless the court should be satisfied the verdict was unjust, and that he was not so convinced of the injustice of this verdict as to warrant him in granting a new trial.

It is the judgment of this court that the judgment of the circuit court be affirmed.

BANK OF SPARTANBURG v. MAHON.

(Supreme Court of South Carolina. Oct. 3, 1906.)

BILLS AND NOTES—ACCOMMODATION INDORSER—EVIDENCE.

A bank was a holder of a note indorsed by defendant. The bank delivered to the makers of the note blank notes to be signed by them and indorsed by the defendant in renewal of the note held by the bank. The notes were sent to defendant who wrote his name across the back, and forwarded them to the other parties, who signed as makers and then presented them to the bank, who filled the blanks by inserting the name of the defendant as payee with the knowledge and consent of the other parties to the note. *Held*, that defendant had received valuable consideration in the surrender of the original note and was not an accommodation indorser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes. §§ 535, 536, 539.]

Appeal from Common Pleas Circuit Court, Spartanburg County.

Action by Bank of Spartanburg against G. H. Mahon. Judgment of nonsuit, and plaintiff appeals. Reversed.

Simpson & Bomar and M. F. Ansel, for appellant. McCullough & McSwain, for respondent.

GARY, J. This is an appeal from an order of nonsuit. The complaint sets out three causes of action, in the first of which it is alleged that James & Stewart made their promissory note in writing, on the 15th of September, 1904, and thereby promised to pay to the order of the defendant, G. H. Mahon, the sum of \$2,000. The third paragraph of the complaint is as follows: "That the said G. H. Mahon then and there, and before this action was brought, indorsed the said note to the plaintiff herein for value, who is now the legal owner and holder of the same." The second and third causes of action are upon other notes maturing at different dates, but in other respects the allegations thereof are similar to those set out in the first cause of action. There was testimony to the effect that the notes in question were renewals of other notes, which the bank held against James & Stewart, and which were indorsed by the defendant; that the notes described in the complaint were executed in the following manner: The bank delivered to James & Stewart blank notes (except as to amounts) for the purpose of being signed by them, and indorsed by the defendant; that the notes were sent to the defendant, who wrote his name across the back thereof, and forwarded them to James & Stewart, who signed as makers; that the notes were then presented to the bank by James & Stewart and the bank filled out the blanks by inserting the name of G. H. Mahon as payee, with the knowledge and consent of James & Stewart.

The grounds of the motion for nonsuit were: "(1) That the bank has failed to prove title to these notes. (2) That the undisputed testimony shows that Mr. Mahon indorsed these notes in blank, and that they were subsequently written out and signed by James & Stewart at Spartanburg, Mr. Mahon not being present, and that the insertion by the bank of the name of Mr. Mahon as payee of the notes, was in violation of his rights as an indorser, and made for him a contract, which the bank had no right or authority to make." The appellant's exceptions merely assign error on the part of his honor, the presiding judge, in sustaining the motion for nonsuit, on the grounds just stated, and need not be considered in detail. The cases of *Stoney v. Beaubien*, 2 McM. 319, 39 Am. Dec. 128; *Cockrell v. Milling*, 1 Strob. 444; *Baker v. Scott*, 5 Rich. Law, 310; *Carpenter v. Oaks*, 10 Rich. Law, 17; *McCreary v. Bird*, 12 Rich. Law, 556; *Watson v. Barr*, 37 S. C. 463, 16 S. E. 188, and *Johnston v. McDonald*, 41 S. C. 81, 19 S. E. 65, show that G. H. Mahon did not sustain towards the bank the relation of an accommodation indorser, but of a joint maker, as he was a party to the original contract and

indorsed the notes before they were negotiated. It cannot be successfully contended that he was an accommodation indorser, for the further reason that he received a valuable consideration when the bank surrendered the notes, previously executed by James & Stewart and indorsed by him.

The general principle as to the effect of inserting in a note the name of a party as payee, who had previously indorsed it, is stated as follows, in the case of *Aiken v. Cathcart*, 3 Rich. Law, 133, 45 Am. Dec. 764, which was an action by the last indorser, who had paid the note, against the first indorser, to wit: "The insertion of the name of the first indorser, in the blank left for the name of the payee, was not an alteration but the completion of the note. It gave effect to the note, consistently with the liabilities of the parties expressed by their indorsements. The note might then be perfected after a transfer. When the blank was filled in pursuance of the authority implied by the delivery of the note to the maker, it had relation back to the indorsement, and took effect as if the note were then perfect; for the cases show that when a signature is written to a paper which is intended to have the operation of a negotiable instrument, it becomes such when perfected, from the time when it was signed, so as to support the allegation that the party made or indorsed the note or bill." The testimony shows that James & Stewart were the agents of the defendant in negotiating the notes. It does not appear that the plaintiff had notice of any limitations imposed upon their power by the defendant. In fact, it does not appear that he gave them any instructions whatever, as to the manner in which the blanks were to be filled. The insertion of the payee's name in the note was within the scope of their employment, as shown by the case of *Aiken* against *Cathcart*, *supra*, in which the court says: "Many cases concur to establish that when the indorser of a note commits it to the maker in blank, either in whole or in part, the note carries on the face of it an implied authority to the maker to fill up the blank. As between the indorser and third persons, the maker must under such circumstances be deemed to be the agent of the indorser, and as acting under his authority and with his approbation. Therefore, even if they acted contrary to defendant's instructions, he would nevertheless be liable as payee." *Reynolds v. Witte*, 18 S. C. 5, 36 Am. Rep. 678; *Rucker v. Smoke*, 37 S. C. 377, 16 S. E. 40, 34 Am. St. Rep. 758; *Hutchison v. Real Estate Co.*, 65 S. C. 45, 43 S. E. 291; *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811. Furthermore, even if it should be conceded that the insertion of the payee's name was not the act of the defendant through his agents, nevertheless they had notice of this fact, while acting within the scope of their employment, and it was binding on him.

American Co. v. Felder, 44 S. C. 478, 22 S. E. 598. Therefore, it was a question to be determined by the jury, whether he had not either acquiesced in such action or was estopped from contesting the point, after he had received the valuable consideration arising from the satisfaction of the notes previously executed, as hereinbefore mentioned.

It is the judgment of this court, that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

JONES, J., concurs in the result and in the separate opinion of WOODS, J.

WOODS, J. (concurring). I concur in reversing the judgment of the circuit court, but, being unable to agree with Mr. Justice GARY in the view that Mahon, the defendant, was a maker of the notes sued on, I state briefly the reasons why I think he is clearly liable as indorser, as alleged in the complaint.

The action was brought on three promissory notes by Bank of Spartanburg as indorsee and holder against G. H. Mahon as indorser. The appeal is from an order of nonsuit granted after evidence of the following facts: In 1904, James & Stewart, a firm merchandising in Spartanburg, obtained three blank notes from the plaintiff, Bank of Spartanburg, and after filling the blank for the figures on each of two of the notes with the figures "\$2,000" and on the other with the figures "\$2,200," leaving all the remainder of the unprinted portions blank, they sent the notes to the defendant, G. H. Mahon. Mahon wrote his name across the backs of the notes and returned them, intending James & Stewart to use them in the plaintiff bank, but without giving any instructions as to the manner in which the blanks should be filled in. James & Stewart signed the notes and took them to the bank, and the cashier filled out the blanks, inserting the name of G. H. Mahon as payee, and discounted the notes for the credit of James & Stewart. Upon maturity, the notes were protested for nonpayment. The motion for nonsuit was granted on two grounds: "(1) That the bank has failed to prove the title to these notes. (2) That the undisputed testimony shows that Mr. Mahon indorsed these notes in blank, and that they were subsequently written out and signed by James & Stewart at Spartanburg, Mr. Mahon not being present, and that the insertion by the bank of the name of Mr. Mahon as payee of the notes was in violation of his right as indorser, and made for him a contract which the bank had no right or authority to make."

When Mahon wrote his name across the backs of the incomplete notes and turned them over to James & Stewart to be used by them, he constituted them his agents to have the notes filled out in such form as would make him liable to the holder. If

they had inserted the name of Bank of Spartanburg as payee before presenting them for discount, in that form he would have been liable to the bank as maker. Stoney v. Beaubien, 2 McM. 319, 39 Am. Dec. 128; Cockrell v. Milling, 1 Strobl. 444; Baker v. Scott, 5 Rich. Law, 310; Carpenter v. Oaks, 10 Rich. Law, 17; McCreary v. Bird, 12 Rich. Law, 556; Watson v. Barr, 37 S. C. 463, 18 S. E. 188; Johnston v. McDonald, 41 S. C. 81, 19 S. E. 65. But when they carried them to the bank for discount with the name of the payee in blank, the insertion of defendant's name as payee was merely a completion of the notes so as to place him in the position of indorser. By signing his name on the backs of the notes and sending them to James & Stewart to be used by them, he placed in them the power to impose upon him the liability of either a maker or an indorser, according as they saw fit to insert the name of the bank or the name of the defendant as payee. Mahon thus expressed his intention that his signature on the backs should relate forward to the time when the notes should be filled out and completed, and that he should be liable as indorser if the parties to whom they were intrusted or the bank at which they were discounted should insert his name as payee or as maker, if the name of the bank should be inserted as payee. The notes were filled out in the precise form necessary to fix upon him the liability of an indorser as distinguished from a maker, and the court will give effect to his intention that his signature on the back of the note should relate to the time of its completion and discount, and hold him liable as an indorser. The case of Alken v. Cathcart, 3 Rich. Law, 183, 45 Am. Dec. 764, is conclusive on this point, and the cases of Armstrong v. Harshman, 28 Am. Rep. 665; Frank v. Lillienfeld, 33 Grat. (Va.) 377; Michigan Ins. Co. v. Leavenworth's Estate, 30 Vt. 11; Kayser v. Hall, 28 Am. Rep. 624; Weston v. Myers, 33 Ill. 424; Dunham v. Clogg, 30 Md. 284; Schooler v. Tilden, 71 Mo. 580, are to the same effect. These with other authorities sustain the principle that the bank where the note was to be discounted had the right to insert the name of the indorser as payee. On the note so completed he was manifestly liable as an indorser and not as a maker.

The point was strenuously pressed in argument that the nonsuit should be sustained on the ground that there was no proof that the defendant was an indorser for value, as alleged in the complaint, as distinguished from an accommodation indorser. Assuming, without deciding, that there was no proof of consideration to the defendant for his indorsement, that could not acquit him of his liability as indorser to the bank which discounted the note. The fact that the bank parted with money, or something else of value on the faith of the indorsement, is

sufficient to support the allegation that the defendant as to the bank was an indorser for value.

LOW MOOR IRON CO. v. LA BIANCA'S ADM'R.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. DEATH—ACTION—RIGHT TO SUE—NONRESIDENT ALIEN BENEFICIARIES.

Under Va. Code 1904, § 2902 et seq., authorizing the maintenance of an action for the death of a person caused by the wrongful act of another, and providing that the action shall be brought in the name of the personal representative of the decedent, and that the amount recovered shall be paid to the personal representative and distributed by him to the wife, husband, and child of the decedent, an administrator of a decedent who was a resident alien, and whose widow and infant child are nonresident aliens, may bring such an action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, § 38.]

2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE.

Where an employé engaged in mining ore undertook to punch the waste down a chute in obedience to the foreman's order without knowing, or without being able to ascertain by ordinary care that the waste was not securely supported, but was liable to give way if he worked on it, and the employer knew or by ordinary care might have known that the waste was not securely supported, it was the duty of the employer to warn the employé of the danger to which he would be exposed by so working.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 310, 316½.]

3. SAME—REASONABLY SAFE PLACE IN WHICH TO WORK.

It is the duty of an employer to exercise ordinary care to provide a reasonably safe place in which an employé is required to work.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 173, 179.]

4. SAME.

Where the place where an employé was mining ore was not reasonably safe, and he was ignorant of the fact, and could not by ordinary care have discovered the danger, it was the duty of the employer to inform him of it, and, in the absence of an official of higher grade, this duty devolved on the foreman, under whom he was working, as vice principal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 297, 298.]

5. SAME—FELLOW SERVANTS.

A mine boss discharging the duty of the employer in furnishing to an employé engaged in mining ore as a common laborer a reasonably safe place in which to work is a vice principal, and not a fellow servant of the employé.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 429, 434.]

Error to Circuit Court, Craig County.

Action by La Bianca's administrator against the Low Moor Iron Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

James W. Marshall and R. L. Parrish, for plaintiff in error. Gordon Paxton and G. W. Layman, for defendant in error.

HARRISON, J. This action was brought to recover damages of the defendant company for the alleged negligent killing of the plaintiff's intestate. At the time of the accident the defendant was engaged in mining iron ore, and converting or manufacturing the same into pig iron. The plaintiff's intestate was an employé of the defendant, mining ore, as a common laborer, at its Fenwick mines in Craig county. There was a verdict and judgment in favor of the plaintiff for \$2,000, of which \$500 was allotted by the jury to the widow of the deceased, and \$1,500 to his child. This judgment, at the instance of the defendant, is now before us for review.

It appears from the record that the deceased was a resident alien, and that his widow and infant son were residents of Raccaja, Sicily, and subjects of the King of Italy. The question raised by the first assignment of error is whether this action can be maintained for the benefit of the widow and son under section 2902 et seq. Code Va. 1904.

In the case of Pocahontas Collieries Co. v. Rukas' Adm'r, 104 Va. 278, 51 S. E. 449, it was decided that the action could be maintained for the wrongful death of a resident alien, for the benefit of his resident alien widow and children, residing in another state. The question now before us, where the alien beneficiaries reside in a foreign country, was discussed in that case, with citation of authority on both sides, but was not decided. The investigation of the cases then made led Judge Whittle to remark that "the weight of authority in this country, however, maintains the right even of nonresident alien relatives of the deceased to receive the benefit of these statutes."

Further investigation affords abundant proof of the accuracy of this statement. The earlier cases, both in this country and in England, denied the benefit of these statutes to nonresident aliens, but more recent judicial utterance is practically united in favor of their right to the benefit of such statutes.

In the case of Mulhall v. Fallon, 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309, Holmes, C. J., in delivering the opinion of the court, observes: "One or two cases may be found where a general grant of a right of action for wrongfully causing death has been held to confer no rights upon nonresident aliens. * * * On the other hand, in several states the right of the nonresident to sue is treated as too clear to need extended argument"—citing *Philpott v. Missouri Pac. R. Co.*, 85 Mo. 164; *Chesapeake, etc., Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Augusta Ry. Co. v. Glover*, 92 Ga. 182, 18 S. E. 406; *Luke v. Calhoun County*, 52 Ala. 115.

This case establishes the right of nonresident aliens to the benefit of the Massachusetts wrongful death statute, which is similar to

our own. The most recent cases all follow the Massachusetts rule. *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 68 N. E. 94, 88 Am. St. Rep. 191; *Szymsanski v. Blumenthal* (Del. Super.) 52 Atl. 347; *Renlund v. Commodore Mining Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; *Bonthron v. Phoenix Light & Fuel Co.* (Ariz.) 71 Pac. 941, 61 L. R. A. 563; *Romano v. Capital City Brick & Pipe Co.*, 125 Iowa, 591, 101 N. W. 437, 68 L. R. A. 132, 106 Am. St. Rep. 323; *Cleveland, etc., R. Co. v. Osgood* (Ind. App.) 78 N. E. 285; *Alfson v. Bush*, 182 N. Y. 393, 75 N. E. 230, 108 Am. St. Rep. 815; *Trotta's Adm'r v. Johnson* (Ky., 1906) 80 S. W. 540. In the Iowa and Kentucky Cases, *supra*, the beneficiaries were citizens of Italy; the other cases relate to citizens of Canada, Great Britain, Norway, Russia, etc. These cases fully sustain the affirmative of the proposition under consideration.

The theory of the cases, which deny the benefit of wrongful death statutes, as a general rule, to nonresident aliens is that statutes have no extraterritorial force and effect, and, in the absence of any words in the statute expressly conferring this right upon nonresident aliens, the statute will be presumed to apply only to persons residing within the jurisdiction of the state.

"It is true that legislative power is territorial," said Holmes, C. J., in *Mulhall v. Fallon*, *supra*, "and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered." This learned judge further says: "In all cases the statute has the interest of the employes in mind. It is on their account that an action is given to a widow or next of kin * * * We cannot think that workmen were intended to be less protected if their mothers happened to live abroad. * * * In view of the very large amount of foreign labor employed in this state, we cannot believe that so large an exception was silently left to be read in."

The latest case in England (1901) overrules a former decision to the contrary, and holds that the fatal accidents acts apply as well for the benefit of representatives of a deceased foreigner as for those of a British subject; and the principle contended for in the prior case by the defendant, that acts of parliament do not apply to nonresident aliens, unless the language of the statute expressly refers to them, is repudiated, and the former case so holding is overruled. *Kennedy, J.*, uses this language: "It appears to me, under all the circumstances, and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners, as well as upon subjects, and certainly that, as against an English wrongdoer, the foreigner has a

right to maintain his action under the statutes in question." *Davidson v. Hill*, 2 K. B. 606.

In a recent New York case (1905), where this question is fully considered, it is said: "The principle underlying the legislation we are considering is manifestly the protection of those who suffer pecuniary loss when a laborer or servant is killed by the negligent act of the individual or corporation employing him. The clear intention of the Legislature is that the negligent employer shall no longer escape the consequences of his act by the death of his servant, but shall respond in damages to those who have suffered pecuniary loss. It is difficult to conceive of any argument springing from public policy, sound reason, or a proper discrimination between the rights of the citizen and the alien, that should prevent the alien husband, wife, or next of kin of a laborer, killed by reason of his employer's negligence, from receiving those damages that a jury has awarded a local legal representative, who derives his authority from and acts under the control of the surrogate's court. The damages are imposed upon a negligent employer as compensation to those who suffer by his act, and there is no valid reason, as it seems to us, why they should not be paid to the survivors, whether residing here or in some foreign jurisdiction. The statute not only benefits the survivors, but protects the laboring man, as it tends to enforce observance by the employer of the rule requiring him to furnish his servant a safe place in which to work. The laborer, leaving wife and children behind him and coming here from abroad, has a right to enter into the contract of employment, fully relying upon the statute. The conflict of authority in England and our sister states leads us to deal with this question on principle, and to base our answer to it on reasons that are weighty and controlling." *Alfson v. Bush Co.*, *supra*.

These statutes are regarded by the courts as remedial in their character, as affording compensation for injuries unknown to the common law, and are to be liberally construed to promote the object the Legislature manifestly had in view. *Balto. & Ohio R. Co. v. Wightman's Adm'r*, 29 Gratt. 431, 444, 26 Am. Rep. 384. While our statute, like other wrongful death statutes, does not expressly include nonresident aliens, yet the language employed is general, containing nothing that would necessarily limit its operation to citizens or residents of this state. Both upon reason and authority, we have no hesitation in upholding the right of the nonresident alien to maintain this action, and we are therefore of opinion that there was no error in the ruling of the circuit court in sustaining the motion of the plaintiff to reject the plea of the defendant which denied that right.

The second assignment of error calls in question the action of the circuit court in giving, on behalf of the plaintiff, instructions

Nos. 1 and 2. These instructions are as follows:

No. 1.

"The court instructs the jury that if they believe from the evidence that the deceased undertook to punch the waste down the chute in obedience to the foreman's order, and that the deceased did not know or could not have ascertained, by the exercise of ordinary care and foresight that the said waste or ore was not securely supported or shored up underneath, but was liable to give way and fall if he worked upon it, and that the deceased was inexperienced in that kind of work; but that the defendant did know, or by the exercise of ordinary care and diligence might have known, that the said waste was supported by timbers liable to break and that it was dangerous to stand upon them, then it was the duty of the defendant to warn the deceased of the danger to which he was exposed and which caused the accident.

"In other words, if they believe from the evidence that the danger to which the deceased was exposed in going upon the waste was not so open and obvious as to be apparent to a man of ordinary care and prudence, but was unseen and latent, and not known to deceased, and that the defendant did know of the danger, or should have known of it in the exercise of ordinary care and diligence, and yet failed to warn the deceased of it; and that the deceased was killed as a result of such failure to warn him, and without fault on his part, then the defendant is liable to the plaintiff in damages. And the warning required should be given in terms sufficiently clear to call the attention of the deceased to the danger to which he was exposed."

No. 2.

"The court instructs the jury that it was the duty of the defendant to exercise ordinary care to provide a reasonably safe place in which the said La Bianca was required to work; and if they believe from the evidence that the place where the said La Bianca was required to work was not reasonably safe, and that he was ignorant of this fact, and could not by the exercise of ordinary care discover the danger, it was the duty of the defendant to inform him of it, and in the absence of an official of higher grade this duty devolved upon the foreman, under whom he was working, as vice principal; and if they believe from the evidence that the said foreman ordered the said La Bianca to work in that place, and did not inform him of the danger, and that as a result thereof the said La Bianca was killed without fault on his part, then the defendant is liable in damages to the plaintiff."

These instructions announce no new principles of law. They correctly propound the plaintiff's theory of the case, and they are sustained by the evidence.

The rule of law applied in these instructions were stated by this court in *Richmond Locomotive Works v. Ford*, 94 Va. 627, 645, 27 S. E. 509, 512 in these words: "It is the duty of the master to inform an inexperienced servant of dangers ordinarily incident to the service, and, if he fails to do so, and the servant has no opportunity to learn of them, he will not be held to assume risks not obvious to one of his age, experience, and judgment. 2 Bailey on Personal Injuries, § 2565. But this rule only applies where there is a danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the exercise of ordinary care. *Rooney v. Sewall*, 161 Mass. 153, 36 N. E. 789; *Stuart v. West End Ry. Co.*, 163 Mass. 391, 40 N. E. 180.

The same doctrine is laid down as follows by *Shearman & Redfield*: "The master must therefore give warning to his servants of all perils to which they will be exposed, of which he is or ought to be aware, other than such as they should, in the exercise of ordinary care, have foreseen as necessarily incidental to the business, in the natural and ordinary course of affairs, though more than this is not required of him. It makes no difference what is the nature of the peculiar peril, or whether it is, or is not, beyond the master's control. And it is not enough for the master to use care and pains to give such notice. He must see that it is actually given. If, therefore, he fails to give such warning, in terms sufficiently clear to call the attention of his servants to a peril of which he is or ought to be aware, he is liable to them for any injury which they suffer thereby without contributory negligence." 1 *Shear. & Red. on Neg.* (5th Ed.) § 203. And in note 5 to the same section it is said: "An employer is bound to give notice of latent dangers among which the employé is required to work, and of which the employer has knowledge."

The plaintiff's second instruction is objected to on the ground that the mine boss, Thomas, was a fellow servant of the deceased.

This position is not tenable. The evidence tended to show that, at the time of the accident, Thomas was discharging a nonassignable duty of the master in furnishing to the plaintiff's intestate a reasonably safe place in which to work. Ordinarily the foreman or boss of a gang of hands employed in executing the master's orders is a mere fellow servant with the other members of the gang, but if he is discharging a nonassignable duty of the master, he is to that extent a vice principal. One of these nonassignable duties is to exercise ordinary care to provide a reasonably safe place in which the servant is to work. If the place was originally safe, but has become unsafe during the absence of the servant and he is ignorant

of this fact and cannot discover it by the exercise of ordinary care, it is the duty of the master to inform him of it, and, in his absence this duty devolves upon the foreman of the gang as a vice principal. *Lane Bros. v. Bauserman*, 108 Va. 146, 48 S. E. 857, 108 Am. St. Rep. 872. And it is said in *Russell Creek Co. v. Wells*, 96 Va. 416, 31 S. E. 614, that a mine boss is not a fellow servant of the members of his gang under all circumstances, though he is such fellow servant while discharging duties affecting the mere administration of the work to be done; he is not a fellow servant when discharging the nonassignable duties of the master.

There is no conflict between the defendant's second instruction and those given for the plaintiff. In giving the defendant's second instruction, the learned judge of the circuit court was evidently of opinion that there was evidence tending to sustain the theory therein presented. The jury, however, found in favor of the view taken by the plaintiff's first and second instructions, and that view is amply sustained by the evidence.

The third assignment of error is to the refusal of the circuit court to set aside the verdict as contrary to the law and the evidence. We have already seen that the case was fairly submitted to the jury upon the law, and we are further of opinion, without reviewing the evidence here, that it is amply sufficient to sustain the conclusion reached by the jury.

The judgment complained of must therefore be affirmed.

BUCHANAN, J., absent.

SULLIVAN v. GUM, Sheriff, et al.
(Supreme Court of Appeals of Virginia. Nov. 22, 1905.)

ACKNOWLEDGMENT—BILL OF SALE—SUFFICIENCY.

The acknowledgment to a bill of sale was: "On the 12th day of July, A. D. 1905, before me personally appeared William Morse, to me known and known to be the same person mentioned and described in the foregoing instrument, and he duly acknowledged to me that he executed the same. H. E. Cole, Notary Public, New York City." The Virginia statute prescribes a form of acknowledgment, and declares that a certificate to such effect shall be sufficient, and a certificate complying literally with the statute would have read: "Corporation of New York, to wit, I, H. E. Cole, a notary public for the corporation aforesaid, in the state of New York, do certify that William M. Morse, Jr., whose name is signed to the writing above, bearing date on the 27th day of June, 1905, has acknowledged the same before me, in my corporation aforesaid. Given under my hand this 12th day of July, 1905." *Held*, that the acknowledgment was sufficient as a substantial compliance with the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Acknowledgment, §§ 151-172.]

Error to Circuit Court, Bath County.

Interpleader by John E. Gum, as sheriff of Bath county, to determine the legality of liens on property in his possession under ex-

ecutions against William M. Morse, Jr., in which Michael W. Sullivan intervened. Judgment against intervener, and he brings error. Reversed and remanded.

John A. Lamb, for appellant. John W. Stephenson and McAllister & Nelson, for appellee.

WHITTLE, J. This is a proceeding in interpleader, instituted by the defendant in error, John E. Gum, sheriff of Bath county, to determine the legality and priority of liens and conflicting claims to certain personal property in his possession under levy on executions against William M. Morse, Jr. The plaintiff in error, Sullivan, having intervened, asserted title to the property by virtue of a bill of sale from Morse; and from the judgment of the circuit court, declaring the instrument void as to creditors, because not duly recorded, this writ of error was awarded.

The question for determination involves the adequacy of the following certificate to the bill of sale:

"City, County, and State of New York.

"On the 12th day of July, A. D. 1905, before me personally appeared William M. Morse, Jr., to me known, and known to me to be the same person mentioned and described in the foregoing instrument, and he duly acknowledged to me that he executed the same.

"[Notarial Seal.] H. E. Cole,

"Notary Public, New York City."

The Virginia statute prescribes the form of acknowledgment, and declares that a certificate to that effect shall be sufficient. A certificate complying literally with the statute would read:

"Corporation of New York—to wit:

"I, H. E. Cole, a notary public for the corporation aforesaid, in the state of New York, do certify that William M. Morse, Jr., whose name is signed to the writing above, bearing date on the 27th day of June, 1905, has acknowledged the same before me, in my corporation aforesaid. Given under my hand this 12th day of July, 1905."

The decisions of this court show that it is the policy of the law in this jurisdiction to uphold certificates of acknowledgment where there has been a substantial compliance with the statute. *Langhorne v. Hobson*, 4 Leigh, 224; *Tod v. Baylor*, 4 Leigh, 498; *Hairston v. Randolph*, 12 Leigh, 445, 463; *McClanachan v. Siter*, 2 Grat. 280, 293, 294; *Hockman v. McClanahan*, 87 Va. 38, 12 S. E. 230; *Va. Coal & Iron Co. v. Robertson*, 88 Va. 116, 13 S. E. 350; *Hurst v. Leckie*, 97 Va. 550, 34 S. E. 464, 75 Am. St. Rep. 798; *Gell v. Gell*, 101 Va. 773, 45 S. E. 325.

Accordingly it has been held that "a certificate of acknowledgment to a deed which identifies the subscriber, specifies the writing subscribed, states the capacity in which the subscriber executes it, and certifies his ac-

knowledge thereof, contains all that is necessary." *Banner v. Rosser*, 96 Va. 238, 31 S. E. 67.

In 1 Am. & Eng. Ency. of Law, 528, it is said: "Where a conveyance is acknowledged before an officer authorized within the limits of his territorial jurisdiction to take acknowledgments, it will be presumed that the acknowledgment was taken within these limits, although this fact is not stated in the certificate"—citing *Rackleff v. Norton*, 19 Me. 274; *Bradley v. West*, 60 Mo. 83; *Dunlap v. Daugherty*, 20 Ill. 398; *Morrison v. White*, 16 La. Ann. 100; *Bensimer v. Fell*, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774.

The West Virginia statute is very similar to our own, and in the last-named case the court remarked: "But it is said that the certificate of the privy examination and acknowledgment of Mrs. Creigh is faulty, because it certifies that she appeared before the justice, without saying that she appeared in a particular county. The certificate has the caption: 'State of West Virginia, Greenbrier County—to wit:' It will be presumed that the act occurred in that county, and that the officer did not do an illegal act in taking an acknowledgment out of his county." See, also, *Carpenter v. Dexter*, 8 Wall. 513, 19 L. Ed. 426; *People v. Snyder*, 41 N. Y. 397; *Coles v. Miller*, 8 Grat. 6; *Hassler's Lessee v. King*, 9 Grat. 115; 1 Cyc. 574, note 62, citing cases in point.

We are of opinion that the substantial requisites of the statute have been observed in this instance, and that the trial court erred in holding otherwise.

Reversed and remanded.

WAYT v. GLASGOW.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

MUNICIPAL CORPORATIONS—OFFICERS—ELECTION—STATUTES—APPEAL.

Acts 1893-94, pp. 201, 219, c. 205, amending the charter of Staunton, provided that the city council should elect at its first regular meeting after the passage of the act, and at its first meeting in July of each year, a police justice, to hold office for one year, unless sooner removed, etc. Under such act, relator was elected police justice by the council on July 1, 1905, for the term of one year, and, by Acts 1906, p. 105, c. 106, which went into effect on June 12, 1906, the Legislature provided that the police justice for such city should be elected by the voters of the city at the first regular election for municipal officers (other than the mayor and members of the city council) which should be held after the passage of the act, and thereafter at every recurrence of such general election; that such police justice should enter on the performance of his duties on the 1st day of January next following his election, and should hold office until his successor was elected and qualified. The first election at which a police justice could be elected under such act would not occur until November, 1909, and the justice then to be elected would be entitled to take office on January 1, 1910. *Held*, that the latter act repealed the former, in so far as the election of

the police justice by the city council was concerned, from the date the act took effect, and that the justice in office at that time was entitled to hold the office until his successor was elected under the act of 1906, and had qualified.

Error to Corporation Court of Staunton.

Information in the nature of a quo warranto by Joseph A. Glasgow against Hampton H. Wayt. From a decree in favor of relator, respondent brings error. Affirmed.

Timberlake & Nelson and Braxton, Ker & McCoy, for plaintiff in error. Carter Braxton and J. M. Perry, for defendant in error.

CARDWELL, J. Joseph A. Glasgow filed an information in the nature of a quo warranto against Hampton H. Wayt to try the right of the respondent to the office of police justice for the city of Staunton. The respondent demurred and answered, and the matter was heard upon the information, the demurrer, and answer, the matters considered on demurrer being in their entirety practically the same set up by the answer, there being no controversy as to the facts of the case.

Upon a hearing of the cause before the Hon. George W. Morris, judge of the corporation court of the city of Charlottesville, sitting for the judge of the corporation court of the city of Staunton, it was held that the respondent was without title to the said office, his demurrer overruled, and judgment given in favor of the relator. To this judgment a writ of error was awarded by a judge of this court.

The following are the facts appearing in the record: Joseph A. Glasgow, defendant in error, had held the office in controversy for several terms immediately preceding this litigation. The office was created by the Legislature (Acts 1893-94, pp. 201, 219, c. 205), in amending the charter of the city of Staunton. By the terms of this charter it is provided that the "council for the city shall elect at its first regular meeting after the passage of this act, and in the first meeting in July in each year, a police justice, * * * each of whom shall hold office for one year unless sooner removed for cause by the said council; and the said council shall define their powers and prescribe their duties, and fix their compensation in all cases, except where such powers, duties and compensation are set forth and prescribed in this act." Under this provision of the charter, the defendant in error was elected by the council of the city of Staunton to the office of police justice, on July 1, 1905, for a term of one year, expiring on July 1, 1906. By an act of the General Assembly—Acts 1906, p. 105, c. 106—provision was made for the election of a police justice for the city of Staunton by the qualified voters of the city instead of by the council of the city, as theretofore. That act is as follows:

"An act to provide for the election and

compensation of a police justice for the city of Staunton.

"1. Be it enacted by the General Assembly of Virginia, that for the city of Staunton there shall be one police justice and no more. The said police justice shall be elected by the qualified voters of said city at the first regular election for municipal officers (other than for mayor and members of the city council) which shall be held after the passage of this act, and thereafter at every recurrence of such regular election.

"2. Such police justice shall enter upon the duties of his office on the first day of January next following his election; he shall hold his office until his successor is elected and qualified, and he shall receive such compensation as may be provided by law."

This act, in accordance with section 53 of the Constitution [Va. Code 1904, p. ccxxi], and section 4 of the Code of Virginia of 1904, went into effect 90 days after the adjournment of the General Assembly, to wit, on June 12, 1906, but before the regular term of defendant in error expired. Notwithstanding this act, the city council undertook to elect plaintiff in error to the office of police justice for the term of one year, to expire July 1, 1907, under the provision in the charter of the city, *supra*, and upon this election of appointment he rests his claim to the office.

It is settled in this state that an office created by statute is within the control of the Legislature; that the term "mode of appointment," etc., may be altered by the Legislature at pleasure, there being no constitutional limitation on that power. *Sinclair v. Young*, 100 Va. 284, 40 S. E. 907, and authorities cited.

In the case here it was plainly the purpose of the Legislature to take away from the council of the city of Staunton the power of filling the office of police justice, and to make the officer elective by the qualified voters of the city. No other change with reference to the office is made by the act which took effect June 12, 1906, *supra*, the office being thereby recognized and continued, but to be filled by the qualified voters at the next general election for city officers (other than mayor and members of the city council), which election, as it happens, does not occur until November, 1909, and the police justice then to be elected takes the office, for the term prescribed by law, on January 1, 1910. Counsel for plaintiff in error do not seem to question the power of the Legislature to change, as it did, the mode of filling the office of police justice for the city of Staunton, but earnestly contend that, until a police justice for the city is elected, as provided by the act of March 8, 1906, and his term of office begins, the act has no effect upon the provision of the charter of the city, and under its provisions the council has authority to fill the office until such officer is elected as provided by the act of March 8,

1906, *supra*, and qualifies; and that, although the Legislature directly or indirectly may extend a term of office of an incumbent, provided the extension be reasonable and be incidental to changing the time or manner of an election, the Legislature here has exceeded its power. A number of authorities are cited in support of these contentions, but as we do not consider that they are applicable they need not be reviewed. They apply in the main only where the legislative intent is clearly to extend the term of incumbents in office, and not where the Legislature, in the bona fide exercise of its power to deal with municipal officers, undertakes to postpone an election, or to readjust the commencement of official term, or to change the mode of election to an office. The mere fact that the Legislature, in order to make the change of the mode of filling the office of police justice for the city of Staunton, thereby incidentally continued an incumbent in office, cannot be urged as a reason against the exercise of the power to change the mode of filling the office, nor does the fact that this incidental continuance of the incumbent in office for a longer period than the fixed term of the office under the previous statute justify the presumption of mala fides on the part of the Legislature.

The authorities agree that in changing the term of an office, or the mode of filling the same, an incidental continuance of the incumbent in office must not be unreasonable, so unreasonable "as to raise the presumption of a design substantially to deprive the offices of their elective character," but they do not fix any standard by which the reasonableness or unreasonableness of the continuance may be determined.

The rule is well stated in *Cyc.*, vol. 15, p. 343, as follows: "It is within the province of the Legislature to postpone elections and readjust the commencement of official terms in order to do away with frequent and unnecessary elections, in which case the incumbent may either hold over, or special elections may be authorized to fill the vacancies thus occasioned until the next general election. Such statutes are not in violation of the Constitution, where it is clear that the object is to regulate the time of holding elections, and not merely to extend the term of incumbents. But, if the legislative intent is clearly to extend the term of present incumbents in office, the act will fall within the constitutional inhibition of such legislative interference."

What is meant in this text by the use of the words "legislative interference" clearly refers to the right of local self-government, provided for in section 120 of our Constitution [Va. Code 1904, p. ccxxxix], which is as follows: "All city and town officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such cities and towns, or of some division thereof, or appointed by such

authorities thereof as the General Assembly shall designate." No one can read our present Constitution and doubt that it was the purpose and aim of the honorable body framing it to generally provide against the frequency of elections made necessary by the provisions of the Constitution theretofore in force since 1870, and, recognizing that the carrying out of that policy by provisions in the new Constitution and the acts of the General Assembly enacted in pursuance thereof would necessarily give rise to cases of the character of the one we have before us, section 33 of the Constitution [Va. Code 1904, p. ccxv]—a provision in our former Constitution, and found in the organic laws of nearly all, if not all, of the several states of the Union—was adopted, which provides that all officers elected or appointed shall continue to discharge the duties of their offices after the terms to same have expired until their successors have qualified. Under this provision and the general statute on the subject, defendant in error was the incumbent of the office of police justice of the city of Staunton on the 2d day of July, 1906, as he had been theretofore from the 1st day of July, 1905, clothed with the powers and charged with the performance of its duties until his successor is duly elected and qualified.

In *Commonwealth v. Drewry*, 15 Grat. 1, the opinion by Samuels, J., says: "I attach no weight to the argument that the General Assembly might prolong the office of an incumbent for a longer period of time by postponing the term of his successor. The exercise of a power is not to be questioned only because it may be abused. The most salutary powers, plainly granted, may be perverted, yet it would be unreasonable to hold that, therefore, those powers do not exist." And further: "If the beginning of the term of Butts, successor of Drewry, was lawfully postponed, then the Constitution required Drewry, the incumbent, to continue to discharge its duties."

After the act of March 8, 1906, *supra*, took effect, on June 12, 1906, the successor of defendant in error to the office of police justice for the city of Staunton could not be chosen until the election to be held November, 1909. The interim between the expiration of the regular term of the office, on July 1, 1906, and the beginning of the term of defendant in error's successor, on the 1st day of January, 1910, is a mere incident of the change made in the mode of filling the office, there being no other change whatsoever with respect to the office, so that the charter office of police justice for the city of Staunton remains exactly as it was, except for the fact that it is now elective instead of appointive. This change being clearly within the constitutional power of the Legislature, the contention that the act making the change is to be suspended in its operation until the general election of November, 1909, has no ground to rest upon. To take this view

the court would have to hold the act of March 8, 1906, *supra*, constitutional if suspended and kept in abeyance until the general election in November, 1909, but unconstitutional if given effect 90 days after the adjournment of the Legislature enacting it. If the contention that the act of March 8, 1906, *supra*, is unconstitutional if given effect as provided by law, because violative of the principle of local self-government, could be sustained, and for that reason it be held that it does not take effect before 1909 in order to save its constitutionality, the repugnancy, between the act and the charter of the city of Staunton would be just as great in November, 1909, as it is now. If the city council, as plaintiff in error contends, has the right to elect each year a police justice for a term of one year under the charter until 1909, we would have in office a police justice in November, 1909, appointed in the preceding July for a term of one year, and another police justice elected under the act in question, who would be entitled to demand the office on January 1, 1910, when the council's appointee would have finished just one-half of his term. Clearly had it been intended by the Legislature that this act should not become effective at the regular time fixed by law, it was entirely competent for it to have said so, and not having said so it necessarily became effective, under the Constitution and under section 4 of the Code of 1904, June 12, 1906, as we have stated, and it is to be presumed that the act was passed and allowed to become operative with section 33 of the Constitution [Va. Code 1904, p. ccxv] in view, and with knowledge on the part of the Legislature that there would be no vacancy whatever in the office of police justice for the city of Staunton and no interruption in the public service, and that the incumbent in office at the time would continue to exercise the powers and to discharge the duties of the office until the election by the people of his successor.

This statute being effective from and after June 12, 1906, necessarily the provision of the city's charter authorizing the common council to fill by appointment the office of police justice becomes inoperative, null, and void. It is true that repeals by implication are not favored, and a statute passed later in time will not be construed as repealing a former statute on the same subject unless it be clear that the repugnancy between the two statutes is such that they could not have been designed to remain equally in force, but where the co-existence of the two sets of provisions would be destructive of the object for which the later act was passed, it is clear that there must be an implied repeal. In other words, where the later statute embraces the whole subject of the former and is plainly substituted for all former statutes on the subject, the former will be deemed to be repealed. Black on Interpretation of Laws, p. 115. Sutherland on Stat.

Constr. § 138; *Somers v. Com.*, 97 Va. 759, 33 S. E. 381, and authorities cited.

Where, however, it is necessary to hold an earlier statute impliedly repealed by a later one, on account of the repugnancy between them, the extent of the repeal will be measured by the extent of the necessary conflict or inconsistency between them. And, if there are parts or provisions of the earlier law which may stand as unaffected by the later act, they will not be held repealed thereby. *Black on Inter. of L.*, supra, p. 115; *Sutherland on Stat. Constr.* §§ 138, 383, and authorities cited in notes.

As will be observed by reference to the act of March 8, 1906, set out above, after providing "that for the city of Staunton there shall be one police justice and no more," it is further provided that "the said police justice * * * shall be elected by the qualified voters of the city at the next general election (other than for mayor and members of the city council) which shall be held after the passage of this act." It then goes on to make the election regular by providing for the holding of it regularly thereafter at every recurrence of such general election. No change of any sort is made in the office, or in its powers or duties. The existing office of police justice for Staunton is left by the act exactly as it was before, except for the single change that it is now elective by the people instead of being appointive by the council. To change the office only in respect to the mode of filling it, more apt language to carry out the intent could not have been employed. There is nothing whatever in this case to suggest any other than a legitimate and reasonable purpose on the part of the Legislature to merely change the mode of filling an office. The change is nothing more than an amendment of the city's charter as to the mode of filling the office of police justice. Our view, therefore, is that from and after the act of March 8, 1906, became operative, on June 12, 1906, there was no longer any power or authority in the council of the city of Staunton to fill the office of police justice; that the said act necessarily repealed the provision in the charter of the city by which the council of the city was theretofore authorized to fill said office; and that the appointment by the council of plaintiff in error to said office on July 2, 1906, is null and void. Among the decisions of courts of other states in point, sustaining the conclusion we have reached, are *Ranson's Case*, 73 Mo. 78; *State ex rel. Crow v. Smith* (Mo. Sup.) 54 S. W. 221, 47 L. R. A. 560; *Swangur v. Rose* (Ky.) 49 S. W. 40; *State v. McNaugh* (Ind. Sup.) 51 N. E. 117, 43 L. R. A. 408; *Common Council v. Schmid* (Mich.) 87 N. W. 384; *Scott v. State* (Ind. Sup.) 52 N. E. 163; *State v. Bailey* (Minn.) 33 N. W. 778; *Wilson v. Clark* (Kan. Sup.) 65

Pac. 705; *State v. Simon* (Or.) 26 Pac. 171; *Sipe v. People* (Colo. Sup.) 56 Pac. 571.

After the case had been argued and submitted for decision, counsel for plaintiff in error, by a communication addressed to the court, seek to have us pass upon the question whether or not the act of March 8, 1906, received on its passage the vote required by section 117 of the Constitution [Va. Code 1904, p. cccxxviii]; that is, a recorded two-thirds vote of all the members elected to each branch of the General Assembly. As authority for the court now considering the question, the case of *Sanger v. C. & O. Ry. Co.*, 102 Va. 86, 45 S. E. 750, is relied on. In that case, counsel for defendant in error did, after the case had been argued and submitted, call the court's attention to the question whether or not the court had jurisdiction of the cause, and the court did pass upon the question, but that was a question of law already before the court or of which the court might have taken judicial notice, the question of jurisdiction being an open question of law in every case until the case is finally disposed of.

In this case, whether the act in question received on its passage the requisite constitutional vote, a question not suggested in the record, is a question of fact which could only be determined upon evidence aliunde. True, the question might have been determined in the lower court, had it been raised, upon record evidence, but, like any other fact relied on, it had to be proved, and might have been proved or disproved by the introduction in evidence of copies of the journal of each house of the General Assembly, printed as required by law. Section 3329, Va. Code 1904. This question not having been raised, and therefore not considered by the lower court, it is not in the record, and we can only consider the case, as to questions of fact, upon the record certified to us from the trial court as provided by law.

The judgment of the corporation court of the city of Staunton is affirmed.

BUCHANAN, J., absent.

BLUE RIDGE LIGHT & POWER CO. v. TUTWILER.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. STREET RAILROADS — OPERATION — ACTION FOR INJURIES — PLEADING.

A declaration alleging that while the plaintiff, in the exercise of reasonable care on his part, was driving his wagon and horses along the street, where he had a right to be, defendant, a street car company, through its agents and employes, negligently ran its car against the rear end of the wagon with such force and violence as to cause the injuries complained of, is sufficient to show the duty of defendant to plaintiff, and its breach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 224.]

2. WRIT OF ERROR—RECORD—BILL OF EXCEPTIONS—NECESSITY.

Where an order of the trial court showed that the defendant moved that the plaintiff be required to file a bill of particulars, that the court overruled the motion, and that the defendant excepted to the court's action, no bill of exceptions was necessary to present the ruling in the record for review.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2417, 2350.]

3. PLEADING—BILL OF PARTICULARS—NECESSITY.

In an action for injuries caused by the striking of a wagon driven by plaintiff by a street car, where the declaration contained a full and clear statement of the plaintiff's case, it was not error to refuse to require a bill of particulars.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 954, 956.]

4. STREET RAILROADS — OPERATION — NEGLIGENCE OF STREET RAILROAD COMPANY — EVIDENCE.

Evidence that plaintiff was driving a wagon along a street railroad track on a downgrade, and that, as a car approached him slowly from the rear, it began to slip on the rails and the motorman reversed the current and applied sand freely to the rails, but was unable to stop the car till it pushed against the plaintiff's wagon until the pole of the wagon came in contact with the rear of another wagon, breaking the pole and causing plaintiff to fall off his seat into his wagon, was insufficient to show negligence of the street railroad company.

Error to Circuit Court, Augusta County.

Action by Samuel H. Tutwiler against the Blue Ridge Light & Power Company. From a judgment in favor of plaintiff, defendant brings error. Reversed and remanded.

The declaration, omitting formal parts, is as follows:

"Samuel H. Tutwiler complains of the Blue Ridge Light & Power Company of a plea of trespass on the case, for this, to wit: That heretofore, to wit, on the 9th day of September, 1905, at the time of the committing of the grievances hereinafter complained of, the defendant was the owner and occupier of a certain street railway track running through the city of Staunton, along Augusta street, and over and along which the said defendant ran and operated its street cars run by electricity, for the purpose of carrying passengers, and it was the duty of the said defendant to run and operate its said cars, through its agents and employes, with due care and caution, so as not to run against wagons or persons traveling along the said street on, at, or near the track of the said railway, and especially to so control, operate, and manage its said cars as not to injure persons or to injure or damage wagons or horses traveling along the said street, but the said plaintiff says that the said defendant disregarded its duty, and the said plaintiff says that, to wit, on the day aforesaid, to wit, the 9th day of September, 1905, the said plaintiff was, in the exercise of due care on his part, riding in his two-horse wagon, and driving two horses belonging to him hitched to said wagon south, along the said Augusta street, in the city of Staunton,

and that the street on both sides of the street railway track was crowded or blockaded with wagons and horses, and that in passing along said Augusta street, between Frederick street and Main or Beverley street, it was necessary for the plaintiff to drive in the middle of the street along the defendant's street railway track, and said plaintiff says that while he was driving along said track, where he had the lawful right to be, and while in the exercise of due care and caution, that the said defendant company, through its agents and employes was running and operating a certain one of its cars along said street railway track going south and behind said plaintiff's wagon on Augusta street, and said defendant, through its agents and employes, carelessly, negligently, and recklessly ran its said car against the hind end of the said plaintiff's wagon on said Augusta street, between Frederick street and Main or Beverley street, and with such force and violence that it smashed the said wagon and ran forward on the horses hitched thereto, stunned, bruised, injured, and seriously and permanently damaged the said plaintiff, and injured the said plaintiff's said horses, and particularly injured one of the said horses hitched to the said plaintiff's wagon, and seriously and permanently injured one of the horses hitched to the said wagon so that the same was disabled altogether, and the said plaintiff says that his wagon was rendered altogether worthless, that the wagon was damaged to the extent of \$50, and the damage to the said horses was, as plaintiff avers, \$100, and said plaintiff says that he expended the sum of \$30 in having said horse cared for and treated by a veterinary surgeon, and said plaintiff says that during the illness of the said horse that he lost the services of the said horse and thereby sustained special damages to the amount of \$25, and the said plaintiff says that he was seriously and permanently injured and damaged, and says that the damages and injuries aforesaid were the result of the said neglect of the said defendant company, through its agents and employes, and that he has sustained damages therefrom to the extent of \$1,000, to the damage of the said plaintiff \$1,000. And therefore he brings his suit."

J. M. Perry, for plaintiff in error. Charles Curry, for defendant in error.

HARRISON, J. This action was brought by Samuel H. Tutwiler to recover damages for injuries alleged to have been occasioned the plaintiff by the negligence of the defendant street car company. The jury returned a verdict for the plaintiff, which the circuit court, on motion of the defendant, refused to set aside. The judgment rendered upon that verdict is now before us for review.

The grounds of error assigned are:

(1) That the demurrer to the declaration should have been sustained.

(2) That the motion of the defendant to require the plaintiff to file a bill of particulars should have been sustained.

(3) That the verdict should have been set aside as contrary to the law and the evidence.

We are of opinion that the demurrer to the declaration was properly overruled.

In the case of *Hortensine v. Virginia-Carolina Ry. Co.*, 102 Va. 919, 47 S. E. 996, which is relied on in support of the demurrer, it is said: "The declaration must show that, from the relation existing between the plaintiff and the defendant, a legal duty was owing from the latter to the former, the failure to discharge which caused the injury for which the action is brought, or makes such averments as to the circumstances under which the plaintiff was injured as will show the existence of the duty which it is claimed has been neglected and which neglect has caused the plaintiff's injury."

In the declaration before us the relation between the plaintiff and the defendant as occupants of the public highway is made clearly to appear. The declaration avers fully and distinctly the duty of the defendant to the plaintiff, the breach of that duty, and the injuries resulting from that breach. The negligence of the defendant company, which was the breach of the duty alleged, is averred to be that while the plaintiff, in the exercise of reasonable care on his part, was driving his wagon and horses along the street, where he had a right to be, the defendant, through its agents and employees, had carelessly, negligently, and recklessly run its car against the rear end of the plaintiff's wagon with such force and violence as to cause the injuries complained of. If the averments of the declaration were admitted, there would be no difficulty in rendering judgment upon them for the plaintiff.

We are also of opinion that there was no error in the refusal of the circuit court to require the plaintiff to file a bill of particulars. It is insisted that this assignment of error cannot be considered because the ruling of the court was not made part of the record by a bill of exceptions. The order of the court shows that the defendant moved that the plaintiff be required to file a bill of particulars, that the court overruled its motion, and that the defendant excepted to the court's action. This is all that a bill of exceptions would have shown, and it is sufficient. *Driver v. Southern Ry. Co.*, 108 Va. 650, 49 S. E. 1000.

There is no inflexible rule with respect to requiring a bill of particulars to be filed. It is a matter resting in the sound judicial discretion of the court, and its action will not be reversed unless plainly erroneous. *Driver v. Southern Ry. Co.*, *supra*.

In view of the full and clear statement of the plaintiff's case made in the declaration, we do not see that the defendant could have

been prejudiced by the refusal of the court to require a bill of particulars to be filed.

We are further of opinion that the circuit court erred in refusing to set aside the verdict. The evidence, which is without conflict as to any material fact, wholly fails to show that the defendant has, by any act of negligence, rendered itself liable to the plaintiff for the injuries of which he complains.

The record shows that at the time of the accident Augusta street, between Frederick and Main streets, was so crowded with wagons standing on both sides of the street car track that only space enough for a car to pass was left. Into this narrow passageway the plaintiff turned with his wagon from Frederick street, going south and downgrade, in the direction of Main street. The street car going south down Augusta street followed at once, close in the rear of the plaintiff. Immediately in front of the plaintiff in this narrow passageway, going in the same direction, was a road wagon. As soon as the car crossed Frederick street and started very slowly down Augusta street between the file of wagons mentioned on either side, its wheels commenced slipping on the rails as if moisture or grease was upon them. The motor-man realized at once that the wheels were sliding on the rails and that the car was beyond his control, and he commenced immediately to sound his gong and to call to the plaintiff to get out of the way. The current was reversed and sand freely applied to the rails. Finally the plaintiff was reached, and the front of the car, which was still moving slowly, pushed up against the rear of plaintiff's wagon and pushed it along some 15 or 20 steps, until the pole of the wagon came in contact with the rear of the road wagon in front, snapping the pole of plaintiff's wagon, causing one horse to fall and the plaintiff to fall off of his seat backwards into his wagon. The resulting injury both to the person and property of the plaintiff appears to have been comparatively slight; he not finding it necessary to call in a doctor.

These facts furnish no suggestion of negligence on the part of the defendant. The company was using its rails for the passage of its car in a lawful manner. When it found that the wheels were sliding on the rails, through no alleged fault of its own, its employees, who were at their posts with a car properly equipped and all of its appliances in proper condition, put on the brakes, reversed the current, put sand on the rails, and used every means in their power to stop the car and avoid injury to the plaintiff. The verdict of the jury was not warranted by the facts proved, and was contrary to the law as laid down by the court, without objection, for their guidance.

For these reasons the judgment complained of must be reversed, the verdict set aside, and the cause remanded for a new trial.

SIPE v. TAYLOR et al.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. LIMITATION OF ACTIONS—COMPUTATION—PENDENCY OF LITIGATION.

In 1870 a person became a surety on a bond and died. In 1871 a judgment was rendered on the bond against the personal representatives of the deceased surety. In 1887 a decree was entered directing process to issue against the principal and the personal representatives of the deceased surety, and directing that the cause should be referred to a commissioner, with instructions to settle the account showing the deficiency for which the surety was liable. The proceedings causing a delay in enforcing the judgment and determining the amount of the surety's liability were brought about by the acts of the personal representatives, and it was not until 1902 that a decree determining the amount of the liability on the bond was rendered. *Held*, that the decree of 1902 was not rendered invalid by lapse of time.

2. EXECUTORS AND ADMINISTRATORS—ACTIONS—LIMITATIONS.

In 1903 suit was brought against the heirs and personal representative of the deceased surety to recover the amount of the decree. *Held*, that the liability of the heirs was not barred by limitations, notwithstanding Code 1887, § 2020 [Va. Code 1904, p. 699], limiting the time within which a claim may be proved against the estate of a decedent to five years from the qualification of his personal representative.

3. PRINCIPAL AND SURETY—LIABILITY—DISCHARGE OF SURETY—CHANGE IN OBLIGATION.

A decree appointed a commissioner to sell the lands of a decedent. The commissioner at one sale sold a part of the property to one who became a surety for a purchaser of another part thereof. *Held*, that the person becoming a surety for the purchaser became a quasi party to the suit, and the decree confirming the sale was binding on him, notwithstanding the fact that the decree changed the contract of suretyship.

4. SAME.

A commissioner appointed by the court to sell the property of a decedent sold property to a purchaser, who was required to make provision for a cash payment of \$2,075 and to execute three bonds for \$2,075 each for the residue. The cash payment due was not paid in money, but by an order for \$3,000 given by a third person. *Held*, that the variance in the terms complained of were matters which should have been brought forward by the surety before the confirmation of the sale to the purchaser, and his heirs, when sued for the amount of the surety's liability, could not escape liability on the theory that the terms of the sale were varied without the consent of the surety.

5. PAYMENT—APPLICATION—RIGHTS OF SURETIES.

The excess of the amount of the order over the required cash payment could not be applied to the satisfaction of the bond in the absence of an agreement between the commissioner and the purchaser that any part of the money when collected on the order should be applied to the payment of the bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Payment, § 123.]

6. SUBROGATION—SURETIES—SUBROGATION TO RIGHTS OF CREDITORS.

A surety liable for only a part of a debt who pays that part is not entitled to be subrogated to the securities held by the creditor, unless the whole demand has been paid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Subrogation, § 54.]

7. JUDGMENT—WAIVER OF SERVICE.

A purchaser at a judicial sale executed a bond with a surety securing a part of the purchase price. The purchaser had previously sold land to a third person, who gave him an order for the purchase price, which order the purchaser delivered to the officer making the sale as part payment. The third person did not record her deed until after judgment had been rendered against the purchaser and the personal representative of the surety for the balance of the purchase price. *Held* that, as the amount of the order had been collected and applied to the purchase money due from the purchaser, the judgment could not be enforced against the lands purchased by the third person for exoneration of the estate of the surety.

Appeal from Circuit Court, Rockingham County.

Suit by George E. Sipe, as general receiver, against John W. Taylor and others, heirs at law of Zachariah Taylor, deceased, and against John W. Taylor and another, as the personal representatives of the decedent. From a decree dismissing the bill, complainant appeals. Reversed and remanded.

Jno. E. Roller and Sipe & Harris, for appellant. Harnsberger & Harnsberger, for appellee.

CARDWELL, J. The decree brought under review by this appeal is the sequel of a long drawn out litigation as to the liability of Zachariah Taylor as surety for purchasers of real estate sold under the decree of the circuit court of Rockingham county in a chancery cause instituted in the year 1869, or prior thereto, having for its object the marshaling of the assets of the estate of Joseph H. Conrad, who died in 1861, and the application of these assets to the decedent's debts.

In the chancery cause referred to, styled Baugher's Adm'r v. Conrad's Adm'r, a decree was entered in October, 1869, appointing certain commissioners to sell the lands of Joseph H. Conrad, deceased, and on the 22d of April, 1870, these commissioners sold, among other lands, a two-thirds interest in what was known as the "Fudge" tract to J. M., William H., A. F., and V. H. Lam, at the price of \$8,303; the purchasers making provision for the cash payment of one-fourth of the purchase money, and executing their three bonds, each in the sum of \$2,075, for the residue, these bonds falling due, respectively, at one, two, and three years from the day of sale. Upon the first of these bonds Zachariah Taylor became co-obligor with the purchasers as their surety.

Thereafter, at the August term, 1871, of the county court of Rockingham county, Zachariah Taylor having departed this life, a judgment was rendered on the bond upon which he was surety in favor of Walker and Compton, two of the commissioners (the other one having died) who made the sale referred to, against the Lams, and a separate judgment against John W. Taylor and Hiram H. Taylor, administrators of Zachariah Taylor, deceased. And subsequently, on the 23d of February, 1873, after proper proceedings for the purpose, the said real estate

was resold for the unpaid purchase money due thereon, and the said John W. Taylor became the purchaser thereof at the price of \$21.60 per acre, thereby leaving a deficiency of approximately \$4,000 on the purchase price agreed to be paid by the Lams at the first sale. Thereupon a litigation arose between the Lams and John W. Taylor as to who was the real purchaser at said resale, which was not terminated until 1882, as well as between the creditors of Joseph H. Conrad, whose debts were liens upon the lands, and, of course, upon the fund arising from the sale thereof; and notably between the personal representatives of Zachariah Taylor, deceased, as to the amount of the deficiency and the liability of the estate of Zachariah Taylor, deceased, therefor on account of his suretyship in said first bond of \$2,075. And so persistently did the personal representatives of Zachariah Taylor resist the ascertainment of this deficiency and the liability of Zachariah Taylor's estate therefor that the litigation lasted until the year 1902, when a decree was entered in the cause, adjudging the liability of the estate of Zachariah Taylor, by reason of his suretyship as aforesaid, to be the sum of \$2,963.33, with interest on \$1,040.02 from the 24th of September, 1902, and the sum of \$223.83 costs, after allowing the estate a very large, but disputed, credit claimed by the personal representatives, thereby relieving the estate of nearly \$4,000 asserted against it.

Upon a report being made of the first sale of the Fudge tract of land, it was confirmed to the Lams, and after the resale of the land to John W. Taylor a controversy between him and the Lams originated and continued, as stated, for a number of years. After the termination of this controversy and the completion by Taylor of the payment of his purchase price on September 1, 1886, a decree was entered in the cause on the 21st of April, 1887, directing process to issue against the Lams and their assignee in bankruptcy, and the personal representatives of Zachariah Taylor, deceased, and further directing that, "when the cause matures as to these defendants, it shall stand referred to commissioner Bryan, with instructions to examine, state, and settle (1) an account showing the deficiency, if any there be, arising from the sale of the Fudge tract to the Lams, and the resale because of the failure of the purchasers to pay for the same, (2) who are bound for said deficiency, and out of what assets the same ought to be paid."

In response to this decree, Commissioner Bryan made and returned his report on the 28th of April, 1890, wherein he ascertained the deficiency and reported that the estate of Zachariah Taylor was liable for any balance remaining unpaid on the first deferred payment, under certain conditions set out in the report. Thereafter the cause was four times referred to Commissioner Liggett; he being engaged at that time in taking the

account in a certain other chancery cause, entitled *Bruce v. Dovel*, with direction to report upon the same matters required to be considered by Commissioner Bryan.

In response to each of these references to him, Commissioner Liggett made full and lucid reports upon all the questions presented for consideration; and by his fourth report, filed on the 24th of September, 1902, he ascertained and reported that the amount due upon the judgment on the bond in which Zachariah Taylor was surety was, as above mentioned, \$2,963.33, with interest on \$1,040.02 from September 25, 1902, and \$223.83 costs. Upon this report the circuit court made its decree overruling all exceptions thereto, and approving and confirming the report; and further adjudged and ordered that the personal representatives of the estate of Zachariah Taylor, deceased, pay out of the assets of the estate of their intestate in their hands to be administered, if any there be, to George E. Sipe, general receiver of the court, the amount ascertained to be due as above stated, and that unless the recovery authorized by the decree should be paid to Sipe, general receiver, within 30 days from the rising of the court, he should institute such proceedings as he might be advised to enforce payment of said recovery.

After fruitless endeavors on the part of Sipe, general receiver, to collect said recovery from the personal representatives of Zachariah Taylor, deceased, he, in obedience to the directions of the decree of the court, in May, 1903, instituted this suit in the circuit court of Rockingham county against John W. Taylor, H. H. Taylor, and Joseph F. Taylor, heirs at law of Zachariah Taylor, deceased, and the said John W. Taylor and H. H. Taylor, as the personal representatives of Zachariah Taylor, deceased, alleging in his bill that the heirs of Zachariah Taylor, deceased, named, had received from their ancestor and still own real estate of very considerable value, and that this real estate was assets for the payment of the decedent's debts, and charging that this real estate in the hands of the heirs at law of Zachariah Taylor was liable for the recovery authorized by the decree of the court, above mentioned, and praying that the said parties be made defendants to the bill, and that all proper accounts might be taken, especially an account of the indebtedness against the estate of Zachariah Taylor, what assets of his estate, real and personal, are liable for the payment of the said recovery, in whose hands they are, and who was liable therefor, etc.

To this bill the parties defendant filed their answers, as heirs at law and as the personal representatives of Zachariah Taylor, deceased, respectively, accompanying the answers with voluminous exhibits, whereupon such proceedings were had that the cause came on to be heard on the 7th day of April, 1905, on the complainant's bill and the exhibits and answers aforesaid, the docu-

mentary evidence filed, including as much of the records in the causes of *Bruce v. Dovel* and *Baughner v. Conrad* as was pertinent, and upon consideration thereof the circuit court entered the decree here under review, dismissing complainant's bill, with costs.

The first question presented is whether, under the circumstances disclosed by the record, the heirs at law of Zachariah Taylor, deceased, were exonerated from the payment of their ancestor's debt asserted by reason of the statute of limitations.

In the recent case of *Turk v. Ritchie*, 104 Va. 587, 52 S. E. 339, the facts and circumstances relied on to defeat the recovery of the debt asserted were very similar to the facts and circumstances disclosed in this record, and the same legal defenses made that have been urged against the recovery sought in this cause, viz., that the circuit court of Rockingham county was without jurisdiction to enter the decree of the 7th day of November, 1902, in the cause of *Baughner v. Conrad*, against the personal representatives of Zachariah Taylor, deceased, for the amount due on the bond of the Lams in which Zachariah Taylor was surety, and that under section 2920 of the Code of 1887 [Va. Code 1904, p. 699], providing that a right of action against the estate of a decedent which accrues after the decedent's death shall not continue longer than five years after its accrual, a recovery of the debt asserted is barred.

In *Turk v. Ritchie*, supra, the bill alleged the execution of a bond by a principal and sureties, the death of the principal and sureties, and that the orator and oratrix were entitled to have the sum due paid over by the personal representatives, heirs, and distributees of the principal and of the sureties, parties defendant, specifically praying that the personal estate of the principal and certain land covered by a deed of trust securing the debt be applied to the payment of the debt, and concluding with a prayer for general relief. Held that the allegations of the bill conferred upon the court jurisdiction to render a decree against the personal representatives of the sureties under the prayer for general relief. In that case there had been no opportunity, as argued, for the personal representatives of the deceased sureties to set up their defense in a proceeding at law or for a trial by jury, while in the case here Taylor's personal representatives had both the opportunity to set up their defense as the personal representatives of the surety, Zachariah Taylor, in a proceeding at law, and for a trial by a jury. But it was, nevertheless, held in the first-named case that the decree against the personal representatives of the surety was a valid decree, the decision being founded upon the fact that Turk's personal representatives were put on notice of the liability asserted against them in the chancery cause, and the decree over against them was not inconsistent with the

case made in the bill, but was in conformity with the principle that, when a court of equity acquires jurisdiction of a cause for one purpose, it will retain it and do complete justice between the parties, enforcing, if necessary, legal rights and applying legal remedies to accomplish that end; citing a number of authorities.

The decision in that case is conclusive of the question here, whether or not the decree over against the personal representatives of Zachariah Taylor entered in *Baughner v. Conrad* on the 7th of November, 1902, is valid; the case here being stronger against these personal representatives than was the cause of *Turk v. Ritchie*, for the reason that the judgment at law on the purchase money bond in which Zachariah Taylor was surety was not only notice to his personal representative of the liability asserted against the estate of their intestate, but they were parties to the cause of *Baughner v. Conrad* and had full notice of all proceedings therein to ascertain and determine the liability of the estate of Zachariah Taylor for said judgment.

It could not be denied that the judgment rendered in August, 1871, against the personal representatives of Zachariah Taylor, could be enforced at any time within 20 years from the date of the judgment, and, the bond having been merged in the judgment and execution having issued thereon, it is clear that the judgment remained in force for 20 years. It is true that 32 years elapsed before the heirs at law of Zachariah Taylor were impleaded, but this lapse of time in no way affects the validity of the decree of November 7, 1902. *Turk v. Ritchie*, supra.

The reports of Commissioner Liggett state clearly and logically facts to show that the statute of limitations running against the judgment rendered in August, 1871, against the personal representatives of Zachariah Taylor, was suspended, and necessarily so, in order to correctly and definitely ascertain the liability upon Zachariah Taylor's estate by reason of his suretyship in the bond upon which this judgment was rendered, for a sufficient length of time to make the judgment a living and valid one, enforceable against the heirs of Zachariah Taylor when this suit was instituted.

It could not be contended that the statute of limitations has been running against the judgment of 1871 since the decree of April, 1887.

In *Turk v. Ritchie*, supra, it is said: "The decree asserted by appellee being a valid decree, it settles all questions as to the validity of the debt claimed, and that the debt was not barred by the statute of limitations when the decree was made,"—citing *Brewis v. Lawson*, 78 Va. 36, and *Smith v. Moore*, 102 Va. 260, 46 S. E. 326.

The facts stated in Commissioner Liggett's reports show clearly that the appellees here have no cause to complain of delay in ascer-

taining the liability asserted against their intestate's estate in Baugher v. Conrad, because of the fact that the proceedings causing the delay were not only brought about by the action of Taylor's personal representatives, but resulted in reducing the liability now asserted against appellees by several thousand dollars.

It is contended, however, that the proviso to section 2920 of the Code of 1904, limiting the time within which any claim may be proved against the estate of a decedent to five years from the qualification of his personal representative, whether the right of action accrued before or after his death, applies to the case here, because the heirs could only have been sued upon the original claim.

This contention cannot be sustained, for the reason that the judgment was obtained, and the claim thereby proved, against Zachariah Taylor's estate in August, 1871. If this construction of the statute contended for could be maintained, then a judgment against a personal representative on a decedent's debt may be good for 20 years against the personal estate and good for only 5 years as against the heirs at law. This question was settled in *Turk v. Ritchie*, wherein it was held that the claim having been asserted against Turk's devisees within 3½ years after the rendition of the decree of December 10, 1895, into which the right of action on the original debt was merged, the proviso of the section could have no application. In this case the decree of November 7, 1902, was asserted within one year from its rendition, viz., in May, 1903, and this decree was conclusive of the question whether or not the debt was barred by the statute of limitations as against the estate of Zachariah Taylor. Therefore the proviso to section 2920 of the Code has no application to the case.

It is contended, however, by appellees, who, as is admitted, received real estate as heirs at law of their father, Zachariah Taylor, liable for his debts, that Zachariah Taylor's estate is discharged from the debt asserted in this cause, because the contract of suretyship was changed without his knowledge or consent, and to his prejudice.

This contention is not sustained by the record. There was no change in the terms of the sale made to the Lams of the Fudge tract of land without the knowledge or consent and to the prejudice of Zachariah Taylor. He was himself a purchaser of a portion of the property sold by the commissioners at the same sale at which the Lams made their purchase, thereby becoming a quasi party to the suit, which purchase was confirmed to him by decree of the 31st day of May, 1870, the same decree by which the sale to the Lams was confirmed, "provided the said purchasers comply with the terms of sale by paying one-fourth cash and

executing their bonds with approved security, * * * but, if any of the purchasers fail to comply with the terms of sale within ninety days from this date, then the commissioners are authorized to resell the property." In a subsequent report of the commissioners they reported that Zachariah Taylor had executed his bonds with security for the purchase made by him, and that the Lams had executed their bonds with security on one of them, and had made arrangements in regard to the cash payment, and that the security on the one bond of the Lams—the bond for the first deferred payment—was Zachariah Taylor himself; and this report was confirmed by decree of September 20, 1870.

In *Robertson v. Smith*, 94 Va. 250, 28 S. E. 579, 64 Am. St. Rep. 723, it was held, as to "a judicial sale, though made on terms differing from those prescribed by the decree of sale, yet the confirmation of the report of sale cures the irregularity, and gives the sale the same validity and effect as if made upon the precise terms of the decree."

But, say appellees, the cash payment due from the Lams was not paid in money, but by an order on Dovel's estate for \$3,000, given by Mrs. Burkett to the Lams, accepted by Dovel's executors, and transferred by the Lams to the special receiver in the cause of Baugher v. Conrad, and no personal security was taken for the second and third deferred payments of the Lams' purchase of the Fudge tract. Therefore the terms of the sale were so varied without the knowledge or consent of Zachariah Taylor, and to his prejudice, that he is exonerated, at least to the extent that he is damnified.

While a surety has a right to stand upon the very terms of his contract, and, if he does not assent to any variation when the variation is made, it is fatal, the rule cannot apply to this case. The variances in the terms complained of, even if material, were matters which should have been brought forward by Zachariah Taylor, appellees' ancestor, before the confirmation of the sale to the Lams, as we have heretofore shown.

The further contention is made that as the Burkett order for \$3,000, turned over by the Lams to the commissioners to be collected and applied on their purchase money, was greatly in excess of the cash payment due from the Lams, the excess being \$994.84 as of May 19, 1870, this excess should have been applied to the bond in which Zachariah Taylor was surety and to the exoneration of the surety to that amount. . .

The Burkett order referred to was taken by the commissioners who made the first sale of the Fudge land to the Lams, given by Mrs. Burkett in favor of the Lams, for \$3,000, to be paid out of funds coming to Mrs. Burkett in the suit of Bruce v. Dovel, pending, also, in the circuit court of Rocking-

ham county, the amount thereof when collected to be applied by the commissioners to the payment of the purchase money owing by the Lams for the Fudge land. There is not sufficient proof in this record of any valid agreement or understanding between the commissioners and the Lams, or any one else, that any part of the money, when collected on the Burkett order, was to be applied to the payment of the bond in which Zachariah Taylor was surety for the Lams. It was doubtless due to the fact that the commissioners considered that this order, together with the land purchased by the Lams, the title to which was retained as security for the unpaid purchase money, made it unnecessary to require of the Lams personal security for the deferred payments of their purchase money other than the first, and their action in not requiring personal security for the second and third deferred payments was approved and ratified by the court, with Zachariah Taylor before the court as a quasi party to the cause in which the Lams made their purchase. Here there had been the failure of both debtor and creditor to exercise their confessed right to direct the application of the proceeds of the Burkett order when collected, whereby the court was left without any peculiar fact to aid its discretion in applying the money to the discharge of the Lams' indebtedness in the cause, and in accordance with the well-established rule governing in such a case, the court rightly applied it to that part of this indebtedness which was the least secured, or, in other words, in the interest of the creditor. *Pope v. Transparent Ice Co.*, 91 Va. 79, 20 S. E. 940, and authorities cited.

The doctrine of subrogation invoked by appellees has no application whatever to the case. Zachariah Taylor has himself paid no part of the indebtedness of the Lams for the Fudge land.

"Even if a surety is liable for only a part of the debt, and pays that part for which he is liable, he cannot be subrogated to the securities held by the creditor until the whole demand of the creditor is satisfied. * * *"
Sheldon on Subrogation (2d Ed.) § 127; *Grubbs v. Wysors*, 32 Grat. 127.

The Burkett order was given by Mrs. Burkett for the purchase money for a parcel of land which she bought from the Lams at the time the order was given, but she failed to record her deed of conveyance of the land until after the judgment in favor of the commissioners of the court in *Baugh v. Conrad* against the Lams and Taylor's personal representatives, at the August term, 1871, of the county court of Rockingham county, above spoken of, had been obtained; and the contention is made here that, although the amount of this order had been collected and applied to the purchase money due by the Lams for the Fudge tract of land in the suit of *Baugh v. Conrad*, the

judgment in favor of the commissioners of the court in that suit should have been enforced against the lands so purchased by Mrs. Burkett for the exoneration of Zachariah Taylor's estate from that judgment. It could not be reasonably expected that a court of equity would take the value of the land purchased by Mrs. Burkett and also subject the land to the payment of the debt, to the discharge of which the value of the land had already been applied. No authority in support of this proposition has been cited, and none can be found, so far as we are advised.

The further contention is made that by a proper application of the moneys collected for and on account of the Lams' purchase of the Fudge tract of land the bond in which Zachariah Taylor was surety for them has been fully paid; but we deem it unnecessary to enter into a discussion of this contention, as we can find nothing in the record to sustain it. This was a matter most carefully considered by Commissioner Liggett in making up his report of the amount still due from the estate of Zachariah Taylor by reason of his suretyship, which was confirmed by the court and made the basis of the decree of November 7, 1902.

With reference to the last contention of appellees, that the estate of Zachariah Taylor is discharged from all liability upon the bond of the Lams, in which Zachariah Taylor was surety, because of the laches on the part of his creditors, we need only repeat that the delay in ascertaining finally and conclusively the amount of the liability of Zachariah Taylor's estate was due to the resistance of the collection of the judgment against the Lams and Taylor's personal representatives rendered in August, 1871, resulting in reducing the amount recoverable on that judgment between \$3,000 and \$4,000. Under these circumstances, appellees cannot be heard to complain of delay in enforcing the judgment. *Turk v. Ritchie*, supra.

It follows that the decree appealed from must be reversed and annulled, and the cause remanded for further proceedings therein not inconsistent with the views expressed in this opinion.

HERRING v. WILTON.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. NUISANCE—PRIVATE NUISANCE—NATURE OF INJURY—BARKING OF DOGS.

The howling of dogs and the barking of puppies upon the premises of their owner, when they subject a neighbor and his family to great and continuous annoyance so that their rest is broken, their sleep interrupted, and they are seriously disturbed in the reasonable enjoyment of their home, constitute a nuisance which equity will enjoin.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37. Nuisance, § 23.]

2. SAME—ABATEMENT—JURISDICTION OF EQUITY.

The jurisdiction of equity to abate by injunction a private nuisance resulting from the barking and howling of dogs, is not taken away by a town ordinance claimed to afford a remedy for whatever inconvenience may have been caused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 49.]

Appeal from Circuit Court, Rockingham County.

Bill for injunction by one Wilton against George Herring. From a decree granting the injunction, defendant appeals. Affirmed.

J. B. Stephenson and H. W. Bertram, for appellant. Sipe & Harris, for appellee.

KEITH, P. Wilton, the appellee in this court, filed a bill in the circuit court of Rockingham county, in which he states that he is a resident of the town of Harrisonburg, and that contiguous to him is the property occupied by George Herring; that for three years past Herring has maintained on the lot on which he resides a kennel, about 100 or 125 feet distant from Wilton's residence, in which he is breeding dogs for sale, having at times as many as seven or eight, and rarely so few as two or three; that the dogs keep up an incessant barking, especially during the night, by which the complainant and his family are so annoyed and disturbed as to be prevented from obtaining such sleep and rest as health requires; that, by reason of the repetition of this nuisance, he has become extremely nervous, at times almost unfit to attend to business; that the health of his family is being seriously and permanently impaired, and they are being deprived of the use and enjoyment of their home; that he has complained to Herring, but is unable to obtain from him any permanent relief; and that complainant, impelled by the desire to avoid litigation between himself and a neighbor, has borne with the situation until he can no longer endure it without serious and permanent injury to the health of himself and his family. He further avers that Herring is without visible means to respond in damages to an action at law, and charges that any judgment against him commensurate with the damage sustained will be wholly unavailing. He prays that Herring, his agents, etc., may be enjoined from keeping upon his premises dogs causing the injurious noises and disturbances complained of; that the nuisance of the kennel may be discontinued and abated; and for general relief.

A temporary injunction was granted in accordance with the prayer of the bill, and at a subsequent day the defendant answered the bill, admitting that for a number of years he has been keeping a few dogs for his own pleasure, and for the profits derived from their sale, but denying that they have been creating a nuisance to the plaintiff and his family or that the dogs kept by him could have been a nuisance to any one in a normal

condition of health and nerves. He denies that he has kept the number of dogs with which he is charged in the bill, and states in detail the number kept by him at various times. He denies that he is unable to respond in damages for any nuisance he may have occasioned; and finally claims that the plaintiff's annoyance is due to his nervous temperament, and asserts that neither the plaintiff nor any member of his family has ever been made ill or prevented from attending to business.

Upon these issues evidence was taken, and the case coming on to be heard, the circuit court perpetuated the temporary injunction; and Herring obtained an appeal from one of the judges of this court.

We think the weight of evidence establishes that plaintiff and his family were subjected to great and continuous annoyance and discomfort by the howling and barking of the dogs and the whining of puppies upon the premises of appellant; that their rest has been broken, their sleep interrupted; and that they have been seriously disturbed in the reasonable use and enjoyment of their home.

In *Dittman & Berger v. Repp*, 50 Md. 516, 33 Am. Rep. 325, Judge Alvey, delivering the opinion of the court, says: "In all such cases, the question is whether the nuisance complained of will or does produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant."

In *Spelling on Injunctions*, § 431, it is said that "noises which tend to disturb rest and quiet in the neighborhood may be restrained." * * * To warrant an injunction against a noise as a nuisance it must be shown that the noise is such as to produce actual physical discomfort to a person of ordinary sensibilities, and is unreasonably and unnecessarily made."

In *Brill v. Flagler*, 23 Wend. (N. Y.) 357, a case in which Flagler sued Brill for killing his dog, and the defendant pleaded that the dog was accustomed to come upon the premises of the defendant in the nighttime as well as in the daytime, and, by his barking and howling, annoy and disturb the defendant and his family, speaking of this plea the court said: "I am of opinion that the facts which the plea sets up constitute a bar to the action. The demurrer admits that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and willfully neglected to confine him, and that defendants, unable to remove the nuisance in

any other way, killed him. No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and, upon general principles, justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action. It is far too dilatory and impotent for the exigency of the case. Whatsoever unlawfully annoys, or does damage to another, is a nuisance, and may be abated by the party aggrieved, so as he commits no riot in the doing of it."

That case, it is true, was an action at law, but it states clearly and forcibly the annoyance and inconvenience arising from the barking and howling of dogs, that they constitute a nuisance, and in that case excused what would otherwise have been a trespass. It declares that the remedy by action at law would be a mockery, and far too dilatory and impotent for the exigency of the case, thus presenting a case for the interposition of a court of equity. It is true, also, that in that case the dog came upon the premises of the man who shot him. It was, therefore, somewhat in the nature of a trespass, while a nuisance generally results from the commission of an act beyond the limits of the property affected. High on Injunctions (2d Ed.) § 739. Especially is this true of noises, and many other illustrations might be added. Dogs in a neighbor's yard may effectually murder sleep, and destroy the reasonable enjoyment of a home.

It is urged on the part of plaintiff in error that an ordinance of the town of Harrisonburg afforded an easy and expeditious remedy for whatever inconvenience appellee may have suffered.

In *Kelly v. Lehigh M. & M. Co.*, 98 Va. 406, 36 S. E. 511, 81 Am. St. Rep. 736, this court said: "Where courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject, does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law, unless the statute conferring such jurisdiction uses prohibitory or restrictive words." And this was reiterated in *Steinman v. Vicars*, 99 Va. 595, 39 S. E. 227, where it was said: "Where courts of equity have once acquired jurisdiction, they do not lose such jurisdiction merely because courts of law have been subsequently authorized to administer the same or similar relief." Spelling on Injunctions, ss. 398-399.

We are of opinion that a court of equity has jurisdiction in such matters, and that in this case it has been properly exercised.

The decree of the circuit court is affirmed.

BUCHANAN, J., absent.

DUKE et al. v. NORFOLK & W. RY. CO.
(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. SALES — CONSTRUCTION OF CONTRACT — TIME FOR DELIVERY.

Where a contract for the sale and delivery of cross-ties to a railroad company fixes no time for their delivery, the contract must be performed within a reasonable time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 218.]

2. SAME—REMEDIES OF SELLER—ACTION FOR BREACH OF CONTRACT—INSTRUCTIONS.

In an action for breach of contract for the sale of cross-ties to a railroad company, which fixed no time for delivery, it was proper to instruct that the jury, in determining what constitutes a reasonable time, may consider the declarations of the parties, whether oral or written, and whether previous to the contract or not, and the conduct of the parties subsequent to the contract, attaching such weight to the evidence as they may determine.

3. SAME.

Where a contract for the sale of cross-ties to a railroad company fixed no time for their delivery, and the railroad notified the seller that it would not receive the ties after a certain date, the seller was entitled to recover damages for breach of the contract only in case the date fixed did not permit a reasonable time for performance of the contract.

4. SAME—MEASURE OF DAMAGES.

Where a contract for the sale of cross-ties to a railroad is broken by the railroad, the seller is entitled to recover not merely the difference between the contract price and the market price, but the difference between the contract price and the cost of making and delivering the ties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1098-1107.]

5. JURY — SELECTION OF PANEL — STATUTORY PROVISION.

Under Va. Code 1904, § 8158, providing with respect to a special jury that from those summoned by the court, a panel of 20 qualified jurors shall be made, from which 16 shall be chosen by lot, it was proper to draw out 4 by lot and excuse them from service.

Appeal from Circuit Court, Warren County.

Action by W. A. Duke and another against the Norfolk & Western Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed and remanded.

E. H. Jackson, O'Flaherty & Fulton, and E. Hilton Jackson, for appellants. Downing & Weaver and Marshall McCormick, for appellee.

KEITH, P. Plaintiffs in error, Duke and Rudacille, who were partners engaged in the business of making and furnishing cross-ties to the railway company, gave notice of motion for judgment against the Norfolk & Western Railway Company in the circuit court of Warren county upon a contract contained in a letter to them, written by E. T. Burnett, the purchasing agent of the railway company, set out in their notice, as follows:

"Roanoke, Va., April 11th, 1903.

"Mr. W. A. Duke, Mr. W. E. Rudacille, Front Royal, Va.—Gentlemen: Referring to the visit of Mr. W. A. Duke to my office a

few days ago, I would advise you we are now in a position to confirm the arrangements made at that time—that is, that you are to deliver to our company the ten thousand cross-ties which you have under contract and are about to make in the neighborhood of Cedarville, Front Royal, and Riverton—and, also, you are to purchase the ties of Mr. C. H. Simpson, who delivers at Limestone; and, further, that you will agree to furnish our company in excess of above figures, about twenty thousand cross-ties which are to be delivered to the line of our road between Limestone and Charlestown.

"I would further advise you we will ask our general manager, Mr. Johnson, for passes in your favor between the above points.

"The prices we agree to pay for these ties will be 50c. for first class and 35c. for second class. It is understood that no intimation is to be given by either of you who are parties to this contract as to the prices that are being paid for these ties, except to parties duly authorized to accept same.

"Please sign inclosed copy of letters signifying your acceptance of the above contract and return to me and oblige,

"Yours truly,

[Signed]

E. T. Burnet,

"Purchasing Agent."

It appears from this letter that plaintiffs in error were to deliver to the railway company 30,000 ties, in addition to those which were to be purchased by them from C. H. Simpson. After they had delivered a considerable number of the ties the purchasing agent, Burnet, on the 28th of November, 1903, addressed to plaintiffs in error the following letter: "Referring to our arrangements made last summer, whereby we gave you an increased price for cross-ties, I would advise you that after December 31st, 1903, this arrangement will be made void, and we can only accept cross-ties at our advertised prices.

Plaintiffs claim in their notice that they were entitled to be paid, not only for the ties actually delivered, but that by reason of the refusal of the defendant company to keep and perform its contract they were entitled to recover a large sum by way of damages; and they filed a bill of particulars with the notice in which they claimed that the defendant was indebted to the plaintiffs in the sum of \$727.53 for ties accepted and not paid for, and in the sum of \$6,593.40 for damages for failure to receive and accept ties under the contract of April 11, 1903, which were not delivered because of the refusal of defendant to receive them.

Upon this notice issues were joined, and a verdict was rendered for the plaintiffs for the sum of \$737.93, for ties delivered, and \$105, damages for breach of contract. The plaintiffs in error asked the court to set aside this verdict as contrary to the law and the evidence, because of error committed during

the progress of the trial and in the instructions given by the court; but the court overruled the motion and entered judgment upon the verdict, to which a writ of error was awarded by this court.

It will be observed that the contract set out in the notice fixes no time for the delivery of the cross-ties, and in such a case it is plain that the contract is to be performed within a reasonable time; and it is well settled that it is for the jury to say what is a reasonable time, under all the circumstances of the case, under proper instructions from the court.

In this case the jury were correctly told that it was left to them to determine what constitutes a reasonable time, from all the evidence; that to this end they may consider the declaration of the parties plaintiff or of the agents of the party defendant, whether oral or written, whether previous to the contract or subsequent thereto, as well as the conduct of the parties subsequent to the contract, attaching such weight to such evidence as they may determine. They were further told that the burden of proof was upon the plaintiffs to show that they had performed their contract in whole or in part, and that they were excused from the performance of the contract, so far as they had not performed it, by the wrongful act of the defendant; that after receipt of the letter of November 28, 1903, the plaintiffs were excused from any further performance of the contract after December 31, 1903, unless that letter was afterwards modified or changed by the defendant; and that the burden of proof was upon the plaintiffs to show that the time limit fixed by the letter of November 28, 1903, to wit, December 31, 1903, was not a reasonable time within which to perform the contract sued on.

The controlling question in this case arises, first, upon the admissibility of testimony; and, again, upon the instructions. We can sufficiently present our views of the law in the consideration of instruction No. 6 given by the court, which is as follows:

"As to the law applicable to the claim for damages for a failure on the part of the defendant to carry out the contract on its part, where no ties have been tendered by plaintiffs, the court tells the jury that the liability of the defendant depends upon whether the limit prescribed by the defendant within which it would receive ties was a reasonable one. If the said limit of December 31, 1903, was not a reasonable one, then the plaintiffs are entitled to recover damages, the measure of which is fixed by the difference between the contract price and the market price as of January 1, 1904, at the points of delivery specified in the contract, and by the number of ties of either class, not exceeding the number set out in plaintiffs' bill of particulars of each class capable of being delivered by plaintiffs within a reasonable time."

We have seen that this instruction, so far as it touches upon the question of what constitutes a reasonable time, is free from objection; but we are of opinion that it is erroneous with respect to the measure of damages which the plaintiffs in error would be entitled to recover if the jury were of opinion that the time limit fixed by the defendant in error in the letter of November 28, 1903, was not a reasonable one. In a case such as this, the plaintiffs are not held down to the difference between the contract price and the market price, but are entitled to recover the difference between the contract price and the cost of making and delivering the ties.

The general principle is thus stated in *Hadley v. Bazendale*, 9 Ex. 353: "Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect to said contract should be such as may be fairly and reasonably considered, either as arising naturally—that is, according to the usual course of things—from such breach of contract, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it."

And the same principle is announced in *Griffin v. Colver*, 16 N. Y. 494, 69 Am. Dec. 718, in which it is said: "The broad general rule is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract—that is, must be such as may naturally be expected to follow its violation—and they must be certain, both in their nature and in respect to the cause from which they proceed."

So, in the case of *Structural Steel Car Company, American Bankruptcy Rep.* vol. 13, p. 373, it is held: "The measure of damages in a case like this is the value of the bargain to the complaining party or the loss which the fulfillment of the contract would have prevented, or which the breach of it has entailed. * * * The general intent of the law is to put the injured party, so far as can be done by money, in the same position as if the contract had been performed. Ordinarily the measure of damages in such a contract is the difference between the price contracted to be paid and the cost of manufacture and delivery."

In this case the contract upon the part of the plaintiffs involved, certainly as to a part of the subject, the process of manufacture. The plaintiffs were to convert the standing timber which they owned or might purchase into ties, which they were to deliver to the defendant at stipulated prices. The contract did not exclusively contemplate their purchase of lumber already converted into ties and the sale of the ties to

the railway company, but includes those which they were to "make," which involves a change from standing timber into ties to be delivered at designated points upon the railroad.

In *Black River Lumber Co. v. Warner*, 93 Mo. 374, 6 S. W. 210, it is said that "breach of a contract between a lumber manufacturer and another, whereby the former was to manufacture and deliver a designated quantity of lumber for a specified price, by the act of the purchaser in refusing to receive the lumber, warrants a recovery upon the part of the manufacturer, as to the lumber sawed, but not delivered, and the lumber not sawed, because of the breach of the contract, of the profits which would have accrued to him but for the refusal of the other party to go on with the contract, which would be the difference between the contract price and the cost of manufacturing, including the cost of delivery at a place where it could be sold."

In *Hale v. Trout*, 35 Cal. 230, it is said: "One who contracts with another to manufacture for him a given quantity of lumber by a given time for a specified price, payable at the end of each month, which contract is broken by the latter by refusal to pay for lumber manufactured and received, and refusal to receive any more lumber, and a declaration that the contract is at an end, is entitled to recover the difference between the cost of manufacturing the lumber and the contract price."

In *Chapman v. Kansas City, etc., Co.*, 146 Mo. 481, 48 S. W. 646, it is said: "Breach by a railroad company of a contract by which a contractor was to furnish it with a large quantity of ties, giving the exclusive right to furnish it with ties for a designated period, by abandoning the contract and preventing its performance, authorizes a recovery by the contractor of the difference between the contract price and the cost of getting out and delivering the ties on the railroad right of way according to the contract."

In *Cameron v. White*, 74 Wis. 425, 43 N. Y. 155, 5 L. R. A. 493, the second syllabus of the case is as follows: "Plaintiffs, having contracted to sell and deliver sawed lumber to the defendant, purchased the logs from which such lumber was to be sawed, but before any of it had been sawed the defendant notified them that he would not fulfill the contract. Held, that the measure of damages was the profits which the plaintiffs would have made on the contract, and not the difference between the contract price and the price for which they afterwards sold the lumber." The court says in the course of its opinion "that the profit which the plaintiffs could have made on the contract, if they had been permitted to perform the same, is the correct rule of damages, and the one most in accordance with equity."

In conclusion, we are of opinion that the contract sued on was to be performed within a reasonable time; that the instructions to the jury as to their duty in ascertaining

what was a reasonable time were correct; that, if the jury should find upon the evidence that the time fixed in the letter of the purchasing agent of November, 1908, was a reasonable time, the plaintiffs would not be entitled to recover, except for ties actually delivered in accordance with the contract; that, if the jury should be of opinion that under all the circumstances the time fixed was not a reasonable one, the plaintiffs would be entitled to recover damages for the breach of the contract; and that the measure of damages would be the difference between the contract price and the cost of making and delivering the ties of each class capable of being delivered by plaintiffs within a reasonable time. The principle thus established would involve the admission of testimony excluded by the court upon the former trial upon the theory that plaintiffs were to be limited in their recovery to the difference between the contract price and the market price, as set out in the court's instruction No. 6, and what we have said will, we apprehend, sufficiently indicate our views of the law upon the assignments of error with respect to the exclusion of testimony without a particular discussion of that subject.

The first error assigned, as to the mode of selecting the special jury, is without merit.

Section 3158, Va. Code 1904, provides, with respect to a special jury, that "the court shall order such persons to be summoned, as it shall designate for the purpose, and from those summoned a panel of twenty qualified jurors, free from just cause of exception, shall be made, from which sixteen shall be chosen by lot."

In this case 4 jurors were drawn out by lot and excused from service on the jury. The contention of plaintiffs in error is that 16 should have been drawn by lot and the remaining 4 should have been discharged. Whether the 16 were drawn from the 20 by lot, leaving the 4 in the box to be discharged, or the 4 were drawn from the 20, leaving the 16 in the box from which 12 were to be selected by plaintiff and defendant alternately striking off 1 until 12 remained, is immaterial, as in either case the jury is selected by lot and the letter and the spirit of the statute obeyed.

We are of opinion that the judgment of the circuit court should be reversed, the verdict set aside, and the cause remanded for a trial, to be had in accordance with the views herein expressed.

STONEGA COKE & COAL CO. v. LOUISVILLE & N. R. CO.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

CONTRACTS — CONTINUANCE — CERTAINTY — TERMINATION.

Plaintiff's assignor, being the owner of extensive coal lands some 12 miles from defendant's railroad, defendant, to induce the development of the land, agreed that if plaintiff's as-

signor would develop the land, and would build and maintain a connecting line between its plant and a station on defendant's road, and give defendant running rights over the same, defendant would transport coal and coke destined to points on its main line and empties over such connecting line free of charge. *Held* that, in the absence of a provision in the contract as to the time it was to run, it was unenforceable and subject to termination by the railroad company at its election.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 996.]

Error to Circuit Court, Wise County.

Action by Stonega Coke & Coal Company against Louisville & Nashville Railroad Company. From a judgment in favor of defendant, plaintiff brings error. *Affirmed*.

R. T. Irvine, Bullitt & Kelly, and B. A. Ayers, for plaintiff in error. Helm Bruce, E. M. Fulton, and C. T. Duncan, for defendant in error.

BUCHANAN, J. This is an action of assumpsit, based upon a contract between the Virginia Coal & Iron Company (of which the plaintiff, the Stonega Coke & Coal Company, is the assignee) and the defendant, the Louisville & Nashville Railroad Company.

The case made by the last-amended declaration, briefly stated, is that the Virginia Coal & Iron Company was the owner of very large and valuable coal mining lands in Wise county, which extended from Big Stone Gap to Norton, a distance of about 12 miles; that the Louisville & Nashville Railroad Company had extended its line of road through the said property with the hope and expectation of transporting coal and coke which it expected would be mined and manufactured on the land; that the Virginia Coal & Iron Company had purchased the property, which was wholly undeveloped, as an investment, and was entirely indifferent about commencing its speedy development; that after the railroad company had built its road it frequently importuned the coal and iron company to commence the development of its property and made divers propositions as to freight rates, etc., which it would give in case the coal and iron company did speedily develop its property; the result of which was that in the spring of 1895 the railroad company and the coal and iron company entered into a contract (whether in writing or not does not appear) which is set out in the declaration as follows: " * * * whereby the said defendant company agreed that if the said Virginia Company would commence the development of the said property by opening coal mines and building coking plants thereon (and would continue to mine coal thereon and manufacture coke therefrom, either directly or by and through its lessees or assignees, and would build and maintain, or cause to be built and maintained a connecting line, or lines, of railroad up Callahan creek from the yards of the said defendant company on its main line at Appalachia, to such mines and coking plants, and would

give or cause to be given to the defendant running rights over the same, free of charge to the defendant), it, the said defendant company, would transport free of charge to the said Virginia Company, and to any of its assignees or lessees, all such empty cars as might be needed for shipment of coal or coke from such mines or ovens over its said road or any part thereof, from its main line of railroad, to wit, its Cumberland Valley division, to any and all coal mines, and to any and all coke ovens which might be erected or constructed upon the said property on Callahan creek and the waters thereof, and would likewise transport the loaded cars of coal and coke destined to points on and over its said main line, free of charge to the said Virginia Company, and free of charge to any and all assignees or lessees of the said Virginia Company, from any and all such coal mines and coking plants which might be erected upon the said property on Callahan creek or its waters back to the main line at Appalachia."

The declaration further avers that acting upon the said agreement, the coal and iron company did, on its lands on the waters of Callahan creek which do not exceed (10,000 acres), open coal mines, erect coke ovens and build a connecting line of road from the same to the railroad company's main line at Appalachia, a distance of about four miles; that the coal and iron company afterwards, in the year 1902, built a branch line to another coking plant also located on the waters of Callahan creek; that from the time the said agreement was made, in the year 1895, until May 1, 1902, coal was mined and coke manufactured which was hauled free of charge by the railroad company to its main line from the coal mines and coking plants of the coal and iron company, as provided for by the said agreement; that in May, 1902, the coal and iron company leased to the plaintiff, the Stonega Coke & Coal Company, the properties on which the said mines and coking plants were located and assigned to it all the rights which the coal and iron company had under its contract with the railroad company; that on December 6, 1902, the railroad company notified the plaintiff that on and after February 15, 1903, it would cease to furnish empty cars or haul loaded cars between the plaintiff's mines and coking plants to Appalachia free of charge; and that after the last-named date the railroad company failed and refused to keep and perform its part of said contract.

To recover damages for this alleged breach of the contract, this action was instituted. The circuit court sustained a demurrer to the said amended declaration, and rendered a final judgment in favor of the railroad company. From that judgment this writ of error was awarded.

The first question to be considered is whether, under the contract between the parties, the defendant had the right to termi-

nate the arrangement into which they had entered, upon reasonable notice. If it had, there can be no recovery in this case, and the demurrer was properly sustained.

The contract sued on was one for the rendition of services on the part of the railroad company. There is nothing said in the agreement as to the time during which it should continue. Does it, when considered in connection with the circumstances under which it was made, furnish the means of determining its duration? This is essential, because when a contract calls for the rendition of services, if it is so far incomplete as that the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so. This is the statement of the general rule, as made by the court in *Miss. Riv. Logging Co. v. Robson*, 89 Fed. 773, 779, 16 C. C. A. 400, one of the cases chiefly relied on by the plaintiff to sustain its contention, and is sustained by the authorities.

While the court, in construing a contract, may take into view the circumstances under which it was made, yet, when a breach of it is averred, its language must determine to what the parties to it have bound themselves. Courts are not authorized to make contracts for them or to add any stipulation which they have not seen proper to insert. What is there in the contract, viewed in the light of the circumstances surrounding its execution, which will show its duration? Was it to continue for any definite number of years, or as long as the coal and iron company or its lessees saw proper to mine coal and manufacture coke, or until all the coal on the 10,000 acres had been mined and hauled away, or for any other definite period? The question is not what would have been a reasonable contract, nor what it may be supposed or conjectured the contracting parties contemplated or anticipated when the contract was entered into; but what did they agree to as evidenced by their contract. It may be that the coal and iron company, when it entered into the arrangement, expected it to last as long as it or its assignees saw proper to mine coal and manufacture coke, or until the coal upon the lands on Callahan creek was exhausted; but if it did, it failed to give that expectation the sanction or binding force of a contract. The parties to the contract seem to have left out of consideration its duration, or at least failed to make it the subject of contract obligation.

If it were admitted, as was said by Judge Strong, in *Coffin v. Landis*, 46 Pa. 426, 432: "That neither of the parties contemplated a severance of the relation formed by the contract, at the will of the other party, it does not follow that we are at liberty to treat the agreement as containing a covenant against it. That would be to make an expectation of results equivalent to a binding engagement that they should follow." That

was a case where one as agent of another contracted to sell lands of the latter in consideration of one-half the net proceeds of the sales, and there was no stipulation in the contract as to its duration. It was held that the principal had the right to terminate it at will.

A case more directly in point, and which is sustained by the weight of authority in this country, is that of *Jones v. Newport News & Miss. Valley Co.*, 65 Fed. 786, 18 C. C. A. 95, decided by the United States Circuit Court of Appeals for the Sixth Circuit. That was a case in which a railroad company had entered into a contract with one owning land adjacent to its track, that if he would build a coal tippie and a trestle therefrom to its track, it would construct a switch thereon and thereafter deliver coal to him there. In that case the plaintiff's contention was that, as nothing was said in the agreement as to the time during which the switch should be maintained, the implication was it was to be maintained at all times; i. e., forever. But the court, Judge Taft delivering the opinion, held that there was no such implication, and affirmed the judgment of the trial court, sustaining the demurrer to the declaration.

In the case of *Barney v. Indiana Ry. Co.* (Ind. Sup.) 61 N. E. 194, a like conclusion was reached. Barney was the owner of a race track, which cost him a large sum of money. He made an agreement with the Indiana Electric Railway Company, which operated a street railway in the city near his track, by which Barney was to purchase sufficient steel rails to extend the railway company's lines out to his track, he donating \$500 of the price of the rails, and to be paid back the remainder of the price out of the daily receipts of the railway company. He furnished the rails and paid his \$500 toward the price thereof. The company laid its track out to the race course, and it and its successors operated the road for several years, when the railway company took up its rails and destroyed its track. Barney claimed that the removal of the track was a breach of the contract. The court held that it was not, and in discussing that question said: "If the company was willing to operate the road mentioned for any definite period, and appellant so desired, such a clause should have been incorporated in the contract. As the contract does not fix any definite time during which the company should operate the road, the right to determine that question, so far as the appellant is concerned, remained with the company."

Baldwin v. Kansas City, etc., Ry. Co., 111 Ala. 515, 20 South. 349, was an action against a railroad company in which the plaintiff claimed damages because the defendant having contracted to put in a switch and side track at a sand pit owned by the plaintiff, and to haul sand from such pit at a certain price per car load, after putting in the

switch and side track as agreed upon, and hauling the sand at the stipulated rate for a long time, ignored the contract, put up the freight rate, and afterwards tore up the switch and side track. The court sustained a demurrer to plaintiff's complaint on the ground that the contract was not enforceable because of its uncertainty and of its being determinable at the will of either party.

See the following cases, where the principle controlling the courts in the cases cited above is recognized: *Willcox, etc., Co. v. Ewing*, 141 U. S. 627, 12 Sup. Ct. 94, 35 L. Ed. 882; *Marble v. Standard Oil Co.*, 169 Mass. 553, 48 N. E. 783; *Bates Machine Co. v. Bates (Ill.)* 61 N. E. 518; *Irish v. Dean*, 39 Wis. 562; *Kenderdine, etc., Co. v. Plumb*, 182 Pa. 463, 38 Atl. 480; *Phila., etc., R. Co. v. River Front R. Co.*, 168 Pa. 357, 31 Atl. 1098; *Christenson v. Borax Co.*, 26 Or. 302, 38 Pac. 127; *Lambre v. Sloss Iron & Steel Co.*, 118 Ala. 427, 24 South. 108; *Mercantile Trust Co. v. Columbus, etc., R. Co. (C. C.)* 90 Fed. 148.

The cases chiefly relied on by the plaintiff to sustain its contention on the question under consideration are *Miss. Riv. Logging Co. v. Robson*, supra, and *Great Northern Ry. Co. v. Manchester, etc., Ry. Co.*, 5 De Gex & McNaghten & Gordon, 138; 7 Eng. & Irish App. 550. The former of these cases, so far as it sustains the plaintiff's contention, is in conflict with the weight of authority in this country, and besides was based largely upon the fact that the contract in that case was a settlement of past differences between the parties, and if the contract, the court said, could be terminated at pleasure by either party, it might prove a very inadequate consideration for the settlement of claims growing out of past transactions which had been surrendered and discharged when the contract was entered into.

The case of the *Great Northern, etc., Ry. Co. v. Manchester, etc., Ry. Co.*, in which the decree of the lower court was affirmed by the House of Lords, does not, as it seems to us, sustain the plaintiff's contention. The agreement in that case, which it was held was permanent, and not determinable by either party upon notice, was a contract between two railway companies, by which it was provided that one of them should have running powers over the lines of the other, subject to certain regulations. The chief consideration for the agreement was an advance of money by the company acquiring the running powers. The grounds upon which the House of Lords based its decision were that while there was no express contract as to its duration, all the provisions of the agreement showed that it was a permanent, and not a terminable, agreement; that the running powers acquired by it might have been obtained through the Board of Trade under the English railway act without the consent of the other company, which powers when obtained would have been continuing

and could not have been terminated; and that the agreement in no way resembled contracts of partnership or of hiring and service.

We are of opinion that there is no error in the judgment complained of, and that it must be affirmed.

NORFOLK & W. RY. CO. v. McDONALD'S ADM'X.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. MASTER AND SERVANT—DEATH OF SERVANT—NEGLIGENCE OF MASTER.

Where an employé of a railroad, engaged in removing rails from a car by means of a rope and hooks attached to the rails of a track and a rail on the car, was struck and killed by the hook attached to the rail of the track because of its straightening out and flying up when the rail on the car was caught, the accident happening so quickly that the time could not be estimated even in seconds, this did not show the railroad guilty of negligence, conceding that the engine was out of order, that the fireman who handled it was incompetent to discharge the duties of an engineer, and that there was an insufficient number of employés engaged in unloading the rails.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 935.]

2. SAME—EVIDENCE—BURDEN OF PROOF.

In an action for causing the death of an employé of a railroad, the burden is on the plaintiff to show negligence of the railroad.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 895.]

Error to Circuit Court, Clarke County.

Action by the administratrix of Alexander McDonald against the Norfolk & Western Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

O'Flaherty & Fulton and Robert F. Leedy, for plaintiff in error. Joseph I. Doran and Marshall McCormick, for defendant in error.

CARDWELL, J. This action was brought by the administratrix of Alexander McDonald to recover from the Norfolk & Western Railway Company damages for the alleged negligent killing of plaintiff's intestate. McDonald was a conductor in the employ of the defendant company, and had absolute and complete charge of a construction train, which was unloading, at the time of the injuries of which he died, 85-pound steel rails. The rails were loaded in a stock car, and had been shipped from the factory in that car, and had to be gotten out, and the question was how to get them out most conveniently and safely. The defendant company had adopted the preceding year the method of unloading these rails by means of a rope about 50 feet long with an iron or steel hook to each end. One hook was placed under the rail of the track, and the other was fastened in a bolt hole in the rail on the car. The train at the time consisted only of the engine and two stock cars, attached to

the front of the engine; the engine in propelling the cars along the line of railway moving backwards. In unloading the rails, McDonald had the direction of the work to be done and the movement of the engine and cars backward and forward, and this, under the rules of the company, was his whole duty. When the rope was placed, as stated, with the hook on one end under the rail on the track and the other fastened in a bolt-hole in the rail on the car which at the moment was to be pulled out of the rear end of the car and thrown on the ground, the man who had placed the hook under the rail of the track, just as the engine had been signaled forward, discovering that it was straightening, cried out to McDonald "Whoa"; thereupon McDonald, who had himself placed the hook in the end of the rail in the car, and had stepped back from the car some eight or ten feet, holding on to the rope with his right hand, signaled with his left hand to the man in charge of the engine to stop, and the engine was stopped, but before this was accomplished the hook under the rail pulled out and flying back in the direction of the car struck McDonald on the back of his head, inflicting an injury from which he died in a few moments.

The essential grievances stated in the declaration are that the defendant company failed to provide suitable and safe appliances to be used in the work required to be done on the occasion of this accident; that a sufficient number of competent employés to do this work were wanting; and that the method adopted by the defendant company for unloading the rails from the car was an unsafe method.

The jury found a verdict for the plaintiff, and assessed the damages at \$5,000, and thereupon the defendant company moved for a new trial upon the ground that the verdict was contrary to the law and the evidence, and for other reasons; but the court overruled the motion, and gave judgment for the plaintiff, to which action of the court the defendant company duly excepted, and the case is now before us for review upon a writ of error awarded the defendant company.

We are of opinion that in no aspect of the case, under the evidence adduced, was the plaintiff entitled to recover, and in this view it is unnecessary to consider any other assignment of error than the refusal of the court to set aside the verdict as contrary to the law and the evidence.

As we review the evidence it will clearly appear, we think, that if it were conceded that the engine in use at the time was out of order, its air brakes not working; that the fireman, who, at the time, was handling the engine, the engineer having necessarily to step aside, was incompetent to discharge the duties of an engineer; and that the defendant company did not have engaged in the work of unloading these rails a sufficient

number of competent employes to do such work, there is not the slightest foundation for the contention that the unfortunate occurrence in which McDonald lost his life was brought about from either of those causes. Nor is it necessary to determine whether or not McDonald was, at the time of his injury, at work in the line of his duties.

As stated in the outset, the rails being unloaded at the time were in a stock car, and had been shipped from the factory in that car, and a witness for the plaintiff, Waters, who was in the best position from which to have observed just what happened on the occasion when McDonald lost his life, after stating that the work of unloading the rails was simple, requiring no great art in the doing of it, that the rope and the hooks used were of sufficient strength and that the doing of this work could be learned in a few minutes, because it simply consisted of placing one hook in one place and another hook in another place, and when that was accomplished the work was over and the employe got out of the path of danger, if there was any, describes the occurrence as follows: "Mr. McDonald was carrying the front end of the rope, and hooking under the rail under the car, and was carrying the hind end of it, and put it under the rail under the track, and I always held my feet against the hook until the rail started out of the car always, to keep it from sliding out or anything, and I had my feet against the hook, and I felt it give under my feet, and I looked down and saw it was straightening out, and I looked at the car and saw that the rail wan't coming out, and I hollered 'Whoa,' and Mr. McDonald gave the signal to the engineer to shut off, you know, and I felt the hook still giving under my feet, and I just took my eyes off and stepped off down on the ballast over the rail behind me, and when I looked up Mr. McDonald was going down the bank." This witness further states that the whole thing was done so quickly that he could not calculate it even in seconds, and that the rope and hooks at either end were of sufficient strength to do the work in which they were engaged. It further appears that the whole trouble grew out of the end of the rail catching on one of the stanchions or upright pieces of the car. It was the end of the rail in which McDonald had placed the hook, and if there was danger of the rail so hanging no one could have known it better than McDonald himself. When he was notified by Waters that something was wrong, he immediately signaled the man on the engine to stop, and this man (Koontz), who was examined as a witness, states that he did stop the engine, and upon cross-examination, though reluctantly, says that he stopped it immediately, his whole testimony being to the effect that it was stopped as soon, as instantaneously, as it could have been stopped if it had been

in charge of the most experienced engineer, and equipped with the most improved appliances. But, be that as it may, we have this situation: When Waters, at the end of the rope, where he hooked it under the rail, discovered that the rail on the car was not coming out, that the rope had been stretched to its fullest capacity, and the hook under the rail straightening, he at once notified McDonald of the danger, and in a space of time which he could not count in seconds the injury to McDonald had been inflicted, and he had fallen over the bank where he expired immediately. It was done, says the witness, in the twinkling of an eye. There was no danger whatever in the situation, no neglect whatever of any duty which the defendant company owed to McDonald, until the man at the end of the rope hooked under the rail found the hook straightening out. The rope was then tight and straining upon the hook, and it was impossible for the man at the hook to signal McDonald, McDonald to transmit the signal to the engineer, and the engineman to stop the engine in time to prevent the accident. If the engine had been of the most improved type and equipped with the most improved appliances, it was a matter of physical impossibility for the accident under the circumstances, brought about in an instant of time, to have been avoided.

This is the case made in the record, by the uncontradicted evidence, and considered under the rule governing its consideration by this court.

The burden is upon the plaintiff to make out her case, which is in the first instance to establish the negligence of the defendant company, by affirmative evidence, which must show more than a mere probability of a negligent act. It is true that the proof need not be direct and positive by some one who witnesses the occurrence and saw how it happened, but it must be such as to satisfy reasonable and well-balanced minds that it resulted from the negligence of the defendant. *Consumers' Brewing Co. v. Doyle*, 102 Va. 399, and 48 S. E. 390, and authorities cited. There being nothing in the situation to suggest danger to any one until the moment when McDonald received his injury, it was an utter impossibility for the defendant company to have foreseen the danger, and guarded against it. If the accident had been anticipated, it could have been easily avoided, and by no one more easily than McDonald himself. If he, at the point where the danger originated, failed to foresee it in time to guard against it, it was impossible, as it seems to us, that the defendant company could have anticipated the danger and guarded against it. It has been repeatedly said by this court, with the sanction of innumerable cases decided by other courts, that it would violate every principle of justice or law, if a defendant, in an action to recover damages

for injuries by an employer to his employé, were compelled to foresee and provide against that which reasonable and prudent men would not expect to happen.

It was a matter of pure speculation or conjecture, according to plaintiff's own evidence in this case, as to what the defendant company could or should have done to avoid the condition of things which arose in a moment of time, and which resulted in the injury to McDonald. The evidence fails utterly to point out any negligence on the defendant company's part which could be fairly considered as the proximate cause of this injury.

As said by this court in *N. & W. Ry. Co. v. Cromer*, 101 Va. 671, 44 S. E. 899: "The existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries, based upon no sure grounds of inference."

The evidence proves no more than that the occurrence, resulting in the injury and death of McDonald, was an accident pure and simple, for which the defendant company could not, either in law or justice, be held responsible.

We are therefore of opinion that the lower court erred in overruling the motion of the defendant company to set aside the verdict, and its judgment must be reversed, and the case remanded for a new trial.

BUCHANAN, J., absent.

LANE BROS. CO. v. SEAKFORD.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. PLEADING — DECLARATION — REQUISITES IN GENERAL.

A declaration must state the facts relied on as constituting the cause of action with sufficient certainty to be understood by defendant, the jury and the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 105.]

2. MASTER AND SERVANT — INJURY TO SERVANT — DECLARATION — SUFFICIENCY.

A declaration, in an action for personal injury, which alleges the relation of master and servant between plaintiff and defendant, and that plaintiff was operating a hoisting engine in defendant's work, which states the duty of defendant to exercise ordinary care to furnish and maintain for plaintiff a reasonably safe place for doing the work, and which avers that unskilled servants of defendant placed dynamite near where plaintiff was working and that the dynamite caught fire, exploded and injured plaintiff in a manner described, sufficiently states a cause of action.

3. SAME — DUTY OF MASTER — REASONABLE CARE — INSTRUCTIONS.

An instruction in an action against an employer for injuries received by an employé that it was the duty of the employer to "use ordinary and all reasonable care" to furnish and maintain a reasonably safe place for the employé in which to work, etc., and if the employer failed to exercise "ordinary and all reasonable care" in the performance of any one or all of the duties specified, and such failure was the

proximate cause of the injury, the jury must find a verdict for the employé, limits the duty of the employer to the exercise of ordinary and reasonable care, and is not misleading as leading the jury to suppose that an unqualified duty rested on the employer to discharge the several duties mentioned.

Error to Circuit Court, Albemarle County.

Action by W. L. Seakford against the Lane Bros. Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

O'Flaherty & Fulton and Robert F. Leedy, for plaintiff in error. Cabell, Talley & Cabell and Duke & Duke, for defendant in error.

HARRISON, J. W. L. Seakford brought this action to recover of Lane Bros. Co. damages for injuries received by him, which it is alleged were occasioned the plaintiff by the negligence of the defendant. A verdict was returned for the plaintiff, which the circuit court refused to set aside. To the judgment rendered upon that verdict this writ of error was awarded, upon the petition of Lane Bros. Co.

A demurrer to the declaration, and each count thereof was overruled. This action of the court is assigned as error.

The purpose of a declaration is to inform the defendant of the nature of the demand made upon him. The facts must be stated with sufficient certainty to be understood by the defendant who has to answer them; by the jury, who have to enquire into their truth; and by the court, which has to render the judgment. *Wood v. American Nat. Bank*, 100 Va. 306, 40 S. E. 931; *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

In the case of *Hortenstien v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996, which is relied on by the defendant, the conclusion was reached, that "in actions for a tort, the declaration must state sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff would be entitled to recover."

Tested by these familiar principles, we are of opinion that the declaration, in the case before us, states a good cause of action. The relation between the plaintiff and the defendant is shown to be that of master and servant, it being averred that the defendant was a contractor engaged in the work of building railroads, etc., excavating, blasting, and using dynamite for such purposes; while the plaintiff is averred to be an employé of the defendant, 18 years of age, deficient in mental capacity, and engaged in operating a hoisting engine used in the defendant's work. The duty of the defendant company is distinctly averred to be to exercise ordinary care to furnish and maintain for the plaintiff a reasonably safe place for doing the work assigned him, and to exercise the same care to see that the men employed by it are careful, skillful, and competent. The breach of these duties is fully set forth, as well as

the injuries resulting from the failure of the defendant to perform such duties. The negligence, which was the breach of the duty alleged, is averred to be that while the plaintiff, in the exercise of ordinary care on his part, was engaged in operating the hoisting engine, the defendant, through its agents and servants, negligently placed dynamite, a highly destructive explosive, dangerously close to a fire which had been built near the engine by the plaintiff for warming his feet, for the purpose of thawing it, and had carelessly left the same there unattended, and not watched for a long period of time; and that so placing and leaving such dynamite exposed to the fire were dangerous, negligent, careless, and wrongful acts and conduct on the part of the defendant and its employes. After reciting that dynamite is a highly dangerous explosive, requiring expert, trained and careful men to properly thaw and use the same, and that the servants, foreman and agents of the defendant were untrained, inexperienced, and unskilled, and averring that the defendant negligently failed to instruct its servants how to thaw, handle, and use dynamite, and carelessly failed to warn plaintiff of the danger, on the contrary told him there was no danger. It is declared that the defendant knew these things, but not regarding its duty in that behalf, did not use due diligence and proper and ordinary care to furnish to and keep and maintain for the plaintiff a reasonably safe place for his work, and did not use due diligence and proper care to see that careful and competent men were employed by it; but, on the contrary, had wholly neglected and failed to do so, and that such negligent failure was the proximate cause of the accident and injury to the plaintiff, which is set out to be that the dynamite caught fire, exploded, and injured the plaintiff in the manner complained of.

It is not necessary to recite here with more detail the averments of this declaration. It sets out with unusual fullness and clearness every essential fact necessary to apprise the defendant of the nature of the demand against him, and "to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff would be entitled to recover." *Hortenstein v. Va.-Car. Ry. Co.*, supra.

Several bills of exception were taken to the action of the court in permitting certain questions to be asked and answered which were propounded to plaintiff's witnesses, and in rejecting certain questions and answers which were propounded to the defendant's witnesses. These objections were not pressed in the oral argument, and we are not able to see that the defendant has been, in any respect, prejudiced by these rulings of the circuit court.

A bill of exceptions was taken to the action of the court in giving eight instructions asked for by the plaintiff. In the oral argu-

ment before this court these objections were abandoned, except as to the second and eighth instructions.

The second instruction is as follows: "The court instructs the jury that it was the duty of the defendant company to use ordinary and all reasonable care: First, to furnish and maintain a reasonably safe place for the plaintiff to do the work which he was employed by the defendant to do; second, to use a like degree of care to employ fit, competent, and careful men to do any other work required by said company to be done in, about, nearly and around the place where the plaintiff was working, and to see that said other workmen were careful in doing their said work; third, to use like care to make and give proper orders and instructions to its employes doing its work how to properly and carefully do the same, and to see that its said orders and instructions were obeyed and carried out by each and all of said employes; and that these duties could not be assigned or delegated by the defendant to any of its employes; and if the jury believes from the evidence in this case that the defendant company failed to exercise ordinary and all reasonable care in the performance of any one or all of said duties, or failed to perform any one or all of them, and such failure was the proximate cause of the injury to the plaintiff, then the jury will find for the plaintiff."

The objection urged to this instruction is that it is not clear, in limiting the duty of the defendant to the exercise of reasonable care in furnishing a safe place for the plaintiff to work; in providing careful and competent employes where the plaintiff was working; in giving proper orders and instructions to such employes; and in seeing that such orders and instructions were carried out; that the instruction is so framed as to mislead the jury into supposing that an absolute and unqualified duty rested upon the master to discharge the several duties mentioned; and that this is particularly true of the charge with respect to the defendant seeing that his orders and instructions were carried out.

It is undoubtedly true that the master is only bound to exercise reasonable care to discharge the several duties mentioned in the instruction. This rule has been repeatedly laid down by this court. *Norfolk, etc., R. Co. v. Nuckols' Adm'r*, 91 Va. 193, 207, 21 S. E. 342; *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509; *McDonald's Adm'r v. N. & W. Ry. Co.*, 95 Va. 98, 27 S. E. 821; *Robinson's Adm'r v. Dinlinny*, 96 Va. 41, 30 S. E. 442; *Va. & N. C. Wheel Co. v. Chalkley*, 98 Va. 62, 34 S. E. 976; *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 696, 37 S. E. 285.

The master does not discharge his whole duty to his employes by formulating and promulgating proper rules, but he owes the

further duty to use reasonable care and vigilance in the enforcement of such rules. *Warn v. N. Y. Cent., etc., Co.*, 157 N. Y. 105, 51 S. E. 744; *Ohio & M. Ry. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 184; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627. The master is, however, not an insurer of the observance of rules, though obliged to use reasonable care to enforce them. *Rutledge v. Missouri Pac. Ry. Co.*, 123 Mo. 133, 24 S. W. 1053, 27 S. W. 327.

We are of opinion that the objection urged to instruction No. 2 is not well taken. The instruction begins by telling the jury that "it was the duty of the defendant company to use ordinary and all reasonable care, first," etc. After setting out each of the duties to be observed, the instruction concludes as follows: " * * * and if the jury believes from the evidence in that case that the defendant company failed to exercise ordinary and all reasonable care in the performance of any or all of said duties, or failed to perform any one or all of them, and such failure was the proximate cause of the injury to the plaintiff, then the jury will find for the plaintiff." The expression, "ordinary and all reasonable care," both at the beginning and conclusion of the instruction clearly qualifies each duty set forth in the instruction, and limits the duty of the defendant to the exercise of ordinary and reasonable care.

The eighth instruction is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff was injured by some act, even though it may have been a negligent act, of a fellow servant, yet they cannot find for the defendant company unless that negligent act of a fellow servant was incident to the risk assumed by the plaintiff in his contract of employment."

It is contended that this instruction erroneously places a limitation upon the established rule that a master is not liable for the negligent acts of a fellow servant; and that this erroneous limitation is found in the following concluding words: "Yet they cannot find for the defendant company, unless that negligent act of a fellow servant was incident to the risk assumed by the plaintiff in his contract of employment."

The court being evenly divided as to the propriety of this instruction in its present form, no opinion is expressed with respect thereto.

The only remaining assignment of error is to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence. A careful consideration of the record satisfies us that the evidence abundantly sustains the conclusion reached by the jury, and therefore their verdict cannot be disturbed.

For these reasons the judgment complained of must be affirmed.

BUCHANAN, J., absent.

ROLLER v. PAUL et al.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. RECEIVERS—PURCHASE OF CLAIMS BY RECEIVER—CREDIT AGAINST FUNDS.

Where a receiver of funds arising out of the sale of real estate of a debtor against whom a general creditor's suit has been brought buys up the claims against the debtor, he cannot require payment for the face value of the claims, but can only recover such sum as he paid for them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 190; vol. 22, Executors and Administrators, §§ 467, 761.]

2. SAME.

A receiver of funds arising out of the sale of real estate of a debtor was required to place the funds at interest, taking good security therefor, so as to have the same forthcoming when required by any decree subsequently rendered. The receiver did not invest the funds but the same remained in his hands to the time of an application for the settlement of his accounts. The receiver, subsequent to his appointment, purchased claims against the debtor for a sum less than their face value. *Held* that, as the beneficiaries of the funds were entitled to interest on the funds, and to profits arising from the purchase of the claims, they were not required to elect whether they would take interest or profits.

3. SAME—ATTORNEYS' FEES—ALLOWANCE.

A receiver of funds arising out of the sale of real estate of a debtor was required to invest the same. The claims asserted against the debtor were satisfied and a balance was left in the hands of the receiver. There was litigation over the funds in the hands of the receiver, who represented claims opposed in interest to the debtor entitled to the balance. *Held*, that the receiver was not entitled to an allowance for attorneys' fees out of the balance, since no services inured to the benefit of the debtor entitled thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 184.]

4. SAME—INTEREST—SIMPLE INTEREST.

Code 1887, § 3409 [Va. Code 1904, p. 1811] makes a receiver liable for moneys coming into his hands, and for interest thereon on his failing to invest the same. A receiver of funds arising out of the sale of real estate of a debtor was required, by the court appointing him, to invest the funds. The receiver did not invest them, but the same remained in his hands to the time of the application for the settlement of his accounts. *Held*, that the receiver was chargeable only with simple interest on the funds, notwithstanding section 3413 [Va. Code 1904, p. 1812] declaring that the interest on all loans to individuals under an order of the court shall become payable on the 1st day of January next after the making of the loan, and annually on the 1st day of January of each succeeding year, until the principal is paid, and unless the principal be paid when due, compound interest shall be charged thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 189.]

Appeal from Circuit Court, Rockingham County.

Proceedings for the settlement of the account of John E. Roller as special receiver of funds arising from the sale of the land of William I. Paul in a creditors' suit against William I. Paul and others. From a decree settling the accounts, John E. Roller appeals. Affirmed.

M. McCormick, for appellant. Sipe & Harris and Conrad & Conrad, for appellees.

HARRISON, J. In the year 1871 the original bill of Valentine & Franklin against Isaac Paul & Sons was filed in the circuit court of Rockingham county seeking to enforce a judgment in favor of the plaintiffs against the defendants. This cause soon developed into a general creditors' suit, not only against the partnership of Isaac Paul & Sons, but against the individual members of the firm, which was composed of Isaac Paul and his sons, William I. Paul and Robert C. Paul. In the year 1876 the appellant, John E. Roller, appeared in the case as counsel for Saufley's Adm'r, asserting a debt against the firm of Isaac Paul & Sons, alleged to be a vendor's lien on a tract of land which had been already sold and the proceeds applied to inferior liens, and asking that his client be reimbursed from other assets of the debtor. After various reports of a commissioner had been made, ascertaining the assets of the defendant firm and of the individual members thereof, and the indebtedness against them, and after a number of sales of property had been made, O. B. Roller, acting as special commissioner, under a decree at the May term, 1877, sold a tract of land belonging to William I. Paul containing 67 a., 1 r., 5 p., to John R. Liskey, at the price of \$24.15 per acre. By decree of March 15, 1878, this sale was confirmed. The controversy in the cause then pending between the infant children of William I. Paul and his creditors, with respect to this tract of land, was transferred to the fund arising from its sale, and the appellant, John E. Roller, who was inadvertently mentioned in the decree as having made the sale, was directed, as special commissioner and receiver, upon giving bond in the penalty of \$3,000, to receive the cash payment from the purchaser, John R. Liskey, and to collect the deferred payments as they fell due, and to place the fund at interest, taking real estate or other undoubted security, so as to have the fund well secured and forthcoming when required by decree to be thereafter rendered. It is not denied that, under this decree of March 15, 1878, the proceeds of this William I. Paul tract of land passed into the hands of the appellant; that it was never invested by him as the decree directed, but has remained in his hands to the present time.

By decree of April, 1899, the appellant was directed to settle his account as receiver of the funds arising from the sale of the William I. Paul land. What credits shall be allowed the appellant in this settlement, and what interest he shall be required to account for, are the subjects of the present controversy.

In his petition for appeal appellant assigns two errors. The first that we shall consider is that the circuit court erred in refusing to

allow credit for the judgments against the fund, which had been assigned to appellant by Reese & Bro., and others.

It appears from the record that, subsequently to his appointment as receiver, the appellant, for a comparatively small sum, bought up certain claims that were payable out of the funds in his hands as receiver. He now insists that he should receive credit in the settlement of his account for the full face value of such claims.

This contention cannot be sustained. We are of opinion that the circuit court was plainly right in limiting its receiver to a credit, on this account, of only such sums as he had paid out in acquiring the claims in question, as of the date of such expenditure.

In the case of Baugh's Ex'r v. Walker, 77 Va. 99, numerous authorities are cited in support of the well-settled proposition that neither trustees, executors, or administrators will be permitted to obtain any profit or advantage in managing funds in their hands, but that whatever benefits or profits are obtained will belong exclusively to the cestui que trust. They are not permitted to buy up debts, payable out of funds held by them in a fiduciary capacity, on their own account, but whatever advantage is thus derived by them, by purchases at an undervalue, is the common benefit of the estate. It is a settled rule in equity that if a trustee purchase claims against the trust estate at a discount, the purchase shall inure to the benefit of the interest which it is his duty to protect. 1 Leading Cases in Eq. (4th Ed.) pp. 64, 65. Such purchases ought justly, and upon all sound principles of public policy, to inure to the benefit of the trust, and not to the benefit of the trustee. *Green v. Winter*, 1 Johns. Ch. (N. Y.) 27, 36, 7 Am. Dec. 475. Weighty authority elaborating and enforcing these principles could be multiplied if it were necessary. *Miller v. Holcombe's Ex'r*, 9 Grat. 665, 667.

These principles apply with equal, if not greater, force to the special receiver of the court in a case like this. He is the trusted officer and representative of the court, its arm, charged with the delicate and responsible duty of handling and disposing of funds which have come under the control of the court. The parties litigant are looking to the court, and through it to the receiver, for the proper care and distribution of the fund according to their respective rights, and, if, instead of investing the fund, as required by the decree appointing him, the receiver were permitted to use such fund for the purpose of buying up, for his own gain, the claims of the creditors at a discount, it is easy to see that the result would be disastrous to those who had sought the court's protection. The argument that an attorney who becomes receiver would, under such circumstances, be denied the right to represent his client is not tenable. The profes-

sional relation suggested is known of record to the court and counsel in the cause, and the relation of the receiver to the court is that of a disinterested officer, whose duty it is to obey the court's orders and to disburse the fund in his hands when and to whom the court shall direct. But it is a widely different situation when, as in the case at bar, the personal and private relation of appellant, as the beneficial owner of the judgments now asserted by him, was not known to court or counsel until he was called upon to settle his accounts, more than 15 years after he had become the purchaser of such claims, and thereby personally interested in the fund he was supposed to be aiding the court in properly administering. It is of the utmost importance that, in his character as receiver, he should have no personal interest but that flowing from the accurate and faithful discharge of his duties.

"If self the wavering balance shake,
It's rarely right adjusted."

Hence the universal and inexorable rule of courts of equity, in all cases where the fiduciary relation exists, that the purchase of adverse claims against the fund being administered shall inure to the benefit of the trust and not to the benefit of the trustee.

It is argued in the petition for appeal that the beneficiaries of the fund in controversy must elect whether they will take interest on the principal sum involved, or the profits which have been made. The doctrine of election relied on has no application in a case like this where the appellant was an officer of the court, charged with the faithful performance of a certain statutory duty. The view suggested would put the court in the attitude of speculating with the funds under its control, and then requiring the beneficiaries to elect whether they will take profits or interest. The numerous cases to which we have adverted hold that, in cases where the fiduciary purchases adverse claims against the fund under his control, he is only entitled to credit for the amount expended in making such purchases; that sound principles of equitable policy require that such transactions should inure to the benefit of the trust and not to the benefit of the trustee. To apply the doctrine of election in such a case would deprive the trust of the benefit of the transaction by requiring the beneficiary to either give up the profit or give up the interest due him on his fund in the hands of the receiver. And, further, the application of such a doctrine in this case would tend to encourage a course of dealing with funds in court that cannot be too earnestly discouraged by courts of equity.

It is further assigned as error by the appellant that the circuit court erred in refusing to allow him, in the settlement of his accounts, compensation for his services as attorney, for bringing in, preserving, and protecting the fund.

A careful examination of the record falls to disclose any ground upon which this claim can be rested. As already seen, the appellant appeared in the case as counsel for Sauley's Adm'r, in the year 1876. At the October term, 1877, he filed in the cause an affidavit setting forth that the land of William I. Paul was being trespassed upon, and secured an order restraining the trespasser. In less than six months after this order was made the land had been sold and the proceeds of sale had passed into the hands of the appellant as special receiver of the court. From that time to the date of the final decree appealed from, the litigation has been over the fund in the hands of the appellant, who has been representing claims opposed in interest to those who are now entitled to the balance in his hands. The claims asserted against William I. Paul have been so far satisfied as to leave a balance of the proceeds of his land payable to him or his assignee. The balance that is left to this debtor can hardly be appropriated to the payment of fees to the counsel of those who have sold his land and fought for years over its proceeds. When their claims were satisfied they had secured from their debtor's property all that they were entitled to. There was no creation of this fund by any one; it arose, as already seen, from the judicial sale of William I. Paul's land, and has been ever since under the control and protection of the court, awaiting a settlement of the rights of the respective contesting claimants thereto. The record discloses no service of the appellant to those entitled to the balance in his hands for which he is entitled to compensation from them.

Under Rule 9 (45 S. E. vi) the appellees assign as cross-error the action of the circuit court in holding that its special receiver in this cause was not chargeable with compound interest on the funds in his hands, but was only chargeable with simple interest on such funds. In support of this assignment of error it is contended that, whenever a receiver of funds under the control of a court is directed to invest such funds, he is accountable for interest thereon according to the terms of section 3413 of the Code of 1887 [Va. Code 1904, p. 1812] which is as follows: "The interest on all loans made to individuals under an order of court shall become due and payable on the 1st day of January next after the loan was made, and annually on the 1st day of January of each succeeding year, until the principal is paid, and, unless the interest be paid at the time it becomes due and payable, compound interest shall be charged thereon to the borrower from such time until payment thereof is made."

The position of the appellees is that, in dealing with the trust fund in this cause, the appellant was wrongdoer, and therefore has no equities quoad the transaction in

question; that the decree appointing appellant receiver recognized the controversy over the land, transferred the proceeds thereof to the fund in court, directed the receiver to give bond in the penalty of \$3,000—which does not appear to have been done—authorized him to collect the purchase money, and directed him to place the fund at interest, taking real estate or other undoubted security, so as to have the fund well secured and forthcoming when required by decree to be thereafter entered. It is insisted that the duty of appellant under this decree was plain; that, had he invested the fund as directed, it would have borne compound interest under the express terms of section 3413; and that the beneficiaries of the fund should not be placed in a worse position by the receiver of the court disobeying its order than they would have occupied had that order been obeyed by him; that, the receiver having seen fit to disregard the decree under which he was acting, and to retain the fund in his own hands, he must be treated as the borrower and held to account upon the same terms that the borrower would have been compelled to account had the decree been obeyed; that, where there is an express trust to make improvement of money, and no honest endeavor is made to improve it, there is nothing wrong in considering the trustee to have lent the money to himself upon the same terms upon which he should have lent it to others; that to hold otherwise would be to reward receivers for disregarding the orders of the court, and to induce them to ignore such orders and the positive provisions of the statute, to the prejudice of those entitled to the fund, in order that they may use the fund at simple interest; that disobedience of the decree under which he is acting is made to result to the advantage and profit of the receiver, whereas obedience of the court's order would have resulted in the improvement of the fund for the cestui que trust; and that equity regards that as done which ought to be done, and never allows one to take advantage of his own wrong.

On the other hand, it is earnestly insisted by the appellant that the statute invoked by the appellees is a part of the act of 1852 which relates to general receivers of the court and not to special receivers; that no special receiver can loan out money at compound interest, and therefore cannot be required to pay compound interest; that it has never been the practice of the Virginia courts to charge compound interest to a special receiver; and that, even in the case of a general receiver, it has been decided, in the case of *Walton v. Williams*, 1 Va. Dec. 579, that, where such a receiver has loaned the funds to a firm of which he was a member, he and his sureties are chargeable with simple interest only, to be computed from the time it became his duty to invest the fund,

55 S.E.—38

which case, it is contended, has been noted by the revisers on the margin of the Code of 1887 as giving the proper construction of section 3409 of that Code [Va. Code 1904, p. 1811] and, although numerous Legislatures have assembled since that date, no change has ever been made or suggested to that section. There was a partial settlement of the accounts of the receiver with the fund in question in 1885, showing that the fund came into his hands during the years 1878, 1879, 1880, and 1881. It is insisted that this settlement recognizes that appellant was only chargeable with simple interest on the fund in his hands, and that such settlement was confirmed by decree of October 29, 1885, which decree has never been reheard, set aside, or annulled. It is finally insisted that the rule fixed by section 3409 of the Code is to charge the receiver, in all cases where he fails to invest as required by the preceding sections, with simple interest alone, and that this rule is the one to be followed in the case at bar.

The views presented by the appellees in support of this assignment of error have, in my judgment, great force, and I am inclined to think that they should prevail under the circumstances of this case, and that the appellant should be held to make good to the appellees all the loss they will otherwise suffer by reason of his failure to obey the plain mandate of the decree from which he derived his authority. The majority of the court are, however, of the opinion that the ruling of the circuit court upon this question, holding that appellant is only chargeable with simple interest, should be affirmed.

The decree appealed from must, therefore, be, in all respects, affirmed.

BUCHANAN, J., absent.

SHENANDOAH LAND & ANTHRACITE COAL CO. v. CLARKE.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. EVIDENCE — PAROL EVIDENCE — WRITTEN CONTRACT—EXPLANATION.

Where the meaning of a written contract is obscure, evidence of the acts of the parties under it, and what was said and done at the time it was executed, is admissible to show the parties' intent, and to explain the meaning of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2129-2132.]

2. LOGS AND LOGGING — SALE OF STANDING TIMBER—RESERVATION IN DEED—CONSTRUCTION—RESERVATION.

Defendant, on September 27, 1853, executed a deed to mountain land, supposed to contain minerals, to complainant's grantor, reserving all timber on the tract. The grantee purchased the land for the minerals, intending to develop its mineral resources. After the deed was delivered, it was discovered that the grantee had no right to timber necessary for mining operations, whereupon, on September 29, 1853, a clause was written on the deed below the sig-

natures, signed and sealed by the grantor and his wife, that the extent of the reservation was only intended to allow the grantor the privilege of cutting and removing such timber from the land as he might want from time to time, but that it was not intended to prevent the grantee and his assigns from also cutting and using whatever timber he might want from time to time. On March 17, 1875, the lands were conveyed to complainant company, which made no objection to the removal of timber by the original grantor, until suit was brought to restrain such acts in 1906. *Held*, that the reservation of the grantor's title to and right to remove the timber were not affected by such added clause, except so far as was necessary to enable complainants to take timber for mining operations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Logs and Logging, § 9.]

Appeal from Circuit Court, Augusta County.

Suit by Shenandoah Land & Anthracite Coal Company against James T. Clarke. From a decree dismissing a bill, complainant appeals. Affirmed.

Bumgardner & Bumgardner, for appellant.
Patrick & Gordon, for appellee.

CARDWELL, J. On the 27th day of September, 1853, James T. Clarke and wife made, executed and delivered to one Anastatius Nicholas their deed conveying two adjacent tracts of mountain land, settling out the metes and bounds thereof, situated in Augusta county, Virginia. A reservation was expressed in this deed in the words following: "And the said Clarke and wife hereby reserve for themselves or assigns all of the timber upon the said tract, with the privilege of removing the same at such time as may suit their convenience." On the 29th day of September, 1853, a writing was made on this deed below the signatures thereto, which was signed and sealed by Clarke and expressed in the words and figures following: "In the foregoing deed there is reserved to the grantors all of the timber on the lands conveyed with the privilege of removing the same. The extent of such reservation is only intended to allow the said Clarke the privilege of cutting and removing such timber from the said lands as he may want from time to time without let or hindrance from said Nicholas, but is by no means intended to prevent said Nicholas or his assigns also to cut and use whatsoever timber he may want from time to time. Witness the following signature and seal September 29, 1853. James T. Clarke. [Seal]."

By deed dated March 17, 1875, Anastatius Nicholas conveyed the lands above mentioned and the appurtenances to the Shenandoah Land & Anthracite Coal Company, together with other lands in the same locality; and, on the 21st day of April, 1906, the Shenandoah Land & Anthracite Coal Company filed its bill in the circuit court of Augusta county against James T. Clarke, praying an injunction restraining Clarke, his agents, etc., from cutting timber standing and growing upon the lands in question, and from remov-

ing any timber cut by Clarke upon said land, and from selling or disposing of any of said timber so cut and removed. Upon this bill a temporary injunction was awarded, in accordance with the prayer thereof, and subsequently the cause was heard upon the bill of complaint, the answer of James T. Clarke thereto, and certain affidavits taken and filed on behalf of Clarke, and depositions taken on behalf of the plaintiff; whereupon the circuit court dissolved the temporary injunction theretofore awarded, and dismissed the complainant's bill. From this decree the Shenandoah Land & Anthracite Coal Company obtained this appeal.

The effect of the decree appealed from is, as appellant claims, that the appellee, Clarke, is the absolute owner of all the timber on the lands in question, and that appellant has no interest in or right to this timber or any part of it.

The first error assigned is that the court overruled the exception taken to the answer of Clarke filed in the cause, and refused to strike out and expunge from the answer the portion thereof excepted to.

The bill of appellant called for an answer from Clarke to each and every allegation thereof on oath, as fully and to the same extent as if he were directly and particularly interrogated as to each allegation; and the answer of appellee was accordingly made under oath, admitting the execution of the deed of September 27, 1853, filed with the bill, and also the indorsement thereon dated September 29, 1853, and sets out fully the facts and circumstances as they existed at the time of the execution of these two writings from the standpoint of appellee.

As to the objection that the answer is sworn to, it need only be said, that the bill called for an answer under oath, and therefore the answer was admissible, and conclusive in so far as it was responsive to the bill until it was overcome by the testimony of two witnesses, or by one witness and corroborative circumstances. Appellant might have waived oath to the answer, but this it did not see fit to do, and there was no ground upon which the answer or any part of it could be excluded merely because it was under oath.

Nor should the exception thereto, on the ground that the answer was not responsive to the bill, have been sustained, as the matters set up in the answer were clearly relevant to the issues presented in the bill and responsive thereto.

The answer, after setting out that the lands conveyed by the deed of September 27, 1853, are rough mountain lands, of which the principal value is the timber and such minerals as they contain; that no minerals of any value have ever been discovered, or are known to exist under said lands, although more or less extensive experiments have been made at various times since 1853; that there is valuable timber growing on said

lands, which has recently become more valuable by reason of the construction of the Chesapeake-Western Railroad; that respondent had made arrangements to cut and remove the timber from said lands because the growing timber thereon belonged to him under the true intent, meaning, and the proper construction of the deed from him to Nicholas, and denying that the addendum to the deed was made before the actual delivery thereof—states “The facts about the transaction are that Anastatius Nicholas, who was from Vermont, but did business in New York City, conceived the idea that there was anthracite coal and iron ore on your respondent's and other adjacent lands, and he desired to acquire the minerals, intending to form a company, develop the minerals, and either operate the mines or sell at a large advance. Your respondent had no great faith in the minerals, but did think that the timber might some time become valuable. He, therefore, contracted to sell said Nicholas the land and reserve the timber, and the deed was drawn up, signed, and delivered in exact accordance with the contract, and the purchase money was paid. It then occurred to said Nicholas that he had no timber for use in the mines, or even to open up and show the vein of coal, and he asked your respondent to allow him to use such of the timber as he might need to prop up the roof of such openings as he might make to show the vein of coal. This your respondent agreed to, and the indorsement was made on the deed to carry this understanding into effect. There was no consideration given for it, and it was not intended to deprive your respondent of the valuable timber which he had not sold. The indorsement was inartificially drawn and badly expressed, but was understood by said Nicholas, who stated to your respondent and to others his understanding of it to be as stated above.” It is clear that this part of the answer objected to is merely explanatory of the general denial of the equities set up in the bill, and was therefore relevant to the issues presented in the bill and responsive to the equities asserted.

Concerning the timber upon the lands conveyed in the deed of September 27, 1853, the deed is not susceptible of any other construction than that by it the absolute right to all of the timber upon the lands was reserved to the grantor, Clarke, and it is by reason only of the “addendum” to this deed that any difficulty is encountered in reaching a satisfactory conclusion as to the meaning and import of the language employed by the parties contracting. According to the contention of appellant, the language of the “addendum” is to be construed as giving to Nicholas and his assigns the absolute ownership of the timber upon the lands. Plainly this contention cannot be sustained; for, if the words “the right to cut and use” timber gave Nicholas the absolute ownership

of it, then the words preceding, which reserved to the grantors all the timber on the lands conveyed “with the privilege of removing the same,” must necessarily have the same construction; the result being that both the grantors and the grantee in the deed thereby reserved or acquired an absolute ownership of the timber, with the right to the former to “cut and remove” and to the latter the right to “cut and use.” It is impossible that both could own an absolute right to the timber. It is immaterial, we think, whether the deed and the “addendum” be treated as one paper or separate. Under the deed the whole of the timber is unmistakably reserved to the appellee, and there is nothing in the “addendum” which required him to surrender the whole of it to Nicholas and his assigns; on the contrary, it is distinctly stipulated that he may cut and remove as much of the timber as he might want from time to time, without let or hindrance from Nicholas, who was given the privilege merely of cutting and using whatever timber he might want from time to time, but the exercise of this privilege was in no way to hinder appellee from cutting and removing as much of the timber as he might want from time to time. It would, therefore, be illogical, at least, to say that this “addendum” is to be construed as giving Nicholas' assignee the right to enjoin appellee from cutting and removing such of the timber as he may want from time to time; for in that case there would be none reserved by the plain terms of the deed and the stipulation in the “addendum” for him to cut and remove. To read the “addendum” separately, the ambiguity is patent, and renders the instrument inoperative and avoid, as the two clauses therein—the one recognizing in appellee the right to “cut and remove” the timber, and the other the right or privilege of Nicholas to “cut and use” the timber—are destructive of each other, and leaves the reservation of the timber in the deed itself unaffected. To consider the ambiguity as latent, however, the same result must follow; for by no rational construction to be given this “addendum” could appellee be deprived of the right to “remove” the timber from the land as he might desire to do from time to time. If it was intended by the parties to confer upon Nicholas the right to all the timber, or such right therein as would exclude appellee from the right to cut and remove such timber as he might want from time to time, the language employed is inapt and ineffectual to accomplish that purpose, and other more apt and effectual language could and doubtless would have been used.

The rule that parol evidence is not admissible to alter the terms of a written instrument or to add thereto does not exclude evidence going to explain the instrument, where the language employed is of equivocal import.

"Where a written contract is obscure in its meaning, evidence of what was said and done at the time of its execution is competent, not to add to or change it, but to explain it." *Knick v. Knick*, 75 Va. 12; *Richardson v. The Bank*, 94 Va. 186, 26 S. E. 413.

"If the meaning of an instrument be doubtful, evidence of the acts of the parties under it may be received to show intent." *Glenn v. Augusta Perpetual, etc., Co.*, 99 Va. 695, 40 S. E. 25, and authorities cited.

To ascertain the intent of the parties is the fundamental rule in the construction of an agreement; and in such construction courts look to the language employed, the subject-matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and to that end they are entitled to place themselves in the same situation which the parties who made the contract occupied, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described. *Talbot v. R. & D. R. Co.*, 31 Grat. 685.

Considering the language employed in the "addendum" to the deed in question, in the light of the well-established rules adverted to and the proof in the record, the construction of it claimed by appellee is fully sustained. For about 53 years prior to the institution of this suit, appellee cut and removed tan bark and timber from these lands, according to the very terms of the deed of September 27, 1853, without hindrance on the part of Nicholas or any one claiming under him; no question being raised by any one at any time as to appellee's right to do so. It further appears that it was the sole purpose of Nicholas, and appellant who claims under him, to develop such minerals as might be found upon the lands in question, and that neither ever contemplated cutting and removing from the lands the timber thereon reserved in the deed to appellee. It further appears that neither Nicholas nor the appellant, during the period from the date of the deed to Nicholas in 1853 to the institution of this suit, ever attempted to cut and use any of this timber, nor have they or either of them, during that period, attempted to open and operate any mines under the lands; but, on the contrary their course, with reference thereto, has been such as to warrant the conclusion that they had abandoned all idea of mining any coal or other minerals in the lands or of there being coal or other minerals therein to mine. Appellant now concedes in its bill that there is nothing in the lands to be mined, and it is only at this late day that it has conceived the idea that under the "addendum" to the deed to Nicholas it owns an interest in the timber thereon and is entitled to enjoin appellee from the further enjoyment of the right to cut and remove

the whole of it at his convenience, expressly reserved to him in the deed.

The facts and circumstances shown in the record clearly sustain the contentions of appellee: (1) That the addendum to the deed was made after the execution and delivery thereof, and without consideration; (2) that it was made for the purpose only of conferring upon Nicholas the right or privilege of using enough of the timber upon the lands conveyed as he might need to prop up his mines in taking out any coal he might find and want to market or show with the view of selling his purchase of the lands at an advance—it being the purpose of Nicholas to either mine and market the coal he believed he could find in the lands, or to sell the lands together with other lands in the same locality, with the right to mine coal or other minerals therein, for an advanced price; (3) that Nicholas never intended to purchase, nor ever considered that he had purchased the timber on the lands conveyed by him to appellee, or any interest therein which he could assert in hindrance of appellee in cutting and removing the timber at his convenience; and (4) that neither Nicholas nor appellant ever conceived the idea that the "addendum" in question conferred upon Nicholas any interest in the timber other than the mere privilege of using such of it as Nicholas might want to use in propping up openings in the lands to take out coal found therein or to show the same, until long after all expectation of finding coal or other minerals in the lands had been abandoned, the lands regarded of little or no worth, and the timber had become valuable only by reason of the construction of a railroad to the vicinity of the land, affording transportation for timber from that region to market.

In our view of the case, the occasion has never arisen for Nicholas or his assignee, appellant, to exercise the right or privilege conferred upon the former by the "addendum" to the deed of September 27, 1853, and that by the concession of appellant in its bill, which agrees fully with the proof in the record, the occasion can never arise for the exercise of such right or privilege; therefore, it would be manifestly unjust and inequitable to grant the relief prayed by appellant in this case.

It follows that the decree appealed from is without error, and should be affirmed.

KENT et al. v. KENT et al.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. WILLS — CONSTRUCTION — LAPSED GIFT — INTESTATE PROPERTY.

Code 1887, § 2521 [Va. Code 1904, p. 1289], declares that a will shall be construed with reference to the real and personal estate, to take effect as if it had been executed immediately before the testator's death. Section 2524 [Va.

Code 1904, p. 1290] provides that, unless a contrary intention shall appear by the will, the real estate devised thereby which shall fail shall be included in the residuary devise. A testator gave the residue of his real and personal property to three children named. One of the three died intestate without issue before testator's death. *Held*, that the devise to him lapsed, and as to his interest in the residue the testator died intestate, the object of section 2521 being to make wills speak, with respect to real estate, as they did under the common law with respect to personalty, as of the death of the testator, and section 2524 placing real and personal estate on the same footing in respect to lapsed devises and legacies.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 2173-2183.]

2. SAME—DESIGNATION OF DEVISEES—GIFT TO CLASSES OR INDIVIDUALS.

A testator's gift of the residue of his real and personal property to three children named, children of his first marriage, is not a gift to them as a class, but to them as individuals, and on the death of one of them without issue before the death of the testator the gift to him lapsed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1115.]

Appeal from Circuit Court, Wythe County.

Suit between William P. Kent and another and Mary Kent and others for the construction of the will of Robert C. Kent, deceased. From a decree construing the will, the former appeal. Affirmed.

Fulton & Fulton and Bullitt & Kelly, for appellants. A. A. Campbell, for appellees.

KEITH, J. Robert C. Kent, Sr., a citizen of Wythe county, died in April, 1905, having first made and published his last will and testament. He had been twice married, and, at the time of the execution of his will, there were three children of the first marriage living, William P., Robert C., Jr., and Tyler G. Kent; and of the second marriage his wife and her children, Mary, Elizabeth, Anastasia, and J. Cloyd Kent were living. By the third clause of the will, William P., Robert C., and Tyler G. Kent were given all the residue of the property real and personal of which their father was possessed, after making provision for others of his family, subject to the widow's dower during life, to be equally divided between them. It appears, further, that Tyler G. Kent died intestate and without issue after the execution of the said will, and a few months before the death of his father.

Upon a bill filed to obtain a construction of this will, the circuit court held that Tyler G. Kent having died during the lifetime of the testator leaving no children, the devise to him lapsed and became void; that as to the one-third interest of the said Tyler G. Kent the testator, Robert C. Kent, died intestate; and that it descended to his heirs at law. From that decree William P. Kent and Robert C. Kent have appealed to this court.

We accept as correct the statement in the petition for appeal with respect to the law bearing on the subject as it stood before the passage of the statutes hereinafter to be considered:

1. That if a lapse occurred in the bequest of personal property outside of the residuary clause, the property bequeathed should pass to the residuum, and be distributed among the residuary legatees, because it ought to be held that the testator did not intend to die intestate as to any of his property if it could be avoided.

2. That whilst this should be held true as to personalty, it ought not to prevail as to a devise of realty; and as to it, the rule was that if a lapse in a devise of realty outside of the residuary clause occurred, it should not go to the residuum and pass to the residuary devisees, but should go to the heir; and the reason assigned for the distinction between a bequest and a devise was that as to personal property the will spoke as of the date of the testator's death, but as to real property it spoke as of the date of its execution.

3. That the above-announced principles had no application whatever to lapses occurring in the residuary clause of the will; and that if a lapse there occurred, it continued, and the testator as to this should be held to have died intestate, and that the bequest or devise, as the case might be, passed to the next of kin or the heir.

These rules of construction were adopted by our courts, and continued in force in this state until the Code of 1849 was enacted, in which two statutes appeared which materially changed the common law, and which are to be found in our present Code of 1887 as section 2521 [Va. Code 1904, p. 1289], which reads as follows: "A will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will"—and section 2524 [Va. Code 1904, p. 1290], which provides that, "unless a contrary intention shall appear by the will, such of the real estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will."

The obvious effect of section 2521 was to make wills speak with respect to real estate, as they had done under the common law with respect to personal estate, as of the death of the testator, thus sweeping away the distinction which had theretofore been held to exist with respect to bequests of personal and devises of real estate. This is not controverted.

But it is claimed that while section 2521 has the effect of destroying the distinction between real and personal property, as to the date at which the will shall speak, section 2524 establishes a distinction between the devise of real and the bequest of personal property which shall for any cause fail or be void, viz., that while a devise or legacy, failing from any cause, falls into the residuum,

and passes under its provisions, a failure of any part of the residuary clause itself, as to personal property, by lapse or otherwise, becomes an intestacy and passes to the next of kin as undisposed of; but that, by force of section 2524, real estate comprised in any devise which may lapse or fail to take effect, although it be a part of the residuum, shall still be included in and pass under the residuary clause. So that, in the case before us, there having been a devise to William P., Robert C., and Tyler G. Kent, and the latter having died during the lifetime of his father, his interest in the real estate devised would pass to his surviving brothers.

The argument upon the statute turns upon the force of the words, "such of the real estate, or interest therein, as shall be comprised in any devise in such will which shall fail or be void, or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will," but we are of opinion that the words "any devise" are to be limited to any devise other than the residuary clause.

As is well said in the opinion of the learned circuit judge: "Residue" means that of which no effectual disposition is made other than by the residuary clause. The statute provides that real estate, which shall be comprised in any devise which shall fail, shall be included in the residuary devise, if any. The statute clearly imports a purpose to bring into the residuary devise something of which no effectual disposition is made outside of the residuary clause, and cannot, without greatly straining the words, be construed as changing the rule when the failure is in the residuum itself. In other words, the subject of section 2524, and statutes to the same effect in England and other states of the Union mentioned, was to put real estate and personal property on the same footing in respect to void and lapsed devises and legacies." This conclusion seems to be fully warranted by the authorities. See Woerner on Am. Law of Adm., vol. 2, § 487; Beach on Wills, § 262; Redfield on Wills, vol. 2, 1119; Jarman on Wills, vol. 1, p. 655.

There is not much force in the contention that, if the construction claimed by appellants be not placed upon section 2524, the statute would be wholly useless. This argument would prove too much, for a very great proportion of our statute law is merely declaratory of the common law. The object of the Legislature in such cases is, we presume, to make the law plain, unambiguous, and uniform, and to put it beyond the reach of the ebb and flow of judicial opinion and decision.

The construction given by the circuit court is in accordance with the current of authority elsewhere, and with the little that we have upon the subject in Virginia.

In 18 Am. & Eng. Enc. Law, p. 765, it is said: "Where a residuary bequest or devise lapses or is void it goes to the heirs or next of kin of the testator, as in cases of intestacy, and

the same is true where the lapse or invalidity is only as to one or more of several residuary legatees or devisees who are to take distributively, the share or shares, of which the gift fails, go to the testator's heirs or next of kin, and not to the other residuary legatees or devisees." Citing in support of the text authorities from very many states. *Frazier v. Frazier*, 2 Leigh, 642; *Stone v. Nicholson*, 27 Grat. 8, where Judge Moncure states the law to be, that "when a specific devise fails from any cause the subject of it goes to the residuary devisee unless a different intention appears in the will. But when a residuary devise fails from any cause the subject of it, to the extent of such failure, goes to the heirs at law of the testator." It is said that this was a dictum. Grant that it is so; it was the dictum of a distinguished judge, concurred in by the entire court, and is entitled to much respect.

The effect of section 2521, as we have seen, was to obliterate the distinction which had theretofore existed between legacies and devises, and to place them both upon the same footing, by making the will in all cases, unless a contrary intent appeared, speak as of the death of the testator. The construction placed by appellants on section 2524 would have the effect of making a different rule with respect to a failure occurring in the residuary clause between bequests of personalty and devises of realty, the personalty going to the next of kin while the realty would be included as a part of the residuary clause and pass in accordance with its provisions, thus defeating one of the objects which the Legislature had in view, which was to give the same construction to wills with respect to real and personal property. We are of opinion that the circuit court has correctly construed section 2524.

It is contended, however, that the devise to Robert C., William P., and Tyler G. Kent was to them as a class, and not as individuals, and that, therefore, no lapse occurred by reason of Tyler's death before his father, though they took as tenants in common and not as joint tenants; and that the share of Tyler goes to appellants as the survivors of a class.

The circuit court, dealing with this branch of the case, says: "The question as to whether a testator provided for a number of persons as a class, or as individuals constituting a class, is one of intention. The rule is that where several persons are provided for by name, a presumption arises, in the absence of any indication in the language of the will to the contrary, that it is to them severally and nominatim, and not collectively, although the persons named may constitute a class."

In *Workman v. Workman*, 2 Allen (Mass.) 472, it is said: "The authorities on this subject conclusively show that it is an established general rule of law, that when the parties to whom a legacy is given are not described

as a class, but by their individual names, though they may constitute a class, the death of any one of them before the testator causes a lapse of the legacy intended for the legatee so dying." *Frazier v. Frazier*, supra; 2 *Woerner's Am. Law of Adm.* p. 937-8.

In *Moffett v. Elmendorf*, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529, it is held that "a devise to the testator's aunt, naming her, and to his cousins, naming seven persons, each to take an equal share, is not a devise to a class, though all the cousins are the children of such aunt. Therefore, upon the death of any of such cousins, his or her devise lapses and goes into the residue."

"While the mere fact that part of the persons composing a class are named is not controlling, when all are named, each by his or her name in full, and an equal share is given to each, the presumption is that they are to take in their individual and not in their collective capacity, although this may be rebutted by other parts of the will showing a different intention." 3 *Jarman on Wills*, 8; *Woerner's Am. Law of Adm.* § 434; *Savage v. Burnham*, 17 N. Y. 561.

"The courts invariably attach great importance to the designation of the devisees severally by name, and to a provision that they shall share the gift in fixed and definite proportions." *Moffett v. Elmendorf*, supra.

In *Hoppock v. Tucker*, 59 N. Y. 202, the devise was to three persons by name, and as "the children of my deceased daughter Ann Maria." Chief Justice Church said: "It must be conceded that the clause, as it is written, with its double description, free from the influence or control of other portions of the will, would, according to the adjudicated cases, be construed as a personal legacy to each child. The law infers this intent from the specification of names, and regards the descriptive portion of the clause as intended for identification." Citing *Ashling v. Knowles*, 3 Drew, 593; *Viner v. Francis*, 2 Cox, Eq. 190; *Denn v. Gaskin*, Cowp. 657; *Bain v. Lescher*, 11 Sim. 397.

We are of opinion that the court correctly held that the devise under consideration was to the individuals named, and not to them as a class; and, upon the whole case, we are of opinion that the decree of the circuit court should be affirmed.

HARRISON, J., absent.

CLEM v. GIVEN'S EX'R et al.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. COURTS—JURISDICTION—REAL PROPERTY OF NONRESIDENT—PROCESS—PUBLICATION.

It is competent for a state to provide by statute that the title to real estate within its limits shall be settled and determined by suit in which defendant, being a nonresident, is brought into court by publication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 48.]

2. PROCESS — PUBLICATION — ACTIONS IN WHICH AUTHORIZED — SPECIFIC PERFORMANCE.

Va. Code 1904, §§ 3230-3232, providing for process by publication, and section 3232, declaring that "upon any trial or hearing under this section such judgment, decree, or order shall be entered as may appear just," comprehend quasi proceedings in rem, the object of which is to reach and dispose of property within the state, and therefore in an action for specific performance of a contract of sale of real estate brought against a nonresident executor, and the widow and children of the vendor, it was proper to proceed against the executor by publication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 100.]

Appeal from Circuit Court, Augusta County.

Bill by W. J. Clem against J. E. Givens, executor of W. C. Givens, deceased, and others. From judgment sustaining defendants' demurrer, plaintiff appeals. Reversed.

T. K. Hackman, for appellant. Timberlake & Nelson, for appellees.

WHITTLE, J. The bill in this case was filed by the appellant, W. J. Clem, against J. E. Givens, executor of W. C. Givens, deceased, and the widow and children of the testator, five of the latter being infants, for specific performance of a written contract of sale, between the executor and the appellant, of real estate situated in Augusta county, Va.

By his will, which was probated in the county court of that county, in which court the executor also qualified, the testator empowered the executor to sell and convey his real estate at any time during the minority of his youngest child, and to distribute the proceeds among his children, paying the shares of minors to their duly qualified guardians. The widow and children are residents of the county of Augusta, but the bill alleges that the executor is a nonresident of the state, and he was proceeded against by publication.

The record shows that at the first calling of the case, by consent of all parties by counsel, it was submitted to the judge of the court for decision in vacation; but it is admitted that the agreement to this submission was not to be considered as a general appearance on the part of the nonresident executor. Subsequently, by demurrer to the bill, he denied the jurisdiction of the court to decree specific performance of the contract in question. The circuit court sustained the demurrer, and dismissed the bill, and the correctness of that ruling is now before us for review.

It may be conceded in the outset that a personal judgment against a nonresident upon substituted process is void, under the due process clause of the fourteenth amendment of the Constitution of the United States, even in the state where rendered. This was distinctly held in the leading case on the subject of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565, where it was adjudged indispensable to the validity of a proceeding in personam that personal service of process on the de-

fendant be had within the jurisdiction, unless there has been a general appearance, which, of course, operates as a waiver of process. *Huling v. K. R. & I. Co.*, 130 U. S. 559, 9 Sup. Ct. 608, 32 L. Ed. 1045; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867. If, on the other hand, the proceeding be in rem, or quasi in rem, where the res to be affected by the litigation is within the jurisdiction of the court, notice by publication is ordinarily sufficient.

"Jurisdiction is acquired in one of two modes: First, as against the person of the defendant, by the service of process; or, second, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment, beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem. The bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem, in ordinary cases; but where such a procedure is authorized by statute, on publication, without personal service of process, it is substantially of that character." *Boswell's Lessee v. Otis*, 9 How. (U. S.) 336, 13 L. Ed. 164.

Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918, is authority for the proposition, that "a state may provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which a defendant, being a nonresident, is brought into court by publication."

That was an action to recover possession of land, and to quiet title. At pages 320, 321, of 134 U. S., at pages 558, 559, of 10 Sup. Ct., 33 L. Ed. 918, Mr. Justice Brewer, in response to the suggestion that an action to quiet title is a suit in equity, and that equity acts upon the person, observes: "While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is: What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate?"

"If a state has no power to bring a nonresident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens. And a cloud cast upon such title by a claim of a nonresident will remain for all time a cloud, unless such nonresident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the state. It has control

over property within its limits, and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private and public, and the modes of establishing titles thereto. It cannot bring the person of a nonresident within its limits—its process goes not beyond its borders—but it may determine the extent of his title to real estate within its limits, and for the purpose of such determination may provide any reasonable methods of imparting notice."

This is an instructive case, and reviews the authorities bearing on the subject under discussion, and it leaves no room to doubt the power of the states to provide substituted process in all proceedings relating to or affecting the titles to lands within their respective limits.

The subject is also interestingly treated in 5 *Pomeroy's Eq. Jur.* (Pom. Eq. Remedies, vol. 1) §§ 12, 13, 14 and 15. At section 15, the author says: "As a result of statute, it is held in many states that a decree removing a cloud from or quieting title to land within the jurisdiction may be based upon publication of summons. Citing *Arndt v. Griggs*, supra; *Bryan v. Kennett*, 113 U. S. 179, 5 Sup. Ct. 407, 28 L. Ed. 908; *Ormsby v. Ottman*, 85 Fed. 492, 29 C. C. A. 295; *Morrison v. Marker* (C. C.) 93 Fed. 692; *Perkins v. Wakeham*, 86 Cal. 580, 21 Pac. 51, 21 Am. St. Rep. 67; *Kundson v. Litchfield*, 87 Iowa, 111, 54 N. W. 199; *Dillon v. Heller*, 89 Kan. 599, 18 Pac. 693; *Oldham v. Stephens*, 45 Kan. 369, 25 Pac. 863; *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124; *Scarborough v. Myrick*, 47 Neb. 794, 66 N. W. 867; *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1, 977; *American B. & L. Assn. v. Mathews*, 13 Tex. Civ. App. 425, 35 S. W. 690. Likewise, a decree for specific performance, acting upon the land itself, may issue upon such service." Citing *Boswell's Lessee v. Otis*, supra (action to cancel deed); *Corson v. Shoemaker*, 55 Minn. 388, 57 N. W. 134 (reformation); *Seculovich v. Martin*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106 (suit to compel conveyance by absent trustee).

In a note to section 14, reference is made to the statutes of the various states, including section 3418, Va. Code 1904. That section provides: "A court of equity, in a suit wherein it is proper to decree or order the execution of any deed or writing, may appoint a commissioner to execute the same; and the execution thereof shall be as valid to pass, release, or extinguish the right, title, and interest of the party on whose behalf it is executed, as if such party had been at the time capable in law of executing the same, and had executed it."

It has been held that a deed made by a special commissioner appointed and empowered to convey land under that section pass-

es the legal title of all parties to the suit. *Hurt v. Jones*, 75 Va. 341.

Va. Code 1904, §§ 3230, 3231, 3232, provide for process by publication; and section 3232 declares that "upon any trial or hearing under this section, such judgment, decree, or order, shall be entered, as may appear just." While the language of these sections is general, we are of opinion that it comprehends quasi proceedings in rem, the object of which is to reach and dispose of property within the state.

This construction of the statute is sanctioned by the decision of the Supreme Court of the United States in the case of *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, a proceeding against a nonresident of Texas to foreclose a vendor's lien upon land in that state. In the course of his opinion, Mr. Justice Brown, at pages 406, 407, of 176 U. S., at pages 412, 413, of 20 Sup. Ct. (44 L. Ed. 520), remarks: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas * * * contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. * * * When the statute specifies certain classes of cases which may be brought against nonresidents, such specification doubtless operates as a restriction and limitation upon the power of the court; but where, as in article 1230 of the Texas Code, the power is a general one, we know of no principle upon which we can say that it applies to one class of cases and not to another. Unless we are to hold it to be wholly inoperative, it would seem that suits to foreclose mortgages or other liens were obviously within its contemplation. In any event, this was the construction given to it by the Court of Civil Appeals, and apparently by the Supreme Court of the state, and is obligatory upon this court as a construction of a state statute."

Upon the authority of the foregoing decisions, we conclude that it is clearly within the competency of the state of Virginia "to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a nonresident, is brought into court only by publication,"—and we are of opinion that the sections of Va. Code 1904, referred to, though general in their character, offered authority for such procedure.

A fortiori should this be true in the present case, where the nonresident defendant stands in the relation of trustee merely to the property, and is impleaded along with the beneficial owners, who are residents of the state and are before the court on personal service of process.

In the precise form in which it is now presented, the question involved is of first impression in this court. The case of *Grubb*

v. Starkey, 90 Va. 831, 20 S. E. 784, was a suit for specific performance, in which the defendants being nonresidents were proceeded against by publication. The court enforced specific performance of the contract, and, as ancillary relief, awarded damages for the breach. The defendants resisted a decree against them in personam on the ground that they had been proceeded against by publication; but the court held that, by their appearance, it acquired personal jurisdiction over them, and decreed accordingly. The case of *McGavock v. Clark*, 93 Va. 810, 22 S. E. 864, was also a suit for specific performance of a contract of sale of real estate. The bill was filed by a resident vendor against nonresident vendees, and prayed for a personal decree against them, as additional security to the land itself, for the purchase money due upon it. But the court denied the prayer, for the obvious reason that the nonresident defendants had been proceeded against by publication, and had never appeared. The distinction between that case and the one under review is, however, quite apparent. The object of this suit is to acquire title to the land merely, and no relief is sought against the nonresident personally.

For these reasons, we are of opinion that the circuit court erred in sustaining the demurrer to the bill, for which error the decree appealed from must be reversed, and the case remanded for further proceedings.

BUCHANAN, J., absent.

CHESAPEAKE & O. RY. CO. v. FARROW'S ADM'X.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. NEGLIGENCE—DEGREE OF CARE.

The care required to prevent the infliction of injury is always proportioned to the probability that exists that an injury will be done under circumstances which are known to exist, or, from past experience, may be reasonably expected to exist in a particular case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, § 5.]

2. RAILROADS — INJURIES TO TRESPASSERS — CARE REQUIRED.

A railroad company is not required to anticipate and make provision for trespassers upon its tracks, but after it has discovered a trespasser upon its tracks it must exercise reasonable care to avoid injuring him, and, if his danger be obvious and imminent, it must use all the means which are available for his protection which are consistent with its higher duties to the passengers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1238.]

3. SAME—LICENSEES.

Where licensees are such by the mere tolerance and acquiescence of a railroad company, or who have become such by repeated acts of trespass against the will of the railroad company, and in which the company has been compelled to acquiesce because of its inability to

prevent, the company does not owe them the duty of prevision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1236.]

4. SAME.

In an action for injury resulting in the death of plaintiff's intestate, walking along defendant's track at a place where it was used by pedestrians, evidence held to show that defendant was not guilty of negligence.

5. SAME—CONTRIBUTORY NEGLIGENCE.

A licensee walking along a railroad track is charged with the duty to care for his own safety and with the knowledge that the track is frequently used for the passage of trains and the shifting of cars, and he must be considered as charged with knowledge that the usual method of shifting cars at such point was by making flying switches, which method had been in constant use for many years.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1286, 1294.]

6. SAME.

Where a licensee on a railroad track was killed by a moving car, the doctrine of the last clear chance had no application; it appearing that defendant's servant on the train did not see deceased, being engaged in the performance of a necessary duty which he could not neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1324, 1325.]

Error to Corporation Court of Buena Vista.

Action by the administratrix of Stuart Farrow against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

R. L. Parrish, for plaintiff in error. Hugh A. White, for defendant in error.

KEITH, P. This action grows out of the death of Stuart Farrow under the following circumstances: The regular local freight train on the branch line of the Chesapeake & Ohio Railway, between Glasgow and Lexington, Va., was engaged at Buena Vista, a station on that road, in shifting the cars that composed the train when it arrived at Buena Vista. In doing this work it became necessary to move four empty box cars from the paper mill over what is known as the "transfer" track, between the Chesapeake & Ohio and the Norfolk & Western Railroads. For this purpose the engine, to which one car was attached, moved up to the paper mill and was there coupled to the four box cars that were to be moved. This engine with the attached cars then backed out; the train consisting at the time of one box car, then the engine, and then the four box cars, towards which the engine was headed. From the paper mill to the point of the accident which subsequently occurred it is upgrade, and from that point to the station of Buena Vista, in which direction the train was moving, there is a downgrade. When the train thus made up had attained considerable speed, one of the brakemen, who was stationed on the pilot of the engine, cut loose the four empty box cars attached to the front of the engine, and the engine ran on along the main line past the transfer switch, the idea being that the impetus which the four following cars had

attained, aided by the downgrade on which they had to run, would carry them on into the transfer track after they had been detached from the engine; thus making what is known as a "running," "flying," or "gravity" switch. The evidence shows that this was the usual and only method employed in making the necessary transfer of cars at this station. The tracks and switches along which this train passed after it left the paper mill are all within the corporate limits of the city of Buena Vista, but neither the main track nor the switches, as far as the facts of this case are concerned, occupy or are crossed by the streets of the city of Buena Vista; but it does appear that the right of way and tracks of the railway company at the point of the accident were constantly used by pedestrians.

It seems that Stuart Farrow was upon the track; that he stepped off in order to avoid the engine which was approaching him from the rear; that, as soon as the engine passed, he stepped back upon the track, and was almost immediately—after he had taken two steps, according to one eyewitness, and after he had taken eight or ten steps according to another eyewitness—run over by the box cars which had been detached from the engine, and received injuries from which he died. Upon the front end of the box car, next to and following the engine, the conductor, a careful and prudent officer of the Chesapeake & Ohio Railway, was stationed, on the lookout to prevent accidents. A cow got upon the track just in front of the engine and car, and the engineer gave the alarm signal, thereupon the conductor ran to the rear of the car upon which he was stationed in order to apply the brake in obedience to the alarm signal, and just at that moment Stuart Farrow, the engine having passed him, stepped upon the track and received the injury of which he died.

His administratrix brought suit, and the jury upon the demurrer to the evidence rendered a verdict in her favor, upon which the court entered the judgment to which the Chesapeake & Ohio Railway Company applied for and obtained a writ of error.

"Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended damage to the latter." Shear. & Red. on Neg. (5th Ed.) § 3.

The degree of care and skill required is influenced and determined by the conditions existing at the time and place of the act under investigation. The duty with respect to the operation of a railroad occupying a street in a populous town, or crossing a street in such a town, or a public highway, requires the exercise of ordinary care. So the duty of a railroad is to exercise ordinary care in crossing a public highway in a country. In all these cases the duty is expressed by the

term "ordinary or reasonable care to prevent injury," but it means reasonable or ordinary care in the light of all the surrounding facts and circumstances, so that the care required to prevent the infliction of injury is always proportioned to the probability that exists that an injury will be done under circumstances which are known to exist, or from past experience may be reasonably expected to exist in a particular case. A railroad company is not required to anticipate and make provision for trespassers upon its tracks; but, after it has discovered a trespasser upon its tracks, it must exercise reasonable care to avoid doing him an injury, and, if his danger be obvious and imminent, it must use all the means which are available for his protection which are consistent with its higher duties to others. *Seaboard, etc., R. Co. v. Joyner*, 92 Va. 354, 23 S. E. 773.

With respect to licensees the law has been, as we think, correctly stated in recent cases decided by this court.

In *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846, where the plaintiff was standing on the platform of a freight depot and was injured by a freight train that ran against the platform, Judge Buchanan, delivering the opinion of the court, said: "Being there as a mere licensee, the defendant did not owe him the duty of maintaining its roadbed, switches, and connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings and machinery on its cars, or of properly inspecting the same, or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed; the general rule being that a bare licensee—that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes in no way connected with the railroad—is only relieved from the responsibility of being a trespasser and takes upon himself all the ordinary risks attached to the place and the business carried on there." In support of the law as thus stated, a number of authorities are cited, to which reference is here made.

In *Williamson v. Southern Ry. Co.*, 104 Va. 152, 51 S. E. 195, 70 L. R. A. 1007, a licensee had been injured by a train of the defendant company, and it was contended by counsel that, while a railroad company may run its trains on a bright moonlight night without lights on its engines, "if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees, provide its engines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees." Speaking to this contention, Judge Harrison said: "To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees; for, if they must

provide lights for their protection on a dark night, it could with equal propriety be urged that on a downgrade, which it is here contended so reduced the noise of the train as to destroy its value as notice, the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances, other than lights, should be in order, that competent employees should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensees. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad, but enough has been said to indicate how difficult, if not impossible, it would be to ingraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare licensees, and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected."

The syllabus to that case is as follows: "A railroad company owes no duty of previous preparation for the protection of mere licensees. Its sole duty is to use reasonable care to discover and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. The obligation is not an absolute one, but it is only to use ordinary care for their protection, under conditions and circumstances as they actually exist at the time and place where the licensee may be reasonably expected."

In the still more recent case of *N. & W. Ry. Co. v. Stegall's Adm'x*, 105 Va. —, 54 S. E. 19, this court has held that "a railroad company does not owe the duty of prevision to a bare licensee on its tracks, nor does it owe him the duty of employing competent servants to manage its trains, or to run them in any particular manner, or at a particular rate of speed." And this we understand to be the established law with reference to bare licensees; that is to say, licensees who are such by the mere tolerance and acquiescence of the company, and not by its express invitation, licensees it may be who have become such by repeated acts of trespass over the protest and against the will of the railroad company, and in which the railroad

company has been compelled silently to acquiesce because of its inability to prevent.

We cannot say that it is negligence per se for a railroad company to make a "running," "flying," or "gravity" switch, under the conditions existing at Buena Vista. The contradicted evidence is that it was the usual and customary mode of transferring cars; that it was under all the circumstances the most expeditious and safest mode of shifting cars; that it had been in use from the time the railroad was constructed, and was done almost every day in the year and sometimes more than once a day. Upon the front of the box car next to the engine the conductor of the train was stationed, and, upon an alarm signal being given by the engineer, he went to the rear of that car to apply the brakes, as it was his duty to do. The cases we have cited established the proposition that it was the duty of the company to use reasonable care to prevent injury to licensees upon its tracks at this point, but it was not the duty of the company to have a special lookout established for that purpose, nor was it the duty of the conductor to disregard the signal of the engineer, which required him to apply the brakes, in order to keep a constant supervision over the track to see that a licensee who had avoided the engine did not fail to turn his head to see that the track was clear before he returned to it. To do so would be to impose upon the railroad company a higher degree of duty than the law imposes, which requires the exercise of ordinary and reasonable care, and would be in direct opposition to the cases of *N. & W. Ry. Co. v. Wood and Williamson v. Southern Ry. Co.*, supra.

While the deceased was a licensee, he was still charged with the duty to care for his own safety. He was charged with the knowledge that this track was frequently used for the passage of trains and the shifting of cars, and he must be considered as charged with the knowledge of a method of shifting cars which had been in constant and daily use for many years.

The doctrine of the last clear chance has no application to this case. Farrow was not in danger until, the engine having passed, he stepped back upon the track in front of the box cars, and there is no evidence that the defendant company knew, or could have known, of his position of danger in time to avert the accident. On the contrary, the conductor says that he never saw the man until after he had been run over by the cars. He was not seen, because, as we have already said, the conductor was at the moment engaged in the performance of a necessary duty—a duty which he could not neglect without danger of collision with the engine, and injury to persons and property as the probable consequence.

Upon the whole case, we are of opinion that there was no evidence of negligence be-

fore the jury, and that the demurrer should have been sustained; and this court will proceed to enter such judgment as the circuit court should have entered.

BUCHANAN, J., absent.

COMMONWEALTH ex rel. ATTORNEY
GENERAL v. ATLANTIC COAST
LINE R. CO.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. CONSTITUTIONAL LAW — CONSTITUTIONAL
QUESTIONS — DETERMINATION — CORPORATION
COMMISSION — JURISDICTION.

The State Corporation Commission, organized under Const. § 158 (c) [Va. Code 1904, p. ccliii], providing that in all matters pertaining to the public visitation, regulation, or control of corporations, within the jurisdiction of the commission, it shall have the powers and authority of a court of record, etc., has jurisdiction in a proceeding before it, by the state, to compel a carrier to issue mileage books at a reduced rate, as required by Act March 15, 1906 (Acts 1906, p. 541, c. 256), to pass on an issue raised as to the constitutionality of such act.

2. SAME — CARRIERS — REGULATION OF RATES —
DUE PROCESS OF LAW.

Act March 15, 1906 (Acts 1906, p. 451, c. 256), requiring all railroads operating in the state to keep on sale at all times mileage books of 500 miles and over to be sold at not more than 2 cents a mile, and good for the use of any dependent household member of the family of the party to whom it is issued, dwelling under the same roof, within one year from the date of the same, was unconstitutional, as depriving railroad companies of their property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 832, 847.]

3. COURTS — FEDERAL COURTS — RULES OF DE-
CISION.

A decision of the United States Supreme Court holding a state statute regulating railroads unconstitutional, as a deprivation of property without due process of law, is conclusive on the courts of another state in determining the validity of a similar statute of that state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 329-334.]

Appeal from State Corporation Commission. Petition by the commonwealth on relation of the Attorney General against Atlantic Coast Line Railroad Company. From a judgment of the State Corporation Commission, dismissing the petition, the commonwealth appeals. Affirmed.

William A. Anderson, Atty. Gen., for the Commonwealth. William B. McIlwaine, for appellee.

CARDWELL, J. This is an appeal from a judgment of the State Corporation Commission denying the prayer of a petition filed on behalf of the commonwealth by the Attorney General against the Atlantic Coast Line Railroad Company, the object of which was to compel the defendant railroad company to comply with the act of the General Assembly, approved March 15, 1906 (Acts 1906, p. 451, c. 256), requiring all railroads operating in this state to keep on sale at all times

mileage books of 500 miles and over at a charge of not more than 2 cents a mile.

The State Corporation Commission has, in a written opinion made a part of the record, after stating how the case arose, set forth in a very satisfactory manner the reasons why the relief asked on behalf of the commonwealth could not be granted, and we therefore adopt its opinion as a part of the opinion of this court.

"The petition states that the regular maximum rate of the defendant company is 8 cents per mile. The company was summoned by the commission to show cause why it should not be required to comply with the said statute, and have penalties imposed upon it for its failure to perform its public duty in this respect. In its defense the company alleges that the act in question is unconstitutional. Several grounds are assigned by the defendant upon which its assertion of the unconstitutionality of the law is based. The two main contentions are:

"(1) That the statute in question is in contravention of the provisions of the fourteenth amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and without just compensation, and also denies to the defendant the equal protection of the laws.

"(2) That the General Assembly of the state, under the provisions of the organic law of the state, has no authority by legislation to prescribe or fix rates for transportation, but that authority to exercise the legislative functions of the state in that respect is conferred exclusively upon the State Corporation Commission.

"The learned Attorney General, as the highest law officer of the commonwealth, urged upon the commission that, in this proceeding, it was invested with all the powers, and had imposed upon it all the responsibility of a court of record. He earnestly contended that the commission not only had the judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion. This position of the Attorney General was not combatted by the learned counsel for the defendant company, but was conceded to be correct. Indeed, it is no longer open to question. 'In this commonwealth the State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations. For these purposes, it has been clothed with legislative, judicial, and executive powers'—was held by the Court of Appeals of this state in the case of *Norfolk & P. R. R. Co. v. Com.*, 103 Va. 289, 49 S. E. 39, which went up to that court on appeal from the commission. The Constitution of Virginia, in section 156 (c) [Va. Code 1904, p. ccliii] provides, as to the commission, that 'In all matters

pertaining to the public visitation, regulation or control of corporations, and within the jurisdiction of the commission, it shall have the powers and authority of a court of record,' etc. This section gives the commission, in the exercise of its judicial functions, authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments, and confers upon it other ordinary attributes of a court of general jurisdiction. In all matters, 'within the jurisdiction of the commission,' says the Constitution, employing the word 'jurisdiction' which is appropriately used with reference to a judicial tribunal as distinguished from legislative or administrative authority. The commission, by section 156 (b), has conferred upon it the legislative authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the state government. But, in the exercise of this legislative power, it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it. This is done by a notice which affords due process of law to the company. The hearing or investigation upon that notice gives to the final action of the commission the force and effect of a judgment of a judicial tribunal.

"Passing upon the reasonableness of rates and classifications to be prescribed by it, and of regulations, orders, and requirements to be promulgated by it—in the exercise of its legislative authority—constitute the principal matters 'within the jurisdiction' of the commission (as a judicial tribunal) as outlined in the Constitution. The General Assembly has brought many additional matters within the jurisdiction of the commission.

"In this proceeding the Attorney General invokes the jurisdiction of the commission under sections 16 and 19 of the act approved April 15, 1903, (Laws 1902-04, pp. 141, 142), and carried into the Code of 1904, at page 714, as section 1813 (a). By that statute the commission is authorized to compel all corporations to perform any public duty or requirement, and to impose fines upon them for failing to do so. This brings within the judicial jurisdiction of the commission the enforcement of all statutes imposing public duties upon public service corporations. The commission cannot impose a fine upon a corporation without summoning the company before it, hearing what it has to say in its defense, and passing judgment thereon judicially; in other words, giving the company a fair trial as in any other court. To proceed otherwise under this statute would be repugnant to fundamental principles, and would make the statute itself in violation of the Constitution, both of the state and the United States. The jurisdiction of the commission is further enlarged by clause 19 of section 1294 (b) of the Code of 1887 [Va.

Code 1904, p. 660] being section 19, chapter 2, page 974, of the act concerning public service corporations. The commission is there given jurisdiction to entertain a petition filed before it complaining of violation of any of the provisions of that act. 'If the grievance complained of be established,' says the Legislature in this act, 'the State Corporation Commission, sitting as a court of record, shall have jurisdiction by injunction, etc.' The commission awarded an injunction under this statute against the Virginia Passenger & Power Company restraining it from increasing its rates by discontinuing transfers. See report of State Corporation Commission of 1904, part 1, page 94.

"The commission having summoned the defendant company before it to show cause why a penalty should not be imposed upon it, the commission must hear fairly and pass judicially upon any issues properly raised. It matters not that one of the issues is the unconstitutionality of the act which the commission seeks to enforce. If the act is void, it is a just reason why the company cannot be compelled to comply with it, or be fined for violating it.

"In support of its argument that the act in question here contravenes the fourteenth amendment of the Constitution of the United States, the company relies chiefly upon the authority of the case of *Railway Company v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. The Supreme Court of the United States, in that case, held unconstitutional a statute of Michigan requiring railroad companies to keep on sale 1,000-mile books or tickets. The opinion delivered by Mr. Justice Peckham declares that legislation of this character violates the constitutional rights of the railroad companies to due process of law and the equal protection of the laws. The statute provided that the tickets might be required to be issued in the name of the purchaser and his wife and children; the ticket to be valid for two years, and the unused portion then to be redeemed. The court says: 'We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The Legislature having established such maximum as a general law now assumes to interfere with the

management of the company while conducting its affairs pursuant to, and obeying, the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire, and are able to purchase, tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the ticket purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.'

"The learned judge reasons at length along the same lines. The opinion establishes that the state may prescribe a maximum scale of rates, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. The reasoning of the learned judge is not entirely and clearly convincing, nor is the conclusion reached by him very satisfactory, and three of the judges dissented. But we are bound by this decision, as it emanates from the highest tribunal in the country. The case has been referred to in several subsequent cases in the Supreme Court of the United States, without criticism or doubt cast upon it. It has also been followed in New York. In that state a statute somewhat similar to the Michigan and Virginia statutes was assailed as unconstitutional in the case of *Beardsley v. N. Y., L. E. & W. Co.*, 162 N. Y. 230, 56 N. E. 488. The Court of Appeals of New York refers to the opinion of Justice Peckham on the Michigan statute, and is not disposed to agree with all of its reasoning. But the court, in a brief opinion, concludes that it is bound by this opinion of the Supreme Court of the United States on a question arising under the federal Constitution, and held the New York statute to be unconstitutional.

"In referring to the case in 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, the Attorney General says in his written brief: 'I frankly concede that, unless this case can be distinguished from the Michigan Case, or unless it can be shown that this case is overruled by some other decision or decisions of the United States Supreme Court, the decision of the United States Supreme Court in the Michigan Case must be considered as conclusive of this case, and the churchman act must, in that event, be held to be unconstitutional.' It is sought to distinguish the Virginia statute from the Michigan statute by pointing out that, in the latter law, the

right to purchase the mileage tickets seemed to be confined to married men, and that the law itself was a portion of a general statute by which the Legislature had fixed a maximum scale of passenger rates. These differences are incidental and we do not think that they affect the reasoning by which the conclusion is reached by the Supreme Court of the United States.

"The court says: 'The Legislature has the power to secure to the public services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions, and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in order that the Legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.'

"We conclude that the statute before us is in conflict with the Constitution of the United States, and is therefore void, and we have no authority to punish the defendant company for failure to comply with its terms. We are greatly strengthened in this conclusion by a convincing opinion delivered several days ago upon this question by the learned judge of the corporation court of Staunton in which he reaches a similar result.

"As the conclusion already reached forces us to take no further proceedings in this matter, and so disposes of the whole case, it is unnecessary for us to pass upon the other question raised by the defendant company. The entire lawmaking power of the people of Virginia is vested in their representatives constituting our General Assembly, subject only to such limitation as may be placed upon it by the Constitution of the state. Whether the provisions of the Constitution relative to the powers and authority of this commission and vesting in the commission the legislative power to make rates are so worded as to exclude the General Assembly from exercising its legislative power in that respect is a question which it is needless for the commission to pass upon, unless it is so presented as to render its adjudication absolutely essential to the decision of the case."

It will be observed that the commission considered that the controlling question in the case is whether or not the act of the General Assembly under review, and which we will for convenience refer to as the "Virginia Mileage Act," is violative of the provisions of the fourteenth amendment of the Constitution of the United States, by depriving the appellee company of its property or liberty without due process of law, or by depriving it of the equal protection of the laws. The learned Attorney General concedes that the

case of *Railway Company v. Smith*, supra, which we shall speak of for convenience as the "Michigan Case", must be considered as conclusive of this case, unless they can be distinguished, or it can be shown that the Michigan Case is overruled by some other decision or decisions of the United States Supreme Court. Therefore there is but little for us to add to what has been said in the opinion of the State Corporation Commission, supra.

The leading case relied on for the commonwealth is *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, which announced the broad doctrine that a state government has the inherent right to regulate and control railroad companies and other public service corporations, and to prescribe the rates and charges that they should be allowed to make. In that case, the power of the Legislature of Illinois to fix by law the maximum of charges for storage of grain in warehouses in Chicago, and other places in the state, was the question at issue, and, upon the ground that when private property is devoted to public uses it is subject to public regulation, it was held that, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, the Legislature of Illinois could fix by law the maximum of charges for the storage of grain in warehouses, at Chicago and other places in the state. A lengthy dissenting opinion was filed by Mr. Justice Field, concurred in by Mr. Justice Strong, taking the ground that the ruling of the majority was subversive of the rights of private property theretofore believed to be protected by constitutional guaranties against legislative interference, and in conflict with the authorities cited in its support, and that the decision of the court gave unrestrained license to legislative will.

By subsequent decisions of the same court, the doctrine laid down in *Munn v. Illinois* has been frequently and materially modified. *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Chicago, Milwaukee & St. P. R. Co. v. Minn.*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 486, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego L. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

With the modifications engrafted upon the rule referred to, the rule itself has been approved in a number of cases down to and including *Minneapolis & St. L. R. Co. v. Minn.*, etc., 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; and in those cases decided after the Michigan Case we are unable to find anything that can be construed as overruling that case or discrediting it in any degree, the fact being that the case was not referred to because the circumstances in those cases, on the one hand, and the Michigan Case on the other, were different, and therefore the language of the decisions different. In the

cases modifying the doctrine of *Munn v. Illinois*, the trend of judicial thought, it may be safely said, is more in harmony with the views expressed in the dissenting opinion of Mr. Justice Field than with the view of the case taken by the majority of the court.

The most important and pertinent modification to be considered in connection with the case under review appears in the Railroad Commission Cases, *supra*, where the opinion by Chief Justice Waite (who also wrote the opinion in *Munn v. Illinois*), after reviewing the ruling in *Munn v. Illinois*, says: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which, in law, amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Chicago, Milwaukee & St. P. R. Co. v. Minn.*, *supra*, the rule in *Munn v. Illinois* appears to have been approved by a majority of the court and another very important modification of the rule engrafted thereon, to the effect that, where a state created a commission and clothed that commission with authority to prescribe rates and charges to be made by railroad companies, the power thus delegated to the commission should not be exercised arbitrarily without giving the railroad companies affected a day in court and opportunity to be heard, and to appear and show the effect of the schedule of rates and charges prescribed by the commission upon them, and that to do this was depriving them of their property without due process of law, and depriving them of the equal protection of the laws.

The other important modifications of the rule are not relevant to the issue in this case, and were announced in a number of cases in which the rule was variously formulated, many of which are exhaustively reviewed by Mr. Justice Harlan in *Smyth v. Ames*, *supra*, where that learned judge states the doctrine, as established by the adjudications of the court, as follows: "(1) A railroad corporation is a person within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroads that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would,

therefore, be repugnant to the fourteenth amendment of the Constitution of the United States. (3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the Legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

We are wholly unable to perceive the antagonism claimed, on behalf of the commonwealth, to exist between the cases we have mentioned and a number of others, not necessary to be adverted to, recognizing the rule in *Munn v. Illinois* with its modifications, and the principle announced in the *Michigan Case*. The fact is that the last-named case refers to *Munn v. Illinois* and the cases modifying the rule announced therein, and recognizes the existence of the rule as modified; but, while recognizing the power of the Legislature to prescribe maximum charges which may be made by public service corporations, held that the *Michigan* mileage statute did not belong to that class of legislation enacted in the exercise of this admitted power, but was a taking of the property of the company without due process of law—legislation which is prohibited by the fourteenth amendment—and therefore violated the constitutional rights of railroad companies to due process of law, and the equal protection of the laws. It was contended in that case, as in the case here, that, as the Legislature would have the power to reduce the maximum charges to the same rate at which the *Michigan* statute provided for the purchase of 1,000-mile tickets, the railroad company could not be harmed nor its property taken without due process of law when the Legislature only reduced the rate in favor of a few citizens instead of all, but the opinion denied the right of the Legislature to make such an alteration, upon the ground that to do so might involve a reduction of rates to an amount insufficient to give the remuneration to which the railroad company was legally entitled under the decisions of the court.

It will be observed that while the *Michigan* statute required 1,000-mile tickets to be sold by railroad companies for less than the ordinary rates of fare, for use by the purchaser and his wife and children, if named on the ticket, and made them valid for two years after the date of purchase, the *Virginia Mileage Act* requires the companies at all times, day and night, at all stations, regular and flag, to keep on sale books of 500 miles and over, and that "it shall be unlawful for any transportation company or corporation operated by steam to charge or

collect a greater sum than two cents per mile on such mileage books, and such mileage books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year from the date of same." As it appears to us, the provisions of the two statutes are practically the same, and fall within the purview of the Michigan Case, as the reasoning for holding the one violative of the provisions of the fourteenth amendment of the Constitution of the United States applies as well to the other. As stated in the opinion of the State Corporation Commission above, the incident that the Michigan statute had fixed a maximum scale of passenger rates is mentioned in the Michigan Case, but the conclusion reached was in no way rested upon that incident. On the contrary, the opinion says: "The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in a community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not a reasonable regulation." And again: "Regulations for maximum rates for present transportation of persons, or property, bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing the maximum rate, nor is it proper legislation. It is an illegal and unjustifiable interference with the rights of the company." Clearly the dominant idea running through the whole opinion is that this is class legislation, and is not for the equal benefit of the whole people; therefore the conclusion is irresistible that the same judgment would have been rendered by the court had the Legislature of Michigan not have fixed a maximum scale of passenger rates.

It is true that the Michigan Case was decided by a divided court, as was the case of *Munn v. Illinois* and nearly all of the cases sanctioning the doctrine of that case, but, instead of the Michigan Case being discredited by any subsequent decision of the court, in *Wis., M. & P. R. Co. v. Jacobson*, 179 U. S. 288, 21 Sup. Ct. 115, 45 L. Ed. 194, in referring to the power of a state to regulate, etc., railroad companies, the Michigan Case is cited as authority for the proposition of law, that, "while this power of regulation exists, it is also to be remembered that the Legislature cannot, under the guise of regulation, interfere with the proper protection of the business of railroad corporations in matters which do not fairly belong to the domain of reasonable regulation." And the court adds: "The distinction between this case and that of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858,

55 S.E.—37

* * * is very plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the Legislature should be held to constitute such reason."

We have, then, in *Wis., M. & P. R. Co. v. Jacobson*, the court's own construction of its decision in *Railway Company v. Smith* (the Michigan Case).

In *Beardsley v. N. Y., L. E. & W. R. Co.*, supra, holding a New York statute, similar to the Michigan and the Virginia mileage statutes, in conflict with the fourteenth amendment of the Constitution of the United States, the opinion, while indicating that the court was not disposed to agree with all of its reasoning, says: "The Supreme Court of the United States, in *Railway Company v. Smith*, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us."

We fully recognize, as did the court in *Beardsley v. N. Y., etc., Co.*, supra, that the decision in the Michigan Case is conclusive upon us on the question of the constitutionality of the statute under consideration, and therefore the judgment of the State Corporation Commission complained of must be affirmed.

HAMILTON v. STEPHENSON et al.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. MORTGAGES—DEED OF TRUST—FORECLOSURE—SALE—CONDUCT.

A sale of land on foreclosure of a deed of trust was duly advertised, and ample opportunity afforded bidders to arrange in advance to purchase the property. The sale was attended by more than 200 persons, and commenced shortly before noon and continued for over 3 hours. One of the intending purchasers, after having failed to secure the co-operation of another, sought to have the sale which had already progressed more than 3 hours, suspended to enable him to endeavor to effect a similar arrangement with a third person. This was refused, but full time was afforded him to bid for the land individually or arrange with others to do so. As the bidding was drawing to a close, the trustee on two occasions took out his watch and instructed the auctioneer if no higher bid was made in 5 or 10 minutes, to knock down the land, which was then sold for its fair value. *Held*, that the land was not

prematurely sold, so that bidders were deprived of an opportunity to purchase.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, §§ 1070, 1076.]

2. SAME—SALE IN PARCELS.

In a proceeding to set aside a sale of land on foreclosure of a deed of trust, evidence held insufficient to show that the trustee sold the land as a whole at a sacrifice, instead of in four parcels under an agreement with the debtor.

3. SAME — STIFLING BIDDING — BURDEN OF PROOF.

While an agreement tending to lessen bidding at an auction sale of land sold under foreclosure of a deed of trust is illegal, the burden is on a party attacking the validity of the sale thereof, of proving the same by clear and satisfactory evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Mortgages, § 1098.]

4. SAME—SALE—VACATION—ACCOUNTING.

Where the fullest accounts had been made up between debtor and creditor and the vouchers had been turned over to the debtor who had possession of them for many years, and on the day of the sale of land on foreclosure the exact amount of the indebtedness was computed in the debtor's presence with the assistance of his counsel, without any suggestion impugning the correctness of the debt, it was not error to refuse to order an accounting in a proceeding by the debtor to set aside the sale.

5. USURY — ELEMENTS — PERIODICAL SETTLEMENTS.

Where a debtor and creditor had settlements from time to time bringing in new items of debit, and interest was calculated on past due amounts, and a new bond secured by a deed of trust taken for the whole, such transaction did not constitute usury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, § 100.]

Appeal from Circuit Court, Highland County.

Suit by John G. Hamilton against L. H. Stephenson and others. From a decree in favor of defendants, complainant appeals. Affirmed.

J. M. Perry and T. K. Hackman, for appellant. C. P. Jones & Son and Glasgow & White, for appellees.

WHITTLE, J. The object of this suit is to set aside the sale of a tract of land in Highland county, made by John W. Stephenson, trustee, under a deed of trust from the appellant, John G. Hamilton, and others, to secure a debt to Lucius H. Stephenson; and, pending the litigation, to enjoin John A. Whitelaw, the purchaser, from prosecuting an action of unlawful detainer to recover possession of the land.

At the hearing, the circuit court dissolved the injunction, and dismissed the bill, and the plaintiff, Hamilton, appealed.

There are four assignments of error, which will be considered in the order in which they are presented in the petition for appeal:

First, it is alleged that the sale was hurried, and that persons who were present and desired to purchase the land, and made known their purpose to the trustee and auctioneer, were denied the privilege of bidding; and

the trustee caused the land to be prematurely knocked down to the purchaser, Whitelaw.

This assignment is not sustained by the evidence. It appears that the sale was duly advertised, and ample opportunity afforded intending bidders to arrange in advance for purchasing the property, if so disposed. It further appears that the sale was unusually well attended, more than 200 persons being present, and that it was commenced shortly before noon and continued for over three hours. The allegation of misconduct on the part of the trustee rests upon the evidence of a witness, who, after having failed to secure the co-operation of one person in the purchase of the property, sought to have the sale, which had already been in progress for more than three hours, suspended to enable him to endeavor to effect a similar arrangement with another party. Full time was afforded him to bid for the land individually, or to arrange with others to do so, and in the closing moments of the sale, the trustee was under no obligation to comply with his request for further indulgence. It was evident that the bidding was drawing to a close, and the trustee on two occasions took out his watch and instructed the auctioneer if no higher bid was made in five or ten minutes, to knock the land down. This is a common method of stimulating bidders toward the end of a sale, and was a fair and reasonable exercise of discretion on the part of the trustee in this instance.

The second assignment of error involves the charge that the trustee, at the request of the appellant, consented to sell the land in four parcels, but, after offering three out of the four lots, neglected to offer the fourth, and sold the tract as a whole at a sacrifice.

This assignment is also unsustained. The sale was to be for cash, and in the morning before it commenced, the appellant being confined to his bed by illness, the parties repaired to his chamber and entered into an arrangement in writing, to the effect that the trustee should first offer the farm in such parcels as he might be advised, and then as a whole; and adopt the sale that produced the highest price, requiring cash sufficient to pay costs and expenses of sale, and the balance in equal instalments, at one, two, three, and four years, with interest from date. The evidence is conflicting in regard to the terms of the alleged arrangement between the appellant and the Stephensons as to the manner in which the land was to be first offered in parcels; the contention of the appellant being that the trustee violated the understanding in not selling separately a lot of 208 acres. The witnesses for Hamilton are not agreed among themselves with respect to the terms of the agreement. While, on the other hand, the fact that the land was first offered as requested by Hamilton is proved by his counsel, McClintic, and the two Stephensons.

The third assignment of error is that Whitelaw, the purchaser, stifled the bidding at the sale, and thereby acquired the property at a sacrifice.

The principle of law involved in this assignment is well settled in this jurisdiction. The rule is thus stated in a recent case: "Contracts which tend to lessen competition and restrain bidding at judicial sales are, as a general rule, held to be illegal; but the burden is upon the party alleging such a contract to prove it by clear and satisfactory evidence. *Nitro-Phosphate Syndicate v. Johnson*, 100 Va. 774, 42 S. E. 995. See, also, *Barnes v. Morrison*, 97 Va. 872, 34 S. E. 93.

One of the charges under this assignment of error is that prior to the sale Whitelaw entered into a stipulation with McClintic to deter persons from bidding, and agreed, in the event of his becoming the purchaser, that he would sell McClintic part of the land to straighten his boundary line. This allegation is positively denied by Whitelaw, both in his answer to the bill and in his testimony, and the only circumstances tending to give color even to the imputation are that McClintic was one of his sureties on the purchase money bonds, and that after the land was put up as a whole Whitelaw told him if he bought the land he would sell him part of it. There is nothing in the evidence to connect Whitelaw directly or indirectly with any disparagement of Hamilton's title, nor does it appear that the price of the property was to any extent injuriously affected by McClintic's alleged declarations in derogation of the title. Burns' testimony is the only evidence in the case which contributes in any way to sustain the pretension that Whitelaw attempted to stifle bidding. In that connection the witness says: "Mr. Whitelaw did say to me to not run it up on him too high, and if he concluded to dispose of this side he would give us the refusal. At that time I didn't have any idea of making a bid on the place as a whole, because I was not able to buy it." Whitelaw denies making the statement, and says: "It never occurred to me that Mr. Burns would bid on the place as a whole. Mr. Burns, or his wife, asked me if I bought the whole place would I sell the west side. I told them possibly I would do so. But, as to asking them not to bid against me, I made no such request." It is not shown that either McClintic or Burns were prospective bidders; and, after careful examination of the evidence, we are of opinion that it fails to establish the accusation that Whitelaw either stifled, or attempted to suppress, bidding.

We are further of opinion that, in addition to the just criterion of value furnished by the highest bid at a fair sale in open market after due notice, the weight of evidence shows that the price paid, \$11,000, was the fair value of the property. *Todd v. Gallego*

Mills, 84 Va. 586, 591, 5 S. E. 676; *Nitro-Phosphate Syndicate v. Johnson*, supra.

This brings us to the consideration of the fourth and last assignment of error, namely, the refusal of the trial court to order an account of indebtedness between the appellant and Lucius H. Stephenson, as prayed for in the original and the amended bill.

In this aspect of the case, we may with propriety adopt the language, as we must adopt the conclusion, of the learned judge of the circuit court in his carefully considered opinion:

"A great mass of testimony was taken in this case, and all the transactions between L. H. Stephenson and the plaintiff, running through a period of nearly a quarter of a century, were fully investigated. It would serve no useful purpose to take up and discuss the evidence, and each of the numerous items, here in detail. After the most exhaustive argument by able counsel and laborious scrutiny on my part of all the testimony, and conceding that L. H. Stephenson ought to be held to the strictest requirements of the law regarding transactions between counsel and client (and some of the transactions under investigation occurred when the relation did not exist), I am of opinion that he has fully met those requirements, and this record clearly shows that his dealings with the plaintiff have been open and fair, and that he has not used his position of counsel, while that relation existed, to oppress or take advantage of the plaintiff. In every instance of settlements made between these parties, the fullest and most particular accounts were made up, and the vouchers turned over to the plaintiff; he had these in his possession for years, and not until his creditor had his land sold did he ever enter a single protest."

Indeed, it appears that on the day of sale the exact amount of the indebtedness between the parties was computed, in the presence of Hamilton, and with the assistance of his counsel, and there was not a suggestion impugning either the integrity or correctness of the debt.

It is a familiar rule of practice that an order for account will not be awarded to enable the plaintiff to make out his case, but the party asking for an account must show that he is entitled to it. *Baltimore Steam Packet Co. v. Williams*, 94 Va. 422, 28 S. E. 841; *Millhiser v. McKinley*, 93 Va. 207, 35 S. E. 486; *Bresee v. Bradfield*, 99 Va. 331, 38 S. E. 196.

It is also alleged that the debt is usurious, but the charge is denied, and was not proved. It does appear that from time to time Stephenson and Hamilton had settlements, bringing in new items of debit, calculating interest on past due amounts, and taking a new bond secured by deed of trust for the whole; but this does not constitute usury. *Brown v. Brent*, 1 Hen. & M. 4; *Childers v. Deane*, 4 Rand. 406; *Pindall v. Bank of*

Marietta, 10 Leigh, 481; Fultz v. Davis, 26 Grat. 908; Gilbert v. W. C. V. M. & G. S. R. Co., 38 Grat. 586, 599.

In conclusion it may be observed that while the pleadings are replete with allegations of a grave nature, criticising with more or less severity the conduct of the creditor, trustee, and purchaser, the charges are categorically denied by the answers, and are not sustained by evidence.

Upon the whole case, we are of opinion that the decree appealed from is without error, and should be affirmed.

BUCHANAN, J., absent.

HOT SPRINGS LUMBER & MFG. CO. v. REVERCOMB.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. NAVIGABLE WATERS—WHAT CONSTITUTES NAVIGABILITY.

A stream is a navigable or floatable one if, by the increased precipitation at seasons, recurring periodically with reasonable certainty, the flow of water will be sufficient to be substantially useful to the public for transportation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 9.]

2. SAME—FLOATAGE OF LOGS.

One floating logs in a navigable stream was not liable for injuries to a riparian owner from the piling up of the logs on his land if due and ordinary care was used to prevent injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 251, 253; vol. 33, Logs and Logging, § 50.]

3. SAME—ACTION BY RIPARIAN OWNER—DECLARATION—SUFFICIENCY.

In an action by a riparian owner against a boom company the declaration alleged that defendant carelessly and negligently permitted logs being floated by defendant in the stream to pile up on the banks in heaps or jams, which turned the water from the channel upon plaintiff's land. *Held*, that the declaration was demurrable in that it failed to charge facts constituting negligence.

Error to Circuit Court, Bath County.

Action by H. A. Revercomb against the Hot Springs Lumber & Manufacturing Company and another. Judgment in favor of plaintiff, and the above-named defendant brings error. Reversed and remanded.

John W. Stephenson and Geo. A. Revercomb, for plaintiff in error. McAllister & Nelson and D. Harro, for defendant in error.

KEITH, P. H. A. Revercomb brought an action of trespass on the case against the Hot Springs Lumber & Manufacturing Company and the Jackson & Cowpasture Boom Company, and in his declaration avers that he is the owner of lands to the water's edge on both sides of Jackson river, and that he also owns the bed of that stream; that the defendants went above the plaintiff's land on said river and cut and wrongfully put into the river a great many saw logs, for the pur-

pose of floating them down said river to the sawmill of the Hot Springs Lumber & Manufacturing Company, which is situated below the plaintiff's land. He avers "that the said Jackson river is not a floatable stream, and was not at the time said logs were put therein, and is not a stream large enough in volume of water in its natural condition to float the logs of the defendants, placed therein as aforesaid, but was only capable of floating said logs when the river was swollen or made high by rains or melting snow, at irregular periods, all of which facts were well known to the defendants at the time they put the said logs into said river, and at the time they purchased said logs from others, which had been put in said river for the purpose of floating the same down said stream as aforesaid. And the plaintiff avers that when said logs were placed in said river by the defendants, wrongfully and illegally, to be washed or floated down said stream, and after they had purchased the logs from others, who had placed the same in said stream to be floated down the same, wrongfully and illegally, that the said river was on the _____ day of _____, 1904 and 1905 made deep, or raised by the rains or melting snow, and washed the said logs, placed therein by the said defendants as aforesaid, and those purchased by them which had been placed in said river by others as aforesaid, down the said river, and carelessly and negligently permitted said logs to pile up on the banks of said river on the lands of your complainant in great heaps and jams, which turned the water in said river from the channel where it had been accustomed to flow, and caused the water in said river to flow out, on and against the plaintiff's land, and washed away and damaged and injured the same."

Another count of the declaration avers, in addition to the cause of action just set forth, that it was the duty of the defendants to prepare the banks of said river so as to protect the plaintiff's land from damage by said logs being piled and washed on plaintiff's land in the attempt to have the same floated or washed down said stream, as aforesaid; and plaintiff avers that it was necessary that said banks of said river should be prepared by said defendants in order to guard the plaintiff's land against damage by floating said logs. But not regarding their duty in this particular, the said defendants failed and neglected to prepare the banks of said river so as to protect the plaintiff's land from damage from said logs; that the river being swollen by rains or melting snow, the defendants carelessly and negligently permitted the said logs to be washed or floated down said river onto the lands of the plaintiff, and piled them up upon his said land and turned the water in said stream from where it was accustomed to flow, and caused it to run against the said lands of the plaintiff and wash away and

destroy the natural banks of said river where it runs through his said land, and left said banks in an exposed condition, with nothing to protect them from damage by the continued wash of said river. And the plaintiff avers that the said damage is a continuing damage, that the said banks are continually being washed by the said river by reason of their having been left in the exposed condition as aforesaid by the said defendants, and that, in order to protect his lands from being continually washed and destroyed by said river, it will be necessary for him to construct expensive embankments or abutments or cribs along the banks of the said river which were left exposed, as aforesaid; the cost of which will be at least the sum of \$2,000.

These quotations sufficiently present the aspects of the case which we deem it necessary to consider upon the demurrer which was interposed to the declaration by the defendants and overruled by the circuit court.

The question presented is an interesting one, and, in order to determine it, we must ascertain, in the first place, what constitutes in common law a floatable stream; the subject with us not having been regulated by statute.

The contention of plaintiff in error is that for a stream to be floatable, and therefore subject to use as a highway, it is not necessary that it should possess the quality of being capable of such use during the whole year, but it is sufficient if it has water enough, as the result of natural causes, to be capable of floatage periodically during the year, so as to be susceptible of beneficial use to the public.

In *Brown v. Chadbourne*, 50 Am. Dec. 641, the following instruction was refused: "To constitute Little river a navigable or floatable stream, it must be shown to be capable in its ordinary and natural state of floating logs, boats, and rafts; and it is not enough to prove that logs may be carried down it at certain seasons of the year when the stream is raised by a freshet." The refusal to grant this instruction was assigned as error in the appellate court, which, in discussing the subject, says: "Those authorities, upon which reliance is placed, show nothing more than that small creeks or inlets, penetrating into marshes, and which can only be used at certain periods of the tide, and then only for a short time, or in which there is only a possibility of use, under some circumstances, at extraordinary high tides, are not navigable rivers. Such streams are incapable of any practical general use for the purpose of navigation, and they are dissimilar to the river under consideration. * * * A test so rigid and severe as that required by the instruction requested would annihilate the public character of all our fresh rivers, for many miles in their course from their sources toward the ocean. The timber floated upon our waters to market is of great value, and

neither the law nor public policy requires the adoption of a rule which would greatly limit their use for that purpose. The right to the use of the stream in question must prevail, whenever it may be exercised, at any state of the water."

In *Thunder Bay Booming Co. v. Speechley*, 18 Am. Rep. 190, Judge Cooley, after stating that the possibility of occasional use during unusual and brief freshets could not make a stream a public highway, adds: "The doctrine, then, which we derive from the cases is that a stream may be a public highway for floatage when it is capable in its ordinary and natural stage in the seasons of high water of valuable public use. The inference sought to be drawn from it is that a navigable stream must, in contemplation of law, be navigable at all times, and under all circumstances; that there can be no such thing as a highway which is only open to the public use periodically, but that when once the public character of the way is established the right of the public to the easement is paramount to all private rights. * * * But no such inference is warranted by the decisions. The highway they recognize is one *sui generis*, and in which the public rights spring from peculiar facts. It is a public highway by nature, but one which is such only periodically and while the natural condition permits of a public use. During that time the public right of floatage and the private right of the riparian proprietors must each be exercised with due consideration for the other, and any injury which the latter receives in consequence of a proper use of the stream for floatage he must submit to as incident to his situation upon navigable waters."

In *Shaw v. Oswego Iron Co.*, 45 Am. Rep. 154, it is said: "Nor is it essential to the public easement that such capacity continue through the year; it is sufficient if its periods of high water, or navigable capacity, ordinarily continue a sufficient length of time to make it useful as a highway."

In *Gaston v. Mace*, 10 S. E. 65, 5 L. R. A. 392, 25 Am. St. Rep. 960, it is stated: "It is contended that to show a river is public it is not enough to prove that logs may be floated down at a certain season of the year, when it is affected by a freshet, but it should have that capacity in its natural and ordinary state at all seasons of the year. None of the authorities require the stream to possess the quality of being capable of such use during the whole year. A distinguishing criterion consists in its fitness to answer the wants of those whose business requires its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs."

In *Little Rock, etc., R. Co. v. Brooks*, 43 Am. Rep. 279, it is said: "Nor is it necessary that the stream should be capable of floating boats or rafts the whole or even the

greater part of the year. Upon the other hand, it is not sufficient to impress navigable character that there may be extraordinary times of transient freshets when boats might be floated out. For, if this were so, almost all insignificant streams would be navigable. The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population on its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If in its natural state, without artificial improvements, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then in the American sense it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a great convenience and materially promote the comfort and advance the prosperity of the community. But it is evident that sudden freshets at uncertain times cannot be made available for such purposes. No prudent man can afford the expense of preparation for such events, or could trust to such uncertainty in getting to market."

In *Carter v. Thurston*, 42 Am. Rep. 584, it is said: "Clear stream is naturally capable of floating logs at some times every year, and to a considerable extent, and that it is reasonably and substantially useful to the public for that kind of navigation. It is therefore a public highway."

In *Farnham on Waters and Water Rights*, vol. 1, § 25, it is said: "Streams which are capable of floating to market the products of the soil along their banks are navigable within the rule subjecting navigable streams to public use. The public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting in a condition fit for market the products of the forests or mines, or of the tillage of the soil upon its banks. It is not essential that the property to be transported shall be carried in vessels or be guided by the hand of man, if it can be safely carried without such guidance. Nor is it necessary that the stream shall be capable of navigation against its current. Nor that it shall be navigable at all seasons of the year; it being sufficient that it becomes navigable periodically from natural causes. But in order to come within the rule the stream must be actually capable of some profitable use. The capacity, as shown by the use to which it is put, is the true criterion by which to judge the question of navigability. It is sufficient if it is capable of floating vessels, boats, or other craft, or rafts of logs, or logs in quantities to make it of commercial value. The fact that the logs must be floated without being formed into rafts is not sufficient to destroy its navigable character; but the width of the stream may diminish to such an extent that only a single

log at a time will float. Such a stream would be of no commercial value because the cost in time and labor in getting quantities of logs through it would destroy its usefulness. Such streams are not subject to public use. If the stream is capable of floating to a profitable extent it is navigable, and a public highway. The stream must, however, be capable of use in its natural state, for it is not subject to public use if improvement is necessary to fit it for such use. Most streams fluctuate in capacity, containing considerable water during the season of melting snow and the frequent fall of rains, and in periods of drouths, becoming in some instances almost dry. The fact that in the dry season the stream is not capable of use will not prevent its being used at other times when it is capable of it. But the period of capacity must be sufficiently regular and continued to make the stream of commercial importance. * * * When the stream is in a condition to be used, the riparian owner cannot do anything which will interfere with the use. But the right of navigation does not authorize interference with the bed of the stream or with the banks, or the destruction of property on the banks. The right to float is but a right of passage, and includes only such rights as are incident to the use of the stream for that purpose and necessary to render such use reasonably available."

The circuit court seems, when it came to the instructions, to have recognized the force of these authorities, for it instructed the jury as follows: "The jury are instructed that a floatable stream is one capable of being profitably used in its natural state by the public to float logs or timber to market or mills. The stream need not be at all times in the year capable of floating logs; it is sufficient if the public may calculate with tolerable certainty as to the seasons the water will rise to and remain at such height as to enable it to make profitable use of the stream, as the means of transporting logs to mills or markets, by floating them in such stream."

When the authorities speak of the stream in its natural state, they do not refer, we apprehend, to its volume of water, for, however that may vary, it is always due to natural causes; but they have reference to artificial aids or improvements. The declaration avers that the river has not sufficient water in it when in its natural or normal condition, by which we understand is meant in the more usual and continuous stages of the water, but that, in order to float the logs, it is necessary for the volume of water to be increased by melted snows or rains. The condition of the stream when its volume of water is increased by such causes is as natural as when it is diminished by drought; and, as we understand the law, it is a floatable stream if by the increased precipitation at seasons, recurring periodically with reasonable certainty, the flow of water will be

sufficient to be substantially useful to the public for the transportation of the products of their fields and forests.

The right of floatage is one of the innumerable limitations or qualifications by which, in a state of civilized society, we are compelled to yield something of our absolute rights with respect both to person and property, and to enjoy those rights in some degree in subordination to the rights of others. The owner of timber, for instance, upon the upper reaches of a stream, would find his property diminished in value were he not permitted to use the waterway which nature has provided. Riparian owners, therefore, upon the lower parts of the stream, must submit to this use as an incident of their ownership of lands situated upon a navigable stream.

Having come to an understanding as to what constitutes a floatable stream, we will apply it to the declaration.

The point of demurrer is that, while the plaintiff denies that Jackson river is a floatable stream, his declaration sets out facts which in law make it a floatable stream; and that position is, we think, warranted by the language of the declaration, which avers that while in its "natural and normal condition"; that is to say, in its usual condition—Jackson river has not sufficient water to float logs, yet that when the volume of water is increased by melting snows and rains at irregular periods, the volume of water is sufficient to float logs, which concedes to Jackson river conditions which the authorities declare to be sufficient to constitute a floatable stream. The declaration seems to have been framed upon the idea that to constitute a floatable stream it must be capable, in its ordinary and usual state, of floating logs, and that it was not enough that logs could be carried down it at certain seasons of the year when the volume of water was increased by melted snows or rains.

Having set forth, as the pleader supposes, that Jackson river is not a navigable stream, it follows of course that the defendants had no right in it, that they were trespassers and liable for whatever injury their trespass might have occasioned. But it was contended on the part of the defendants, in support of the demurrer, that the declaration, whatever the intent may have been, shows that Jackson river was a floatable stream, in which the defendants had a right to place their logs in order to carry them to the mill, and being in the exercise of a right, they could only be responsible for carelessness or negligence in the exercise of that right; and that the declaration wholly fails to show any fact from which carelessness or negligence can be inferred.

In *Hortenstein v. Va.-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 998, it is said: "The object of the declaration is to apprise the adverse party of the ground of complaint, and

in actions of tort the declaration must state sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff is entitled to recover. A statement of a cause of action in general terms, and general averments of negligence of the defendant which fall short of this, are not sufficient."

As was said by Judge Staples in *B. & O. R. R. Co. v. Whittington's Adm'r*, 80 Grat. 806: "It is very true that in actions for torts it is frequently sufficient to describe the injury generally, without setting out the particulars of the defendants' misconduct. In such cases great latitude of statement is allowed. But this rule does not justify a general and indefinite mode of declaring, admitting of almost any proof."

The averment is that the defendants "carelessly and negligently permitted said logs to pile up on the banks of said river on the lands of your complainant in great heaps or jams, which turned the water in said river from the channel where it had been accustomed to flow, and caused the water in said river to flow out on and against the plaintiff's land." The declaration is wholly silent as to the act of negligence; it merely states that the logs were piled up on the banks of the stream on the plaintiff's land, which may have been the result of negligence, but is silent as to the facts which constitute the negligence. If the defendants had the right to the use of Jackson river, they would not be liable for injury, although logs did pile up on plaintiff's land and injure him, provided due and ordinary care was used in floating the logs upon the stream to prevent injury to the adjacent landowners.

In *Southern Railway Co. v. Hansbrough's Adm'r*, 105 Va. —, 54 S. E. 17, it is held that a count in a declaration was bad which alleged "that the engine was run at a high rate of speed carelessly, negligently, and unskillfully, without pointing out in what manner it was so run, and without alleging a violation of any ordinance, or averring any obstruction to the view of persons crossing, which made it necessary for the company not to run its engines at a high rate of speed, states no cause of action, because it fails to point out in what manner the company was negligent," and for the reason that the count, having stated facts which showed that the railroad company was in the exercise of its rights, was demurrable, because while it stated in general terms that it was running its engine carelessly and negligently, it did not show with sufficient particularity of what that negligence consisted. It stated the result of the negligence, but not the acts relied upon as constituting negligence, and therefore did not give sufficient facts to enable the court to say whether, if they were proved as stated, the plaintiff was entitled to recover.

As was said by Judge Cooley, in *Thunder Bay, etc., Co. v. Speechley*, supra: "When once the public character of a way is estab-

lished, the right of the public to the easement is paramount to all private rights. * * * The public right of floatage and the private right of the riparian proprietor must each be exercised with due consideration for the other and any injury which the latter receives in consequence of the proper use of the stream for floatage he must consider it as incident to his situation upon navigable waters."

And in *Carter v. Thurston*, supra, it is said: "If the logs were cast upon the shore, not by reason of an improper use of the stream, but by accident, and without any fault of the defendants, they are not responsible at common law for the damage thus occasioned. Such streams, as well as our larger rivers, will, as experience has universally shown, from their windings and the rush of their waters, especially in times of freshets, cast floating logs upon the shores and bank."

We are further of opinion that the fourth count charges the defendants with a higher duty than is imposed upon them by law.

In *Field v. Apple River Log Driving Co.* (Wis.) 31 N. W. 17: The defendants, it was claimed, might have protected the land by building some structure along the shore, or by having men there to keep logs from striking it, and the court said: "Now as we understand the law, the right of navigation is not subject to any such duty. The right of passage on a navigable stream is a common and paramount one, but must, of course, be exercised with due regard to the rights of riparian owners. The use of the stream must be reasonable, and it must be exercised with ordinary care and skill, such as the great mass of mankind would exercise, under like circumstances, in driving logs. If the wind jam on the bar below the dam caused

the injury complained of, it might have been the duty of the defendant to prevent such jams from forming, if it was practicable to do so by any reasonable means; but it is not its duty to build booms or other structures along the plaintiff's shore to protect it from wearing or washing away."

And in *Coyne v. Miss. & Run River, etc., Co.*, 75 N. W. 748, 41 L. R. A. 498, 71 Am. St. Rep. 508, the rule is stated thus: "The party using the highway is not an insurer, but he must not be negligent or careless. Floating logs may cause damage to the estate of the riparian owner, but, if the party floating or driving the same uses due care and skill, he is not liable for such damage. Land on navigable streams is subject to the danger incident to the right of navigation, and where logs are driven in a stream in any ordinary, careful, prudent manner, the owner is not liable for damages which may result to the riparian owner."

We are of opinion, for the foregoing reasons, that the demurrer should have been sustained, with leave to the plaintiff to file an amended declaration.

We do not deem it proper to discuss the instructions. What we have already said will indicate in large measure the views of the court upon the propositions of law involved, and in the present aspect of the case it would be premature for us to discuss the instructions or the evidence, as upon another trial a wholly different record may be presented.

The judgment complained of is reversed, and the cause remanded for further proceedings to be had, not inconsistent with the views herein expressed.

BUCHANAN, J., absent.

HULVEY et al. v. ROBERTS et al.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

COURTS—APPELLATE COURTS—JURISDICTION—GROUNDS—CONSTITUTIONAL QUESTIONS.

Const. art. 6, § 88 [Va. Code 1904, p. cccxx], provides that, subject to such reasonable rules as may be prescribed by law as to the course of appeal, the Supreme Court of Appeals shall have appellate jurisdiction by virtue of the Constitution in all cases involving the constitutionality of a law. Section 586a, Code 1904, declares that, in judging of an election for the licensing of the sale of intoxicating liquors, the circuit court shall proceed on the merits and decide on the Constitution and laws according to the right of the case, and the judgment of such court shall be final. *Held*, that where, in a liquor election contest, it was objected that certain voters had been permitted to vote illegally without having paid their poll taxes, etc., as required by Code 1904, § 62, but the constitutionality of such section, as distinguished from a mere construction thereof, was not raised in the trial of the contest proceedings, the Supreme Court of Appeals had no jurisdiction to review the decision of the circuit court on a writ of error.

Error to Circuit Court, Augusta County.

Proceedings by one Hulvey and others against one Roberts and others to determine the validity of an election forbidding the licensing of the sale of intoxicating liquors. From a judgment declaring the election valid, Hulvey and others bring error. Writ dismissed.

Patrick & Gordon and Hulst Glenn, for plaintiffs in error. J. M. Perry, Quarles & Pilson, and H. H. Blease, for defendants in error.

WHITTLE, J. The writ of error in this case was allowed by one of the judges of this court to the judgment of the circuit court of Augusta county, declaring valid an election under chapter 25, Va. Code 1904, against licensing the sale of intoxicating liquors in Basic City. We are met at the threshold of the inquiry by the question of jurisdiction.

Section 586a declares that, "in judging of such election and return, the court shall proceed on the merits thereof, and decide the same on the Constitution and laws, and according to the right of the case, and enter such order as will carry its decision into full and complete effect. And the judgment of said court shall be final."

In *Lester v. Price*, 83 Va. 648, at page 652, 3 S. E. 529, at page 530, it is said: "From a very early period—certainly as early as 1666—the subject [licensing the sale of liquor] was committed to the sole judgment and discretion of the county courts, and their discretion to grant or refuse licenses could not be interfered with by any higher courts. In the earlier statutes we find the language conferring such absolute discretion quite specific, as for instance: 'And, if such petition appear reasonable, such court is hereby authorized, and may, if they think fit, grant the petitioner a license,' etc., or 'by their discretion, shall judge whether it is convenient to suffer such a house to be set up,' etc." See Va. Code 1849, pp. 443, 444, c. 96, § 3; and Acts 1669-70, pp. 22, 239.

This policy seems to have been pursued and to have remained unchallenged until the case of *Ex parte Yeager*, 11 Grat. 655 (decided in

1854) arose. In that case, Judge Daniel, who delivered the opinion of the court, reviews the history of legislation in regard to granting licenses, in light of the earlier decisions, and holds that the act (Code 1849, p. 443, c. 96, § 3) "vests in the county courts a discretion to grant or refuse a license to keep a tavern; in the exercise of which discretion they cannot be controlled by the circuit courts, either by mandamus, writ of error, or certiorari."

So, in *French v. Noel*, 22 Grat. 454, in prohibition, the same doctrine was reaffirmed; and it was said that the action of the circuit court allowing an appeal to the order of the county court in such case was *coram non judice*.

In *Leighton v. Maury*, 76 Va. 865, the court construed the act of March 3, 1880 (Acts 1879-80, p. 147, c. 155), and held that it was the purpose of that enactment to depart from the policy of former statutes as construed in *Yeager's Case*, *supra*. In that case the court observes: "That statute says the county court 'shall grant the license' if the applicant brings himself within the requirements, and the circuit court 'may grant the license' means the circuit court shall have the jurisdiction to do so, and must do so, if the applicant brings himself within the requirements." The act was declared to be mandatory, and the right of appeal to the circuit court absolute.

In *Thon v. Commonwealth*, 31 Grat. (Va.) 887, will be found a comprehensive note on the subject of intoxicating liquors in general, and, at page 893 of 31 Grat., it is said: "In *Ailstock v. Page*, 77 Va. 386, the court expressly overrules *Leighton v. Maury*, 76 Va. 875, so far as that case decides that the contestant is such a party in interest that he is entitled to an appeal or writ of error."

"In *Ex parte Lester*, 77 Va. 663, it was held that, under the act of 1882, the applicant may appeal to the circuit court or he may, upon bill of exceptions taken at the trial, apply to the circuit court for a writ of error and supersedeas, and, if the circuit court also erroneously refused the license, its decision is reviewable by the Supreme Court upon appeal, or writ of error and supersedeas, as in other cases. The applicant is a party directly in interest in the decision refusing the license, and comes within the letter of Code 1878, c. 178, § 2, but this is not true of the contestant who cannot appeal. See, also, *Haddox v. County of Clarke*, 79 Va. 677." It is also said that, "under the Acts 1883-84, p. 606, c. 450, application for license to retail liquor must be made to the county court, and either applicant or defendant may appeal of right from the decision to the circuit court where the application is heard *de novo*, and no appeal lies to the decision of the latter court."

The case of *Lester v. Price*, *supra*, construed the act of 1883-84. It is there held that no appeal lies to the decision of the circuit court, and the writ of error and supersedeas was dismissed as having been improvidently awarded.

The court, as at present constituted, has, on several occasions, refused to grant writs of error in this class of cases, so that the doctrine of *Lester v. Price* represents the present state of the law on the subject.

In the recent case of the City of Danville

v. Hatcher, 101 Va. 523, 44 S. E. 723, this court had occasion to consider the question of state control of the traffic in intoxicating liquors. It was there held that the sale of liquor is not one of the privileges or immunities of citizenship guarantied by the Constitution of the United States, or the fourteenth amendment thereof; that the regulation of the subject is completely within the police power of the state; that the sale of liquor may be entirely prohibited, or regulated in any manner the Legislature may deem wise, without supervision or control by the courts.

The previous legislative and judicial policy of the state with respect to governmental control of intoxicating liquor is emphasized by section 62 of the present Constitution, which declares:

"The General Assembly shall have full power to enact local option or dispensary laws, or any other laws controlling, regulating, or prohibiting the manufacture or sale of intoxicating liquors."

It is conceded in the petition for the writ of error in this case that under section 581 of the Code of 1904, by virtue of which the proceeding under review was instituted, there can be no appeal from the judgment of the trial court, unless it is provided for in the Constitution.

So much of that instrument as need now be considered is as follows: "The Supreme Court of Appeals * * * shall have original jurisdiction in cases of habeas corpus, mandamus, and prohibition; but in all other cases, in which it shall have jurisdiction, it shall have appellate jurisdiction only. Subject to such reasonable rules as may be prescribed by law, as to the course of appeal, the limitation as to time, the security required, if any, the granting or refusing of appeals, and the procedure therein, it shall, by virtue of this Constitution, have appellate jurisdiction in all cases involving the constitutionality of a law as being repugnant to the Constitution of this state or of the United States." Const. Virginia, art. 6, § 88 [Va. Code 1904, p. cxxxx].

In order that jurisdiction may be conferred upon this court by force of the constitutional provision, it must appear that the constitutionality of a law was called in question and decided in the trial court; and error committed in the construction and interpretation of a statute will not of itself confer jurisdiction upon this court; but the constitutionality of the statute, as distinguished from its interpretation, is the source of appellate jurisdiction.

Now in this case there is not a word said in the petition to the circuit court with respect to the constitutionality of section 62 of the Code of 1904, or of any other statutory provision. It is claimed that persons were allowed to vote at the election under review whose poll taxes had not been paid according to law as a prerequisite to their right to vote; and again the election is assailed because the judges allowed a number of persons to vote in said election whose poll taxes had not been paid within six months prior to the election, as required by the Constitution and laws of the state of Virginia, although each and every one of such persons was challenged when he presented himself at the polls for the purpose of casting his ballot. These averments charge the judges of

election with having made an erroneous decision with respect to the rights of certain persons to vote, but nowhere call in question the validity of the statute bearing upon the subject as being repugnant to the Constitution. There is nowhere in the petition a suggestion or intimation that any part of the statute law of the state bearing upon the subject of elections is repugnant to the Constitution; but the whole contention is rested upon the proposition that error was committed in the interpretation of the Constitution and laws.

It is true that the answer of the defendants avers that section 62 of the Code of Virginia, which requires all persons to pay their poll taxes six months prior to a local option election in order to be qualified to vote at such election, is unconstitutional and void in this respect; the contention being that the persons mentioned in the complaint were qualified voters, even if they had not paid their poll taxes six months prior to the election. But the case was not heard upon the answer. The order of the court appealed from is as follows: "This day came the petitioners, as well as the contestees, by their attorneys, and thereupon the said contestees, John Roberts and others, demurred generally to the petition of the contestants, W. J. Hulvey and others, and the said contestants joined in said demurrer. Whereupon, the same being argued and maturely considered, it is adjudged and ordered by the court that said demurrer be sustained, that said election be and is hereby declared valid, and that said petition be dismissed, and that the contestees recover against the contestants or petitioners their costs in this behalf expended."

The grounds of demurrer are specifically stated. The sixth ground is as follows: "If it were true, as alleged, that the judges of election refused to follow the list of voters certified by the clerk of the circuit court of Augusta county as those who had paid the state poll tax for the years of 1903, 1904, and 1905, six months prior to the 28th day of April, 1906, and permitted persons to vote who had not paid their state poll taxes six months prior to said election (local option election), this is not a good ground for either setting aside the returns of the election, or declaring them, or either, invalid and void; and those persons mentioned in specification 5 as disqualified because they were not on said list were not legally disqualified from voting on account of this, as they could have been legal and qualified voters at said local option election without their names being on said list, and it will be noted that no other reason is assigned and stated for their disqualification."

The ninth ground of demurrer is: "Because the persons mentioned in specification 10 were not disqualified from voting for the reasons stated therein, and were entitled to vote. Being registered, they were entitled to vote at said local option election, whether they had paid their state poll taxes six months prior thereto, or within six months prior thereto."

So much of section 62 as applies to this case is as follows: "Every male citizen of the United States twenty-one years old, who has been a resident of the state two years, of the county, city, or town, one year, and of the precinct in which he offers to vote thirty days next pre-

ceding the election, and who has been duly registered and has paid the state poll tax, as required by law, and is otherwise qualified under the Constitution and laws of this state, shall be entitled to vote for members of the general assembly and all officers elected by the people, and in any special election or local option election in any county, district, city, or town, except when otherwise provided by law."

It appears from the petition to this court that there has been much diversity of opinion among the corporation and circuit court judges of this state with respect to the proper interpretation of section 62 with reference to local option elections; but it does not appear upon what ground the learned judges referred to rested their decisions. The theory of the contention of plaintiffs in error upon this point, as we understand it, is that by a proper construction of section 62 certain voters should have been excluded from voting at the election under consideration, because they had not paid their poll tax as provided by section 62, and that section 62 was disregarded by the judge of the circuit court of Augusta county, because in his opinion it was in conflict with the suffrage clause of the Constitution, and that upon a proper construction of that clause the voters excluded should have been permitted to vote, although they had not paid the poll tax required by law. But, as we have seen, no such issue was presented by the pleadings for the determination of the circuit court. Non constat, the judgment of the court was based upon the construction of the statute, and not upon its invalidity.

There are cases which have been decided by the Supreme Court of the United States which throw light upon the point we have been endeavoring to present.

In *Delmas v. Merchants' Ins. Co.*, 14 Wall. (U. S.) 661, 20 L. Ed. 757, the effort was made to sustain the jurisdiction of the Supreme Court over the case upon the ground that it involved the validity of a contract the consideration for which was Confederate money, and also upon the ground that there was a state constitutional provision which declared all contracts, the consideration of which was Confederate money, to be void. With respect to the first contention the Supreme court held: "A decision of a state court that a contract of which the consideration was Confederate money was void does not of itself raise one of those federal questions which belong to this court to settle, when made upon the general principles of public policy." For, said the court, "so long as they in those opinions placed the invalidity of this class of contracts on the ground of a public policy existing at the time the contract was made, or so long as they left us to infer that such was the ground, having once before so decided, the decision presented no question over which we had any revisory power. But when, going a step farther, they expressly rest the decision of the same question on the constitutional provision we have quoted, and on no other ground, the question necessarily arises, is that provision in conflict with the Constitution of the United States? And the answer to this question depends solely on the validity of the contract when made; for, if valid then, the federal Constitution protects it from

all subsequent acts of state legislation, whether in the form of constitutional or ordinary legislative enactments."

It will be recalled that the provision of the federal Constitution with respect to the impairment of contracts is very similar to the language of our Constitution conferring jurisdiction upon this court. "No state," says that instrument, "shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts." Courts may blunder in the construction of contracts, may deny parties rights secured to them by contract, but under this provision of the Constitution, nothing confers upon the Supreme Court of the United States authority to review the decision of a state court, unless the state has undertaken through some of its lawmaking agencies to pass a law impairing the obligation of contracts.

With reference to the fourteenth and fifteenth amendments, and rights arising under them, it may be observed it is otherwise. "No state," says the fourteenth amendment, "shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The fifteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." And with respect to these two amendments the Supreme Court has held that the prohibitions have reference to state action exclusively, and not to any action of private individuals, and that a state may act through different agencies, either by its legislative, its executive, or its judicial authorities, and prohibitions of the amendment extend to all actions of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. *Ex parte Virginia*, 100 U. S. 313, 25 L. Ed. 667.

But with respect to the obligation of contracts it is only by virtue of a law which impairs their obligation that the Supreme Court of the United States acquires jurisdiction to review a judgment of a State court; and so, in the very similar language employed in our Constitution with respect to the jurisdiction of this court. The case must involve the constitutionality of a law as being repugnant to the Constitution of this state or of the United States, in order that the Constitution may *ex proprio vigore* confer jurisdiction upon this court to review for that cause a judgment of an inferior tribunal.

For these reasons, we are of opinion that the writ of error was improvidently awarded, and must be dismissed.

BLACK'S ADM'R v. VIRGINIA PORTLAND CEMENT CO.

(Supreme Court of Appeals of Virginia. Nov. 22, 1906.)

1. MASTER AND SERVANT—RISKS ASSUMED.

In an action for an injury resulting in the death of plaintiff's intestate while employed

in defendant's quarry, it appeared that the rock which fell on deceased had been loose for some time, and that there was a water seam around it, which was seen by other employes working in the quarry at a place removed from the place at which deceased was put to work. Defendant's inspector, whose duty it was to keep the quarry in a safe condition, testified that the condition of the rock could have been seen from certain places, but not from where deceased was at work, and that he had never inspected it, as he did not suppose it would be dangerous. *Held*, that the risk was not one that was assumed by defendant as incident to his employment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 557.]

2. SAME—PLACES FOR WORK—KNOWLEDGE OF MASTER.

Proof that the master, in the discharge of his duty to keep the place where his servant is required to work in a reasonably safe condition could, by the exercise of reasonable or ordinary care, have ascertained that the place was not reasonably safe, is proof of knowledge on his part that it was not safe.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 966.]

3. SAME—ACTION FOR INJURY—ISSUES AND PROOF.

In an action for injuries to a servant employed in defendant's quarry, where the declaration alleged that it was the duty of defendant to keep and maintain its quarry in a reasonably safe condition, and that it neglected this duty, plaintiff was entitled to show that defendant had failed to make proper inspection of its quarry just prior to the injuries.

4. SAME—FELLOW SERVANTS—SUPERINTENDENCE.

Where the duty of a stone company to keep its quarry in a reasonably safe condition devolved upon its foreman, whose duty it was to inspect the quarry, in the discharge of such duty such foreman was not the fellow servant of workmen in the quarry.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 393, 453-465.]

5. SAME—ACTIONS—QUESTIONS FOR JURY—KNOWLEDGE OF MASTER.

In an action for an injury resulting in the death of a servant while working in defendant's quarry, *held*, that it was for the jury to determine whether defendant could have, by the exercise of reasonable or ordinary care, known of the danger to which deceased was subjected.

6. SAME—PROXIMATE CAUSE.

In an action for an injury resulting in the death of a servant while employed in defendant's quarry, *held*, that it was for the jury to determine whether or not the negligence of defendant was the proximate cause of death.

7. SAME—CONTRIBUTORY NEGLIGENCE.

In an action for an injury resulting in the death of a servant while employed in defendant's quarry, *held*, that it was for the jury to determine whether or not deceased was guilty of contributory negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 1089.]

8. NEW TRIAL—WEIGHT OF EVIDENCE.

The verdict of the jury should not be disturbed by the trial court, unless plainly against the weight of the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 130, 146-148.]

Appeal from Circuit Court, Augusta County.

Action by the administrator of George H. Black against the Virginia Portland Cement Company. From a judgment setting aside a verdict, plaintiff appeals. Reversed.

The court gave the following instructions for plaintiff:

"(9) The court instructs the jury that the law presumes that Geo. H. Black exercised due and proper care on his part at the time he was injured, and the burden of proving that he was negligent is upon the defendant, unless such neglect appears from the plaintiff's evidence.

"(10) The court instructs the jury that, if they believe from the evidence that the plaintiff is entitled to recover, then in ascertaining and fixing the damages in this case they should fix the same with reference:

"First. To the loss sustained by Sylvia Black, the widow of George H. Black, deceased, by the death of her husband, George H. Black, fixing the same at such sum as would be equal to the probable earnings of the said George H. Black, taking into consideration the age, business capacity, experience, habits, energy, and perseverance of the deceased during the lifetime of the said Sylvia Black, if he had not been killed.

"Second. By adding thereto compensation for the loss of his care, attention and association to his wife.

"Third. By adding such further sum as they may deem fair and just by way of solace and comfort to his said widow for the sorrow and suffering and mental anguish, caused to her by his death."

Certain other instructions, asked for, were modified and given as follows:

"(3) The court instructs the jury that the duty of the master where its servants are employed, is to exercise reasonable and ordinary care for their safety, is affirmative, and must be continuously fulfilled and positively performed, and if the master neglects this positive duty, and his servant is injured as a proximate result of such neglect, the master is liable in damages; but the defendant is not liable, if contributory negligence was the proximate cause of the accident.

"(4) The court instructs the jury that, if they believe from the evidence that the work at which Black was employed was of a particularly dangerous character, then it became the duty of the defendant company to use care and skill commensurate with the danger of the employment of the said Black; but, if they believe that the work was of an extra hazardous character, then Black assumed all risks incident thereto."

"(8) The court instructs the jury that a master is charged with notice, not only of what he or his representative knew, but also of what he or his representative ought to have known by the exercise of reasonable care on their part; and where there is a danger that the master or his representative ought to have known of by the exercise of reasonable care, and his servant is injured or killed by this danger that the master ought to have known of, if he or his representative had done his duty, then the master is liable in damages, if the neglect of the master to find out and remove or guard against the danger was the proximate cause of the servant's injury or death, and if the accident arose from the changing and shifting condition of the quarry, resulting from its operations, of which the master was not informed, and which he could not reasonably be expected to have known, or if it was the result of an open and obvious danger, of which plaintiff's decedent had knowledge, or could have known in the exercise of ordinary care."

The court gave the following instructions for defendant:

"(1) The court instructs the jury that the burden of proving his case is upon the plaintiff, and that he must prove it by a preponderance of the evidence in order to entitle him to a recovery.

"(2) The court instructs the jury that if they shall believe from the evidence that the accident in this case arose from the changing and shifting conditions of the quarry, resulting from its operation, of which the master was not informed and which he could not be reasonably expected to know, then there is no liability upon the defendant company, and the jury must find for the defendant.

"(3) The court instructs the jury that if they shall believe from the evidence that the plaintiff's intestate, George H. Black, knew that the rock which killed him was a dangerous one and liable to fall, or if in the exercise of ordinary care he might have known this, then the defendant company is not liable and the jury must find for the defendant.

"(4) The court instructs the jury that, where a person voluntarily enters the service of another, he assumes all the risk usually incident to such employment, and is presumed to have contracted with respect thereto, and the jury are instructed that George H. Black, the plaintiff's intestate, in entering the service of the defendant company, assumed all the risks of danger incident to his employment in connection with the quarry, whether said risks arose from the shifting and changing character of the place, or from any other cause incident to the work on which he was engaged.

"(5) The court instructs the jury that an employé who knows the unsafe or dangerous conditions of the place in which he is working, or by the exercise of ordinary care might know, is not compelled to continue the work; but, if he does continue it, then he must be held to have assumed, not only the risks ordinarily incident to the service when he entered upon it, but such as became known to him during the progress of the work, or which might have been ascertained by him in the exercise of ordinary care.

"(6) The court instructs the jury that if they shall believe from the evidence that the plaintiff's intestate, George H. Black, was an experienced man and had the same knowledge of the condition of the quarry at the point at which the accident happened, or the same means of knowledge as was possessed by the defendant company, and knew or ought to have known the risks incident to his employment, and failed to exercise proper care for his own safety or to inform the defendant of the condition of the quarry, then the jury must find for the defendant, even though they may believe from the evidence that the said defendant company was guilty of negligence."

"(8) The court instructs the jury that it is the duty of the employer to furnish a reasonably safe place and proper and suitable appliances and machinery for the employé, and to keep the same in a reasonably safe, proper, and suitable condition, where the place of employment is permanent in its character; but this rule is not applicable to a place, the furnishing and preparation of which is in itself a part of the work which the employé has to perform, and in which conditions are changing continually as a result of the work done. The defendant company's duty was to use only ordinary care for the safety of its employés in the performance of their work, having due consideration of the dangerous character of the work required to be performed; and if the jury shall believe from the evidence that the quarry in question was such a place, and that the defendant used ordinary care for the safety of the men employed therein, the said company is not liable, and the plaintiff cannot recover.

"(9) The court instructs the jury that, under the circumstances of and the evidence in this case, Hunter was only a fellow servant of the plaintiff's intestate, Geo. H. Black; and if the jury believe from the evidence that the accident that happened to said Black was due to the negligence of said Hunter, the jury are instructed that the defendant is not responsible

for the negligence of a fellow servant, and they must find for the defendant.

"(10) The court instructs the jury that, though they may believe from the evidence that the defendant company carried a policy of accident insurance against loss by death or injury of its employés yet the fact that it carried such a policy is immaterial to the issue, and should not be considered in finding a verdict."

Charles Curry, H. H. Hoyt, and Carter Braxton, for appellant. Patrick & Gordon, for appellee.

CARDWELL, J. This is the sequel to the case of Black's Adm'r v. Virginia Portland Cement Company, 104 Va. 450, 51 S. E. 831. When the case was here on the former occasion, this court reversed the judgment of the circuit court on the demurrer to the declaration, and remanded the cause for trial. At the trial the verdict of the jury was for the plaintiff, assessing his damages at \$1,386, and at the following term of the court this verdict was set aside and a new trial awarded the defendant company. The second trial resulted in a verdict for the plaintiff, assessing his damages at \$1,248.18, which the circuit court also set aside; and at the third trial the verdict was for the defendant company, which verdict the court refused to set aside on the motion of the plaintiff. All the evidence adduced upon the first trial is now before this court, having been duly incorporated in a bill of exceptions taken at the time, signed by the presiding judge, and made a part of the record.

The first inquiry by this court is whether the circuit court erred in granting a new trial and in not rendering judgment according to the first verdict.

The defendant company was the owner and operator of a large rock quarry near its cement works in Augusta county, from which the rock was taken that was manufactured into the products of the works. The quarry was in the side of a hill and about 100 feet high, composed of different ledges. It sloped back from the bottom, and about 30 or 40 feet from the bottom there was a cave, the top of which was apparently solid rock. Near the mouth of this cave and below it was a ledge, and the top of the cave overhung this ledge. The method of operating the quarry was to drill holes in the rock, fill them with dynamite, and explode them. All the rock that is loosened by the blast, but not thrown down, must be gotten down, either by prising it off with a crowbar, or by throwing it off with charges of dynamite inserted in the cracks. Plaintiff's intestate, between 45 and 50 years of age, had been in the employ of the defendant company for some time, perhaps since the quarry was opened. His employment, at the time of the accident out of which this suit arose, was to load and set off blasts, or, as said by a witness for the defendant company (W. S. Hunter), a foreman and walking boss in its quarry, "his duties were as powder man, loading the holes." In the quarry about 100 hands were employed, and a great deal of blasting done; the quarry being made by cutting down a very high and precipitous bluff on the northwest side of the Little Cowpasture river, the height of which, as stated, was about 100 feet. Black, the decedent, was assisted by another negro named John Parks. No work had been done in that part of the quarry where this accident occurred for some little time before the day on which it happened. On the day before the accident Hunter went to this point to clear away the loose rock, in order that the quarry might be made safe for the men to work below; but he makes no claim to having overlooked the quarry above the place of the accident, with the view of making this place safe. In order to ascertain whether or not it was safe for the men to work at the point where Black received his injuries,

it was necessary, according to the uncontradicted evidence, that the quarry be looked over and examined above that point, which had not been done. Hunter only claims that he looked the face of the quarry over and saw a good many loose stones on the ledge below the cave that had to be removed; but there was nothing to indicate that there was anything the matter with the roof of the cave. Unless care was taken to examine and inspect the wall of the quarry after blasting had been done, rocks were liable to fall down on the hands at work below, and kill or injure them; and the defendant company, recognizing this danger, had employed special men to swing around on ropes to ascertain whether or not there were such impending dangers, and to clear out the loose rock. Hunter testifies that it was his duty to inspect, and that of one Knowles to go along with ropes to swing around over the walls to see that loose stone was removed. These precautions, for some cause, had not been taken for some days, at least, prior to this accident, and Hunter, the walking boss, himself had assumed the entire duty of inspecting the quarry and of making it safe, as he himself testifies. Black, as powder man, had to load and fire from 150 to 160 holes a day, and some of them very large holes.

About three or four days before the accident to Black a ledge under the dolomite ledge had been shattered with blasts, being the lower ledge next to the base, and Parks and Hunter had been clearing out some of this the day before with crowbars, and some blasts had been put in by Black, some of them to throw off big stones. Black and Parks were directed by Hunter, the walking boss, to go under this dolomite ledge the next day, at the mouth of the cave, and do further blasting. They went there about 11 o'clock for that purpose, and from where they were under this ledge at the mouth of the cave there was no apparent danger from the ledge above. There was no crack in the ledge above them which they could see, it had not been shattered by the blasts in the ledge below, and the formation above their heads, from which the rock fell that killed Black, according to the statement of Hunter, looked just "as the old Master made it." The rock which fell and killed Black was about four feet wide, about eight feet long and about eight inches thick, and at the place from which it fell (the roof of the cave) it slanted upward and ran out to a "feather edge." After this rock had fallen, it was perfectly apparent that it had been loose for some time and that there was a water seam around it, which was seen by other employes working in the quarry at a place removed from the place at which Black and Parks were put to work that morning. Hunter states that it could have been seen by going up on the dolomite ledge, but not from where Black and Parks were at work. It was, according to all the evidence, the special duty of Hunter to keep the quarry in a safe condition, and to that end to inspect it. He says himself: "I never inspected the natural roof [that is, where the impending rock was located]. I never supposed that would be dangerous." Yet, without any examination as to the condition of the quarry above where he was to work, Black was directed to go under the impending rock to work. Hunter only claims that he looked from below to see what stone was to be removed, and also looked when he went to the place at which Black and Parks were directed to work, and that neither from below nor from the ledge on which the work was being done could the condition of the stone which fell be discovered. This admission removes all room for contention that the danger to Black was open and obvious, or might have been discovered by the exercise of ordinary care for his own safety, and therefore one of the assumed risks incident to his employment. Nor can it be maintained that the dangerous condition of the place at which Black was put to

work and where he met his death was due to the changing and shifting conditions of the quarry, brought about in operating it.

There is no evidence in the record sustaining the contention of the defendant company that Black was guilty of contributory negligence. In *Black's Adm'r v. Va. Portland Cement Co.*, supra, the opinion says: "The declaration before us states that the plaintiff's intestate was in the employment of the cement company, engaged in quarrying rock; that the defendant company, whose duty it was to keep its quarry in a reasonably safe condition, knowingly permitted a stone to remain in a position from which it was liable to fall at any time, and in fact it did fall on the day stated upon George H. Black—he being ignorant of the danger and in the exercise of due and proper care and caution—by reason of which he received injuries which resulted in his death. It would seem beyond dispute that this state of facts disclosed actionable negligence upon the part of the defendant in error. Every fact here stated is upon demurrer to be taken as true—that the rock which inflicted the injury was in a position from which it was liable to fall; that the master knew this fact, and negligently permitted it to remain; and that the servant, ignorant of the situation, remained at work in the quarry in the due course of his employment, and while in the performance of his duty received the fatal injury. If these facts be established, a case of negligence is made out which entitles the plaintiff in error to a recovery." In the preceding portion of the opinion, after referring to authorities for the rule as to what risks a workman or servant impliedly agrees to assume upon entering the master's employment, and as to what constitutes negligence in a legal sense, it is said: "Any failure upon the part of the master to observe for the protection of his servant that reasonable degree of care which the circumstances of the particular case justly demand is actionable negligence, and is not within the influence of assumed risks."

Proof that the master, in the discharge of his duty to keep the place where his servant is required to work in a reasonably safe condition, could have by the exercise of reasonable or ordinary care ascertained that the place was not reasonably safe, is proof of knowledge on his part that it was not safe. This is too well settled to admit of the citation of authority. In fact, it is elementary law. It is, however, earnestly contended by the learned counsel for the defendant company that the proof in the case does not sustain the allegation in the declaration that the defendant company knew of the dangerous condition of the place where Black was put to work and was killed, and that there is no proof that would have justified the jury in finding that the defendant company ought to have known that fact, except the proof that the company had failed to make proper inspection of its quarry just prior to the injuries to Black, and that this proof should have been stricken out by the circuit court on the motion made by the defendant company, upon the ground that there was no allegation in the declaration under which such evidence could be offered or admitted; therefore, that the verdict of the jury was rightly set aside.

The gravamen of the declaration is that it was the duty of the defendant company to keep and maintain its quarry in a reasonably safe condition, and that it neglected this duty, etc. The defendant company protesting its ignorance of the basic fact alleged in the declaration, the plaintiff might have proved, if he could, directly, that the defendant company had knowledge of this fact; and, if it could not be so proved, there was but one other way to prove it, and that was by proving that by the exercise of reasonable or ordinary care it could have known it. Inspection is but a means to an end, and we think that it was entirely admissible under the declaration charging the neglect of

the admitted duty of the defendant company to keep its quarry in a reasonably safe condition, the neglect of which duty was the proximate cause of Black's death, to prove that the defendant company could have ascertained the danger to which he was subjected by regularly inspecting its quarry and clearing away dangerous stones therefrom, as it had theretofore done, but had abandoned, leaving that duty upon Hunter, its walking boss, alone, and which duty he confessedly neglected. There was no way by which the defendant company could continuously keep its quarry in a reasonably safe condition without looking and seeing whether or not it was safe, without employing some person or persons to do this work of inspection. The quarry was in an unsafe condition confessedly. The circumstances were such as not to put any responsibility for its unsafe condition upon Black.

"The master is chargeable, not only with such knowledge as he actually has, but also with that which he ought to have by the exercise of reasonable care and diligence on his part in the performance of his duties as master." 1 Labatt on Master & Servant, 125; Fisher v. C. & O. Ry. Co., 104 Va. 635, 52 S. E. 873, 2 L. R. A. (N. S.) 954; Norfolk & W. Ry. Co. v. Coffey, 104 Va. 665, 51 S. E. 729, 52 S. E. 367, 8 L. R. A. (N. S.) 111.

In the last-named case the injury to Coffey was sustained by reason of the falling of a stone upon him while at work in a rock quarry, and the railroad company was held responsible therefor because of its negligence in not keeping its quarry in a reasonably safe condition.

In Russell Creek C. Co. v. Wells, 96 Va. 424, 81 S. E. 614, relied on for the defendant company, the company avoided a recovery for the injuries to Wells by it appearing in proof that the company had properly inspected its mines a short while before the accident to Wells, and that the accident arose from the changing and shifting condition of the mine resulting from its operation, the mine being in the first instance in a reasonably safe condition, and that it was as much the duty of Wells as the mine boss to guard against the danger brought about by the changed conditions, it thus becoming one of the risks assumed by his employment; but that is by no means the case here.

The duty of the defendant company to keep its quarry in a reasonably safe condition devolved upon Hunter, as the evidence clearly shows. In the discharge of this duty, Hunter was not a fellow servant of Black. "A 'mine boss' is not a fellow servant of members of his gang under all circumstances. Though he is

such fellow servant while discharging duties affecting the mere administration of the work to be done, he is not a fellow servant when discharging the nonassignable duties of the master." Russell Creek C. Co. v. Wells, supra.

The evidence in the record that might be considered as tending to prove that the defendant company did not employ competent servants is of so little importance that it could not, as it appears to us, have influenced the jury in any degree in finding the verdict they rendered.

The court gave for the plaintiff eight instructions to the jury, to all of which the defendant company excepted, and all of the ten instructions asked by the defendant company were given as asked, except the eighth, which was refused, and the second, fourth, ninth, and tenth, which were modified, and, as modified, given. With reference to these numerous instructions, we deem it only necessary to say that we are of opinion that they fairly submitted the case to the jury upon the evidence, and propounded the principles of law applicable thereto as favorably to the defendant company as it could have reasonably asked.

It was for the jury to say whether or not the defendant company could have, by the exercise of reasonable or ordinary care, known of the danger to which Black was subjected at the time and place when and where he met his death, and to find, if it could have known of the danger by such care, that then it knew of the danger. It was for the jury to determine whether or not the negligence of the defendant company was the proximate cause of Black's death, and whether or not he was guilty of contributory negligence. Upon all of these questions, fairly submitted to them, the jury found for the plaintiff.

"The verdict of the jury is entitled to great respect, and it should not be disturbed, even by the trial court, unless plainly against the weight of the evidence; and, while greater latitude is allowed the trial judge in granting than in refusing new trials, yet, if reasonable men may fairly differ as to the inferences to be drawn from the facts, the verdict should not be disturbed." Marshall v. Valley R. Co., 97 Va. 653, 34 S. E. 455, and authorities cited.

In the statement of the case above, we have adverted to the evidence sufficiently, we think, to render it unnecessary to review it at greater length. We are of opinion that the judgment of the circuit court setting aside the first verdict should be reversed, the subsequent proceedings annulled, and judgment rendered for the plaintiff on the first judgment as the circuit court ought to have done.

BUCHANAN, J., absent.

CASTILOW v. CASTILOW.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

DIVORCE—DESERTION—EVIDENCE.

A case where a husband is entitled to divorce for desertion.

(Syllabus by the Court.)

Appeal from Circuit Court, Marshall County.

Bill by Frank Castilow against Lucy Castilow. Judgment for defendant, and plaintiff appeals. Reversed.

El. D. Leach, for appellant.

BRANNON, J. Frank Castilow and Lucy Taylor were married. She left her husband at the marriage altar, and went to her father's home, has dwelt there ever since, never lived with her husband an hour, but always failed and refused to do so. She abandoned and deserted him with sedate intention, and continued to do so for more than three years. He brought suit for divorce from the bond of matrimony, proving wilful desertion and abandonment. The wife made no defense. The circuit court refused a divorce and dismissed the bill.

The circuit judge filed the following opinion: "This is a very peculiar case. The wife seems to have left the husband immediately after the marriage ceremony was performed, and has since refused to live with him. There must be a good deal of the history of this case that is not developed by the evidence. How did the parties come to be married at all under the circumstances? And how did it happen that the defendant consented to the marriage, and yet was not willing to live with the husband? No reason for deserting seems to have arisen after the marriage. The court prefers to know all of the surrounding facts and circumstances, those leading up to the marriage, as well as those showing desertion. A decree will not be granted on the evidence as it now stands." As the circuit judge found the fact of desertion and abandonment, the plaintiff was entitled to the relief given by law. He has no right to call for evidence of the secret history, or how the parties came to marry, or why the wife deserted and abandoned the husband. The judge could not demand the circumstances leading to the marriage and the desertion. Perhaps the plaintiff could not furnish them save by his own incompetent evidence. He does swear that he protested against her continued desertion, and that she flatly refused to live with him; but this is likely not admissible. Other evidence proves the plaintiff's case. The wife gives no explanation. At any rate, the court did not retain the case and demand more evidence (which he had no right to do), but dismissed the bill.

We reverse the decree of the circuit court, and decree that Frank Castilow be absolutely

divorced from Lucy Castilow, and that the bond of matrimony between them be dissolved.

BEAUDROT v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. CRIMINAL LAW—APPEAL—LEADING QUESTIONS.

To allow counsel to ask a witness leading questions being a matter resting in the sound discretion of the court, and there being no abuse of discretion in this case, no reason for the grant of a new trial on that ground appears. See, in this connection, *City of Rome v. Stewart*, 42 S. E. 1011, 116 Ga. 740; *Doster v. State*, 18 S. E. 997, 98 Ga. 43.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3064.]

2. SAME—ASSIGNMENT OF ERROR.

An assignment of error in these words: "Because the court erred in confining the word 'aggression' to an assault, either upon the part of the prosecutor or defendant, and taking no account of abusive words or opprobrious epithets," is fatally defective in not setting forth the language of the charge wherein the word "aggression" was used, and cannot be considered by this court. See *Langley v. State*, 54 S. E. 821, 126 Ga. 100.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2954-2959.]

3. SAME—NEW TRIAL.

One of the grounds of the motion for new trial complains that "the court erred, after the jury had recommended the defendant to mercy, in sentencing him to three years in the penitentiary." This objection goes only to the judgment of the court, and does not extend to the verdict, which the motion for new trial seeks to set aside. It is not a proper ground for a motion for new trial, and will not be considered. See *Mayson v. State*, 53 S. E. 32, 124 Ga. 789; *Burgamy v. State*, 40 S. E. 991, 114 Ga. 832; *Thomas v. Clarkson*, 54 S. E. 77, 125 Ga. 73 (7), and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2292-2297.]

4. SAME—HARMLESS ERROR.

There are numerous other exceptions taken to the rulings of the court, but no error appears sufficient to authorize a reversal of the judgment refusing a new trial. The evidence supports the verdict, and the judgment will be affirmed.

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

One Beaudrot was convicted of crime, and brings error. Affirmed.

Thos. S. Morgan, Jr., for plaintiff in error.
W. W. Osborne, Sol. Gen., for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

GLOVER v. STATE.

(Supreme Court of Georgia. Nov. 8, 1906.)

1. INDICTMENT—DESCRIPTION OF OFFENSE.

An indictment which charges the offense defined by a legislative act in the language of the act, where the description of the acts alleged as constituting the offense is full enough to put

the defendant on notice of the offense with which he is charged, is sufficiently specific.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 289-294.]

2. STATUTES—TITLE OF ACT.

The title of the act approved August 10, 1906, "An act fixing the annual license fee for retailing or vending spirituous, intoxicating, or malt liquors, in Irwin county at twenty thousand dollars, and to provide a penalty for violating the same, and for other purposes," is broad enough to provide for a license fee for the sale of such liquor in any quantity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 145.]

3. SAME—OBJECT OF ACT.

The title of the act referred to in the preceding headnote expresses a legislative intent to regulate the sale of spirituous, intoxicating, or malt liquors in Irwin county, and the territory of incorporated towns located in that county is within the provisions of the act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 145, 171.]

4. SAME—REPEAL—INCONSISTENT PROVISIONS.

Whenever the Legislature passes an act and applies its provisions to the entire territory of a county, inconsistent provisions in the charter of an incorporated town located within that county are repealed by necessary implication.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 229, 238.]

5. SAME—LOCAL LAW—INTOXICATING LIQUORS.

The item in the Political Code 1895, § 421, "To sell liquors, \$25.00," and the provisions of the same Code, §§ 1519, 1535, 1536, 1537, 1538, 1540, and of the Penal Code 1895, §§ 431, 433, are to be construed in *pari materia*; and when construed together they will not be regarded as prescribing such a general law for the license of spirituous, intoxicating, or malt liquors, and fixing a license fee to sell the same, the existence of which will preclude the General Assembly from enacting a local law fixing the license fee in a named county, on the ground that such local law is violative of that clause of the Constitution which declares that "no special law shall be enacted in any case for which provision has been made by an existing general law."

6. SAME—PARTIAL INVALIDITY.

So much of the Irwin county liquor act, approved August 10, 1906, as includes domestic wines in the category of the liquors, the sale of which may be licensed by the county authorities, is inoperative, because the wine act (Acts 1904, p. 98), conferring on municipalities the power to license the sale of domestic wines in quantities of not less than a quart, not to be drunk on the premises within the municipality, is a general law. Inasmuch as this unconstitutional feature may be disassociated from the act without interfering with the general legislative design, the local act will not be held void in its entirety on this account.

7. COMMERCE—REGULATION OF INTERSTATE COMMERCE.

The fifth section of the Irwin county liquor act discriminates against wines made outside of the state, but the effect of the omission to exempt from license wines made outside of the state is not to render the act invalid, but to place all wines on the same basis whether made within or without the state.

8. INTOXICATING LIQUORS—LICENSE—PROHIBITIVE FEE.

The presiding judge allowed the defendant to introduce evidence to support his plea that the license fee fixed in the act was so large as to be prohibitive, and that, therefore, the local act contravened the constitutional provision forbidding special legislation where there is an ex-

isting general law, viz., the general local option liquor law. Even if a legislative act can be declared unconstitutional by the finding of a jury on the facts of a particular case, the evidence submitted did not necessarily constrain a finding that the license fee was prohibitory.

(Syllabus by the Court.)

Error from Superior Court, Irwin County; J. H. Martin, Judge.

T. S. Glover was convicted of a violation of the liquor law, and brings error. Affirmed.

The plaintiff in error, T. S. Glover, was tried for the offense of selling liquor without a license, under an indictment framed upon a special statute approved August 10, 1906, entitled "An act fixing the annual license fee for retailing or vending spirituous, intoxicating, or malt liquors, in Irwin county at twenty thousand dollars, and to provide a penalty for violating the same, and for other purposes." Acts of 1906, p. 430. This act provided that from and after its passage "the annual license fee to retail or vend spirituous, intoxicating or malt liquors, in any quantity, in the county of Irwin, in this state, or in the incorporated cities, towns or villages in said county," should be \$20,000, and that "neither the county authorities in the county of Irwin, nor the municipal authorities of any incorporated city, town or village in said county of Irwin, [should] grant or issue license to any person to retail or vend spirituous, intoxicating or malt liquors in any quantity anywhere in said county of Irwin, until the person applying" for a license should pay "into the county treasury said license fee of twenty thousand dollars," and give the bond and take the oath "required by law for retailers of spirituous liquors," and otherwise comply with "the general law in reference to the retailing or vending of such liquors; and any license granted or issued without the payment of said twenty thousand dollars, and without a full compliance with the requirements of this act and the general law [should] be null and void." The act also set forth the following provisions: The "words 'spirituous, malt or intoxicating liquors,' as used in this act, shall be construed to mean and embrace all and every kind of distilled spirits, malt liquors, wines, beers, ciders and drinks, which, if drank to excess, will produce intoxication. * * * It shall be unlawful for any person, by himself or agent, either directly or indirectly, to sell, barter, exchange, furnish or supply spirituous, intoxicating or malt liquors in any quantity in said county of Irwin for a valuable consideration, or to give away any such liquors for the purpose of inducing trade, without first paying said license;" but "nothing in this act shall be construed to prevent the sale or to require said annual license fee for the sale of domestic wines, made in said county, or for the sale of wine for sacramental purposes." The act further provided that any violation of its provisions should be a misdemeanor, and should be pun-

ishable as such. The indictment charged that the accused, on the 11th day of August, 1906, "with force and arms, and without the license from the proper authority authorized by law to grant license for the sale of such liquors in said county of Irwin, and without having paid into the county treasury of said county of Irwin the license fee of \$20,000 as required by the local act of the Legislature approved August 10, 1906, and without a license from the corporate authorities of any town or city issued in accordance with the provisions of said local act of the Legislature, whereby lawful authority to grant such license is vested in such corporate authorities, did unlawfully sell and vend certain quantities of whisky, alcoholic liquors, mixtures of such liquors, and malt liquors, contrary to the laws of said state," etc. The accused demurred to the indictment generally, on the ground that it set forth no penal offense, and also specially, because it failed to allege a sale of liquor by retail or in a quantity less than a quart, and because the act which the accused was charged with violating was, for various reasons assigned, unconstitutional. By way of special plea the accused set up the defense that the license fee of \$20,000 was prohibitive, and therefore the local act of 1906 was unconstitutional, being in its practical effect and operation, in direct conflict with the general local option law. The demurrer was overruled, and the case was submitted to the presiding judge for determination without a jury, upon an agreed statement of facts and certain evidence which the accused offered, in connection with his statement, to show that the business of selling liquor in Irwin county could not be successfully carried on if burdened with a license fee such as was prescribed by the local act. In the agreed statement of facts it was admitted that the accused did on the date charged in the indictment, without first paying the license fee of \$20,000, sell at retail certain spirituous and other intoxicating liquors, as therein charged, but that he had previously obtained a liquor license for the year 1906 from the town of Fitzgerald, granted in accordance with the terms of its charter, and had, before doing business thereunder, complied with all the state and federal regulations then of force. The judge found that the accused had violated the provisions of the act of 1906, and passed sentence upon him accordingly, and exception is taken to this finding, as well as to the ruling upon the demurrer.

Haygood & Cutts, Candler, Thompson & Hirsch, and W. I. Heyward, for plaintiff in error. B. D. Graham, Sol. Gen., and Smith, Berner, Smith & Hastings, for the State.

EVANS, J. (after stating the facts). 1. The first and second grounds of the demurrer are that the indictment sets forth no of-

fense, and fails to allege that the sale of intoxicating liquors was by retail or in a quantity less than a quart. The indictment charged the offense in the language of the local act fixing the license fee for retailing or vending spirituous, intoxicating, or malt liquors in Irwin county, and fixing a penalty for violating the same. If that local act is not unconstitutional for any of the reasons assigned in the demurrer or the bill of exceptions, then an indictment which charges the offense defined by the act, in the language of the act, where the description of the acts alleged as constituting the offense is full enough to put the defendant on notice of the offense with which he is charged, is sufficiently specific.

2. It is insisted in the demurrer that the local act is violative of Const. art. 3, § 7, par. 8 (Civ. Code 1895, § 5771), in this respect: The body of the local act requires a license fee of \$20,000 before there can be a sale of spirituous or other intoxicating liquor in any quantity, whereas the title of the act requires a license fee only of retailers or dealers who sell in quantities of less than one quart; and the intention of the act, as disclosed by the body thereof, being to apply its provisions to all sales, this purpose is frustrated by the limitation in the title. The constitutional provision referred to reads: "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." To state the contention concretely, it is that the title in these words, "An act fixing the annual license fee for retailing or vending spirituous" or other liquors in Irwin county, limits the act in its application to a license fee for the sale of such liquors by retail, in quantities less than one quart, while the body of the act fixes the "annual license fee to retail or vend spirituous [or other] liquors in any quantity in the county of Irwin." The soundness of this attack depends upon the interpretation to be given to the word "vending," as used in the title. We cannot say that "vending" is the equivalent of "retailing," as used in the title, because to give it this limited significance would be to transgress the familiar canon of construction which requires that some effect, if possible, shall be given every word, clause, and sentence of a statute. To vend, in its largest sense, means to sell, and it is quite apparent that the legislative scheme was to impose a license fee, not only on the retailer, who sells in quantities less than a quart, but also upon all vendors or sellers of intoxicating liquors, irrespective of the quantity involved in the sale. When this construction is given to the title, the body does not contain matter different from what is expressed in the title of the act.

3. It is also urged in the demurrer that the local act is further opposed to the constitutional provision quoted in the preceding division of this opinion, in this respect: The

body of the local act forbids the sale of intoxicating liquor in any municipal corporation, unless the license fee be first paid, whereas the title of the act applies only to Irwin county; and as the existing law of the state excepts municipal corporations of county license, the true meaning and intent of the title of the act is that the same applies only to those portions of Irwin county lying outside of municipal corporations, and therefore the body of the act contains matter different from that which is expressed in the title, to wit, so much of the body of the act as undertakes to make it apply to municipal corporations in the county of Irwin. The manifest purpose of the act is to fix a license fee for the sale of spirituous or other intoxicating liquors in Irwin county. The General Assembly plainly expressed its intent to regulate the sale in a designated territory, and that territory embraces the whole county of Irwin. As the whole must include all the parts, the territory embraced in incorporated towns located within the confines of the county must, of necessity, come within the operation of the act. The argumentative statement in the demurrer that, under existing law, municipal corporations are excepted from the operation of county license will be noticed elsewhere in this opinion, and we will attempt there to show that the laws which except incorporated towns and cities are special, and not general, in character, and that there was no obstacle to prevent the Legislature from passing a local law for an entire county, effective both in urban and nonurban territory.

4. The local act is said to be obnoxious to paragraph 17, § 7, art. 3, of the Constitution, which is as follows: "No law, or section of the Code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall describe the law to be amended or repealed, as well as the alteration to be made." It is contended that the effect of the local act is to practically repeal, or at least to materially amend, section 40 of the act of December 2, 1896. (Acts 1896, pp. 157, 168), incorporating the city of Fitzgerald, in Irwin county, wherein exclusive authority was given to the mayor and council to regulate and control the sale of intoxicating liquors in that city; and that the effect of the local act is further to practically repeal, or at least materially amend, the Political Code of 1895, § 421 (which fixes the county charge for license to sell liquors at \$25), and that neither the act incorporating Fitzgerald nor this section of the Political Code is in any way referred to or described in the local act. As has been previously indicated, the local act is applicable to the whole county. Whenever the Legislature enacts a local act and applies its provisions to the entire territory of a county, inconsistent provisions in a charter of an incorporat-

ed town located within that county are repealed by necessary implication. *Turner v. Mayor of Forsyth*, 78 Ga. 683, 3 S. E. 649; *Strauss v. Mayor of Waycross*, 97 Ga. 475, 25 S. E. 329. Upon the enactment of the local law fixing the license fee for the sale of intoxicating liquors in the county of Irwin, the charter provisions of the city of Fitzgerald giving that municipality exclusive power to grant licenses and regulate the sale of liquor in that city was superseded by the local act. With reference to the criticism that the effect of the local act will be to repeal or amend the Code section referred to, we will now attempt to demonstrate that this Code section is not a general law, but only special in its scope and effect, and for this reason it was competent for the Legislature to enact another local law for Irwin county. A similar contention was presented in the case of *Sasser v. Martin*, 101 Ga. 447, 29 S. E. 278, but it is insisted by the counsel for the plaintiff in error that the decision therein announced is not to be regarded as having any application to the present case, because, it was made with reference to the law as it existed in 1879, the date of the passage of the Bulloch county license act, and before the Legislature effected a complete change in its policy as to the granting of liquor licenses by county authorities.

5. The question dealt with and disposed of in the *Sasser-Martin Case*, supra, was whether, at the time of the passage of the act of September 5, 1879, providing for the granting of licenses to sell intoxicating liquors in the county of Bulloch, there was any general law on the subject of licensing the sale of such liquors with which that act came into conflict. In reaching the decision announced in that case, the public laws of the state with regard to the sale of intoxicating liquors, as embraced in the Code of 1882, were looked to and considered as controlling the question then in hand. Since 1882, the public laws regulating the sale of intoxicating liquors in this state have been, in certain respects, amended and amplified. By an act approved December 22, 1884, to amend section 1419 of the Code of 1882, persons desiring to sell spirituous liquors in any quantity less than a gallon were required to apply to the proper authorities for a license. Acts of 1884-85, p. 42. Prior to that date, provision was made only for the granting of licenses to sell spirituous liquors at "retail" (Code of 1882, § 1419); that is to say, in quantities of less than one quart (*Id.* § 1424; *Beiser v. State*, 79 Ga. 327, 329, 4 S. E. 257). Under an act approved October 16, 1885, still further amending section 1419 of the Code of 1882, provision was made that before any license should be granted, the applicant therefor should present to the ordinary the written consent of 10 of the nearest bona fide residents (five of whom

should be freeholders) living nearest to the place of business where such spirituous liquors were to be sold, but that this additional requirement of the applicant should not be understood to apply to the licensing of the sale of liquor in incorporated towns or cities. Acts of 1884-85, pp. 59-60. In other words, an applicant for a license who desired to sell outside of an incorporated town or city was required, as a condition precedent to getting a license, to exhibit to the ordinary the written consent of 10 of the nearest residents to his proposed place of business, as provided by that act. No other change in the then existing law was thereby made. In 1890, the General Assembly passed an act declaring that "it shall be unlawful for any person, firm or corporation in this state, to sell spirituous, vinous or malt liquors in any county or village thereof, in any quantity, without first obtaining a license from the authorities now authorized by law to grant license for the sale of such liquors by retail; and the laws now in force in this state with reference to the granting of license to retail dealers in spirituous, vinous and malt liquors in the several counties, and the penalties attached for the violation of the same, are hereby made applicable to dealers who sell in any quantity whatever; provided, that nothing in the act shall be so construed as to interfere with municipal laws regulating the sale of spirituous liquors, by wholesale or otherwise," nor to "interfere with existing laws in regard to the sale of domestic wines." Acts of 1890-91, vol. 1, p. 128. This act merely penalized the sale, without license, of any kind of intoxicating liquors (with an exception as to domestic wines), in any quantity whatever, in any county of this state or village thereof. It did not prescribe how licenses should be secured, nor make any change in the existing law as to the granting of licenses; moreover, it expressly declared its purpose was not to supersede or disturb any municipal law regulating the sale, by wholesale or otherwise, of spirituous liquors, nor to substitute any change of policy with regard to the sale of domestic wines. In construing this act, it was said, in *Hardison v. State*, 95 Ga. 337, 22 S. E. 681: "If the selling is done in an incorporated city, town or village, the municipal authorities of which have authority to grant liquor licenses, the license must be obtained from those authorities; if elsewhere, it must be obtained from the county authorities." In none of the acts passed since the Code of 1882 has there been any attempt to amend, or in any way modify, section 1422 thereof, which expressly declared that none of the provisions of the then existing law respecting the granting of licenses by the ordinary, should "apply to any corporation, town or city, which by charter has power to grant licenses, provided the fees for licenses are at least as much in said city as are required

by law in the county." The amount of the prescribed license fee was \$25. Code of 1882, § 529.

But it is insisted that the law relating to the granting of liquor licenses underwent a radical change in the compilation of the new Code of 1895 and its adoption by the General Assembly. Chapter 8 of the thirteenth title of the Political Code of 1895 (page 416) deals with the subject of "liquor," and section 1519 of article 1 thereunder is headed, "License to Sell, How Obtained." It first provides that application must be made to the ordinary (or county commissioners, if there be a board of commissioners), who shall have power to grant or refuse the application. Next comes the requirement introduced by the act of 1885, respecting the written consent of 10 bona fide residents to the granting of the license, followed by the proviso "that this section shall not apply to incorporated towns or cities." Apparently, the term "section" refers to the section of the Code in which it is used (section 1519); but, if so, then the power of the county authorities to grant licenses is limited to territory not included within any incorporated town or city, irrespective of whether the municipal authorities have or have not power to grant a license. The express declaration to the contrary contained in section 1422 of the Code of 1882 is not, however, omitted from the chapter on the subject of liquor, but its precise language is to be found in article 3, which takes up the subtitle of "regulating the sale of liquors." Pol. Code 1895, § 1538. The first of the section under that article (section 1535) declares that no one shall sell any intoxicating liquors, in any quantity, in any county or village in this state, without first obtaining a license; the next section deals with the oath to be taken by vendors of spirituous liquors in any quantity; section 1537 declares that a license shall not authorize the person to whom it is issued to sell at more than one place in the county; and the following section (brought forward from the Code of 1882) says that "said provisions do not apply to any corporation, town or city, which by charter has power to grant licenses," etc. The "said provisions" are not, assuredly, only those embraced in the section immediately preceding; for it cannot be assumed that the intent was to allow a vender to sell at more than one place in a city, under one and the same license, upon payment of but one license fee, nor would there be any reason, simply because he was operating under a municipal license, for relieving him from taking the oath referred to in section 1536; while it would be absurd to attribute to the codifiers or the General Assembly any intention to declare that the provisions of section 1535 should not apply to a municipality having power to grant licenses, since this would be the equivalent of saying it should not be unlawful for a person to sell intox-

licating liquors therein "without first obtaining a license." Obviously it cannot be concluded that the intention was that none of the preceding provisions of article 3 should be held to apply to such a municipality, if "the fees for licenses [were] at least as much in said city as are required by law in the county." The only reasonable conclusion to be drawn is that there was a legislative intent to except a certain class of municipalities (upon a stated condition) from the operation of the general scheme adopted for fixing a license fee for the sale of intoxicating liquors, providing how and upon what conditions a license could be obtained, and "regulating the sale of liquors" in various particulars. This general scheme is set forth in chapter 8, but from the anomalous position which section 1538 occupies, relatively to those provisions it must have been intended to qualify. It is evident that we cannot, with any degree of certainty, arrive at the true intent of the Legislature without resorting to the expedient of looking to the declaration of that intent made in the various acts passed by the General Assembly since the Code of 1882, and reading them in connection with the law as it then stood and as it is now expressed in the Code of 1905. This course is proper to be pursued when there is, in the codification of a statute, more or less uncertainty of intent or ambiguity in expressing that intent. *Smith v. Evans*, 125 Ga. 112, 58 S. E. 559. It is proper to pursue this course in the present instance, because, considering in *pari materia* the various provisions of the Code of 1905 relating to the granting of liquor licenses and the regulation of the liquor traffic, it is evident that the scheme of the General Assembly was not to make certain municipalities in "wet" counties "dry," nor to limit the power of the county authorities over the granting of licenses to territory not included in any municipality. (See, also, in this connection, *Pol. Code 1895*, §§ 420, 421, 1521, 1522; *Pen. Code 1895*, §§ 431, 433). If this was the legislative scheme, there would have been no occasion for preserving and incorporating into the new Code the provision embraced in section 1422 of the Code of 1882, excepting from the operation of the public laws, respecting the granting of licenses, such municipalities as had power to issue licenses, upon the express condition that these municipalities should exact from the seller as a license fee at least as much as that to be exacted by the county authorities for a county license. Looking, then, to the law as it stood when the new Code was compiled, we find, that, with the exception of the corporate limits of a particular class of municipalities, the territory within which the county authorities were empowered to grant licenses embraced the entire county, as well the urban districts which were incorporated as cities or towns as the rural districts which

were sparsely peopled and were under less rigid police protection.

The misleading proviso contained in the Political Code 1895, § 1519, "that this section shall not apply to incorporated towns or cities," doubtless was the result of an effort on the part of the codifiers to adhere as closely as possible to the precise language of the amending act of 1885 (*Acts of 1884-85*, p. 59), rather than the result of an attempt to arrive at the true meaning of that act. It was awkwardly expressed, in that it proposed to amend section 1419 of the Code of 1882 by inserting therein a certain requirement to be made of the applicant for a liquor license, with the proviso that "this act shall not apply to incorporated towns or cities." It was not proposed that the section as amended should set forth the provision that it—the section—should not apply to any municipality. Had this been done, the section, as amended, would have been in hopeless conflict with the succeeding section of the Code (section 1422), which contained an exception of a specified class of towns and cities under a stated condition, and which was logically the section to be amended or repealed in the event it was intended that the license law should have no application to any municipal corporation. That the codifiers did not understand that this section was in any way amended or repealed is evidenced by the fact that its language was introduced, without change of a syllable, as section 1538 of the Political Code of 1895. It simply got misplaced; it was neither overlooked nor neglected, but was assigned to a place in the Code where its meaning was obscured. In view of these considerations, it cannot fairly be said that the codifiers misinterpreted the existing law and evolved a new scheme for granting liquor licenses which has met with the approval of our General Assembly, so that there has thus come about a change in the law which we must recognize and feel constrained to enforce. Indeed, any change in the law brought about by its codification is not one which reflects a different scheme or policy adopted by the Legislature, but one which has so confused and involved the law as it existed that its meaning cannot be gathered from a reading of the new Code without resort being had to extrinsic evidence of the legislative will.

As has been already pointed out, the policy with regard to granting liquor licenses has undergone no essential transmutation since the Code of 1882 or the rendition of the decision in the *Sasser-Martin Case*. In fact, in passing recent local legislation affecting various sections of the state, the decision in that case has evidently been looked to and relied on by the General Assembly in shaping its policy of regulating the sale of liquors in communities where different conditions prevail, or there is a difference of sentiment upon the vital question of how the situation should be met. That decision is

not binding as authority upon this court, having been concurred in by only five justices. But this bench, as now constituted, is well content to let it stand as a precedent, for the reasoning of Mr. Justice Little, who pronounced it, is more than persuasive, and rests upon familiar rules of statutory construction which may no longer be questioned. In undertaking to arrive at the purpose of the General Assembly—whether the legislative intent was to deal with the granting of liquor licenses by a general law or by way of special enactment—we are bound to attribute to the members of that body a knowledge of our fundamental law on the subject of legislation, and an abiding purpose to observe the constitutional restrictions by which they are to be governed. Bearing this in mind, we cannot conclude that the General Assembly sought, under the guise of a general law, to make a purely arbitrary classification of municipal corporations, assigning some cities and towns to a class of communities made up largely of rural districts, and assigning other municipal corporations of precisely the same character to an altogether different class to be added to or depleted at the legislative will by special enactment. By a general law, provision could constitutionally be made for the granting of liquor licenses in all rural districts where the sale of liquor was authorized; such an exercise of police power could not be attributed to any design to make an arbitrary distinction between territory lying within the limits of a municipality and territory lying adjacent to, or remote from, an incorporated town or city. Where municipal government has been established and protection against violence and lawlessness has been specially provided for, conditions may be far different from those which prevail in sparsely settled territory in the immediate vicinity, where ample police protection against the evils resulting from intemperance can hardly be provided. So, also, a general law might be passed to regulate the sale of liquor in all municipalities in the state, or perhaps in all those having more than a given number of inhabitants, or in all which naturally belong to a particular class which for any substantial reason is distinguishable from another class of cities or towns in which the same conditions do not exist. But manifestly the General Assembly did not have in mind any such logical scheme of classification, and it is much to be doubted that our lawmakers have ever entertained the idea that it was possible, by a statute operating alike throughout the entire limits of this state, which has much territory and is peopled by a community divided in sentiment upon almost every question connected with the liquor traffic, to deal with all the complexities which have arisen out of the diversity of local opinion regarding the restrictions which should be placed upon the sale of intoxicating beverages.

6. The constitutionality of the local act is

further assailed on the ground that it is antagonistic to paragraph 1, § 4, art. 1, of the Constitution, which declares: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law"; in that the local act applies to all wines except those which are expressly excepted by section 5 thereof (domestic wines made in Irwin county and wines for sacramental purposes), and so much of the act as applies to domestic wines other than those excepted constitutes a special law in a case for which provision has been made by general laws, to wit, the wine acts of 1877 and 1904—Acts of 1877, p. 33; Acts of 1904, p. 98. The wine act of 1877 does not appear to have been codified in either of the Codes adopted since its enactment, but its omission therefrom does not have the effect of repealing the act. The general scope of the wine act is to make lawful the sale of domestic wines at wholesale and in quantities of not less than one quart, notwithstanding any provisions of law requiring a license or oath or other regulation or condition, prohibition or penalty, to the contrary. The wine act of 1904 confers upon the authorities of an incorporated town or city, within the limits of the town or city, and the commissioners of roads and revenues or ordinary (as the case may be) without the limits of all incorporated towns or cities, the power to grant license to the manufacturers of domestic wines made from grapes, berries, or fruits purchased by them or grown on lands owned, leased, or rented by them, to retail the same in quantities not less than a quart, and not to be drunk on the premises where sold, and to fix the license at such price as these authorities may see proper. It would be foreign to the discussion of the point in hand to enter into any extended analysis of these two acts to determine whether they are conflicting in any wise or what effect the latter act may have on the first. This fact is worthy of note, that neither act is designed to operate on sales in quantities less than one quart. In *Papworth v. State*, 103 Ga. 36, 31 S. E. 402, it was held that domestic wines were intoxicating liquors, and that while the wine act of 1877 was of force the General Assembly could not constitutionally vary its provisions in any locality in Georgia by special legislation. This ruling was applied to the local act up for consideration in that case, which prohibited the sale of intoxicating liquors in a certain county. The local prohibitory act was held to be void because the legislative purpose was to totally prohibit the sale of intoxicating liquors in the county, and this could not be constitutionally done, because of the wine act of 1877. Other local prohibitory laws have been pronounced unconstitutional for the same reason. *Griffin v. Eaves*, 114 Ga. 63, 39 S. E. 913, and cita-

tions. In these cases the local prohibitory acts were declared void on the principle that the whole legislative scheme was defeated by the unconstitutional feature of the special law. The local act before us, considered as a license regulation of intoxicating liquors, has for its purpose the regulation of the sale of liquor and for the raising of revenue for the county. If there had been no attempt to except domestic wines of any character, the local act would not have been rendered unconstitutional because of the wine act of 1877, for an intention will be imputed to the Legislature to enact local license laws only for the sake of such intoxicating liquors as could not be lawfully sold without a license. *Roberts v. State*, 114 Ga. 541, 40 S. E. 750. This is in accord with a well-recognized rule of statutory construction. See 1 Lewis' *Suth. Stat. Con.* § 298. But the local act for Irwin county undertakes to deal with the subject of putting a license fee upon sellers of domestic wines, and excepts only such wines as are made in the county; so the act is in conflict with the general wine act of 1877. Attention is also called to the fact that the wine act of 1904 is a general law, and the contention is urged that the local act conflicts with its provisions, as it prohibits the license by county authorities of the sale of wine in quantities of not less than a quart, and not to be drunk on the premises where sold, within the limits of an incorporated town. Let this be granted, still it does not follow that the whole legislative scheme is defeated, so much of the act as is constitutional may not be enforced. The purpose was to regulate the sale and impose a license tax, and not to prohibit the sale altogether. The license tax was laid upon the sale of all kinds of intoxicating beverages except domestic wines made in the county of Irwin and wines sold for sacramental purposes; and if, for any reason, the license cannot be required of any seller who deals in wines exclusively, there is no reason for supposing the Legislature would not have been willing to impose the restrictions upon the sale of other intoxicants unless all wines except as expressly provided should also come under those restrictions. To enforce so much of the local act as is constitutional will not, we are sure, defeat the general scheme which the Legislature had in mind, but will give effect to that scheme, save as to matters of minor importance which can be disassociated therefrom without doing violence to it.

7. It is further contended that the exceptions contained in the fifth section of the local act is discriminatory and excludes from its operation all wines except such as are made in the county of Irwin and wines sold for sacramental purposes, and is therefore an effort to regulate commerce among the several states, which is forbidden to the states by the Constitution of the United States. The failure to include within the exception of wines which might be sold with-

out a license wines made outside the state is a discrimination against wines made beyond the state. The effect, however, is not to render the act invalid, but to place all wines on the same basis, whether made within or without the state.

8. And, lastly, it is contended that the evidence shows that the license fee is so large that it amounts to prohibition, and therefore the act contravenes the constitutional provision forbidding special legislation where there is an existing general law on the subject-matter, the general law being the local option liquor law. The presiding judge allowed the defendant to introduce evidence to support his special plea raising this point. Speaking for myself, I know of no principle of law which allows a legislative act to be declared unconstitutional by the finding of a jury or of the trial judge on the facts of a particular case. The constitutionality of an act is purely a question of law—a question of construction of the statute and the Constitution, to ascertain agreement or conflict of the former with the latter. But, as the propriety of this mode of attack on the constitutionality of the act is not under review, we will simply look to the evidence to see if it demanded a finding that a \$20,000 license fee would necessarily amount to a total prohibition of the traffic. We do not think the evidence was such as to constrain such a finding of fact, and we cannot reverse the judgment because the court reached the conclusion that the license fee was not prohibitory.

Judgment affirmed. All the Justices concur.

STATE v. TROTMAN.

(Supreme Court of North Carolina. Dec. 4, 1906.)

COMMERCE—INTERSTATE COMMERCE—SALE OF GOODS—LICENSE LAWS.

Orders for drugs and patent medicines were taken by an agent of a nonresident drug company, and forwarded to and accepted by the latter at its place of business in another state. Each order was separately wrapped, with the name of the purchaser marked thereon, and all were packed in one crate and shipped to defendant, another agent of the drug company, in North Carolina, who delivered the packages to the purchasers in their original form. *Held*, that the transaction constituted interstate commerce, and that defendant was therefore not liable for selling or offering to sell patent medicines and drugs without having obtained a license, in violation of Revisal 1905, §§ 5150, 5151.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, §§ 104, 106, 109.]

Appeal from Superior Court, Franklin County; Long, Judge.

O. A. Trotman was indicted for unlawfully selling and offering patent medicines and drugs for sale without a license, and from an order directing a verdict of not guilty the state appeals. *Affirmed*.

The Attorney General, for the State. W. H. Yarbrough, Jr., for appellee.

HOKE, J. Defendant was indicted for unlawfully selling and offering to sell patent medicines and drugs without having obtained license so to do, contrary to the provisions of sections 5150 and 5151, Revisal 1903. On the trial the jury rendered a special verdict, which established that certain citizens of Franklin county, each acting for himself and within two years before finding the bill of indictment, gave certain orders for medicines on the Standard Drug Company, of Spartanburg, S. C.; that the orders were procured by H. S. Newman, an agent of the said drug company, and same were to be delivered to the parties at Youngsville, N. C.; that the orders were forwarded to the drug company, and received and accepted by them at their place of business in Spartanburg, S. C., and were shipped by the company to O. A. Trotman, the defendant, and agent of the company at Wake Forest, N. C.; that each package was wrapped in separate parcel, with the name of the purchaser marked thereon for identification, and same were then packed in one crate and shipped to defendant, who distributed same to the purchasers; that each package was delivered in its original form to the party for whom it was intended; and that defendant, at that time, neither had, nor had applied for, license as required by the sections referred to. Upon these facts the court was of opinion that the defendant was not guilty, and so advised the jury, who thereupon rendered a verdict of not guilty, and state excepted and appealed.

It has been frequently decided that these license taxes and the penalties imposed to secure their collection are inoperative against one who is at the time engaged in interstate commerce; and on the facts established by the special verdict we think it clearly appears that the defendant was so engaged at the time, and that the judge below correctly advised and directed the jury as to the law. The case of *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 836, is decisive of the question presented and meets every suggestion that can be urged in support of the prosecution. In this case pictures, frames, etc., ordered by purchasers in Greensboro, N. C., from a house in Chicago, were sent by this house to their agent in Greensboro, who, after properly placing the pictures in the frames, delivered the same to the persons who had made the order and for whom they were intended. In holding a license tax, imposed by the board of aldermen of the city of Greensboro, unconstitutional as prohibited by the commerce clause of the federal Constitution, the court said, quoting from *Robbins v. Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694: "A state cannot impose taxes on property imported from another state and not be-

come a part of the common mass of property therein." And in reply to a position that the statute made no discrimination, as to the burden imposed, between dealers within or without the state, the court said, quoting from *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719: "But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce as on that which is carried on solely within the state." And to a distinction, suggested in the opinion of the state Supreme Court then under review, that the transaction had ceased to be interstate commerce because the shipment had been made to an agent of the nonresident company, who received the goods shipped to him in Greensboro, N. C., opened the boxes, assorted the pictures and frames, and, after putting them together, delivered them to the purchasers, the court said: "Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to the agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two, instead of one, agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself or by personal agent had carried and delivered the goods to the purchaser. That the articles were sent as freight by railroad, and were received at the railroad station by the agent, who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate."

This decision has been several times reaffirmed and applied to cases in this and other jurisdictions, and fully sustains the ruling of the judge on the facts established by the verdict. *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663; *Range Co. v. Campen*, 185 N. C. 506, 47 S. E. 658; *Stone v. State*, 117 Ga. 292, 43 S. E. 740; *In re Spain* (C. C.) 47 Fed. 208, 14 T. R. A. 97. There is no error, and the judgment below is affirmed.

No error.

STATE v. LEWIS.

(Supreme Court of North Carolina. Nov. 21, 1906.)

1. CRIMINAL LAW—VENUE—LYNCHING—STATUTORY PROVISION.

Laws 1893, p. 440, c. 461, which defines and fixes a penalty for the crime commonly known as "lynching," is brought forward into various sections of the Revisal of 1905 under the appropriate subheads. Section 3698 (section 1 of the original act), preceded by the word "lynching," defines the offense commonly so

known without stating that the crime is "lynching," and section 3233 (section 4 of the original act), preceded by the same word, gives the superior court of an adjoining county jurisdiction of the "crime of lynching," with provisions for investigation by the grand jury of such adjoining county. *Held*, that the scattered sections fixed the procedure for the crime as fully as though it was expressly defined, and hence authorized an indictment by a grand jury of an adjoining county.

2. SAME—CONSTITUTIONALITY.

Revisal 1905, § 3233, authorizing an indictment for lynching to be brought by the grand jury of a county adjoining the one where the crime was committed, is not an improper exercise of legislative power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 219.]

3. INDICTMENT—MOTION TO QUASH—PLEA IN ABATEMENT.

The proper method for attacking an indictment as defective, in that the crime was committed in another county, is by a plea in abatement, rather than a motion to quash.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 456, 481.]

4. CONSPIRACY—INDICTMENT—SUFFICIENCY.

Revisal 1905, § 3698, provides for the punishment of any one who shall "conspire" to enter a jail for the purpose of lynching. An indictment charged that defendant and "others" conspired to enter, etc. *Held*, that the indictment was not defective for failing to name the others in the conspiracy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Conspiracy, §§ 80, 85, 87.]

Brown, J., dissenting in part.

Appeal from Superior Court, Union County; Shaw, Judge.

Prosecution of Zeke Lewis for lynching. From an order quashing the bill, the state appeals. Reversed.

The defendant was indicted in said county upon the following bill:

"North Carolina Superior Court. Union County, July Special Term, 1906. The jurors for the state upon their oath present: That Zeke Lewis and others, late of the county of Anson, on the 28th day of May, in the year of our Lord one thousand nine hundred and six, with force and arms, at and in the county aforesaid, unlawfully, wickedly, willfully, and feloniously did conspire together to break and enter the common jail of Anson county, the place of confinement of prisoners charged with crime, for the purpose of lynching, injuring, and killing one John V. Johnson, a prisoner confined in said jail, charged with the crime of murder, against the form of the statute in such case made and against the peace and dignity of the state. And the jurors for the state, upon their oaths aforesaid, do further present: That the said Zeke Lewis afterwards, to wit, on the day and year aforesaid, with force and arms, at and in the county aforesaid, unlawfully, willfully, and feloniously did engage in breaking and entering the common jail of Anson county, the place of confinement of prisoners charged with crime, with intent to injure, lynch, and kill one John V. Johnson, a prisoner con-

fined in said jail charged with the crime of murder, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors for the state, upon their oaths aforesaid, do further present: That the said Zeke Lewis afterwards, to wit, on the day and year aforesaid, with force and arms, at and in the county aforesaid, unlawfully, willfully, wickedly, and feloniously did injure, lynch, and kill one John V. Johnson, a prisoner confined in the common jail of Anson county, charged with the crime of murder, against the form of the statute in such case made and provided, and against the peace and dignity of the state. Robinson, Solicitor." The defendant moved to quash the bill "for the reason that it appears upon the face of the bill that the offenses charged were committed, if at all, in Anson county, and there is no warrant or authority of law for finding the indictment or trying him in Union county;" and also to quash the first count in the bill because it charges that "the defendant conspired with others," without naming or charging, "and others to the jurors unknown." Both motions were allowed, and the state excepted and appealed.

Walter Clark, Jr., and R. B. Redwine, with the Attorney General, for the State. J. A. Lockhart, H. H. McLendon, and W. J. Cox, for the defendant.

CLARK, C. J. The first statute passed in this state in regard to lynching was chapter 461, p. 441, Laws 1893. Each provision in that act has been brought forward and incorporated, with very slight verbal changes, under appropriate heads in Revisal 1905. Section 1 of said act, defining lynching and imposing the penalty, is now Revisal 1905, § 3698, and is in the chapter on "Crimes," under the subhead "Public Justice," and is as follows:

"3698. Lynching. If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoners, he shall be guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the State's Prison or the county jail not less than two nor more than fifteen years." Laws 1893, p. 440, c. 461, § 1.

Section 2 is now Revisal 1905, § 3200, and provides that the solicitor shall prosecute and have the prisoners bound over to the superior court of an adjoining county. Section 3 is as to witnesses testifying, and is Revisal 1905, § 3699. Section 4 of the said act of 1893 is Revisal 1905, § 3233, in the chapter on "Criminal Proceedings," subhead "Venue" and reads:

"XI. Venue. 3233. Lynching. The superior court of any county which adjoins the county in which the crime of lynching shall be committed shall have full and complete jurisdiction over the crime and the offender to the same extent as if the crime had been committed in the bounds of such adjoining county; and whenever the solicitor of the district has information of the commission of such a crime, it shall be his duty to furnish such information to the grand juries of all adjoining counties to the one in which the crime was committed from time to time until the offenders are brought to justice." Laws 1893, p. 440, c. 461, § 4.

Section 5, as to witnesses answering questions, is made Revisal 1905, §§ 1638, 3201. Sections 6 and 7 are the same as Revisal 1905, §§ 1288, 2825. The whole of chapter 461, p. 440, Laws 1893, is thus in the Revisal, and its force and effect is not impaired by the fact that it has been split up, and its different sections placed under appropriate heads. It seems to us that the above provisions fully define the offense intended to be repressed, and designate the punishment and procedure. There are many offenses in this chapter on "Crimes" which, though not common-law offenses, are not defined save by using the term of common knowledge, as "abandonment," "lynching," etc. It is not necessary to prescribe that an act is a misdemeanor or felony; the punishment affixed determines that. Revisal 1905, § 3291; *State v. Fesperman*, 108 N. C. 772, 13 S. E. 14.

It was error to quash the bill on the ground that the offense was not committed in Union county, which is an adjoining county to Anson. Owing to the prejudice or sympathy which in cases of lynching usually and naturally pervades the county where that offense is committed, the General Assembly, upon grounds of public policy, deemed it wise to transfer the investigation of the charge to the grand jury of an adjoining county. Without some such provision, an indictment could rarely be found in such cases. We cannot concur with the argument that such provision (Revisal 1905, § 3233) is beyond the scope of the law-making power and unconstitutional. The Legislature of North Carolina has full legislative power, which the people of this state can exercise completely and freely as the Parliament of England or any other legislative body of a free people, save only as there are restrictions imposed upon the Legislature by the state and federal Constitutions. In the very nature of things, there is no other power that can impose restrictions. When the Constitution uses the words "jury" and "grand jury," they are interpreted as being the same bodies which were known and well recognized when the Constitution was adopted. But this is a rule of ascertaining the meaning of the words, and not a restriction upon the power of the Legislature to make provisions as to venue, and the like incidental matters, which in no wise affect

the nature and composition of a jury and grand jury. Hence, the qualification of jurors, the number of challenges, venue, and other similar provisions as to procedure, are in the discretion of the Legislature. The legislative power can be restrained only by constitutional provisions. It cannot be restricted and tied down by reference to the common law or statutory law of England. There is nothing in the common law or statute law of England which is not subject to repeal by our Legislature, unless it has been re-enacted in some constitutional provision. That the federal government is one of granted powers solely, and the state government is one of granted powers as to the executive and judicial departments, but of full legislative powers, except where it is restricted by the state or federal Constitution, is elementary law. This is nowhere more clearly stated than by Black, *Const. Laws*, §§ 100, 101, as follows:

"Sec. 100. Under the system of government in the United States, the people of each of the states possess the inherent power to make any and all laws for their own governance. But a portion of this plenary legislative power has been surrendered by each of the states to the United States. The remainder is confided by the people of the state, by their Constitution, to their representatives constituting the state Legislature. At the same time, they impose, by that instrument, certain restrictions and limitations upon the legislative power thus delegated. But state Constitutions are not to be construed as grants of power (except in the most general sense) but rather as limitations upon the power of the state Legislature.

"Sec. 101. Consequently, the Legislature of a state may lawfully enact any law, of any character, on any subject, unless it is prohibited, in the particular instance, either expressly or by necessary implication, by the Constitution of the United States or by that of the state, or unless it improperly invades the separate province of one of the other departments of the government, and provided that the statute in question is designed to operate upon subjects within the territorial jurisdiction of the state."

That eminent authority, Cooley, *Const. Lim.* (7th Ed.) 126, says: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." On the next page he further says that "the American Legislatures may exercise the legis-

lative powers which the Parliament of Great Britain wields, except as restrictions are imposed" by some inhibition in the state or federal Constitution; but the Legislature cannot exercise the judicial and executive functions of the British Parliament, which is supreme. This is a clear cut and very exact statement. Our Legislature has the same legislative power as the British Parliament, except where some legislative power is expressly denied it by the Constitution of the state or Union, but, unlike Parliament, it cannot exercise judicial or executive functions, and that only because the Constitution has bestowed those functions upon the other two departments. If the state had adopted no Constitution, as was the case in Rhode Island till 1843, the Legislature would have been supreme, as in England, subject only to the federal Constitution, and there is now, and necessarily can be, no limitations upon the Legislature save those expressly imposed by the state and federal Constitutions, as Judge Cooley well says. Under the North Carolina Constitution of 1776, the Legislature elected all the executive officers of the state, and created and modified at will the judicial department and chose its officers. The subsequent changes in the state Constitution have put the other two departments upon a more independent footing, but have not added any other limitations upon the legislative power of the General Assembly.

It has long been the statute that in the interest of justice the court can remove any cause, civil or criminal, to some adjacent county for trial. Revisal 1905, §§ 426-428. If the trial before the petit jury can by legislative authority be transferred to another county, the far less important matter of the venue of the inquiry and finding by the grand jury can also be transferred. In fact, it has often been provided that the grand jury may find a true bill in certain cases where the offense was committed beyond the limits of the county, as will be seen by reference to other sections of the subhead in which Revisal 1905, § 3233, is found, i. e.: "3234. When any offense is committed on waters dividing counties. 3235. Where assault is in one county, death in another. 3236. Assault in this state, death in another." "3238. Death in this state, mortal wound given elsewhere." "3237. Person in this state injuring one in another." Also sections 3403 and 3404 as to embezzlement and conspiracy by railroad officers confer jurisdiction upon any county through which the railroad passes, and there are still other statutes giving the grand jury jurisdiction to inquire as to offenses committed out of their own county. The Legislature is not likely to increase needlessly the instances in which a grand jury can inquire into offenses committed out of its own county, but of the necessity of such statutes the General Assembly is sole judge. Up to 1739, indictments for offenses occurring anywhere in North Carolina were cognizable

by a grand jury sitting in Chowan county, at Edenton. In that year the venue was changed to New Bern. From 1746 to 1806 (for 60 years) indictments were found in district courts, though the grand jury did not sit in the county where the offense was committed, unless that happened to be the county in which the court was held, and this is the case still with all indictments in the federal courts.

If it were possible to hold that the Legislature cannot shape the criminal procedure of this state to provide remedies required by the exigencies of the present time, unless the same remedies had been found to be necessary in England, and had occurred to and been adopted by those administering its laws in years long gone by, we find that in fact this same necessity of providing for the investigation by the grand jury of another county had been there provided for as to many offenses. In 4 Bl. Com. 303, we find that, while a grand jury could not usually inquire as to offenses committed out of their county, by legislative authority this could be done in very many instances, among others: "Offenses against the Black Act (9 Geo. I, c. 22) may be inquired of and tried in any county in England, at the option of the prosecutor." "So felonies in destroying turnpikes, etc. (8 Geo. II and 13 Geo. III, c. 84) may be inquired of and tried in any adjacent county," and "murders, whether committed in England or foreign parts," may, by virtue of 33 Henry VIII be inquired of and tried in any shire in England. "Any felonies committed in Wales may be indicted in any adjoining county in England (26 Henry VIII, c. 6)." And there are very many similar statutes there mentioned which were enacted, like the above, long prior to the American Revolution; thus showing that the venue of offenses cognizable before any grand jury is a matter of legislative enactment.

In 1 Stephen, History Crim. Law in England, 277, it is pointed out that there are 18 exceptions by statute to the rule requiring an indictment to be found by a grand jury of the county (the first having been enacted as far back as 2 & 3 Edw. VI), and he says their very number proves "that the general principle which requires so many exceptions is wrong." And on page 278 that distinguished judge and author adds: "A rule which requires eighteen statutory exceptions and such an evasion as the one last mentioned in the case of theft (the commonest one) is obviously indefensible. It is obvious that all courts otherwise competent to try an offense should be competent to try it irrespectively of the place where it was committed; the place of trial being determined by the convenience of the court, the witnesses, and the person accused. Of course, as a general rule, the county where the offense was committed would be the most convenient place for the purpose." England has about the same area as North Carolina—40 counties—and a far

denser population, now more than 30,000,000; North Carolina has nearly $2\frac{1}{4}$ times as many counties (97) and about 2,000,000 people. The population of the average English county is therefore 40 times that of an average county in this state. If, nevertheless, the public interest requires that even in England the finding of an indictment shall not be restricted always to a grand jury in the county where an offense is committed, for a stronger reason the Legislature here must have power, in its judgment, to change the venue in the interest of justice, with our smaller counties and sparse population. The venue of a grand jury "is a matter under the control of the Legislature." *State v. Woodard*, 123 N. C. 710, 31 S. E. 219. *State v. Patterson*, 5 N. C. 443, is put on the express ground that the statute did not give the grand jury jurisdiction of an offense committed in an adjacent county, as had been the case under the previous district system. Besides, if there had been a defective venue, the remedy was by a plea in abatement, which is practically a motion to remove to the proper county, and not a motion to quash. Revisal 1905, § 3239; *State v. Carter*, 126 N. C. 1012, 35 S. E. 591; *State v. Lytle*, 117 N. C. 801, 23 S. E. 476.

It was also error to quash the first count. The indictment is against Lewis, and in charging that he "conspired with others" the bill fully complies with Revisal 1905, § 3698, which simply provides that, "if any person shall conspire to break," etc. It was not required to name the others, or to charge that they were unknown. The word "with others" is tautology and mere surplusage. The "con" in the word "conspire" embraces the idea that it is an act done "with" another or others. Even if the statute had used the words "with others," it would have been sufficient to recite in the bill "with others," without charging their names or that they were unknown. Revisal 1905, § 3250; *State v. Hill*, 79 N. C. 658; *State v. Capps*, 71 N. C. 96.

Reversed.

WALKER, J. I concur in the result reached in this case and in the opinion of the CHIEF JUSTICE, except in so far as it is therein impliedly stated that the powers reserved in the Constitution by the people may be exercised by their representatives in the General Assembly. My opinion is that the Legislature has only the powers delegated to it by the people, and all powers not so given are reserved to the people themselves, just as by the ninth and tenth articles of amendment to the Constitution of the general government it is provided that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people, but the powers not delegated to the United States by that instrument, or prohibited by it to the states, are reserved to the states respectively, or to the people. The Constitution is a grant of specific powers,

and not a restriction upon powers granted, which, but for that restriction, would be general and plenary in their nature. The powers granted are to be exercised only as prescribed, and those of a legislative character by the General Assembly; but all not specially granted remain with the people, to be afterwards granted or withheld by them as they may deem best for the public welfare. In this respect the language of the Constitution of this state is substantially like that of the Constitution of the United States, so far as they both confer power upon the three departments of government, and for this reason they should receive practically the same construction. The legislative power under neither is unlimited, except as it may be said that it is not to be restricted so long as the Legislature moves within its legitimate orbit. The words of article 1, section 87, it seems to me, could have no force under any other construction. As we must ultimately construe that instrument and say what it means, we should be exceedingly careful to see that no power is taken from the people that they have not given in their Constitution, but confine each of the departments and every agency of government to the particular sphere of action assigned to it. I do not care to enter upon a discussion of the question whether the Legislature had the power to pass the act under which the indictment was found in this case, and thereby to authorize the laying of the venue in Union county. Such power existed, in my opinion, and I am content to rest my assent to the conclusion of the court upon the reasoning and the authorities as contained in the opinions of the CHIEF JUSTICE and Mr. JUSTICE CONNOR. This power should be confined within reasonable limits, and the court should see that it is not exercised to the oppression of the citizen, or in such a manner as to seriously imperil his natural rights. There is no such case presented here. My only purpose in giving expression to my views at all is that I may now refer to a matter which is not discussed in the opinion of the court.

It is suggested that the Act of 1893, p. 440, c. 461, as brought forward in Revisal 1905, §§ 3233, 3698, does not cover this case, as section 3698 does not define the crime of lynching, and no statute can be found that creates such an offense. It is therefore argued from that premise, and I think erroneously, that as section 3233 confers jurisdiction upon the court of any county adjoining that in which the crime is committed only in those cases where the offense charged is "lynching," it follows that the section is nugatory—a dead letter on the statute book. It will be strange indeed if the Legislature had made so great a mistake, but I do not think it has. The first count of the indictment charges that the defendant conspired with others to break and enter the jail on Anson county for the purpose of lynching, injuring, and killing John V. Johnson, a pris-

oner confined therein and charged with the crime of murder; the second that he actually did break and enter the jail for the same purpose; and the third that after so entering he did lynch, injure, and kill the said prisoner, and all the counts in the bill conclude against the statute and also at common law. When we examine the Revisal, we find several sections relating to the crimes charged in the bill, namely, sections 1288, 2825, 3200, 3201, 3233, and 3698. The first (section 1288) relates to the costs incurred in the prosecution of persons conspiring to break and enter, or for breaking and entering, a jail for the purpose of killing or injuring a prisoner therein confined. The second (section 2825) to the duty of the sheriff to guard the jail, and protect prisoners against persons who may threaten to break and enter it for the purpose aforesaid, and prescribes how he shall proceed. The third (section 3200) to the duty of the solicitor, and provides that he shall cause immediate investigation to be made before a judge or other proper officer, who shall bind the person found to be probably guilty to the ensuing term of the superior court of some adjoining county, or commit him to the jail of said county. The fourth (section 3201) to the testimony of witnesses, requiring all persons to give evidence in such cases, but pardoning those who participated in the crime. The fifth (section 3233) confers full and complete jurisdiction upon the court of any adjoining county to indict and try offenders against the statute. The sixth (section 3698) makes it a felony to conspire to break or enter a jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or injuring any prisoner so confined, or to engage in breaking or entering any jail or like place with intent to kill or injure any prisoner therein confined, and fixes the punishment. These sections were all taken from the Acts of 1893, p. 440, c. 461, but they are not arranged consecutively in the Revisal nor in the order in which they appear in said acts, but the sections are severally assigned to their appropriate titles or chapters in the Revisal. All of the sections except those numbered 2825 and 3698 have special reference to the crime of lynching, but there is no offense created by law, and known or designated by that name, and when, therefore, sections 3200 and 3233 require that persons guilty of that crime shall be bound to the superior court of an adjoining county, and indicted and tried in that county, we are unable to know what the Legislature means, unless we refer to the original act, which makes everything plain. We are at liberty to make this reference because the statute will otherwise be incapable of any intelligent construction. It is not only obscurely worded and of doubtful import, but it can have no meaning at all, whereas it plainly appears that it was intended to have some meaning, and to secure the de-

tection and prosecution of a very dangerous class of offenders. Shall we close our eyes to the only source from which we can secure light, and by which the meaning and intent will be made manifest, and thus defeat the legislative will, or shall we turn the light on that we may see and know what was meant? The law in such a case, I think, permits, and, indeed, enjoins, that the latter course should be taken. *U. S. v. Lacher*, 184 U. S. 624, 10 Sup. Ct. 625, 88 L. Ed. 1080; *The Conqueror*, 106 U. S., at page 122, 17 Sup. Ct. 510, 41 L. Ed. 937. It is a general rule in the construction of statutes that when a provision of a Revision or a Code is plain and unambiguous the court cannot refer to the original statute for the purpose of ascertaining its meaning; but if it is of doubtful import, or without such reference the provision is meaningless, it is proper to resort to the prior act, which has been codified or revised, for the purpose of solving the ambiguity; and especially should this be the rule where the provision is so worded as to be incapable of a fair construction without considering the original statute. *Endlich*, *Int. Statutes*. §§ 50, 51; *Black*, *Int. Laws*, § 136, pp. 365, 366, 367; *Lewis*, *Suth. Stat. Const.* (2d Ed.) §§ 450-453 and 271. "But if it were conceded that the statute be somewhat ambiguous, we are authorized to refer to the original statutes, from which the section was taken, and to ascertain from their language and context to what class of cases the provision was intended to apply." *The Conqueror*, *supra*; *U. S. v. Lacher*, *supra*.

If the headings or marginal notes of the different sections of the Revisal cannot be used to explain their meaning, then the introduction of the words "the crime of lynching" into section 3233 renders it not only ambiguous, but insensible, as there is then no such crime created by the law, and there was no crime known by that name at the common law, and in that event we are clearly permitted by all the authorities to look at the original statute, although it may have been repealed by the Revisal, in order to ascertain what particular crime the Legislature intended to describe when it used those words. When the original statute (Acts 1893, p. 440, c. 461) is examined, we find that section 4 of that act which corresponds with section 3233 of the Revisal of 1905, refers to section 1, which is section 3698 of the Revisal of 1903, so it appears from this comparison that the words "the crime of lynching" were used by the revisers as a convenient form of expression, in view of the fact that they had placed headings, titles, or marginal references to each section, indicating what was meant by the term "lynching," under express authority given to them by the act of 1903 (page 512, c. 314), which provided for a compilation and revision of the statutes of the state, and by which commissioners were appointed for that purpose. This being so, section 3233 should be held to refer to section 3698, and this is also true of section

3200 and the other sections above enumerated, as they all were taken from the same act, and by the same rule of construction are to be taken as referring to each other. When these several sections of the Revisal are thus considered, we find that the Superior Court of the county of Union had jurisdiction to indict through a grand jury in that court, and the power to hear, try, and determine the indictment when found, at least so far as the two offenses mentioned in section 3698 are concerned, and these are the two offenses described in the first two counts of the bill. The same result may be reached by applying to the Revisal another rule of construction. It is generally held that the title of an act is a part of the same, but not in the sense that it can be used to construe it, unless the meaning of the act is ambiguous, in which case we may consider it for the purpose of ascertaining the true meaning. *State v. Patterson*, 134 N. C. 612, 47 S. E. 808. But this rule does not apply to revisions of statutes where the revisers have been authorized to insert marginal references to the original statutes, and to distribute the statutes under appropriate titles, divisions, and subjects, as was done by the act of 1903 (page 512, c. 314, § 1; *Endlich*, Int. of Stat. §§ 51, 69; *Bishop*, Written Laws, § 46); for as the eminent writer last mentioned says, such headings, and the like, in revisions and codes are deemed to be of somewhat greater effect than the ordinary titles to legislative acts, and to indicate at least the nature of the enactment. If this rule is applied, we find that the intent that section 3233 should refer to the jurisdiction of offenses described in section 3698 is made perfectly clear and manifest. As to the right to construe the several sections with reference to each other, see *Fortune v. Commissioners*, 140 N. C. 322, 52 S. E. 950.

My conclusion is that the indictment sufficiently charges the commission of an offense made criminal by section 3698, and that sections 3200 and 3233 refer to the crimes described in that section when they authorize the indictment to be found and the trial to be had in an adjoining county. This makes it unnecessary to inquire whether the indictment is otherwise sufficient to show jurisdiction in the court, under sections 3200 and 3233, or, to speak more generally, whether the jurisdiction of the court can be sustained on other grounds. As there is at least one offense, if not more than one, charged in the bill of which the court has jurisdiction, the motion to quash should be denied, and the defendant required to plead to the indictment.

CONNOR, J. I concur in the opinion of the court in this case with much hesitation. I do not concur in some of the reasons which are given to sustain it. The court held in a well-considered and able opinion by Mr. Justice Shepherd in *State v. Barker*, 107 N. C.

913, 12 S. E. 115, 10 L. R. A. 50, that, although the term "grand jury" is not found in our Constitution, the section of the bill of rights guarantying immunity from criminal prosecutions except upon "presentment, indictment, or impeachment" must be construed to mean "indictment by a grand jury," as defined by the common law—citing with approval the language of Judge Cooley in that connection. *Const. Lim.* 59. It was held in that case, because at common law "the concurrence of 12 jurors was absolutely necessary" to find a bill of indictment it was equally so in North Carolina, and that the Legislature had no power to dispense with such "absolute necessity." *English v. State*, 31 Fla. 340, 12 South. 689. If my investigation had led me to the conclusion that the venue entered into and was an essential element in the term "indictment" at common law at the time of the "separation from the mother country," I could not hesitate to declare that, in my opinion, it was not within the power of the Legislature to abrogate the common law in that respect. I cannot concur in the suggestion that such power is vested in the Legislature. The people, with whom alone is political sovereignty, have expressly declared that their governmental agencies must act and move within the orbit assigned to them by the Constitution. There is no place for arbitrary power in our governmental system of checks and balances. I do not sympathize with the suggestion that no part of the common law is imbedded in our Constitution. Speaking of the common law, after noting some of its defects, Judge Cooley wisely says: "But, on the whole, the system was the best foundation on which to erect an enduring structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought expressly to protect the rights and the privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed, in an unusual degree, to freedom of thought and action, and to a share in the administration of public affairs, and arbitrary power and uncontrolled authority were not recognized in its principles, * * * and, if the criminal code was harsh, it, at least, escaped the inquisitorial features which were apparent in the criminal procedure of other civilized countries, and which have been ever fruitful of injustice, oppression, and terror." That those who came to this colony, and "buidled" our institutions, well knew and jealously guarded these great principles, every page of our early history illustrates. The language of Judge Cooley applies with special force to them. "From the first, the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their condition and circumstances in the new country, and those particulars they

omitted as it was put in practice by them. * * * Did Parliament order offenders against the laws in America to be sent to England for trial, every American was roused to indignation, and protested against the trampling under foot of that time-honored principle that trials for crime must be by a jury of the vicinage." When the courts in this and other states have been called upon to approve departures from common-law principles and procedure in criminal trials, they have steadily refused to do so. In *State v. Branch*, 68 N. C. 186, 12 Am. Rep. 633, it was shown that a judge on the circuit had directed the witnesses to be examined by the grand jury in open court. Chief Justice Pearson, sustaining a motion to quash the bill for that reason, said: "This procedure is opposed to the principles of the common law," which means "common sense." He further says: "There is not the slightest reason to believe that the practice of examining witnesses before a grand jury in public was ever in force and in use in the colony of North Carolina; very certainly such has not been the practice in the state of North Carolina, and it must be rejected as inconsistent with the genius of a republican government." In *Lewis v. Com'rs*, 74 N. C. 194, Bynum, J., in a very strong opinion, denying the right of a solicitor to be present when the grand jury are discharging its duties, finds authority for the decision in the common law. After noticing the English practice, as described by Blackstone and others, he says: "It is more consonant to justice and the principles of personal liberty. The powers of the grand jury, therefore, should not be extended further beyond these conservative and salutary principles than is clearly warranted by public necessity and the most approved precedents." In *State v. Miller*, 18 N. C. 500, while the judges differed in respect to the law, both the Chief Justice and Judge Gaston concurred that in considering questions pertaining to the rights of the accused, in trial by jury, recourse must be had to the ancient common law. The same is true in every case where the question has come into debate, and the citizen has asserted his rights in respect to the manner in which he could be called to answer and put upon trial for a criminal offense. Millingan, Ex parte, 71 U. S. 2, 18 L. Ed. 281. In *Byrd v. State*, 1 How. (Miss.) 176, Sharkey, C. J., said: "The right of trial by jury, being of the highest importance to the citizen, and essential to liberty, was not left to the uncertain fate of legislation, but was secured by the Constitution of this and all other states as sacred and inviolable. The question naturally arises, how was it adopted by the Constitution? That instrument is silent as to the number and qualifications of jurors. We must, therefore, call in to our aid the common law for the purpose of ascertaining what was meant by the term 'jury.' It is a rule that when a statute or the Constitution contain terms used

in the common law without defining particularly what is meant, then the rules of the common law must be applied in the explanation." The Opinion of the Judges, 41 N. H. 550, strongly states the law in this respect. *Brucker v. State*, 16 Wis. 356; *People v. Powell* (Cal.) 25 Pac. 481, 11 L. B. A. 75. I agree, of course, that there is much of the common law which is in force in this state by virtue of Revisal 1905, c. 15, § 932, which is but the re-enactment of the acts of 1715 and 1778; and as to this the Legislature may, as it has in many instances done, repeal or modify it. In respect to those elementary principles and provisions, upon which the security of life, liberty, and property depend, guaranteed by Magna Charta, which was ingrafted, either in express terms or by necessary implication, into our bill of rights, I do not concede that the power exists, in either department of the government, to abrogate or modify them. To do this is among "the reserved rights" to be exercised only by the people themselves in convention. This is one of "the powers not delegated" to the legislative department of the government. I cannot therefore assent to the proposition, sometimes found in judicial opinions, that the Legislature has all of the powers of the British Parliament, except when expressly restricted. In the discussion of this very important and delicate question, Judge Cooley says: "But to guard against being misled by a comparison between the two, we must bear in mind the important distinction * * * that with the Parliament rests, practically, the sovereignty of the country, so that it may exercise all the powers of the government, if it will do so; while, on the other hand, the Legislatures of the American states are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative." Const. Llm. 105. He further says: "So long as the Parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American Legislatures, in regard to their ultimate powers, cannot be traced very far. The American Legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people, and the Legislature which they have created is only to discharge a trust of which they have been made a depository, but which has been placed in their hands with well-defined restrictions." This, I think, the sound view. *Nichols v. McKee*, 68 N. C. 480. The difficulty which I have experienced in arriving at a conclusion in this case is to fix the line at which the Legislature may change or abrogate the procedure, venue, etc., in regard to indictments as they were by the common law recognized and administered by the courts in

England. That it may not lessen the number required to concur in finding a bill, or permit witnesses to be examined before the grand jury in public, or to permit the prosecuting officer to remain with the grand jury while in session, is settled upon the ground that such things were not permissible by the common law. The only decided case which was cited by counsel or I have been able to find in this country in point is *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635. There the statute provided that for cutting timber on the public lands the person charged could be proceeded against in the county where the offense was committed, or such other county as the Attorney General should direct. The defendant in error was prosecuted under the act in a county other than that in which the offense was committed. He was arrested upon a *capias*, and upon *habeas corpus* was discharged. He brought the action against plaintiff in error, who procured the information and arrest, and recovered judgment for false imprisonment. Several irregularities in the proceedings were alleged. In regard to the validity of the statute authorizing the change of venue, Cooley, J., said that the act was "manifestly in conflict with one of the plainest and most important provisions of the Constitution." Now, that in jury trial it is implied that the trial shall be by jury of the vicinage is familiar law. Blackstone says: "The jurors must be of the visne or neighborhood;" which is interpreted to be of the county. 4 Black. Com. 350. This is an old rule of the common law; citing Hawk, P. C., b. 2, c. 40; 2 Hale, P. C. 284. He refers to certain statutory changes made by Parliament prior to the separation of the colonies, saying: "But it is well known that the existence of such statutes, with the threat to enforce them, was one of the grievances which led to the separation of the American Colonies from the British Empire. If they were forbidden by the unwritten Constitution of England, they are certainly unauthorized by the written Constitutions of the American states, in which the utmost pains have been taken to preserve all the securities of individual liberty. * * * But no one doubts that the right to a trial by jury of the vicinage is as complete and certain now as it ever was, and that in America it is indefeasible." After pointing out in strong language the injustice and oppression to which the citizen may be subjected if compelled to answer an indictment in a county otherwise than that in which the offense was alleged to have been committed, he concludes: "We have not the slightest hesitation in declaring that the act, so far as it undertakes to authorize a trial in some other county than that of the alleged offense, is oppressive, unwarranted by the Constitution, and utterly void." I find a number of cases cited by counsel denying the right of the state to remove a criminal trial from the county of the alleged offense for local prejudice. It is so held in a strong

opinion by the Supreme Court of California (*People v. Powell*, supra). Judge Cooley says: "But this may be pressing the principle too far." It was so held in *Kirk v. State*, 41 Tenn. 844, and *Osborne v. State*, 24 Ark. 629. But in both these states the Constitution expressly guaranteed a trial in the county in which the offense was alleged to have been committed. I have carefully examined the history of parliamentary legislation in England on the subject, for the purpose of learning how far the venue in criminal proceedings has been regarded in that country, as fixed by Magna Charta. Fitz James Stephens, in the "History of the Criminal Law," vol. 1, 274, gives an interesting account of the statutory changes made in the law in regard to venue. Some of them are pointed out in the opinion of the Chief Justice. See, also, *Mews Fishers Com. Law Dig.* vol. 2, 2263. In *Brucker v. State*, supra, Dixon, C. J., discussing the right of the Legislature to provide that 17 persons might compose the grand jury, said: "The foundation of the objection is that this was the rule at common law (that the grand jury should consist of not more than twenty-three nor less than twelve) recognized by the Constitution, against which the Legislature had no power to provide. Upon an examination of the authorities, we find no such fixed common-law principle. The only inflexible rule with respect to numbers seems to have been that there could not be less than 12 nor more than 23. The concurrence of 12 was necessary to find a bill, and there could not be more than 23 in order that 12 might form a majority. * * * We are of the opinion, therefore, that it is competent for the Legislature, within the limits prescribed by the common law, to increase or diminish the number of grand jurors to be drawn and returned, without infringing the rights of the accused granted by the Constitution." In *Byrd v. State*, supra, Sharkey, C. J., discussing the subject, says: "The Legislature cannot abolish or change substantially the panel or jury, but it may, it is presumed, prescribe the qualifications of the individuals composing it." I have noted these cases to show that it is held by courts adhering to the principle that the guaranty of immunity from criminal prosecutions, otherwise than by indictment, that the Legislature may change the law in particulars nonessential, such as qualification of jurors, etc., but in regard to essentials, such as number, etc., the constitutional provisions must be read and construed in the light of the common law, and are not subject to legislative change.

In the absence of express legislative enactment, there can be no question that the venue is the county in which the offense is alleged to have been committed. I incline to the opinion, at least to the extent of surrendering my doubts to the judgment of the majority of the court, that the act is not violative of the right of the defendant. In

doing so, I am also influenced by the wise and salutary principle, so frequently announced by the greatest judges who have sat upon the state and federal benches, that every presumption should be made to support the constitutionality of a statute. While I am by no means certain that the beneficial results anticipated by the Legislature will be realized, I sympathize so strongly with the desire and purpose to provide all possible means for detecting, and, after trial and conviction, punishing, those engaged in the crime of lynching, hoping to suppress it, that I am the more willing to surrender my doubts to its best judgment. It is the first time in our history that the question has been presented, because it was not until the act of 1893 that the grand jury of any other county than that of the offense was given power to find a bill of indictment. It would seem that in England it has been deemed necessary to change the venue, and permit indictments to be found in counties other than those in which the offense was committed. For many years the statute permitting the court, upon motion of the solicitor, supported by affidavits, to remove a criminal case for trial to an adjoining county on account of local feeling, has been invoked without question. While the right to remove, after a judicial determination that a fair trial could not be had in the county of the offense, might be distinguished from the right to indict and try in the county of the solicitor's selection, I concede that the recognition of the validity of the removal statutes weighs in my mind in favor of the act of 1893. I have felt impelled to say this much because of the importance of the subject, and a desire to proceed with the utmost caution in experimental legislation of this kind. While it is not for the judiciary to trench upon the domain of the Legislature, I trust that I may, without impropriety, express the hope that the occasion and condition which in its judgment called for this act may soon pass away, and that we may return to the common-law way of securing to every man immunity from being called to answer for violation of the law otherwise than by indictment preferred by a grand jury summoned from the county where the crime is supposed to have been committed. Cooley, 392; Story, Const. § 1769. In addition to the humane policy which protected a man in his hour of trial from being carried away from his home, deprived of the opportunity to have his witnesses, and the benefit of such reputation and character as he had made among his neighbors, this ancient way placed upon the people of each county or neighborhood the responsibility for securing a fair, firm, and just administration of the law, detection and punishment of the guilty, and protection of the innocent. How far removing from the people of each county this

stimulus, and by carrying their citizens into adjoining counties for trial, will promote the end desired, is not clear to my mind. These are questions, however, committed to the wisdom of the Legislature. I disclaim any right to question the constitutionality of an act of the Legislature because it does not accord with my judgment. This would be to move out of the orbit assigned to the judge. Judges must not be wiser than the law, but be content to construe and declare it in the light of principle, precedent, and constitutional limitations.

BROWN, J. (dissenting). I concur in so much of the opinion of the court as upholds the power of the General Assembly generally to provide for the removal of criminal actions to an adjoining county either before bill found or after. I know of no clause of our Constitution, federal or state, which prohibits it. Assuming that the jurors must be summoned from the "vicinage," as at common law, I think an adjoining county might well be held to be within the "neighborhood," for that is what the term signifies. I would hesitate to hold that the Legislature has the power to enact that one who commits a crime in Cherokee may be indicted and tried in Currituck. My convictions, however, compel me to dissent from the judgment of my Brethern that the grand jurors of Union county had jurisdiction over the offense charged in the bill of indictment. The act of 1893 (page 440, c. 461), together with its title, was as effectually effaced and blotted out from the statute law of the state by the Revisal of 1905 as if it had never been enacted. Revisal 1905, § 5453. Therefore, at the time of the commission of the alleged offense and the finding of the bill, the only statute law which it is contended gives jurisdiction to the grand jurors of Union county is section 3233 of the Revisal of 1905. The bill alleges that the offenses therein charged were committed in Anson county. A plea in abatement is not therefore necessary. This court can see on the face of the bill that the superior court of Union had no jurisdiction unless the statute confers it. It is familiar learning that a motion to quash may be made at any time, where it is apparent upon the face of the record that the court was without jurisdiction.

The bill of indictment is drawn under section 3698 of the Revisal of 1905, which is copied in the opinion of the court. The first count charges a conspiracy to break into the common jail of Anson county, entered into within said county, and the second charges the actual breaking into said jail. The third count charges no offense either against common law or statute.

In order to give the superior court of Union county jurisdiction under the terms of section 3233, it must plainly appear that

section 3698 creates an offense and defines it as "lynching," for section 3233 confines the exercise of jurisdiction by the superior court of the adjoining county to the "crime of lynching," and to that alone. Now, does section 3698 create and define in terms a crime known as lynching? That is the crux of this case. Being a criminal statute, it must be construed strictly, as the sacred right of the liberty of the citizen forbids a liberal construction and a reading into the statute of words that are not there. The word "lynching" is nowhere used in the body of the statute, and no such distinct offense is named and created by it. Had the statute (section 3698) declared in express terms that the acts therein denounced shall constitute the "crime of lynching," or that any person committing such acts "shall be guilty of lynching," I should say the superior court of Union county had jurisdiction, under section 3233. But the body of the statute fails to so declare. It is attempted, however, to "piece out" the statute by bringing in a so-called title. It must be admitted that the title to the act of 1893 cannot be looked to, for that is as dead as the body of the act, as I have shown. The only title that can be looked to is the one word "Lynching," which is printed in large letters between the number and the body of section 3698. If that can be called a title, then, according to the authorities, it does not help the contention of the state. It has been established in England since Lord Coke's time, by an unbroken line of judicial decisions, that the title of a statute is not a part of it, and is therefore excluded from consideration in construing it. Endlich on Statutes, 73; Powell's Case, 11 Rep. 336. In this country, while the title of a statute, in the absence of a constitutional provision, is not regarded as a part of the statute, it is legitimate to resort to it as an aid in ascertaining the meaning of the statute, but only when the language and provisions in the body of the act are ambiguous and of doubtful meaning. Endlich on Statutes, p. 74, and cases cited. Such is the ruling of this court. *Hines v. Railroad*, 95 N. C. 434, 59 Am. Rep. 250. In *State v. Patterson*, 134 N. C. 612, 47 S. E. 808, Clark, C. J., says: "The caption of an act was not at all considered, to any extent whatever, in construing it, for reasons given in *State v. Woolard*, 119 N. C. 779, 25 S. E. 719; but the modern doctrine is that, when the language of the statute is ambiguous, the courts can resort to the title as aid in giving such act its true meaning, but that this cannot be done when the language used is clear and unambiguous." The statute construed in that case was, like the one under consideration, free from ambiguity, but in conflict with its title. The title was disregarded, and the body of the statute followed. The title of a statute cannot control or vary the meaning of the enacting part, if the latter is plain

and unambiguous, as the statute in the present case is, nor can the title be used for the purpose of adding to the statute or extending or restraining any of its provisions. Black on Interpretation of Laws, p. 173. "Cases which are clearly not within the contemplation of the enacting clause cannot be brought into it merely because the title appears to include them." Id. p. 173. "Lynching" is a word of much more general and extended meaning and significance than any words contained in the body of section 3698, and, being a penal statute especially, the term ought not to be read into it. Black on Interpretation of Laws, p. 173; U. S. v. Briggs, 9 How. (U. S.) 351, 18 L. Ed. 170. There is no such crime as lynching known to our law, and if the body of this statute does not create it, then it does not exist. The word in its well-known significance and generally accepted meaning embraces many illegal acts which do not come within the purview of this statute, and does not embrace those mentioned in it. The acts made illegal by it constituted indictable offenses before its enactment, and, were it repealed, would still be indictable in the counties where committed. While no statute of this state defines what is lynching, the lexicographers and historians have given it a well-defined and perfectly understood meaning, which exclude any of the crimes denounced in the act. The great Scotch novelist refers to a species of lynching when he refers to what was called "Jedwood" justice, "hang in haste and try at leisure." Again, the same versatile author, in his introduction to the *Border Minstrelsy*, speaks of a sort of lynching called "Lydford Law," quoted by Mr. Justice Connor in *Daniels v. Homer*, 139 N. C. 239, 51 S. E. 992, 3 L. R. A. (N. S.) 997. A most interesting writer in the *American Law Register* (Mr. John Marshall Gest) says that "the lynch law of our country has a very ancient and respectable pedigree." He refers to the Vehm tribunals, originating in Westphalia, which executed thieves and murderers caught in the act without trial or delay, and speaks of them as "Judge Lynch's cousin German." The word "lynching" has been defined by legal as well as other lexicographers, and according to such definitions, and as the term is generally understood, the illegal acts commonly termed "lynching" cannot be committed by a single individual; yet one person alone could be guilty of the crime of breaking and entering a jail with intent to kill under this statute. "Lynching" is defined by Raplje & Lawrence as "mob vengeance upon a person suspected of crime." *Law Dictionary*, 778. It is "a term descriptive of the action of unofficial persons, organized bands, or mobs, who seize persons charged with or suspected of crimes, or take them out of the custody of the law, and inflict summary punishment on them, without legal trial, and without warrant or authori-

ty of law." Black's Law Dictionary, page 737. "A common phrase used to express the vengeance of a mob inflicting injury and committing an outrage upon a person suspected of some crime." Bouvier's Law Dictionary, 287. See, also, *State v. Aler*, 89 W. Va. 558, 20 S. E. 585. Worcester and Webster define the word as the infliction of punishment without legal trial by a mob or by unauthorized persons. The word derives its origin, according to Worcester, from a Virginia farmer named Lynch, who, having caught a thief, instead of delivering him to the officers of the law, tied him to a tree and flogged him with his own hands. Lynching has no technical legal meaning. It is merely a descriptive phrase, used to signify the lawless acts of persons who violate established law at the time they commit the acts, and is universally understood to signify the illegal infliction of punishment by a combination of persons for an alleged crime. As I have said before, the offense of lynching was not known to the common law, and is unknown to the laws of North Carolina, because we have no statute creating and defining the offense. We are therefore, in the anomalous situation of having a statute fixing the venue for the trial of persons charged with lynching, and yet there is no such crime known to our law or created by the act. The statute not only fails to declare that the acts therein set out shall constitute the crime of lynching, but those acts do not come within any known definition of the term, as I think I have plainly shown. A conspiracy to break or enter a jail for the purpose of killing a prisoner has never yet been called "lynching." Neither has the breaking into jail with the intent to kill or injure a prisoner been so denominated. Such acts were recognized indictable offenses before the passage of the act, and are now indictable independent of it. But nowhere have they ever been termed "lynching." This phrase, by common usage, is applied only when the unlawful act is consummated and the illegal punishment actually inflicted. It is plain to me that the so-called title not only is no aid to a proper construction of the act, but the title, tested by every known definition of it, bears no relation to, and does not embrace, the crimes set out in the act. There is nothing in the statute open to construction. Its words are as simple and unambiguous as any that could have been used and their meaning free from doubt. It is not "construing" that the statute needs, but amendment. That is what, with all deference, in my opinion this court has done to it.

For the reasons given, I do not think that section 3233 of the Revisal of 1905 can reasonably be held to give to the superior court of Union county jurisdiction over persons charged with offenses committed in Anson county and indicted in Union, under section 3098. I am of opinion that his honor, Judge Shaw, was correct in quashing the bill.

MORRISON v. NEW HAVEN & WILKERSON MIN. CO. et al.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. PARTIES—INTERVENTION—RIGHT TO WITHDRAW.

An action having been brought by attachment and without personal service against those who had been the owners of the realty, but without making defendants the registered owners, the real owners interpleaded by petition, asking to be made defendants. Such petition contained allegations of an agency in the care of the land, on which plaintiff based his action, which allegations were taken advantage of and admitted by plaintiff in his replication. One of such defendants also judicially admitted such agency, though in a subsequent paper, called an "intervention," they ignored such allegations and admissions. *Held*, that the court properly refused them permission to withdraw from the action.

2. MINES AND MINING—LIENS—GROUNDS IN GENERAL—SERVICE OF AGENT.

Services, consisting in caring for mining property, paying taxes thereon, listing it, and keeping off trespassers, create no lien following the property into the hands of a purchaser.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 234.]

3. ATTACHMENT—PROPERTY SUBJECT—REALTY CONVEYED.

An attachment on lands, which, prior to the institution of the action, had been conveyed by those named in the attachment, is void, creating no lien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 167–175.]

4. WORK AND LABOR—RIGHT TO COMPENSATION—QUANTUM MERUIT.

The law implies a promise by the owner of land to pay the reasonable value of services in care of the land, knowingly received from one admitted to be an agent, but working without any special contract as to remuneration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Work and Labor, § 3.]

Appeal from Superior Court, Burke County; Cooke, Judge.

Action by W. H. Morrison, administrator of John Seals, deceased, against the New Haven & Wilkerson Mining Company and others; T. L. Epley and Fleetwood Ward interpleading. From a judgment against Epley and Ward, they appeal. Affirmed as to Ward, and ordered that Epley go without day.

Civil action, commenced by plaintiff, to recover the value of his intestate's services as a caretaker and agent in charge of mining property. The court submitted the following issues: "(1) Was there any contract to pay the plaintiff's intestate, John Seals, for the taxes and his care of the land their value in excess of the value of the rents? Answer. Yes. (2) If there was, how much, if any, are the defendants Ward and Epley indebted to plaintiff? Answer. \$600." No other issues were tendered. By consent of plaintiff the court reduced the recovery to \$250, and rendered judgment against the defendants Epley and Ward, to which they excepted and appealed.

John T. Perkins, for appellants.

BROWN, J. This action was brought February 23, 1904, by attachment and without personal service, against the New Haven & Wilkerson Mining Company and the New Haven & North Carolina Mining Company and George F. Newcombe. Prior to that date, on June 29, 1898, the New Haven & North Carolina Mining Company had conveyed the lands attempted to be attached to George F. Newcombe by deed registered in Burke county, July 19, 1898, and George F. Newcombe had duly conveyed the lands to Denslow, Ward & Co. by deed registered July 19, 1898. Denslow, Ward & Co., the registered owners, were not made defendants in the attachment. Inasmuch as the defendants named in the attachment owned no interest in the land attached, and the court had acquired no jurisdiction by service of the summons, the case would have come to an end, but for the interpleading of T. L. Epley and Fleetwood Ward. The latter was a member of Denslow, Ward & Co., of New York, and the owner of half the land and mining property. The former, after commencement of the action, had purchased the other half from E. H. Denslow, the other member of the firm, by deed registered January 11, 1905. For the purpose of defending their title to this property, Epley and Ward, upon their verified petition in writing, were made parties defendant at their own request at December term, 1905, of Burke superior court, and a nonsuit was entered as to George F. Newcombe; he having disclaimed any interest in the property. At August term, 1906, Messrs. Morgan & Perkins, the attorneys who filed the joint petition to be made parties defendant on behalf of Ward and Epley, asked to be allowed to withdraw the same and objected to the order making them defendants. We think his honor very properly disallowed the motion. Epley and Ward had come in of their own accord, upon a joint petition written and presented by their attorneys, setting out their interest in the property and asking to be made defendants. Because they repented of their act afterwards is no reason the court should deny to plaintiff the benefit of their presence in the suit. This is especially true in view of the allegations of the petition filed by them, which plaintiff had a right to take advantage of and to admit that particular allegation which constitutes the basis of his cause of action, as plaintiff did in his replication. The fourth and fifth sections of the petition read as follows: "(4) That, as the said T. L. Epley and Fleetwood Ward are informed and believe, the said J. A. Seals, plaintiff in this cause, well knew prior to the bringing of this suit that said land had long since been conveyed by the said George F. Newcombe to the said Denslow, Ward & Co. That they now have in their possession letters signed in the name, and, as they believe, written by the hand, of the said J. A. Seals, which letters are dated, one

November 17, 1898, and the other April 2, 1900, in which letters the said J. A. Seals reports and accounts to the said Denslow, Ward & Co. concerning said land, which is therein referred to as, and acknowledged to be, the property of the said Denslow, Ward & Co. (5) That they, the said T. L. Epley, and Fleetwood Ward, are informed and believe that the said J. A. Seals was, during his lifetime and prior to the institution of this suit, paid in full for any and all service rendered to the owners of said land in caring for the same, and on any and all other accounts, and that, as they are informed and believe, the said J. A. Seals was at the time of the bringing of this suit, and his estate now is, justly indebted to the owners of said land for and on account of valuable timber cut, sold, and removed by the said J. A. Seals in great quantities therefrom, in the sum of at least several hundred dollars." It is thus admitted that plaintiff's intestate, Seals, was the agent of defendant Ward as the caretaker in charge of the property; and the defendant Ward also set up a plea of payment in full for all services rendered and a counterclaim for timber wrongfully removed and sold by Seals, to the amount of several hundred dollars in excess of the services. It is true that, when the court declined to allow them to withdraw from the case, the defendants filed another paper, called an "intervention," in which they ignore these allegations and admissions of the first petition; but that did not have the effect to deprive plaintiff of their benefit. They had voluntarily become parties defendant, and did not occupy the position of mere interveners for the sole purpose of dismissing the attachment. Besides, the defendant Ward has judicially admitted, by his attorneys, that Seals was the agent of his firm in charge of the property. The complaint had been properly amended, and a reply to the answer filed, and it was eminently proper that Ward at least should have been continued as a defendant, to the end that there should be a mutual accounting and settlement of the agency.

At the close of the evidence, both defendants moved to nonsuit, and as to Epley we think the motion should have been allowed. There is no evidence of any contract between him and Seals, and likewise none that he knowingly accepted any service from Seals. On the contrary, he acquired his half of the property some time after the suit had been commenced. Seal's services constitute no lien on the land which followed it into Epley's hands, and the attachment was void and constituted no lien, because the defendants named in the attachment had parted with title some years before the attachment was issued. Epley, therefore, acquired a good title as to one-half of the property, and, as Seals had no personal claim on him, he is entitled to go without day. As to the defendant Ward, the case is different. It is true

plaintiff acquires no lien on his half of the land by virtue of the attachment, but he has a personal judgment in an action to which of his own volition he is a defendant. The issues are framed with a view to present the controverted matters not admitted by the pleadings, and to the form of them there was no exception, and no others were tendered.

The plaintiff offered evidence tending to prove that his intestate, J. A. Seals, was engaged between January 29, 1898, and the date of his death, in the fall of 1904, in looking after this mining property; that he received little rent from it; that he paid the taxes, and listed it, and kept trespassers from entering and working the mines; and that his services were reasonably worth \$175 to \$200 per year. The defendants offered evidence tending to prove, not only that they knew Seals was caring for the property, but that Seals was to care for it and pay the taxes on it for the rents, and that he was to receive no other compensation, and that he received rents and proceeds of timber in excess of the value of his services. The defendants offered evidence of a special contract as against plaintiff's claim for a quantum meruit. The counsel for defendants are mistaken in urging that plaintiff alleges a special contract, and therefore cannot recover on his quantum meruit. Plaintiff alleges the agency, and it is admitted; but he does not either allege, admit, or offer evidence of a special contract for the payment of his services. It is the defendant who offers the evidence that, according to agreement, Seals was to have no remuneration for his services and payment of taxes, except the rents. It is not necessary that plaintiff allege or prove a special contract. The agency being admitted by defendant Ward, and there being proof of the services performed and knowingly received, and of their value, the law implies a promise to pay by defendant, but to be confined, as it was confined, to the years since defendant Ward purchased. "Where services are performed by one for another, either with or without the latter's consent and knowledge, and he knowingly accepts and avails himself of these services, the general rule is that the law will imply a promise to pay a fair and reasonable compensation therefor." 15 Am. & Eng. Encyc. 1083; *Blount v. Guthrie*, 99 N. C. 93, 5 S. E. 890; *Bailey v. Rutjes*, 86 N. C. 517; *Moffitt v. Glass*, 117 N. C. 142, 23 S. E. 104; *Dixon v. Gravely*, 117 N. C. 84, 23 S. E. 39.

We think his honor's charge followed the law as well settled, and applied it properly to the contentions of the parties. The exceptions to the evidence need not be discussed. They are mostly based upon the erroneous idea that plaintiff should not be permitted to prove the value of the services rendered by the intestate, because no special contract had been proven.

The judgment against defendant Ward is affirmed, and as to the defendant Epley it is ordered that he go without day.

Modified and affirmed.

IVEY v. BESSEMER CITY COTTON MILLS.

(Supreme Court of North Carolina. Nov. 27, 1906.)

1. EVIDENCE — WRITTEN CONTRACT — PAROL EVIDENCE.

Where a letter accepting plaintiff's offer to enter defendant's service indicated that there had been previous negotiations and, beyond fixing plaintiff's compensation, did not disclose what the service contracted for consisted of, parol evidence was admissible to supplement the letter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1882, 1884.]

2. SAME—AMBIGUITY.

Where a written contract of employment was ambiguously worded, parol evidence was admissible to disclose the true intent of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2129-2133.]

3. SAME—CONSIDERATION.

Parol evidence is admissible to show the consideration intended to be given for a promise of employment where such consideration was not clearly expressed in the written contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1922.]

4. APPEAL—ADMISSION OF EVIDENCE—PREJUDICE.

In an action for breach of a written contract of employment, plaintiff was not prejudiced by the admission of parol evidence that he had represented himself as qualified for the position he was employed to fill, such representation being no more than would be implied by law.

5. MASTER AND SERVANT — DISCHARGE OF SERVANT—GROUNDS.

The breach of any material stipulation in a contract of employment, express or implied, which disables the servant to perform his part of the contract or which results in his inability to do so, furnishes sufficient ground for the master to terminate the contract, and is a legal excuse for the servant's discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 30-35, 38.]

6. DEPOSITION — NOTICE—TAKING—TIME AND PLACE.

Where notice was served that depositions would be taken at the same time in two different places so that the party notified could not be present at both, but he elected to attend at one place and cross-examined the witness without making any objection as to the notice, the defect was waived.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 329-337.]

7. SAME—OBJECTIONS—TIME.

Where depositions have been taken and regularly returned, an exception based on the form of the notice should be raised before trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 16, Depositions, §§ 309-319.]

8. EVIDENCE—BEST AND SECONDARY—LETTERS —NOTICE TO PRODUCE.

In the absence of a notice served on defendant to produce the original of a letter writ-

ten to it by plaintiff, plaintiff was not entitled to introduce an alleged copy thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 642.]

9. SAME—FORM OF COPY.

An alleged "substantial copy" of a letter written by plaintiff to defendant made by plaintiff from memory was inadmissible as secondary evidence of the contents of the letter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 661-669.]

10. MASTER AND SERVANT — DISCHARGE OF SERVANT—EXCUSE—BURDEN OF PROOF.

In an action for breach of a contract of employment, the burden was on defendant in the first instance to show a good legal excuse for plaintiff's discharge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 47.]

11. SAME — VOLUNTARY RESIGNATION — INSTRUCTIONS.

In an action for alleged wrongful discharge of a servant, an instruction that if the parties agreed that plaintiff might quit the service, and he voluntarily resigned, the contract was thereby terminated, and plaintiff having been paid to the time of his resignation, defendant was under no further liability to him, was proper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 22.]

Appeal from Superior Court, Catawba County; Cooke, Judge.

Action by Geo. F. Ivey against the Bessmer City Cotton Mills. From a judgment for defendant, plaintiff appeals. Affirmed.

This action was brought to recover upon a contract for services. The plaintiff was employed by defendant as superintendent of its mill on March 22, 1902, at \$1,600 per annum, and entered upon the discharge of his duties May 1, 1902. The plaintiff introduced a letter, dated March 22, 1902, from defendant to him, which is as follows: "Yours of the 21 inst. rec'd and noted, and you can come on as soon as you choose at the rate of sixteen hundred dollars (\$1,600) per annum from now until January 1, 1903, and at the rate of \$1,800 per annum as long as it is mutually agreeable after that time, and this shall be a contract to this effect, and I hope you will be here many years. I simply want the best results, and as long as you can give these, I see no reason to change. Ours is a close corporation, and you have few to please. We will begin work on striped Madras, out of 26 warps and 26 fillings, 64 and 54, and weave 32 inch goods. I mean to finish 32 inch goods and I presume will be 33 $\frac{1}{4}$ to 34 in. rough, and you will please write Charlotte Supply Co. about Reeds, Harness, etc., at once. They will want to begin work on the harness. I inclose you letter to C. Supply Co. I will build you a six-room house at once near the mill in a nice place. I leave Monday night, and will be gone a week or ten days." The defendant, over the plaintiff's objection, introduced evidence tending to show that the plaintiff had represented himself to be competent for the work he was about to undertake, and also evidence tending to show that the plaintiff acted as superintendent of the mill, and took control and direction of the

construction work from May 1, 1902 until October 25, 1902, at which time the defendant had discovered that he was incompetent and not qualified for the work for which he was employed; he having made many serious mistakes in the manner of performing the work. The defendant thereupon threatened to discharge him but he asked to be continued in the service as it would injure his reputation as a mill superintendent to be discharged at that time, and he could not get a place anywhere else. He then promised that if he was kept in the employment of the defendant for another month that, at the end of that time he would resign, and he signed a paper dated October 25, 1902, agreeing that the contract would expire on December 1, 1902. The defendant then agreed to retain him upon condition that no mistakes were made thereafter. After a few days the defendant discovered that the plaintiff had made other mistakes, and that it would have to replace machinery put up under his supervision and direction. The plaintiff was notified of this, and admitted that he had made the mistakes, and asked to be allowed to resign at once. This was on October 30, 1902. He did resign and was paid his salary in full to that date. There was evidence on the part of the plaintiff in contradiction of that of the defendant as to plaintiff's representation that he was a competent mill man, and as to what took place October 30, 1902. The defendant denied that he had resigned after that date. He now sues for his salary alleged to be due for the months of November and December, 1902. The defendant introduced the deposition of James L. Wilson to prove that the plaintiff had represented himself to be competent for the position of superintendent of the mill. The plaintiff objected to the deposition because the defendant had served notice to take this deposition in Philadelphia, Pa., on a certain day and also a notice to take the deposition of another witness on the same day at Fayetteville, N. C., though the latter deposition was not taken. The court found as facts, that the deposition of Wilson was opened by the clerk, and passed upon by him after due notice and allowed to be read "subject to exceptions," and, as no exception was then made to the service of the notices to take two depositions in widely separated places, the court ruled that the exceptions reserved applied only to the competency or admissibility of the evidence, and not to the validity of the deposition. The court further found that no such objection as is now urged was made at the opening of the trial or before the trial commenced, nor until after the plaintiff had rested his case and the defendant had introduced the greater part of its evidence, the defendant's counsel then agreeing to waive all objections to the competency of evidence. Thereupon the court overruled the objection and admitted the deposition. The witness testified that Ivey gave him to under-

stand that he was a capable superintendent, and understood the business he was agreeing to undertake. The court submitted two issues, one as to whether the plaintiff had been wrongfully discharged, and the other as to the damages and charged the jury that as the defendant discharged the plaintiff, the burden was upon it to justify the discharge, but that the parties to the contract could, at any time, by mutual consent put an end to it; and if the jury found as a fact by the greater weight of the evidence, the burden being upon the defendant, that the plaintiff failed to perform his duty as superintendent, the defendant had the right to discharge him, and they would answer the issue "No," or if they found that there was a disagreement between the parties in respect to the manner of performing the work and the plaintiff, thereupon, voluntarily resigned his position and accepted the balance due him to the time of his resignation in full settlement of the contract, they should answer the issue "No," but if they found that the plaintiff did not fail to perform his part of the contract and did not resign, they should answer the issue "Yes." The plaintiff excepted to the refusal of the court to charge the jury at his request that, if the defendant knew that the plaintiff was incompetent at the time he was employed, his incompetency would not excuse the defendant from discharging him, and he also excepted because the court, in response to the defendant's requests 1 and 4, charged the jury that if the plaintiff hired himself out to the defendant as being competent and having experience in the kind of business he was employed to superintend and it turned out that he was not competent, and did not have such experience, and he failed to properly perform the duties of his position or he neglected to perform his duties, the defendant had the right to discharge him and they should answer the first issue "No." There was a verdict for the defendant, and judgment was entered thereupon, from which the plaintiff appealed.

Geo. W. Wilson and Cline & Mebane, for appellant. Self & Whitener, for appellee.

WALKER, J. (after stating the case). This case, we think, has been correctly tried and the plaintiff has no just ground of complaint. The objection to the testimony of J. A. Smith, president of the defendant company, as to his conversation with the plaintiff at the Buford Hotel in the presence and hearing of James L. Wilson, is not tenable. It will be observed that the writer of the letter of March 22, 1902, which is stated therein to be the contract, does not profess to set forth the terms of the employment, nor does he even mention the particular position which the plaintiff had been employed to fill. He does refer to a certain class of goods on which the defendant intended to work at the outset, but this is really all in the letter

that gives any intimation of the nature of the service expected of the plaintiff. This phraseology of the letter shows that there had been some previous negotiation between the parties looking to the entrance of the plaintiff into the service of the company, but beyond fixing the compensation we are left in the dark as to what that service was. It shows clearly that the entire contract was not reduced to writing, and, by an elementary rule of law, we are permitted to resort to oral evidence to supply the omission. *Cumming v. Barber*, 99 N. C. 332, 5 S. E. 903; *Nissen v. Mining Co.*, 104 N. C. 309, 10 S. E. 512, and *Evans v. Freeman* (at this term) 142 N. C. —, 54 S. E. 847, where the cases are collected. But if this were not so, the contract would be ambiguously worded, and therefore susceptible in law of explanation, in order to ascertain the true intent and meaning of the parties. The principle is clearly and fully stated by Mr. Justice Burwell, in *Colgate v. Latta*, 115 N. C. 127, 20 S. E. 888, 26 L. R. A. 321, and requires no further elucidation. Such evidence does not vary or contradict the writing, but in the one case it merely shows the completed contract, and in the other it reveals the meaning of the parties, and makes plain that which would otherwise be insensible. It is just as competent in the latter case as in the former. 17 Cyc. 672-679; *Egerton v. Carr*, 94 N. C. 653, 55 Am. Rep. 630; *Perry v. Hill*, 68 N. C. 420; *Robbins v. Love*, 10 N. C. 82; *Lane v. Wingate*, 25 N. C. 328. The letter of March 22, 1902 contains a promise to pay a definite sum, and it may be inferred that it was for some kind of service, but for what kind is left doubtful, and parol evidence was necessary to explain these ambiguous terms, and to fill out the terms of the contract. *White v. McMillan*, 114 N. C. 349, 19 S. E. 234. It has always been considered competent to prove by oral evidence the consideration of such a promise, if it is not clearly expressed in the written instrument. *Perry v. Hill*, supra; *White v. McMillan*, supra. But this evidence, if strictly within the rule excluding oral evidence, did not prejudice the plaintiff, as it tended to prove only that Ivey had substantially represented himself as fit and competent for the position of superintendent of the defendant's mill, and this is no more than the law implies. There is said to be always on the part of the servant an implied obligation to enter the master's service and serve him diligently and faithfully and to conduct himself properly and generally to perform all the duties incident to his employment honestly and with ordinary care, having due regard to the master's interest and business. So, too, the law implies a representation by the servant that he is competent to discharge the duties of his position, and is possessed of the requisite skill which will enable him to do so. These and perhaps other obligations arise out of,

and are implied from, the relation created by the contract, and the breach of any material stipulation, whether express or implied, which disables the servant to perform his part of the contract or which results in his inability to do so, furnishes a good ground for the master to terminate the contract, and is a valid and legal excuse for the discharge of the servant. *Wood's Master & Servant* (1877) p. 166; *Waugh v. Shunk*, 20 Pa. 180. In the case last cited it is said: "Where skill, as well as care, is required in performing the undertaking, if the party purport to have skill in the business, and he undertakes for hire, he is bound to the exercise of due and ordinary skill in the employment of his art or business about it, or, in other words, to perform it in a workmanlike manner. In cases of this sort, he must be understood to have engaged to use a degree of diligence, and attention, and skill adequate to the performance of his undertaking. It is his own fault if he undertake without sufficient skill, or applies less than the occasion requires." *Lyon v. Pollard*, 20 Wall. (U. S.) 403, 22 L. Ed. 361; *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; *Callo v. Brouncker*, 4 C. & P. 518; *Stanton v. Bell*, 9 N. C. 145, 11 Am. Dec. 744; 2 Kent's Com. 458; *Fletcher v. Knell*, 42 (Q. B.) 58. This principle was virtually adopted and applied in the recent case of *Eubanks v. Alsbaugh*, 139 N. C. 520, 52 S. E. 207, which is much like this in its prominent features, and sufficiently so to be decisive of this case upon the main questions involved.

The principles we have stated also apply to the objection of the plaintiff to the deposition of James L. Wilson. He really proved no more than the law implies, and the ruling in regard to that piece of evidence, if erroneous, was harmless. But the exception as to the deposition cannot be sustained for another reason. It appears from the record that the plaintiff did object to it before the clerk, upon the ground that notices were served on him to take the two depositions at the same time in different places. But it also appears that the deposition was not taken in Fayetteville, and that the plaintiff appeared by attorney before the commissioner at Philadelphia and cross-examined the witness Wilson without making any objection at that time. When notice is served that depositions will be taken at the same time in two different places, so that the party who is so notified cannot be present at both, he may attend at either place designated and disregard the notice as to the other, and the deposition taken in his absence at the other place will, on motion, be quashed or suppressed. This is the general rule where statutes such as ours are in force, and it seems to be a reasonable one. 13 Cyc. 909 (b); *Evans v. Rothchild*, 54 Kan. 747, 89 Pac. 701; *Cole v. Hall*, 131 Mass. 88; *Hankinson v. Lombard*, 25 Ill. 572, 79 Am. Dec. 348; *Uhle v. Burnham* (C. C.) 44 Fed. 729. The plaintiff in this case made his election to appear before

the commissioner in Philadelphia and the deposition was taken, and counsel for the plaintiff cross-examined the witness, without making any such objection as is now made. We think this was a waiver of any defect in the notices, and the plaintiff cannot now avail himself of it, even if the objection does not come too late. How the matter would have stood if he had not elected to attend at either place, we need not decide. The deposition, it is stated in the record, was opened by the clerk in the presence of the attorneys of the respective parties, and found to have been taken in accordance with the notice and commission, and the same was ordered to be read at the trial, subject to the plaintiff's exceptions. It is not a strained inference from these proceedings that the plaintiff abandoned his exception to the irregularity in the notice, as his honor held. We take notice of these matters in order to call attention to a custom which we do not approve, and which is contrary to the spirit of the statute, and that is reserving the right to have exceptions, especially those which relate to the regularity of a deposition, passed upon when the deposition is offered in evidence. A practice which essentially nullifies the purpose of the statute is not to be commended. Such exceptions should be disposed of, at the latest, before the trial is entered upon. Parties may be taken at a great disadvantage, if this is not done. They may, perhaps, consent to wait until the deposition is introduced, but it should be so expressly stated, and we will not be disposed to extend the reservation by implication beyond the commencement of the trial. His honor seems to have taken this view, as he held that the plaintiff had waived this objection, not having urged it until plaintiff proposed to read the deposition. *Revisal 1905*, § 1647; *Carroll v. Hodges*, 98 N. C. 418, 4 S. E. 199; *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545.

The plaintiff offered in evidence a paper writing, "which he alleged was a substantial copy of the greater part of his letter to the defendant, dated March 21, 1902, to which the defendant's letter of March 21, 1902 was an answer." It was not claimed by the plaintiff that the alleged "substantial copy" was made at the time the original was written, nor was there any evidence that said copy was made before the commencement of this action. This paper was excluded on objection. We think the ruling was proper. The defendant was not notified to produce the original of the letter, even if the copy was sufficient, and would have been competent if such notice had been given. *Murchison v. McLeod*, 47 N. C. 239; *State v. Kimbrough*, 13 N. C. 431. It is evident that the copy was made from memory and we hardly think it is such a document as is contemplated by the rule admitting secondary evidence, if it can be called a copy at all. It was at least not an admitted copy, if that would be sufficient

to dispense with the necessity of notice. *Beard v. Railway* (at this term) 142 N. C. —, 55 S. E. 294.

The charge of the court was as favorable to the plaintiff as the law permitted. The burden was placed in the first instance upon the defendant to show good legal excuse for discharging the plaintiff. *Eubanks v. Alsbaugh*, supra; *Smith v. Lumber Co.* (at this term) 142 N. C. —, 54 S. E. 788. It was undoubtedly correct to tell the jury that if the plaintiff failed to perform his duty as superintendent, the defendant had the right to discharge him. *Johnson v. Machine Co.*, 130 N. C. 441, 41 S. E. 882. The defendant was not bound to retain in its service an incompetent superintendent, who did not and could not do the work assigned to him. If the parties agreed that the plaintiff might quit the service, and he voluntarily resigned, the contract was thereby terminated, and, having been paid to the time of his resignation, the defendant was not under any further liability to him. The court also instructed the jury that if the plaintiff had performed his part of the contract, and did not voluntarily withdraw from the service, they should find that he was wrongfully discharged. This was a fair submission of the case to the jury. They found against the plaintiff on the issue of fact thus joined and he has, in law, no good reason to complain.

The exceptions to the instructions given in response to the defendant's prayers 1 and 4 are covered by what we have already said in discussing the admissibility of the testimony of the witnesses J. A. Smith and James L. Wilson as to the conversation between them and the plaintiff. If that evidence was competent, those two instructions were not improper. The jury have accepted the defendant's account of the transaction, and it would therefore seem that by agreeing on October 30, 1902 to resign and afterwards asking for another trial, the plaintiff thereby virtually admitted his incompetency, and the mistakes he had made to the great loss of the defendant, if he did not do so in his testimony. It seems that the defendant was very indulgent to him, and gave him every chance to do better and retain his position. He was discharged not so much for his general inefficiency, or for failing to do what the defendant had the right to require of him, as for doing that which was positively injurious to his employer's business. The remaining exceptions have been examined, and are, we think, without merit. They do not call for any separate discussion.

No error.

IN RE WITTKOWSKY'S LAND.

(Supreme Court of North Carolina. Dec. 4, 1906)

1. EMINENT DOMAIN — LEGAL PROCEEDINGS — COMMENCEMENT.

Where the "taking" of land for a highway under the right of eminent domain was not con-

tested, the service of a notice by the trustees of the township of the owner that they had condemned the land was not the commencement of legal proceedings.

2. SAME — ASSESSMENT OF DAMAGES — JURY — NOTICE.

Laws 1901, p. 198, c. 50, § 5, as amended by Laws 1905, p. 932, c. 770, § 1 (2), providing for the condemnation of land for highway purposes, declares that any person aggrieved may, within 6 months after a change of road or on a completion of a new road, apply to the clerk of the superior court, who shall appoint a jury, to consist of five freeholders, to assess the damages. *Held* that, though such section does not in terms require notice of such appointment to the township trustees and county commissioners, such notice is required by the general law of the land.

3. SAME — TIME.

Laws 1901, p. 198, c. 50, § 5, as amended by Laws 1905, p. 932, c. 770, § 1 (2), provides that any person aggrieved by the taking of land for a highway "may, within six months" after the change of road or new road is completed, apply for a jury to assess damages. *Held*, that such section only required that the landowners' proceeding to assess damages should be begun "not later than" six months after the road had been changed or the new road opened and completed.

4. SAME — APPEAL — REMAND.

Where proceedings were instituted to assess damages for lands taken for a highway without notice to the board of trustees of the township or the board of county commissioners, and they appealed from the award, it was proper for the court either to try the case or remand it to the clerk with instructions to appoint a new jury and hear all the parties after notice before assessment of damages.

Appeal from Superior Court, Mecklenburg County; Peebles, Judge.

Proceedings for the condemnation of the land of S. Wittkowsky to widen a highway. From an order remanding the proceeding to the clerk of the superior court for resubmission to another jury, Wittkowsky appeals. *Affirmed*.

On March 15, 1906, the board of trustees of Charlotte township notified S. Wittkowsky that they had condemned a strip of his land to widen the public highway. On March 23, 1906, he applied to the clerk of court to appoint a jury of five men to assess his damages. On March 24, 1906, the clerk appointed the jury, who were summoned by the sheriff and assessed the damages at \$2,000. The application to the clerk, the appointment of the jury, their summons by the sheriff, their meeting and assessment, were all without notice either to the board of township trustees or to the county commissioners, whose first knowledge of the proceedings to assess damages was a notice from the clerk on April 17th that the counsel for Wittkowsky had moved for judgment for \$2,000 damages assessed by the jury. The board of township trustees moved to dismiss the proceedings because prematurely brought. This motion was allowed, and Wittkowsky appealed. The judge remanded the proceedings to the clerk, with directions to issue notice to township trustees and county commissioners of the application for appointment of a jury, which

shall be composed of new men, none of whom have already acted in this case, and that said jury, when appointed, shall procure from the township trustees a map of the land condemned, and shall appoint a time and place for assessment of damages, giving due notice of time and place to the township trustees and county commissioners, as well as to the petitioner, and, after hearing all the parties and the evidence offered, make report of their assessment of damages to the clerk.

Brevard Nixon and J. D. McCall, for appellant. Burwell & Cansler and R. S. Hutchison, for appellees.

CLARK, C. J. This was a proceeding under Laws 1901, p. 198, c. 50, § 5, as amended by Laws 1905, p. 932, c. 770, § 1 (2). The notice to Wittkowsky that the strip of his land had been taken for public purposes was not the beginning of legal proceedings. The "taking" was under the right of eminent domain, and was not contested. The above-quoted section provided that any person aggrieved "may within six months after said change of road, or new road has been opened and completed, apply to the clerk of the superior court, who shall appoint a jury to consist of five freeholders to assess the damages." This was the beginning of these proceedings, whose object was solely to assess damages. It is true that the statute does not in terms require that notice of the proceeding should be given to the township trustees and county commissioners; but that is required under the "law of the land"—that general law, "which proceeds upon inquiry and renders judgment only after trial." In *Gamble v. McCrady*, 75 N. C. 509, it was held that an assessment of damages was void for want of notice, though no notice was required by the statute under which those proceedings were had. That a notice must be given, as of right, is recognized. *State v. Jones*, 139 N. C. 618, 52 S. E. 240, 2 L. R. A. (N. S.) 813.

The clerk, on motion, dismissed the proceeding as premature, doubtless on the ground that the statute provides that the landowner must institute this proceeding "within six months after said change of road or new road has been opened and completed." But this we think means simply that the proceeding to assess damages shall be begun "within"—i. e., "not later than"—six months after the road has been changed or the new road has been opened and completed. It was error, therefore, to dismiss the proceeding. We think his honor took the correct view in remanding the proceeding to the clerk, with directions to give notice to the township trustees and county commissioners, that they may be represented when the jury of five men are selected, and that said jury must give notice and hear all parties before assessment of damages. Their report will

be subject to action of the clerk upon exceptions and an appeal therefrom.

The case being before the judge on appeal, it was optional with him to try it, or remand to the clerk with instructions. *Martin v. Briscoe*, 55 S. E. 782. As the notices, if given before the judge, would have carried the case over to the next term, the course taken was preferable, especially as the jury appointed by the clerk will have a better opportunity to view the premises.

Affirmed.

PETERSON v. SOUTH & W. R. R.
(Supreme Court of North Carolina. Dec. 4, 1903.)

1. RAILROADS—OPERATION—PERMISSIVE LICENSE.

By carrying on its cars venders of fruit, etc., for sale to passengers, a railway company does not invite the public to enter its trains at stations for the sole purpose of making purchases, and the company's failure to object to persons frequently doing so does not create more than a permissive license.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 878, 879.]

2. SAME—ACTION FOR INJURIES.

Where one went upon a railway train at a station for the sole purpose of purchasing fruit from a news agent, the company was not liable for his injury, resulting from his being thrown from the car by the jerking of the train, though no signal was given before the train started, since a railway company is liable to permissive licensees for wanton negligence only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 878, 879.]

Appeal from Superior Court, Mitchell County; Cooke, Judge.

Action by Moses Peterson against the South & Western Railroad. From a judgment for plaintiff, defendant appeals. Reversed.

Moses Peterson on his own behalf testifies: "I was at Hunt Dale, in this county, 2d May, 1903. I went up on the train to that place and got off about 12 o'clock. The train returning passed there about 5 or 6 on its way to Johnson City. I live in Yancey county, and was about to start home on my wagon when the train came on; but while it was stopped at station I went on the train to purchase some lemons. It was a mixed train, and I got on a freight car where the lemons were. There was a door on each side. There were steps to the door, up which I went. Moses Wilson and Van Adkins went on with me. There was a man in there standing in one corner, and had lemons and some other fruit to sell. They were in the rear end of the car. The car doors were about four feet wide. Both doors were open. I reached him a dollar and told him to give me three lemons. He says, 'The train is going to start in a minute.' I says, 'Well, hand me the dollar, and I'll get out of here.' He handed me the dollar, and as he reached it to me it dropped on the floor. I stooped

down to pick it up. The train started, and gave a jerk, and threw me out of the door. I had picked up the dollar, and was straightening up, when the train gave the jerk. There was no signal given of the movement of the train, either by the bell or whistle. It threw me five or six feet to the door, and out of the door on the ground. The door was nearly four feet from the ground, and I fell five or seven feet from the car on my left side and leg, and broke both bones in my left leg. I don't know that it was the custom of the railroad company to sell lemons and other fruit from that car. It was the first time I had ever been there. I was not intoxicated. I had only taken one drink that day. That was just before dinner. When the jerk came, I was five or six feet from the door, towards the back end. Adkins and Wilson were both out before I was thrown. When the man said, 'The train is about to start,' they went out the other door from the one I was thrown out. The train had been delayed at the stop at that station for about half an hour on account of their screwing up some parts of the engine. I did not get out when the others got out, because I wanted my dollar. It dropped on the floor. I can't say whether the man dropped it, or I."

Enoch Bennett testified: "I don't know that the railroad company kept fruit for sale in the car; but I know that somebody sold fruit in that car, for I have purchased it there myself, and I have seen other people than passengers get things in there. They would go in there, and come out eating oranges or other things. I was there for four months. There was no alarm given of the starting of the train that I know of. I was near enough to have heard it. It was the custom of the train at that point to give notice before starting. It started that day with a sudden jerk. There were two or three trains a day passing along there. I can't say whether the bell rang or the whistle sounded the 3d of May, but was the common thing for them to do it. I don't know whether the car had doors in the ends or not. I think Moses went in the side of the door."

J. R. Hughes testified: "It was the general custom that they sold the fruit in them at the different stations. They sold oranges, lemons, and other fruits. They had been selling that way for two or three months. What I saw of people purchasing fruit was generally they went to the door and the fruit was handed out to them; but I had seen persons that I remember now go in the car and purchase the fruit. I saw it sold, besides Hunt Dale, at Poplar Station and Relief—the first, once; the last, twice. Part of the time they would ring the bell, or the conductor would throw up his hands and holler, 'All aboard!' The train started out faster than I ever knew it to do before. I think I recollect that the conductor was

in such a position sometimes that he could have seen people who went in the car to purchase fruit."

Moses Wilson testified: "I went in car with plaintiff. He went in first. There were end doors to the car, and I went up the steps and in at one of the end doors. When I got near the man who was selling the fruit, he said, 'The train is going to start.' Peterson says, 'Hand me my dollar.' I started to get off the car. I went at once, and went through the front end door and down the steps. I was four or five steps from the end door. Directly I got off the train started, and seemed to start sudden. I had just cleared the steps. It seemed to be a sudden jerk, a little more than common. It was for two or three weeks the general custom for people to go in car to purchase fruits and ginger pop. I had bought these myself. Sometimes at the door; sometimes, when I thought I had time, I would go inside. The selling of fruit from the car had been carried on in the previous summer; not so much in the winter months. They kept ginger pop on ice in the summer. They did not keep ice there in winter. There are no side steps to the side doors. I had just passed in the car, and gone some two or three steps, when the man told me the train was going to start. The man said: 'The train is going to start in a minute, boys; get off.'"

Plaintiff rests. Defendant moves for judgment of nonsuit. Refused, and defendant excepts. Judgment and appeal.

J. C. Biggs, for appellant.

CONNOR, J. (after stating the case). The plaintiff was neither a passenger nor an employé. He had no contractual relation with defendant; hence it owed him no contractual duty, nor did defendant owe him any duty in respect to its business as a carrier of passengers. The rights and duties of the parties are therefore not in any degree affected by the fact that defendant was employed in the business of a common carrier. For the purpose of disposing of the exception presented upon the appeal, the car was the property and under the control of defendant, subject to the same power of management as the premises of a private citizen. Taken in the light most favorable to the plaintiff, he was upon the car by virtue of a permissive license, in the pursuit of his own business, with which defendant had no connection or concern. It cannot be successfully contended that, by carrying on its cars venders of fruit and confectioneries or newspapers for sale to its passengers, the company invites or induces the public to enter into them at stations for the purpose of making purchases. Besides being foreign to its legitimate business, to do so would seriously interfere with its power to discharge the duty, imposed by law, to carry passengers

with all reasonable dispatch and safety. It is not necessary to hold, nor do we hold, that plaintiff was a trespasser, although we see no good reason why the defendant's agent and employé may not have forbidden plaintiff to enter the car for the purpose of buying fruit, just as a private citizen may forbid any person to come upon his premises. His failure to do so is no more than a permissive license. If there be any evidence of an existing custom by which persons were in the habit of going into the car at stations for the purpose of buying fruit, it is very slight. It is very doubtful whether, when analyzed, there is any evidence of such custom. One witness, who undertakes to so testify, says: "What I saw of people purchasing fruit was, generally, they went to the door and the fruit was handed out to them; but I had seen persons, that I remember now, go in the car and purchase fruit"—at Hunt Dale once, and Poplar Station twice. Another witness says: "It was for two or three weeks the general custom for persons to go in the car and buy." The plaintiff says that he had never heard of such a custom. It was the first time he was ever there. It would impose hard lines upon the owner of premises, and in respect to the plaintiff the defendant occupies that position, if by permitting persons, in a few instances, to enter thereupon for their own purposes or convenience, a custom or usage should be established, imposing upon such owners the degree of care imposed in the case of invited guests or persons going in for the purpose of transacting business with the owners. *Winder v. Blake*, 49 N. C. 332; *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850; 12 Cyc. 1023. Discussing the question involved in this appeal, *Boynnton, J.*, in *Pitts, etc., R. R. v. Bingham*, 29 Ohio St. 370, says: "It is therefore a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, cannot be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes."

Conceding, however, that there was evidence sufficient to be submitted to the jury, and that they found in accordance therewith, nothing more is shown than that, without objection on the part of defendant, persons usually went into the cars for the purpose of buying fruit, it cannot, as matter of law, amount to more than a permissive license and in respect to the duty imposed upon the

owner to one thus entering, the rule is well settled. "A licensee, who enters upon premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk, and enjoys the license subject to its concomitant perils. * * * Mere permission is neither inducement, allurement, nor enticement." *Pitts, R. R. v. Bingham*, supra. In a case involving the same principle, *Burbank v. Railroad*, 42 La. Ann. 1156, 8 South. 580, 11 L. R. A. 720, *McEnery, J.*, says: "It is not stated in the petition, nor is there any evidence to show that the plaintiff was in the habit of going to the train to solicit custom for her boarding house. * * * Her presence on the platform and at the depot was not for the purpose of transacting any business with the company, * * * or for any purpose for which the depot had been built. She was at the depot, it is true, by a general license from the company, in the absence of any express prohibition. It would not be practical for a railroad company * * * to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform. * * * There must have been, on the part of the company, such gross and wanton negligence that it was equivalent to intentional mischief" to make it liable. We had occasion to discuss the question regarding the measure of duty which defendant owed the plaintiff, as a mere permissive licensee, in *Quantz v. Railroad*, 187 N. C. 186, 49 S. E. 79, and find that the conclusion reached in that case is sustained by the additional authorities cited by the learned counsel for defendant.

Is there any evidence of a breach of duty or the absence of the degree of care imposed upon defendant not to wantonly injure plaintiff? The reason why it is negligent, in respect to passengers, to so manage the engine, approaching or leaving a station, as to suddenly jerk the cars, arises out of the duty of the engineer to know and keep in mind the fact that passengers and those who are entitled, by reason of relationship or otherwise, to accompany them, are usually in the act of going upon or leaving the car at stations. *Nance v. Railroad*, 94 N. C. 619; *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Denny v. Railroad*, 182 N. C. 340, 43 S. E. 847. No such reason existed in respect to persons going upon the cars for purposes having no connection with business of defendant as a carrier of passengers. The engineer cannot be presumed to know that persons are using the car for other purposes than as passengers or employés. If he were required to await the pleasure or convenience of all persons who, from curiosity or other cause, were upon the cars,

the common complaint of belated trains, with all of the attendant inconvenience, damage, and dangers to travelers, would increase more than tenfold. To require the company to keep guards at the doors of their cars to prevent persons going in for other than proper purposes would be impracticable. It is well known that the cars are for passengers and that, save within the exceptions noticed, no one else is entitled as of right to go into them. In many towns and cities, ordinances are made prohibiting persons having no business from going upon cars. In the absence of such ordinances, the only reasonable and workable rule is that which the law prescribes—in respect to passengers, the highest degree of care in the handling and movement of trains; in regard to mere permissive licensees, abstention from wanton injury. It is hardly possible to move a train of cars, especially a mixed train, as this one, without some jerk or jolt (Smith v. Railroad, 99 N. C. 241, 5 S. E. 896), and persons going upon them must take notice of the necessity of some jerk or jolt when the train moves. Of course, if the conductor, or any one having control of the train, had seen the plaintiff on the car, he should have warned him that it was about to move. It is said, however, that no signal was given that the train was about to leave the station. More than one answer may be given to this suggestion. The defendant owed no duty to plaintiff to give a signal. Again, the plaintiff was told that the train would leave "in a minute." He does not claim that he did not have time to get off. The fact is that the other persons who went in with him did get off safely. The cause of his injury was that either he or the fruit vender dropped the coin, and plaintiff was trying to recover it, thereby delaying his movement in leaving the car. Certainly the engineer could not be expected to know that some one was on the car buying lemons, that a coin had been dropped, and that it would require some time to recover it; nor is there any evidence that any one connected with the train knew that plaintiff was on the car. The fruit vender, who was on the same car, is not shown to have been jerked or jolted. The evidence that the jerk was any more severe than was proper or necessary in moving the train, as "made up," was very slight. The plaintiff, when he went into the car on his own business, without invitation or inducement, or, as he says, any knowledge of any custom for persons to do so, but simply by the silent acquiescence of defendant's agents, took the risk incident to the movement of the train. In the absence of any evidence of breach of duty on the part of the defendant, the motion for nonsuit should have been allowed. For refusal to do so the judgment must be reversed. Hollingsworth v. Skelding (at this term) 55 S. E. 212.

Reversed.

TILLINGHAST, STYLES CO. v. PROVIDENCE COTTON MILLS.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. JUDGMENT — COUNTERCLAIM — DEFAULT — PLEADING.

The defendant was not entitled to judgment by default on his counterclaim, where, pursuant to leave given by the court, a formal denial was entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 198.]

2. SAME.

Where the complaint alleged a contract of sale and a breach thereof, and the answer denied that it was an absolute sale, and alleged by way of counterclaim that the goods were shipped on consignment, and demanded an account, the plaintiff's cause of action was in itself a direct denial of the counterclaim, and a judgment by default on the counterclaim before the issues in reference to the plaintiff's cause of action were determined would have been irregular and improper.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 185-196.]

3. SALES—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action for breach of a contract of sale of cotton yarns, the measure of damages is the difference between the contract price and market value at the time when and place where the goods should have been delivered by the terms of the contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1174-1179.]

4. DAMAGES—BREACH OF CONTRACT—SPECIAL CIRCUMSTANCES.

Where the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances, and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 58-62.]

5. SAME—REDUCTION OF DAMAGES.

Where there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage, or the damage which arises from his own neglect will be considered too remote for recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 128-131.]

Appeal from Superior Court, Catawba County; Cooke, Judge.

Action by Tillinghast, Styles Company against Providence Cotton Mills. From a judgment for defendant, plaintiff appeals. Modified and affirmed.

On the part of plaintiff, there was allegation and evidence tending to show: That on or about June 5, 1905, defendant contracted to sell and deliver to plaintiff, f. o. b., Providence, R. I., a quantity of cotton yarns as follows: 10,000 pounds 24 2's regular warp twist skeins at 18½; 10,000 pounds 26 2's regular warp twist skeins at 19¼. That defendant delivered the 26 2's as per contract, save a lot of waste with this shipment, showing a default in the shipment of \$10.50; but failed and refused to deliver the 10,000 pounds of 24 as agreed by terms of contract; that plaintiff had sold

the order of yarn to other parties, and, by reason of defendant's failure to supply same as per contract, plaintiff was forced to go into the market and buy the same at the price of 23 cents, at a loss of $4\frac{1}{4}$ cents over the bargain price; and plaintiff thereupon claimed a damage of $4\frac{1}{4}$ on 10,000 pounds 24, \$425.00; waste on shipment 28, \$10.50; overdraft on same, \$3.00; defendant denied any claim by reason of waste or overdraft. Denied any increase in market price of this yarn. Denied that plaintiff was forced to buy at an advanced price of 23 cents per pound, and, by way of counterclaim, alleged that the 28 2's were shipped to plaintiff, not by way of absolute sale, but to be sold on commission; and that plaintiff had sold 28 at an advanced price, and defendant demanded the amount realized therefrom over and above commissions and costs, as a counterclaim. Plaintiff, by leave of court, at the next term, entered a formal denial to this counterclaim, and defendant excepted.

On issues submitted and considered material to the questions involved in this appeal, the jury, by their verdict have established: (1) That the contract was one for an absolute sale. (2) That the same was broken by defendant. (3) That the market price of yarns at the time of the breach was 22 cents per pound, being three-fourths cents over the bargain price. (4) That the plaintiff had resold the yarn in reliance on this contract; and to make good their own sales was compelled to repurchase yarns at the price of 23 cents per pound. (5) That defendant after breach had notice of these contracts of plaintiff and were given opportunity to deliver the yarns before plaintiff bought at 23 cents, and after they received notice of the obligation on plaintiff. (6) That the amount due plaintiff by reason of waste and overdraft was \$8.69. On the verdict, the court gave judgment against defendant for:

Damage at $4\frac{1}{4}$ cents per pound, estimated at 23 cents, the amount plaintiff was compelled to pay.....	\$425 00
Amount for waste and overdraft.....	8 69
	\$433 69

Defendant excepted and appealed.

L. B. Wetmore and R. E. Costner, for appellant. Witherspoon & Witherspoon, for appellee.

HOKE, J. (after stating the case). There is no merit in the exception of defendant to the refusal of the judge below to enter judgment by default on his counterclaim. In the first place, pursuant to leave given by the court, a formal denial was entered, and the order allowing such denial was in the sound discretion of the judge below. Revisal 1905, § 512. Again, the plaintiff's cause of action set out in the complaint, was, in itself, a direct denial of the counterclaim. The complaint alleged a contract of sale and a breach thereof on the part of defendant. Defendant denied that this was an absolute

sale, and, speaking to the same transaction, alleged, by way of counterclaim, a consignment of goods for sale and demanded an account. The one was in direct contradiction of the other, and a judgment by default on the counterclaim before the issues raised in reference to plaintiff's cause of action were determined would have been irregular and improper. *Phipps v. Wilson*, 125 N. C. 106, 34 S. E. 227. This being the only relevant exception, there is therefore no valid objection shown to the verdict as rendered by the jury. We think, however, that on this verdict the judgment against defendant should have been entered for \$333.69, the difference between the contract price and market value at the time and place when the goods should have been delivered, adding the \$8.69 found to be due by reason of default in another shipment, instead of \$433.69, estimated on the difference between the contract price and the amount plaintiff was compelled to pay for yarn in order to make good contracts of sale between him and other parties, and under the circumstances established by the verdict.

In *Hosley Co. v. Cotton Mills*, 140 N. C. 454, 53 S. E. 740, we stated the rule to be: "That on failure by the bargainor to deliver goods having a market value, the measure of damages is the difference between the contract price and market value at the time when and place where the goods should have been delivered by the terms of the contract." This follows from the principle generally recognized and accepted, that damages for breach of contract are such as are the natural and probable results of the breach according to the usual course of things. In goods having a market value like these and usually procurable the probable loss occasioned by a breach of the contract in the ordinary and usual course of things would be the sum required to buy other goods of like kind, and at the market price. *Hadley v. Bauxendale*, Exch. 341; *Lumber Co. v. Iron Works*, 130 N. C. 584, 41 S. E. 797; *Critcher v. Porter Co.*, 135 N. C. 542, 47 S. E. 604. If the plaintiff seeks to recover different and additional damages arising by reason of special circumstances, he is required to show that defendant had knowledge of these circumstances, and of a kind from which it could be fairly and reasonably inferred that the parties contemplated that they should be considered as affecting the question of damages. *Tiffany on Sales*, 239; *Woods Mayne on Damages*, § 20; *Van Lindley v. R. R.*, 88 N. C. 547; *Booth v. Milling Co.*, 60 N. Y. 487.

It is not established by this verdict, nor is it declared anywhere in this record, that the defendant at the time the contract was entered into had any knowledge of special sales made by plaintiff dependent on this contract, or otherwise. And if it be conceded that a general perusal of the pleadings and evidence would disclose a general knowledge on the part of defendant that plaintiff was buying

the goods to sell again; here too, in the absence of special circumstances, the method of computing plaintiff's profits or loss would be the difference between the contract and market value; and any special price paid by plaintiff to cover against his own sales could only be considered as evidence on the question of market value. *Lewis v. Rountree*, 79 N. C. 122, 28 Am. Rep. 309; *Marsh v. Patterson*, 67 Conn. 473, 35 Atl. 521. On what principle should plaintiff be allowed to recover in this case on a basis of 23 cents per pound when the market value was 22 cents? If he paid this extra cent, because of some "corner" of, or on the market, such a price, paid by reason of abnormal conditions, would not ordinarily be the correct basis for determining the damage. As said by Agnew, J., in *Kounts v. Kirkpatrick*, 72 Pa. 384, 18 Am. Rep. 687: "It is the market value, and not necessarily the price paid, that should determine the amount." The price paid being evidence on that question. *Marsh v. Patterson*, supra. Or, if plaintiff, after he was aware of a definite breach of contract, delayed and neglected to purchase against his own sales till there had been an additional rise of the market, an increase of damage on this account should not be allowed him. It is an established principle that when there has been a breach of contract definite and entire, the injured party must do what fair and reasonable business prudence requires to save himself and reduce the damage; or the damage which arises from his own neglect will be considered too remote for recovery. As said in *Benjamin on Sales* (7th Ed.) p. 934: "In every case, the buyer, to enable him to recover the full amount of damages, must have acted throughout as a reasonable man of business and done all in his power to mitigate the loss." And in 1 *Sedgwick on Damages*, § 201: "The same principle which refuses to take into consideration any but the direct consequences of an illegal act is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them." And, again, at section 202: "It is frequently said that it is the duty of the plaintiff to reduce the damages as far as possible. It is more correct to say that by consequences which the plaintiff, acting as prudent men ordinarily do, can avoid, he is not legally damaged. Such consequences can hardly be the correct or natural consequence of the defendant's wrong, since it is at the plaintiff's option to suffer them. They are really excluded from the recovery as remote. In this view the doctrine would rest on the intervention of the plaintiff's will as an independent cause. Ad hoc he is not damaged by the defendant's act, but by his own negligence or indifference to consequences." If, therefore, the plaintiff, at the time of the breach of contract, in the exercise of reasonable business prudence, could have saved himself this increase of damage

by then making purchases against his own sales, he should have done so, and the increased damage incident to such failure will not be awarded against defendant. We are not inadvertent to the finding that after the breach of contract the defendant had notice of plaintiff's collateral sales in time to have shipped the goods and saved this extra loss. This fact might be a relevant circumstance if the contract was in the course of performance, and the contract relation still subsisted. Such a suggestion was made by Bramly Baron in case of *Gee v. Ry.*, 6 Exch. 211, referred to in *Woods Mayne on Damages*, and the principle may have been applied in subsequent decisions, but no such conditions exist in the present case.

As heretofore suggested, the obligation of the contract had matured and the breach was absolute, causing an entire severance of the contract relations. Defendant has never for an instant changed his attitude about the matter. He has maintained all along that the transaction was a consignment of goods for sale, and that he had a right to terminate the relation whenever he saw proper. The jury have determined this against him; but he has never requested any postponement or indulgence, or indicated in any way that he intended to comply with plaintiff's demand. In such case the notice of special circumstances required to fix a party with special and increased damage means notice given or knowledge had at the time the contract was entered into; and notice given after the contract was definitely and completely broken would not avail to enhance the damages. As said by Chief Justice Andrews, in delivering the opinion of the court in *Marsh v. Patterson*, et al., supra: "Notice to defendants after the contract was entered into would not increase their liability. If these subsales could not reasonably be considered to have been in contemplation of the parties at the time they made the contract, then the defendant could not be made responsible for special profits to be derived therefrom." We are of opinion, therefore, and so hold that, on the facts established by the verdict, the correct rule for awarding the damages is the difference between the contract price and market value as fixed by the jury, and applying the rule that the judgment should be reduced \$100, as of the time when the same was first rendered.

Modified and affirmed.

HAY v. PEOPLE'S MUT. BENEV. ASS'N OF NORTH CAROLINA et al.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. INSURANCE—MUTUAL BENEFIT INSURANCE —ASSESSMENTS—REINSTATEMENT AFTER NONPAYMENT.

Under a by-law of a mutual benefit association, providing that any member failing to pay an assessment within 30 days after notice mailed to him shall be dropped from the association and shall be required to pay a new membership fee in order to renew his insurance, where a member was in failing health at the time he failed to pay an assessment, and so continued

till his death, the beneficiary was not entitled to pay back assessments and have the policy reinstated three months after the delinquent assessment became due.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1924.]

2. SAME—WAIVER OF FORFEITURE.

That a beneficial association accepted payment of certain assessments after they should have been paid did not constitute a waiver of the right to forfeiture of the contract for failure to pay a subsequent assessment when the insured was in failing health.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1907–1916.]

Appeal from Superior Court, Catawba County; Cooke, Judge.

Action by Helen Hay against the People's Mutual Benevolent Association of North Carolina and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

M. H. Yount and W. C. Feimster, for appellants. Self & Whitener, for appellee.

CLARK, C. J. The jury find that the insured had notice of the yearly assessment upon his policy due January 23, 1905; that he failed to pay it; that his wife, the beneficiary named in the policy and plaintiff herein, in the latter part of April or first part of May, 1905, made inquiry of the secretary and treasurer of the defendant whether or not any assessments were due on the policy, and offered to pay the same if any were due, and to pay such other sum as might be necessary for the reinstatement of the policy; and that from January 7, 1905, until his death, June 18, 1905, the insured was in such broken health as not to be able to attend to business part of the time. The plaintiff testified that her husband had a severe attack in November, 1904, and from then on he was in failing health; that about April 1st he began to grow more feeble; that the last of March she came to Raleigh, whither her husband had come just before Christmas, and found him unable to attend to his business, so she took charge of all his mail matters, and the latter part of April or in the first part of May wrote the company, as found by the jury, asking if any assessments were due and to be permitted to pay anything that was due. This offer was not accepted by the company. The defendant is an assessment insurance company. The by-laws in force at the time the policy was issued were put in evidence. Section 9 thereof reads as follows: "Any member failing to pay his one dollar yearly assessment, or one dollar and fifteen cents on every death, within 30 days after notice mailed to him, shall be dropped from the association, and shall be required to pay a new membership fee in order to renew his insurance." The insured having failed to pay his yearly assessment of January 23d, of which he had notice, he was dropped by the terms of section 9. Did he, or his wife for him (he being, as she says, grown too feeble to attend to business), have the absolute right, without the consent of the company, to pay that and other un-

paid dues, 90 days or more thereafter, the last of April or first part of May, and reinstate him? We think not. Indeed, the terms of section 9 seem to contemplate, not a reinstatement, but a reinsurance—"a new membership fee in order to renew his insurance." If so, a new contract was required, and the company did not enter into it. The difference between reinsurance and reinstatement is pointed out. *Lovick v. Ins. Co.*, 110 N. C. 93, 14 S. E. 506.

But, if it be conceded even that section 9 provides for a reinstatement, did the insured have a right to be reinstated after the lapse of more than three months after he had forfeited his policy, and when his health had become so impaired that he was unable to attend to his business and was practically a dying man—dying, indeed, on June 18th? The by-law (section 9) does not state the terms upon which a member who has forfeited his policy could be reinstated, or re-insured; but certainly it required the assent of the company, as well as of the defaulting member, unless an absolute right on certain specified terms had been stipulated for, nor could it be considered reasonable or seasonable that one in such a state of health and after such delay should be entitled to restoration. *Lane v. Insurance Co.*, 141 N. C. —, 54 S. E. 854. In *Lovick v. Insurance Co.*, 110 N. C. 93, 14 S. E. 506, the policy by its terms gave the delinquent the opportunity for reinstatement upon certain conditions, which the context showed meant reinstatement by payment of dues within a reasonable time after default. That decision, besides, expressly excludes its own application to cases where reinsurance, not reinstatement, is stipulated for. It is true it is found in this case that prior to 1905 the defendant had, on some occasions, accepted payment by the insured of assessments after the date at which they should have been paid. It is not found how often, nor after how long a default, these indulgences were granted. But these were mere personal favors, and cannot be construed into a standing waiver of the terms of the contract. They did not constitute a "course of dealing" which amounted to an express agreement that premiums need not be paid promptly, as in *McCraw v. Insurance Co.*, 78 N. C. 149. That was a fire policy, and there was no impaired health or increased risk during delay of payment. It is against public policy that such casual courtesies, extended to the insured when still in good health, should confer a right to demand other indulgences (*Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Lantz v. Insurance Co.* [Pa.] 21 Atl. 80, 10 L. R. A. 577, 23 Am. St. Rep. 202); more especially when, as here, there is unreasonable delay and the health of the insured has become hopelessly impaired. It is always sad when one who has made payments on his policy deprives his family of expected protection by failure to pay at a

critical time. But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning. It is a warning of which the company also has a right to take notice, when asked to waive a forfeiture. It is the insured's own fault when he does not make a payment as he contracted.

Assessment companies being operated upon the plan of requiring only the actual cost of insurance, there is no reserve which, in certain conditions, keeps a policy in force for a limited period, in "old line" companies, notwithstanding a failure to meet the payment of a premium promptly. Upon the issues found, the court should have signed the judgment in favor of the defendant, which it tendered.

Reversed.

GAITHER v. CARPENTER.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. APPEAL — RECORD — AMENDED CASE — PREPARATION.

Where the court adopted "appellant's case as amended by appellee's exceptions" it was improper for appellant to send up the record in that shape, but it was his duty to have the case as modified, redrafted, and submitted to the judge for signature.

2. SAME — PREPARATION — AFFIRMANCE.

Where, after the court had adopted "appellant's case as amended by appellee's exceptions," appellant submitted the record in that shape without redrafting and incorporating the amendments and having the same signed by the trial judge, there was no "case settled" and the Supreme Court was justified in its discretion in the absence of errors appearing on the face of the record, of its own motion either to affirm the judgment, or remand the case.

3. SAME.

Where counsel do not agree as to what the case on appeal should contain, it is only the "case settled" by the judge that should be incorporated in the appeal record.

4. SAME — CASE ON APPEAL — CONTENTS.

The "case on appeal" should contain such incidents of the trial as were duly excepted to.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2483-2489.]

5. MALICIOUS PROSECUTION — EVIDENCE.

In an action for malicious prosecution, evidence of a member of the jury in the criminal trial that the jury was out a considerable time and at first stood 7 for acquittal and 5 for conviction, was inadmissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, § 133.]

6. APPEAL — HARMLESS ERROR.

In an action for malicious prosecution, evidence that, in a criminal action, the jury were out a considerable time, and at first stood 7 for acquittal and 5 for conviction, though erroneous, was not prejudicial to plaintiff.

7. MALICIOUS PROSECUTION — ELEMENTS — INSTRUCTIONS.

An instruction that to constitute malicious prosecution, there must be want of probable cause and malice was correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 18, 59, 171.]

8. SAME — MALICE — DEFINITION.

In an action for malicious prosecution, a definition of malice as a "disposition to do the

person prosecuted a wrong without legal excuse" was not prejudicial to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Malicious Prosecution, §§ 50, 171, 172.]

9. TRIAL — INSTRUCTIONS — REQUEST TO CHARGE.

Plaintiff cannot complain of the omission of the court to charge on any of his contentions where he did not present them by prayers for special instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 627-634.]

10. SAME — SUBMISSION TO JURY.

Revisal of 1905, § 537, provides that whenever instructions to the jury shall be put in writing, the judge, at the request of either party to the action, shall allow the jury to take the instructions with them on their retirement. *Held*, that the court properly permitted the jury to take the written instructions with them on retirement at the request of one of the jurors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 732-737.]

11. SAME.

Where instructions given by the court were taken to the jury room on retirement, but the special prayers asked by plaintiff and given, were omitted by oversight, such omission was waived, plaintiff having failed to call the court's attention thereto before verdict, or to take an exception at the time, as required by Revisal of 1905, § 554, subd. 2.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 732-737, 751.]

Appeal from Superior Court, Catawba County; Cooke, Judge.

Action for malicious prosecution for the larceny of a watch by A. S. Gaither, by his next friend, against P. O. Carpenter. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Cline & Mebane and T. M. Hufham, for appellant. W. C. Feimster, Self & Whitener and M. H. Yount, for appellee.

CLARK, C. J. To the case on appeal tendered by appellant, the appellee offered exceptions. The court adopted the "appellant's case as amended by appellee's exceptions," and the matter comes up to this court in that shape, leaving this court to incorporate the amendments. This practice cannot be tolerated. It is "the duty of the appellant to have the case as thus modified redrafted and submitted to the judge for signature. When he does not do this, but merely sends up the appellant's case with the appellee's exceptions and judge's order, there is strictly no 'case settled' and the court, in its discretion (there being no errors upon the face of the record) may ex mero motu, either affirm the judgment, or remand the case." Mitchell v. Tedder, 107 N. C. 358, 12 S. E. 193; Hinton v. Greenleaf, 115 N. C. 5, 20 S. E. 162; State v. King, 119 N. C. 910, 26 S. E. 261. When counsel do not agree, only the "case settled" by the judge should come up in the record. No part of the tentative cases of counsel, on either side, should come up, save as they appear in the redrafted case signed by the court. State v. Dewey, 139 N. C. 557, 51 S. E. 937. The "case on appeal" should contain such incidents of the trial as were

duly excepted to. What those incidents were is a matter which, if not agreed upon by counsel, must be "settled" by the trial judge, and cannot be determined by this court. A member of the jury in the criminal trial, having testified as to the evidence of the defendant when prosecuting the criminal action, was allowed to state, over the plaintiff's exception, that the jury in that case were "out a considerable time," and at first stood "seven for acquittal and five for conviction." We do not approve of the admission of such evidence. As the jury, on full deliberation acquitted, this is of more value than its first tentative vote. The evidence was irrelevant, and should have been excluded, but we cannot see that its admission was prejudicial or reversible error in this case.

His honor charged the jury that to constitute malicious prosecution there must be want of probable cause and malice. This was correct. *Kirkham v. Coe*, 46 N. C. 423; *Railroad v. Hardware Co.* (N. C.) 55 S. E. 422; *Id.*, 138 N. C. 174, 50 S. E. 571. Nor could the plaintiff complain of the definition of malice, "a disposition to do the person prosecuted a wrong without legal excuse." In *Railroad v. Hardware Co.*, 138 N. C. 180, 50 S. E. 573, it was defined to be a "wrongful act intentionally done without just cause or excuse." Nor could the plaintiff complain that any of its contentions were not presented to the jury. If he wished fuller instructions upon any phase of the evidence it was his duty to have presented them by prayers for special instructions. *Patterson v. Mills*, 121 N. C. 269, 28 S. E. 368, and cases there cited. As the jury were about to retire one of the jurors asked the judge to be allowed to carry the charge to the jury room with them. This the judge properly did, for though not within the very language of *Revisal of 1905*, § 537, it could not be erroneous in view of that statute. Unintentionally, by some oversight, the special prayers asked by the plaintiff, and which had been given, were not also handed to the jury. It does not appear what they were, nor that the failure to hand them to the jury worked any prejudice to the plaintiff. They are not set out so that we might see. It is not contended that they contradicted the charge in any way. If they were material, the jury would probably have sent back for them, for they had been read in the hearing of the jury. Besides, the plaintiff's counsel were present in the courtroom, and did not then or at any time before verdict, call the matter to the attention of the court, who would doubtless gladly have corrected the oversight, nor make any exception. "Exceptions to the evidence and to all matters occurring on the trial, except the charge of the court, must be noted at the time." *Revisal of 1905*, § 554 (2). "If not, they are waived." *Taylor v. Plummer*, 105 N. C. 57, 11 S. E. 266 (often affirmed),

citing *State v. Ballard*, 79 N. C. 627; *Scott v. Green*, 89 N. C. 278; *Alley v. Howell*, 141 N. C. 116, 53 S. E. 821, and cases there cited. "It is the policy of the law to encourage citizens of the country in their efforts to bring public offenders to the notice of the court to the end that they may be regularly put on trial. Hence, one who institutes proceedings for that purpose is in some measure protected, and he does not expose himself to an action merely by acting without probable cause. It must appear also that he acted from malice." *Kirkham v. Coe*, 46 N. C. 423. The jury have found that the defendant acted without malice and, from the evidence, doubtless that he had probable cause, also. Actions of this kind are not favored by the law unless oppression and malice is shown. No error.

HOKE, J., did not sit on the hearing of this case.

STATE v. HODGE.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. COMPOUNDING FELONY — INDIOTMENT — ELEMENTS OF OFFENSE.

An indictment charging that defendant did unlawfully, willfully, and feloniously compound a felony, in that he swore out a warrant charging certain named persons with larceny, and, after they were arrested, abandoned the prosecution on their paying \$15, was fatally defective for failure to allege that the persons with whom defendant was charged to have made the agreement, and from whom he received the money as a consideration for dropping the prosecution, were in fact guilty of the larceny charged against them.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 10, Compounding Felony*, § 5.]

2. SAME—AGREEMENT NOT TO PROSECUTE.

An indictment for compounding a felony must charge clearly the agreement not to prosecute, which is the gist of the offense.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 10, Compounding Felony*, § 5.]

Appeal from Superior Court, Rutherford County; Justice, Judge.

Joseph Hodge was convicted of compounding a felony, and he appeals. Reversed, and motion in arrest allowed.

The defendant was tried and convicted upon an indictment in the following words, to wit: "The jurors for the state upon their oath present that Joseph Hodge, late of the county of Rutherford, on the 4th day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at and in the county aforesaid, did unlawfully, willfully, and feloniously compound a felony, to wit, did swear out a warrant before 'Squire H. S. Taylor against Addie Yelton and Wm. Yelton, charging them with the larceny of certain berries and cherries, and after they had been arrested on said warrant, and before they had their trial, proposed to said defendants and their friends

that if they would pay him (\$10.00) ten dollars and pay his lawyer (\$5.00) five dollars that he would drop the matter and not appear against them, said money was paid, and said prosecution abandoned, against the form of the statute in such case made and provided, and against the peace and dignity of the state." Upon the rendition of the verdict, defendant moved in arrest of judgment. Motion denied. Judgment, and appeal by defendant.

D. F. Morrow, for appellant. The Attorney General, for the State.

CONNOR, J. (after stating the case). Defendant in this court assigns several grounds for his motion for arresting the judgment. We have found no difficulty in disposing of all save one—that the indictment does not aver that the persons with whom he is charged with entering into the agreement, and from whom the received the money as the consideration for "dropping the matter and not appearing as a witness" on the trial, were guilty of the larceny charged against them. We have given the question anxious and careful examination, and find the authorities unsatisfactory and conflicting. In the absence of any statute in this state defining the offense of compounding a felony, we are compelled to look to common-law sources. Our Reports disclose but one indictment for the offense, and from this we derive no aid in the solution of the question presented here. There was no motion presenting the question respecting the sufficiency of the indictment. *State v. Furr*, 121 N. C. 606, 28 S. E. 552. Blackstone (4 Comm. 134), after discussing the crime of receiving stolen goods, knowing them to be stolen, and a kindred offense, says: "Of a nature somewhat similar to the two last is the offense of theft bote, which is when a party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding of felony, and formerly was held to make a man an accessory, but is now punished by fine and imprisonment." Russell on Crimes, 194. Bishop defines the offense as "an agreement with the criminal not to prosecute him." *Crim. Law*, 648. "The offense committed by a person who, having been directly injured by a felony, agrees with the criminal that he will not prosecute him, on condition of the latter's making reparation or on receipt of a reward or bribe not to prosecute." *Bl. Law Dict.* 240; 8 Cyc. 492, where several definitions are given. There is no substantial difference in the definitions given by the writers on Criminal Law and in well-considered cases. All of them concur with Blackstone that, to constitute the crime, the agreement must be not to prosecute the person guilty of the felony, or, as said in some cases, "the guilty person" or "the criminal." It would seem

that, in the light of the language uniformly used, there could be no doubt that, before a conviction can be had, it must be made to appear that a felony has been committed by the person with whom the corrupt agreement was made.

In the indictment before us, the solicitor charges that defendant "did unlawfully, willfully, and feloniously compound a felony." His honor, following the decision of this court in *State v. Furr*, supra, instructed the jury "that, before they could convict, they would have to find beyond a reasonable doubt that the Yeltons had committed a felony." The editor of Cyc. (volume 8, p. 495) says: "The actual commission of a preceding crime would seem to be essential to the offense of compounding the same, and in the majority of jurisdictions this is the view taken, although in some the rule is otherwise"—citing *State v. Leeds*, 68 N. J. Law, 210, 52 Atz. 288. Dixon, J., says: "It is generally held that, to sustain an indictment for compounding a crime, it must be shown that the crime alleged to have been committed had been committed"—citing 1 Hale, P. C. 619, wherein it is said: "If A. hath his goods stolen by B., if A. receives his goods again simply, without any contract to favor him in his prosecution, or to forbear prosecution, this is lawful; but if he receives them upon agreement not to prosecute, or to prosecute faintly, this is theft bote, punishable by imprisonment and ransom, but yet it makes not A. an accessory, but if he takes money to favor him, whereby he escapes, this makes him an accessory." Judge Dixon notes that in some states statutes have been enacted enlarging the scope of the offense, but he says: "The reason of the thing accords better with the common law, for it cannot be held that the public is injured by the refusal of a private person to present or prosecute a charge of crime, if in fact no crime has been perpetrated." In *Swope v. Jefferson Fire Ins. Co.*, 93 Pa. 251, it is said: "The guilt of the party accused and the agreement not to prosecute are essential ingredients in the compounding of a felony." *Watt v. State*, 97 Ala. 72, 11 South. 901. In *State v. Henning*, 33 Ind. 189, an indictment for compounding a crime was held bad, because it did not charge that the defendant had knowledge of the actual commission of the crime alleged to have been compounded. McClain treats the offense in connection with misprison of felony and accessories, as does Sir Mathew Hale, and in offenses of this class it is essential to show that a crime has been committed and that the felon is known to the defendant. *Crim. Law*, § 939. In *Queen v. Burgess*, L. R. [1885] Q. B. Div. 141, the indictment charged the commission of the offense compounded, and that defendant, "well knowing the said felony to have been done and committed by the said A. B.," etc. It was held in that case (Coleridge, C.

J.) that the offense could be committed by one other than the owner of the goods. The case of *Frilby v. State*, 42 Ohio St. 205, is cited as holding that in an indictment for compounding a felony it is not necessary to aver or show that crime has been committed. The decision is based upon the language of the statute, which is much more comprehensive in its terms than the definition of the offense at common law. The court treat the case as coming within the language of the statute and cite no authorities. We cannot regard the decision as controlling us in dealing with the common-law offense. We are not quite sure that we comprehend the import of the language in which the opinion concludes: "It is necessary to aver and prove that the prosecution was for what appeared by the charge to be a crime, but it is not necessary that the actual commission of such crime be either averred or proved." The statute includes "abandoning or agreeing to abandon any prosecution threatened or commenced for any crime or misdemeanor." If the charge was for the commission of the statutory offense, we can easily perceive the meaning of the language quoted.

We conclude, therefore, that the common-law offense, as defined by all of the authorities, involves the charge that a felony had been committed and that the felon is known to the defendant. It would seem clear that, this being an essential ingredient in the offense, it must be alleged in the indictment. In *Leeds' Case*, supra, it is said: "As the preceding crime is essential to the offense of compounding the crime, it should be distinctly averred in the indictment for compounding, and should be set forth with such particularity as will enable the accused to make preparation for rebutting the charge." The precedents are uniform in this respect. 2 Wharton, Prac. 895; Chitty, Crim. Law, 221. An examination of the record in *State v. Furr*, supra, shows that the bill is drawn according to the precedents. *People v. Bryon*, 103 Cal. 675, 37 Pac. 754. "There is a class of offenses involving an obstruction of public justice, in which it is held that it is not necessary to charge or prove the commission of the crime the prosecution of which is interfered with. Persuading or inducing a witness not to attend court, whether under subpoena or not, is indictable. Inducing one to absent himself from attending as a witness before a justice, in an examination of a charge for violating the criminal law, is a high-handed offense." 1 Revisal 1905, § 3696; In re *Young*, 137 N. C. 552, 50 S. E. 220. In *State v. Keyes*, 8 Vt. 57, 30 Am. Dec. 450, it was held that it was not necessary to allege or show that the person against whom the witness would have testified was guilty. *State v. Carpenter*, 20 Vt. 9. The form of the indictment for this offense is found in Chitty, Crim. Law, 235. By St. 18 Eliz. it is made a misdemeanor to

agree for money to compound or withdraw a suit for a penalty without the consent of the court. Under this statute it is held that it is not necessary to allege or show the commission of the act for which the suit or prosecution is instituted. *Regina v. Best*, 38 Eng. Com. L. 159. It would seem that this statute is a part of the common law in force in this state. The case of *State v. Carver*, 69 N. H. 216, 39 Atl. 973, is not put upon that statute, although it is referred to in the opinion. In that case the indictment was in accordance with the precedents, except that, after describing the offense in the concluding sentence of the bill, it is charged that defendant forbore to prosecute for "said supposed" offense. This was held sufficient.

A careful examination of every case at our command fails to discover any one in which an indictment is sustained which omits the averment that a crime had been committed. The judgment must be arrested. It is but just to the learned judge who tried the case to say that it does not appear that his objection was raised before him. As we have seen, he correctly instructed the jury. It may be well enough to suggest that the bill does not very clearly allege any agreement to forbear prosecution. It would conform more closely to the precedents to charge clearly the agreement which is the gist of the offense. We also note that the indictment charges that defendant "proposed to said defendants and their friends," etc., whereas the evidence was "that the father of the Yeltons, through his friends, compromised the case," etc. It is not clear that this was not a variance, entitling the defendant to an acquittal on this indictment. For the reasons given, the motion in arrest must be allowed.

Judgment arrested.

RILEY v. CARPENTER.

(Supreme Court of North Carolina. Dec. 4, 1906.)

SALES — PERFORMANCE OF CONTRACT — SUFFICIENCY.

Shipping goods sold, billed to the shipper with draft attached, is a breach of a contract that the bills of lading were to be sent direct to the depot, and on the receipt of the goods the buyer would remit to the seller; and for such breach the buyer is entitled to recover the difference between the contract price and what it reasonably cost him on the market to supply the goods.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 377-379, 1174-1179.]

Appeal from Superior Court, Catawba County; Cooke, Judge.

Action by Charles E. Riley against D. J. Carpenter on a contract for sale and delivery of a certain quantity of yarn. Defendant admitted the amount claimed by plaintiff, but

set up a counterclaim for damages by reason of an alleged breach of the contract on the part of plaintiff in failing to deliver the remainder of the yarn contracted for. The jury answered the issue on the counterclaim against defendant, and, to his honor's instructions, the verdict, and the judgment thereon, defendant excepted and appealed. Reversed, and new trial ordered.

W. C. Feimster and M. H. Yount, for appellant. Self & Whitener, for appellee.

BROWN, J. The court charged that "if plaintiff shipped the goods with bill of lading attached, and defendant could have gotten the goods by calling at the depot and paying for the yarn, that would be a substantial compliance with the contract; and, if you find from the evidence that this is true, you will answer the second issue 'No.'" In this we think there was error. The contract that bills of lading were to be sent direct to the depot, and upon receipt of the goods he was to remit to the plaintiff, was not performed when the plaintiffs billed the goods to themselves with draft attached. It was not a substantial compliance with the contract, but a willful violation of it. The defendant had the right to insist upon such a contract, and the plaintiffs need not have agreed to it; but, having agreed to it, they should have performed it. If the defendant's credit had become impaired, and his solvency seriously doubted, the plaintiffs could have refused to ship the goods, and should then have notified the defendant of the reason. There is nothing of that sort in the case. The defendant may have thought, and with some reason, that if all his goods were shipped C. O. D. it would impugn his credit, and for that reason insisted as a part of the contract upon direct shipments. One who invokes the doctrine of substantial performance, in order to show a right to recover on a contract, must present a case in which there has been no willful omission or departure from the terms of the contract. He must have faithfully and honestly endeavored to perform it in all particulars. To justify a recovery upon a contract as substantially performed, the omission must be the result of mistake or inadvertence, and not intentional. *Elliott v. Caldwell* (Minn.) 45 N. W. 845, 9 L. R. A. 53, and cases cited. If the evidence of the defendant is to be believed the departure from the alleged contract was intentional. He says: "I told them, when we talked of the modification of this contract, and as a part of the modification and understanding, it was agreed that no goods were to be shipped to me with bill of lading attached. I expressly told Corbett that I never received or had goods shipped to me with bill of lading attached, and I would not receive any goods that way, and they were not to be shipped to me under the modified terms in any such manner; but bills of lading and invoices were to be sent direct

to me, and upon receipt of the goods I was to remit to Riley & Co., Boston, Mass." As the terms of the modified contract do not seem to be in dispute, we are of opinion that the plaintiffs violated it when they shipped the goods C. O. D., and that the defendant was justified in not receiving them, and that the defendant is entitled to recover, as damages, the difference between the contract price and what it reasonably cost the defendant on the market to supply the yarns which plaintiffs fail to supply.

Let there be a new trial upon the second and third issues.

New trial.

HOKE, J., did not sit on the hearing of this case.

LEMLY v. ELLIS.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. PROCESS—PUBLICATION NOTICE—SUFFICIENCY OF AFFIDAVIT FOR ORDER.

Under Code, § 218 (Revisal of 1905, § 442), requiring an affidavit for summons by publication to set out a cause of action, an affidavit alleging that the action arose upon a breach of warranty contained in a deed from E. to L., recorded in M. county, it not appearing there was ever any other deed between same parties, contained sufficient reference to the deed, definite enough description of the land, and an implied allegation of an eviction of plaintiff under a paramount title.

2. SAME—SUFFICIENCY OF NOTICE.

A publication notice reciting that the action was for the recovery of damages for a breach of warranty in a deed made by E. to plaintiff, it not appearing that there was ever any other deed between same parties, contained sufficient reference to the deed, definite enough description of the land, and an implied allegation of an eviction of the plaintiff under a paramount title in violation of the warranty, so as to show a cause of action.

3. ATTACHMENT—CUSTODY OF PROPERTY—SUBSEQUENT ATTACHMENT.

Where a sheriff attached bonds and subsequently the garnishee had an attachment issued against them on his own account, the fact that he had deposited them with the clerk of the court three days before the levy was made upon them, as in his possession, the deposit being made without any order of the court, did not make them in custodia legis, so as to vitiate the subsequent attachment, they being constructively in the possession of the sheriff under the prior levy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attachment, §§ 181, 182.]

4. SAME—EFFECT OF METHOD IN COURT'S ACQUIRING CONTROL.

Where property is brought within the custody of the court, it will be retained to answer any judgment that may be obtained, it being immaterial how it was brought under the control of the court, whether by attachment or some other equivalent and lawful act.

5. WITNESSES—TRANSACTION WITH INSANE PERSON.

Where, in an action against an insane person for the breach of a warranty in a deed, a witness was interested in the land, but not in the event of the suit, he was not disqualified by Revisal of 1905, § 1631, disqualifying those interested in the event of the suit from testify-

ing against the representative of any insane person concerning any personal communication or transaction with such person.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, § 602.]

6. SAME—CONTRADICTION—COMPETENCY OF EVIDENCE.

Where a witness testified that certain corporate stock was not worth more than 50 cents on the dollar, book entries showing that the stock had been sold at par were not competent to contradict him.

7. APPEARANCE—GENERAL APPEARANCE AFTER SPECIAL—RIGHT TO PERSONAL JUDGMENT.

Defendant's exception to the overruling of his motion to dismiss, made under special appearance, does not affect plaintiff's right to a personal judgment, where, after the motion was overruled, defendant entered a general appearance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appearance, § 66.]

8. ATTACHMENT—VALIDITY OF SALE BY COMMISSIONER.

Though Revisal of 1905, § 784, provides for the sale of attached property by the sheriff on judgment for the plaintiff, defendant could not complain where a court treated an action for the breach of a warranty in a deed as one in equity and ordered a sale of the attached property by a commissioner, since, having the right to object if the property did not bring a fair price, he could not be harmed.

9. COVENANTS—ACTION FOR BREACH—DAMAGES.

Where, in fixing damages for a breach of covenants in a deed, it became necessary to determine the value of corporate stock conveyed with the land, the value of the stock should have been determined as of the time the covenants were made, and not by the subsequent financial condition of the corporation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Covenants, § 225.]

Appeal from Superior Court, Forsyth County; Peebles, Judge.

Action by W. A. Lemly against W. B. Ellis. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

The plaintiff brought this action to recover damages for the breach of covenants of seisin and warranty and a covenant against incumbrances contained in a deed executed by the plaintiff to him and to have the amount of the said damages, which were laid at \$13,500, declared to be a lien upon 16 bonds each of the par value of \$1,000, which were a part of the purchase price agreed to be paid for the land conveyed by the said deed and for other property sold to the plaintiff at the same time, the other part of the said consideration being \$21,000 in cash and an account.

It appears that the defendant, on December 20, 1900, contracted to sell to the plaintiff for the sum of \$37,000, eight tracts of land on the French Broad river in the county of Madison and 800 shares of the capital stock of the North Carolina Electrical Power Company, or the subscription to that many shares of the capital stock, each share being of the par value of \$100, and W. B. Ellis having already paid on his shares or subscription \$48,000. A deed for the land was

prepared and duly executed by W. B. Ellis and his wife on March 20, 1900, and acknowledged by them, and the privy examination of the wife taken on March 24, 1900, before the clerk of the superior court of Forsyth county and the deed ordered to registration by the clerk of Madison superior court on January 5, 1901. This deed was afterwards registered. After its execution the plaintiff discovered that there was a defect in the title to one of the tracts of land, known as "Mountain Island," embracing the southern half of the river and running along its bank for a distance of about 46 poles, at a point about two miles from Hot Springs, and containing about 30 acres. He had paid \$21,000 on the purchase money in cash and an account, but still held the \$16,000 in bonds. On February 6, 1904, he commenced this action by causing a summons to be issued against the defendant to the sheriff of Forsyth county, who made the following return: "Received Feb: 6, 1904. Not executed. The defendant not to be found in my county. F. P. Alspaugh, Sheriff." The same day the plaintiff filed his complaint, in which he alleged the execution of the aforementioned deed which is described as dated March 20, 1900, and registered in the office of the register of deeds of Madison county in Book 14, p. 159. He then sets forth the several covenants and the breach thereof as evidenced by the defect in the title to the 30-acre tract, and the existence of certain judgment liens, which had been paid off by him. It is then alleged that the plaintiff has possession of the 16 bonds and brings them into court to be subjected by its order to the payment of his claim. He prays judgment for the amount of his alleged damages, \$13,700, and for a sale of the bonds to satisfy his lien thereon, which he acquired by reason of the defect in the title to the thirty acres. The plaintiff on the same day, and presumably at the same time that he filed his complaint, made an affidavit before the clerk in which he alleged that the defendant was indebted to him in the sum of \$13,700 for breach of the warranty contained in the deed from him to the plaintiff dated March 20, 1900, and registered in Madison county in Book 14, p. 159; that the defendant is a nonresident and has property in this state which should be applied to the satisfaction of the said claim for damages; and that plaintiff has possession of the 16 bonds, in which the defendant claims certain rights; and that plaintiff has a lien on the said bonds for the payment of his claim; and that he holds the bonds subject to said liens. He therefore asks for a warrant of attachment, which was issued and levied February 9, 1904, upon the 16 bonds in the possession of the plaintiff, as appears from the sheriff's return, which was made by his deputy. On the day of the levy, the plaintiff made an affidavit

before the clerk in which he set out in full the return of the sheriff on the summons and then alleges that the defendant cannot, after due diligence, be found in this state, and that he is a nonresident; that the plaintiff has a good cause of action against him, "which arose upon a breach of warranty contained in a certain deed from W. B. Ellis to this plaintiff dated _____ day of _____ and duly recorded in the office of the register of deeds of the county of Madison, Book _____ folio _____, by which said breach of covenant, the defendant is indebted to the plaintiff in the sum of \$13,700; that said defendant is a proper party to this action; that he has property in this state and that plaintiff has issued a warrant of attachment in this cause." He then prays an order of publication, which was granted and the publication was made, on the same day (February 9, 1904) in the following form: "The defendant above-named will take notice that a summons in the above-entitled action was issued against him on the 6th day of February, 1904, and that an action entitled as above has been instituted in the superior court of Forsyth county for the purpose of recovering damages for breach of covenants of warranty and of seisin contained in a deed made by said W. B. Ellis to the said plaintiff, dated the _____ day of _____. The defendant will also take notice that a warrant of attachment was issued by said court on the 6th day of February, 1904, against the property of said defendant, and on the 9th day of February, 1904, the attachment and notice of garnishment were served on W. A. Lemly, and said warrant of attachment and notice of garnishment are returnable before the said court on the 14th day of March, 1904. The defendant is hereby required to appear and answer or demur to the complaint at the term of the superior court of Forsyth county to be held on the 14th day of March, 1904, or the relief demanded will be granted." The court (Judge W. R. Allen presiding) adjudged the publication to be in due form and properly made, and that the original process or summons and the warrant of attachment had been duly served upon the defendant.

At March term, 1904, the defendant, by his attorney, entered a special appearance and moved to dismiss upon the following grounds: (1) No cause of action is set out in the affidavit for publication. (2) That an attachment cannot issue in favor of the plaintiff against himself as garnishee. (3) The plaintiff alleges in his complaint that he holds the 16 bonds subject to his claim against Ellis and that he brings the same into court to be subjected under its order to the payment of the said claim. (4) That the bonds at the time of the levy by the deputy sheriff of the attachment issued in this action, had already been levied upon (September 15, 1903) by the sheriff himself in the action of McCoy

v. Ellis, which is still pending, and the bonds were, and still are, subject to the said prior levy. The motion was denied and the defendant excepted. At the same term of the court, the defendant Ellis was duly adjudged insane and D. H. Blair was appointed his guardian ad litem. In the following August he filed an answer through the same attorney, who had entered the special appearance, and in his answer he admits that the plaintiff had agreed to deliver the 16 bonds to Ellis as a part of the consideration for the deed, the execution of which is admitted, though he denies any knowledge of the nature of its contents. He further denies that the plaintiff has any right to hold the same or that he has any lien thereon, but avers that Ellis is entitled to the possession of the bonds. He admits the non-residence of Ellis, but denies all the other material allegations of the complaint. We state the twenty-first exception substantially as it appears in the brief of the defendant's counsel: The defendant attempted to show that the plaintiff Lemly was acting for himself, the witness C. A. Reynolds, and others in making the purchase from Ellis, and that Reynolds had such an interest in the transaction and in the result of the action as would exclude his evidence concerning any transaction between Ellis and Lemly under section 1631 of the Revisal of 1905. Reynolds was a stockholder in the North Carolina Electrical Power Company. Defendant's counsel asked the witness Reynolds the following question: "Is Mr. Lemly under any contract or agreement to convey what was given him in this deed to the power company?" Plaintiff objected, the objection was sustained, and the defendant excepted. The witness answered: "Mr. Lemly has entirely conveyed part of it. He has not made us a deed to the land, though we have agreed upon the price, and he has agreed to convey it." The witness also testified that he had no interest in the result of this action. The defendant's counsel insisted that under this admission of the witness, he was incompetent. The court ruled otherwise, and the defendant excepted. The thirty-eighth exception is stated in the same manner: It was in evidence that, about the time of the sale by Ellis to Lemly, stock in the power company had been sold to Carr and others, and the defendant offered a book, which Reynolds had previously identified as the stockbook of the company, to show that the stock had been sold to these outsiders at par, and to contradict Reynolds' evidence that the stock was not worth more than 50 cents on the dollar. The book was excluded, and defendant excepted.

In order to ascertain the damage that the plaintiff sustained by reason of the defect in the title of the Mountain Island tract of land, it became necessary to show the value of the property sold, the stock, and the land,

and, also, the value of the Mountain Island tract, and to determine what part of the price was paid for that tract. It appears that, at the time the contract between Lemly and Ellis was made (December 29, 1900), the dam of the power company had not been completed, the machinery had not been purchased, and the plant was only in the process of construction, not being capable at the time of earning anything. In this connection, O. A. Reynolds, a witness for the plaintiff, testified: "At the time Mr. Lemly bought Mr. Ellis' stock, or rather subscription to stock, of the North Carolina Electrical Power Company, it is hard to say what it was worth. There was nothing finished but the plant at Ivy. The dam was only eight feet high. No electrical machinery had been bought; nothing of that sort had yet been obtained, and it is hard to tell what the stock was worth. If you want my opinion, I do not think it was worth 50 cents on the dollar." The other evidence tended to show that, after Ellis sold his interest to Lemly, the plant was completed, and the company furnished electric power to the city of Asheville, but that it had not paid a dividend because it had not earned profits sufficient for that purpose. Upon the issue as to damages the court charged as follows: "When you come to consider the value of the property, you have to estimate the value of the 800 shares of stock in the electrical power company. There was evidence that 60 per cent. of the par value of the stock had been paid in, but the real value of the stock depends on the property owned by the corporation, and in a great measure on the success of the enterprise in which the company was engaged. If the enterprise was a success and paid dividends, of course the stock would be worth more than it would be if it was a failure and paid no dividends. If the operation of the corporation proved a disastrous one and lost money, why then, as a matter of course, the stock would be depreciated in proportion as it lost money. The law would be that, if the corporation failed and got in debt—if it had to go in debt for the running expenses—as a matter of course, the stockholders would have to make good to the creditors for the unpaid stock; and therefore you can take into consideration in valuing that stock the testimony as to the payment of dividends, and as to whether the plant had been a success or not." The issues and the answers of the jury there to are as follows: "(1) Did the defendant W. B. Ellis and wife execute the deed mentioned in the complaint? Answer. Yes. (2) Did said deed contain the covenants alleged in the complaint? Answer. Yes. (3) Has there been a breach of said covenants? Answer. Yes. (4) What damage, if any, is the plaintiff entitled to recover of the defendant? Answer. Twelve thousand five hundred dollars, with interest from December 29, 1901. (5) Were the judgments set out in the com-

plaint liens on the lands conveyed by Ellis to Lemly? Answer. Yes. (6) Have the said judgments been paid off by the plaintiff? Answer. Yes. (7) If so, how much has the plaintiff paid out in discharging said judgments? Answer. Seventy-eight dollars and ninety cents, which is included in fourth issue."

The court rendered a personal judgment against the defendant for \$12,500, and interest from December 29, 1901 and costs, and declared the said amount a lien on the 16 bonds. The court further adjudged that the bonds be sold by the commissioner named in the judgment and the proceeds applied to the payment of the judgment and the residue, if any, be paid to the defendant, who excepted to the judgment generally, and especially for the reason that a personal judgment could not be given against him. Defendant appealed.

Lindsay Patterson, for appellant. Manly & Hendren, for appellee.

WALKER, J. (after stating the case). The first question raised by the defendant is that the affidavit, upon which the order of publication is based, is defective, as no cause of action is sufficiently set out therein and the defendant's counsel, in support of this position, relies on *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508, and *Mullen v. Canal Co.*, 114 N. C. 8, 19 S. E. 106; Code, § 218 (Revisal of 1905, § 442). The specific grounds of objection are: (1) That there is not a sufficient reference to the deed in which the covenant is to be found. (2) That there is no definite description of the land, having special regard to its locality. (3) That there is no allegation of an eviction under paramount title so as to constitute a good cause of action for a breach of the covenant of warranty.

It seems to us that the reference to the warranty, as contained in a certain deed from W. B. Ellis to W. A. Lemly, which is registered in Madison county, is definite enough to notify the defendant of the particular nature of the cause of action and this is the chief purpose in requiring publication to be made. The context of the affidavit would lead to the inference that Madison county is in this state, nothing appearing to the contrary. The same kind of reference is once made to the county of Forsyth; that is, without naming the state of which it is a part, although it elsewhere appears that a county of this state is intended. The allegation is at least sufficient to inform the defendant of the deed to which reference is made, as it does not appear that there ever was any other deed between the same parties and certainly none registered in the county of Madison. The amount of damages claimed for the breach, while not of very much weight in identifying the cause of action, should not be entirely excluded

from consideration in this connection. What we have said applies to the first two grounds of objection. The third is clearly untenable. When the plaintiff alleges that there has been a breach of the contract, it is necessarily implied that there has been an eviction under a paramount title, or its equivalent, the adverse possession of the land, at the time of the delivery of the deed by some one having such a title. *Shankle v. Ingram*, 133 N. C. 258, 45 S. E. 578; *Price v. Deal*, 90 N. C. 290. The allegation of a breach includes, of course, everything essential to constitute a breach of the covenant. It may not be a good allegation in a pleading, as being in the nature of the statement of a conclusion, but we cannot say that it is so radically defective when used in an affidavit for publication as to render it ineffectual. A fuller and more explicit statement of the facts would perhaps be better, as in affidavits, and especially in pleadings, the law seeks to deal with the facts and not the conclusions of the pleader from them. But the failure to comply with the requirements of the law as to the form of a pleading or of a statement in an affidavit falls short of proving that the affidavit is fatally defective; if otherwise, it gives sufficient notice of the nature of the cause of action. The cases cited by the defendant's counsel do not apply. In the first case, the affidavit referred simply to a suit for specific performance of a contract to convey land in Craven county, to which, it is alleged, the defendant was a proper party, while in this case special reference is made to the covenant of warranty in a deed from the plaintiff to the defendant, which is registered in Madison county, for the breach of which he claims \$13,500 as damages. The other case cited was decided upon a different point. The defendant's counsel also contended that the defect in the affidavit is also to be found in the publication itself, but what we have already said is equally applicable to this objection. We hold that the affidavit and publication, when naturally and reasonably interpreted, were not calculated to mislead the defendant as to what was really meant, and gave him sufficient notice to come in and defend his rights.

The defendant's next ground of objection is that the attachment could not be levied upon the bonds, as they were, at the time, in the possession of the court (in custodia legis), having been deposited there by the plaintiff three days before the levy was made. It appears in the case that the bonds had been levied upon by the sheriff under a prior attachment, and we see nothing in the case to show that the lien of this levy did not continue to the time of the second levy, and, if so, the sheriff had, in contemplation of law, the custody of the bonds, although he may have left them with the plaintiff for safekeeping and they were afterwards turned over

to the clerk of the court, for no rights of third persons, either creditors or purchasers, had intervened, so as to invalidate the levy as to them. It is admitted by the defendant, in his written motion, that the former levy was still in force, and, if this be true, the sheriff had the legal right to the possession. This, therefore, is the ordinary case of a second levy on property in the possession of the officer who made the first one. The act of the deputy was, of course, the act of the sheriff, who was his principal, "*qui facit per alium facit per se*." It was competent for the sheriff, so far as the defendant is concerned, to leave the bonds in the possession of the plaintiff as his bailee, and, thus placed, they were still subject to the prior levy. *Kneeland on Attachment*, §§ 474 and 492. How could the defendant be prejudiced in such a case if the sheriff has the bonds forthcoming to answer the mandate of any process afterwards issued to him by the court? But we do not see, if there was no prior levy by the sheriff, why he could not levy on the bonds in the hands of the plaintiff or even after they were put in the custody of the clerk. They were not, in a legal sense, in the custody of the court by reason of the deposit with the clerk, because the court had never ordered any such deposit to be made, had not even recognized it and there was no reason why the deposit should be made at that stage of the case. Besides, the sheriff had, in law, the custody of them by virtue of the prior levy and was at least in constructive possession. The general rule undoubtedly is that property in the possession of the court cannot be attached, as it is said then to be in custodia legis and is protected, not only on the ground of public policy, but for other good reasons. *Kneeland on Attachment*, § 410 et seq. The rule has been relaxed in some cases. See *Williamson v. Nealy*, 119 N. C. 339, 25 S. E. 953, where the course of decision in this state is fully set forth. But, in this case, the deposit, as we have shown, was not made by the authority of the court, and was not within the rule protecting property in custodia legis from a levy. The statute is broad in its language, and requires the sheriff to levy upon any of the property of the defendant in his county. Revisal of 1905, §§ 765-767. It appears that there is nobody who can complain of the levy except the plaintiff, as the deposit was made by him. Besides all this, the court, by its subsequent proceedings, has recognized the levy of the sheriff as a valid one, and has acted upon it as such. But, if the court had the custody of the bonds by virtue of the deposit or of the sheriff's levy, and the court surely had it either the one way or the other, it will not be released, but the custody of it retained so as to await the result of the action and answer, and satisfy any judgment that may be recovered. It is immaterial how the property was brought under the control of the

court—whether by attachment or some other equivalent and lawful act. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 585.

The objection to the evidence of Reynolds is not well founded even if it was made in apt time. The witness testified that he is not interested in the event of the action, and it does not appear that he is. He may have an interest in the land, but this action was not brought to recover the land. The plaintiff already has it and requires no aid from the court to complete the investiture of title. He sues for damages, and the witness is in no way interested in his recovery of them, and he must be so interested in order to disqualify him. *Bunn v. Todd*, 107 N. C. 266, 11 S. E. 1043; *Wetherington v. Williams*, 134 N. C. at page 279, 46 S. E. 728; *Deaver v. Deaver*, 137 N. C. 240, 49 S. E. 113. We do not see how the entries in the stockbook as to the value of the stock, were competent to contradict the witness Reynolds. He did not make them, nor does it appear that they were made in such a manner as to be admissible against the plaintiff. They were *res inter alios acta*. But the witness testified substantially to the contents of the book, and in this way the defendant got the full benefit of the entries as evidence.

The court properly entered a personal judgment against the defendant. *Mullen v. Canal Co.*, 114 N. C. 8, 19 S. E. 106, which was cited by the defendant's counsel, does not decide otherwise. The court merely holds in that case that, if there is a special appearance and a motion to dismiss, which is overruled, the entry afterwards of a general appearance and taking part in the trial of the case upon its merits, do not constitute a waiver of the defendant's right to insist in this court on his motion to dismiss, if he appeals from the judgment, and it was not intended to decide that the general appearance does not authorize the court to render a personal judgment. The exception to the ruling on the motion to dismiss is fully reserved to the defendant, but this does not affect the right of the plaintiff to a personal judgment which follows, as a matter of course, when there is a general appearance. *Revisal of 1905*, § 447; *Wilson v. Seligman*, 144 U. S. 47, 12 Sup. Ct. 541, 36 L. Ed. 338. When there is no general appearance, but merely a special one, and a motion to dismiss for defective service of the original process, or for defective substituted service by publication and the motion is overruled or if the defendant does not appear at all, the court acquires jurisdiction, where an attachment has issued or the *res* has otherwise been brought within its control only to the extent that the *res* will satisfy the plaintiff's recovery, and no general or personal judgment will be binding beyond that. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 585; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198, and *May v. Getty*, 140 N. C. 318, 53 S. E. 75,

where the cases are collected. But a general appearance changes all of this, and confers general jurisdiction of the person and cause of action with the right to proceed personally against the defendant. It occurs to us that the defendant's counsel pursued the proper and only safe course in making his general appearance, so as to protect the interests of his client.

The court does not appear to have rendered a simple judgment for the debt, as if it were an action at law, with an order to the sheriff to sell the attached property, in the nature of a venditioni exponas (*Revisal of 1905*, § 784; *Atkinson v. Ricks*, 140 N. C. 421, 53 S. E. 230; *May v. Getty*, 140 N. C. 310, 53 S. E. 75), but it rather proceeded on the idea that the contract for the sale of the land had not been fully executed by the parties, and therefore granted equitable relief by directing that the bonds be sold by a commissioner. No harm can come to the defendant from this form of judgment, as he will have the right to object to the sale if the property does not bring a fair price, whereas if it had been sold by the sheriff, this objection to the sale would not be open to him.

While there was no error committed in the rulings so far considered, we do think the court erred in its charge to the jury upon the fourth issue as to the damages. Let it be conceded, for the sake of the argument, that the court correctly charged the jury as to how to value the stock until he told them that they could consider, in that connection, "the testimony as to the payment of dividends and as to whether the plant had been a success or not." We think that instruction was erroneous. The value should have been determined as of the time the covenant was made, and according to the facts then existing, and not by what afterwards occurred. The parties did not, and could not know with certainty, whether the company would fail or succeed. They dealt with each other and made their own calculation upon the facts as they then existed and upon the situation as it then appeared to them. It, perhaps, was proper for the jury to consider the probabilities of success or failure, but when they were instructed that they might also consider actual eventualities, a factor was introduced into the computation, which the parties could not have had in their minds at the time they fixed and agreed upon the consideration of the deed. It is what the parties thought, at the time of making their contract, were the values of the respective pieces of property sold, and not what they proved to be by subsequent events which could not be taken into the calculation beforehand, as they could not be forecasted with any degree of certainty. Matters beyond the human ken could hardly be said to have been within the contemplation of the parties, so as to become proper elements to be consid-

ered in assessing the damages resulting from a broken covenant. The evidence and charge as to the actual success of the company were calculated to mislead the jury and produce a wrong appraisement of the value of the stock, and one that would necessarily increase the value of the Mountain Island tract of land, the title to which had proved to be defective.

There was error in the respect indicated, for which a new trial is ordered, but it will be restricted to the fourth and seventh issues as to damages, the seventh issue being included, as the amount awarded in response to that issue was made by the jury a part of the damages assessed under the fourth issue. The appellee will pay the costs of this court.

New trial.

IN RE APPLICANTS FOR LICENSE.

(Supreme Court of North Carolina. Nov. 27, 1906.)

1. ATTORNEY AND CLIENT — ADMISSION TO PRACTICE—MORAL CHARACTER.

Revisal 1905, § 207, relating to the admission of attorneys, provides that "all applicants who shall satisfy the court of their competent knowledge of the law shall receive license to practice in the courts of the state." Section 208 provides that, before being allowed to stand an examination, each applicant must comply with certain conditions, among which "he must file with the clerk of the court, a certificate of good moral character signed by two attorneys who practice in that court." *Held*, that one who complies with the formal prerequisites is entitled to become an applicant and to be examined, and, if he shows himself to have competent knowledge, it is the duty of the court to license him without investigating his general moral character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Attorney and Client, § 5.]

2. SAME—POWER TO REGULATE.

The right to establish the qualifications of the office of attorney rests in the police power by virtue of which a state is authorized to enact laws to preserve the public safety, maintain the public peace, and promote and preserve the public health and morals.

3. CONSTITUTIONAL LAW—LEGISLATIVE POWERS—ENCROACHMENT ON JUDICIARY.

Revisal 1905, §§ 207, 208, relating to the admission of attorneys, and making it the duty of the court to license an applicant where he has complied with the formal prerequisites and shows himself to have a competent knowledge of the law, is not in violation of Declaration of Rights, § 8, which provides that legislative, executive, and supreme judicial powers of the government shall be kept separate and distinct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 53; vol. 5, Attorney and Client, § 2.]

4. SAME.

Revisal 1905, §§ 207, 208, relating to the admission of attorneys, and making it the duty of the court to admit to practice one who complies with the formal prerequisites and shows himself to have competent knowledge of the law, is not in violation of Const. art. 4, § 12, which ordains that the General Assembly shall have no power to deprive the judicial de-

partment of any power or jurisdiction which rightfully pertains to it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 53; vol. 5, Attorney and Client, § 2.]

Brown and Walker, JJ., dissenting.

In the matter of applicants for license to practice law. Applicants licensed.

HOKE, J. At the beginning of the present term, when the court was about to enter on the examination of applicants for license to practice law, we found on file, signed by members of our profession of high standing and deserved repute, protests against the admission of three of the applicants on the alleged ground that they did not have good moral characters. As the applicants were here ready, we determined to proceed with the examination; and, the question being of the first importance, we took the same under advisement, and two of these applicants having passed excellent examinations the question of the protest is fairly presented.

After giving the matter our best consideration, the court is of opinion that under the law as it now stands (Revisal 1905, c. 5) an applicant for license who, on his examination, shall satisfy the court of his competent knowledge of the law, is entitled to receive his license, and that an investigation into his general moral character is no longer required or permitted. Prior to the enactment of this Revisal the law was otherwise. Under the Code of 1883, the Revised Code, and the Revised Statutes, it was provided "that applicants for license shall undergo an examination before two or more justices of the Supreme Court, and on receiving certificates from such justices, of their competent knowledge of the law and upright characters, shall be admitted to practice in the courts." By clear inference from the language of this statute, power is given the court, or judges who acted in the matter, and perhaps the duty imposed of satisfying themselves that the applicant's character was good. Under a rule or custom the certificates of two practicing attorneys of good standing as to the character of the applicants were accepted as evidence sufficient; but this was only *prima facie*, and on protest filed, as in this case, and under the former law, we think the court would clearly have had the power to examine into the question. But, under the Revisal, the sections controlling the question are as follows: Section 208: "Before being allowed to stand an examination each applicant must comply with the following conditions: (1) He must be twenty-one years of age, or will arrive at that age before the time for the next examination. (2) He must file with the clerk of the court a certificate of good moral character signed by two attorneys who practice in that court. An applicant from another state may have such certificate signed by any state officer of the state from

which he comes. (3) He must deposit with the clerk twenty-one dollars and fifty cents." And section 207: "No person shall practice law without first obtaining license so to do from the supreme court. Applicants for license shall be examined only on the first Monday of each term of the supreme court. All examinations shall be in writing, and based upon such course of study, and conducted under such rules, as the court may prescribe. All applicants who shall satisfy the court of their competent knowledge of the law shall receive license to practice in all the courts of this state." This statute presents no question, sometimes mooted by the courts, as to whether the certificates of the attorneys to the character of the applicants is *prima facie* or conclusive. This certificate, to be signed by two practicing members of the court, is only a formal matter, fixing the status as an applicant. When this is done, and the other preliminaries complied with, section 207 requires that the applicant shall be examined, and, if he satisfies the court of his competent knowledge of the law, he shall be licensed. The change from the former law is too pronounced to pass unnoticed, and the meaning too plain for construction.

Says Black, in *Interpretation of Laws*, § 26: "The meaning of a statute must first be sought in the language of the statute itself." And further: "If the language is plain and free from ambiguity, and expresses a simple, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. * * * And in *Lewis, Southerland Statutory Construction* (2d Ed.) § 267, it is said: "When the intention of the Legislature is so apparent from the face of the statute that there can be no question as to its meaning, there is no room for construction." It was not seriously contended in the able argument made by the contestants in compliance with the request of the court that this change has not been wrought by the Revisal of 1905; but the validity of the statute is assailed on the ground that the same is unconstitutional because: (1) It violates section 8 in our Declaration of Rights, to the effect that "the legislative, executive, and supreme judicial powers of the government should be kept separate and distinct." (2) Section 12 of article 4 which ordains that "the General Assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it," etc.; the argument being (a) that the admission of attorneys to practice is a judicial act, and the statute, requiring, as it does, that an applicant be admitted when found to have competent knowledge of the law, is an unwarranted exercise of judicial power prohibited by section 8 of the Declaration of Rights; (b) that attorneys, when admitted, are officers of the court, whose appointment and conduct are under the control of the court as one of its inherent

powers, and the act is an unlawful attempt to deprive the judicial department of a power which of right belongs to it. We do not think, however, that either of these positions can be sustained. True, it is generally held uniformly, so far as we have examined, that the admission of an applicant to the practice of the law is a judicial act. In several decisions on this question, a mandamus to control the action of an inferior court was denied by an appellate tribunal because the admission to the bar was an act involving judicial discretion, and that such discretion, as a rule, could not be directed by this writ.

We do not deduce from this principle and these decisions, as some authorities have done, that because admission to the bar is in some sense a judicial act "that a Legislature has no power, therefore, to provide that any person, possessing certain qualifications, must be admitted, as this would be to assume judicial power." It is well established and sustained by the weight of authority that the Legislature has the right to establish the qualifications to be required of one to become a practicing member of the bar. As said in *Ex parte Garland*, 71 U. S., at page 379, 18 L. Ed. 366: "The Legislature may undoubtedly prescribe the qualifications for the office of an attorney to which he must conform, as it may, when it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life." The right to establish such qualifications rests in the police power, a power by virtue of which a state is authorized to enact laws to preserve the public safety, maintain the public peace and order, and preserve and promote the public health and public morals. Under our system, and as a part of the governmental policy, this power is, in the first instance, rightfully vested in the Legislature. *State v. Moore*, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696. Subject to constitutional restrictions and limitations, the Legislature has the right to prescribe the qualifications and establish the rules and regulations under which its citizens may pursue this or that calling, professional or otherwise. As stated in 4 Cyc. 900: "As attorneys are officers of the court, their admission is the exercise of a judicial power resting with the courts. The Legislature, however, may prescribe regulations and qualifications for the office, and have uniformly done so." From the existence of these two admitted and well-established principles, we draw the conclusion that when a Legislature, by positive enactment, has prescribed the qualifications required to enable one to enter the legal profession, and a citizen presents himself for examination and is shown to possess these qualifications, the courts must admit him to the practice of the law. We exercise our judicial functions in determining whether the applicant possesses the required qualifications, and here our pow-

er in the premises ends. To hold, as we are requested to do here, that, when a Legislature has acted and established the qualifications which shall be required, the court can go on and superadd others, would, in effect, destroy the right admitted to be in the Legislature and uphold the court in the exercise of legislative power. If a Legislature, having prescribed certain qualifications, should undertake to direct whether an applicant did or did not possess them, this might be an unconstitutional exercise of judicial power. But not so here. The Legislature has established a general standard to which all applicants must conform, and has referred it to the court to decide whether, in any particular case, the requirement has been met. The principal test, then, by which the two powers are distinguished, is complied with. The Legislature, in the valid exercise of the police power, lays down a general rule. The judiciary applies the principle to the particular case.

Nor do we think that the statute in question withdraws from the courts any power which rightfully belongs to them. So far as this court is concerned, being now a court created by the Constitution, it has the constitutional power given to it and protected by that instrument; and, as set forth in article 4, § 8: "The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over 'issues of fact,' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Convention 1875. The power here referred to is generally understood to mean the power to hear and determine controversies between adverse litigants; or, as said in *People v. Chase*, 165 Ill. 527, 48 N. E. 454, 36 L. R. A. 106: "Judicial power is that power, which adjudicates and protects the rights and interests of individual citizens, and to that end construes and applies the laws." Certainly the legislation in question interferes in no way with the powers granted to this court by the Constitution which created it. It is urged, however, that the statute impairs or destroys the inherent rights of the courts to admit and control the conduct of the attorneys who are its officers.

Passing from the Supreme Court and the power and jurisdiction given and guaranteed it by the Constitution, the power of the Legislature over the matter in question would seem to be plenary, not only by virtue of the general powers of legislation granted to it by article 2, § 1, of the Constitution, but under the very section to which the protestants appeal. In article 4, § 12, it is said

"that the General Assembly shall have no power to deprive the judiciary of any power which actually belongs to it." The section further prescribes that the General Assembly shall allot and distribute that portion of the power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in the Constitution, or which may be established by law, in such manner as it may deem best, etc. Under this section the Legislature would seem to have the right, not only to prescribe the qualifications, but to determine the courts or agency which should pass upon them. In performing the duty of examining applicants and issuing license, we are not acting as a Supreme Court, certainly not in the exercise of our constitutional powers. We are simply discharging a duty imposed upon us by the Legislature, which we would, no doubt, have the right to decline. We have heretofore done this work in obedience to this reasonable requirement on the part of the Legislature—partly following a custom which has been sanctioned by time and approved by trial, partly from our desire at all times to do what we can to uphold the traditions and promote the interests of the profession to which we belong. If the Legislature sees proper to impose the duty on another court, or to create one for the purpose, the admission of attorneys being a judicial act under section 8 of the article, the Supreme Court would have, no doubt, the right to supervise the procedure. But this would be in order only to see that the form and requirements of the laws addressed to this question are complied with and in accordance with the principles set forth in this opinion.

It is urged, however, that the statute impairs or destroys the inherent right of the court to direct and control the conduct of attorneys who are its officers. There are decisions which so express themselves on this question; and, if by inherent they intend to say, and this is all that most of them do say, that, in the absence of legislation on the subject, the courts have the power to regulate and deal with the matters mentioned, this may be accepted. But, if by "inherent" is meant that the power, to the extent claimed here, is one inherent because essential to the existence of the court and the proper exercise of its functions, we do not think the position can be maintained. Why and how is it essential? If an attorney who has been admitted as a practicing member of a court is presently so conducting himself that the court finds it impossible to properly administer justice in some case or cases being then considered, the question might be presented. But how can the right to pass on an applicant's previous conduct or his character be considered as a power essential to a court's existence, when he has never become an attorney or been given an opportunity to have his demeanor observed or considered? While the precise question has not been presented in this state,

we are not without authority here which will aid us to a correct conclusion in this matter. In *Ex parte Schenck*, 65 N. C. 353, the court, in construing our statute on contempt, held "that the act of April 4, 1871, declaring that no attorney who has been duly licensed to practice law shall be disbarred or deprived of his license and right to practice, except upon conviction for a criminal offense, or after confession in open court, is constitutional"; and, further, "the aforesaid act does not take away any of the inherent rights which are absolutely essential in the administration of justice." And in *Kane v. Haywood*, 66 N. C. 1, under graver circumstance, the same act was upheld. If the power to disbar an attorney who is a sworn officer of the court can be taken away by the Legislature except after conviction or confession of crime, it would surely be competent for the Legislature to provide for the admission of one of its citizens who has established the requisite qualifications, and against whom there are charges which rest only on report. The views we maintain on this question are supported, we think, by the best considered authorities. *Ex parte Thompson*, 10 N. C. 355; *In re Cooper*, 22 N. Y. 67; *In re Robinson*, 131 Mass. 376, 41 Am. Rep. 239; *Ex parte Yale*, 24 Cal. 241, 35 Am. Dec. 62; *State v. Foreman*, 3 Mo. 602; *Freunde on Police Power*, §§ 646-650. In *Ex parte Thompson* the power is treated as legislative. In *Ex parte Yale* it is held "that the manners, terms, and conditions of an attorney's admission to practice, and of his continuing in practice, as well as his powers, duties, and privileges, are proper subjects of legislative control to the same extent, and subject to the same limitations as any other profession or business that is directed or regulated by statute." In *Ex parte Cooper*, supra, the Legislature had directed that applicant holding diploma from Columbia College should be admitted, and the act was upheld and the admission required. In *Ex parte Robinson* a woman had offered for admission to the bar in Massachusetts, and was rejected because the statute had not so provided. The question is treated throughout as a matter exclusively under legislative control; and Mr. Chief Justice Gray closes the opinion in this way: "It is hardly necessary to add that our duty is limited to declare the law as it is; and whether any change in that law would be wise or expedient is a question for the Legislature, and not for the judicial department of the government." Many other authorities could be cited to the same effect.

The position here taken is not only sustained by the weight of authority, but will be found historically correct. In an interesting and learned argument delivered before the Court of Appeals of New York by Dr. Dwight, in the *Matter of the Graduates of Columbia College*, supra, and from the opinion of the court in that case, it will

be found that barristers and counsellors at law in England were never appointed by the court at Westminster, but were called to the bar by the Inns of Court, which were voluntary, unincorporated associations. And, while the judges seem to have had some kind of visitatorial power in regard to these institutions, they declined, in their official capacity as judges, to exercise any control over the action of the benchers in the selection or admission of these officers. While attorneys, in fact, at an early period were authorized, by different methods, to appear for individual litigants, the power of the court to appoint attorneys as a class of public officers was conferred originally, and has from time to time been regulated and controlled in England by statute. True, this historic account of English methods cannot be allowed full significance here, because in that country the power of Parliament is without constitutional restraint, or, rather, it is a part of the Constitution of England that their Parliament has supreme and transcendent power, and can, when it sees proper, exercise judicial as well as legislative power, but this statement of Dr. Dwight's shows that in New York, also, the power to establish qualifications and regulate the admission of attorneys has always been a matter of legislative control. In North Carolina the matter has always so dealt with, and here, certainly, should be given great weight. In 1774, by statute, the North Carolina Legislature conferred the power of admitting attorneys on the judges of the superior court. In 1818 this was changed, and the power was given to two or more judges of the Supreme Court, and so remained until 1869, when the Legislature passed an act that any citizen be allowed to practice law who proved a good moral character and paid a license tax of \$20, and that it was the duty of the judges of the superior court to admit to the practice of law in the courts of the state any applicant who complied with these provisions. During the existence of this statute, it was the custom for an applicant to prove his character and pay the tax to the clerk of the superior court; and the judges of the superior court admitted such applicant on the certificate of the clerk that the provisions of the act had been complied with. While this statute was in force, the judges of the Supreme Court declined to examine applicants, and many of our capable and prominent attorneys were admitted to the profession in this manner; this being the only way that was then open to them. The act was repealed in 1871, and the former law was restored and continued in force until the Revisal of 1905, being the act we are now considering. And what valid objection can be made to this legislation? And here the writer speaks only for himself. It is said by an American author of blessed memory that it does not matter so much where a man is, as the direction in which he is mov

ing. Why should a citizen, even if he has committed some offense in the past, be deprived of the privilege of turning his face the other way and making an honorable effort to gain his living by the practice of the law? Or why should one who seeks to enter this honorable profession be turned from his purpose and the privilege denied him by reason of charges which rest only in rumor, and without having the opportunity to face his accusers and submit the question to trial by a jury of his countrymen?—that goodly way which has long been the approved and accepted method of deciding disputed questions of fact among freemen, and will continue to be while the rights and liberties of men are worth preserving. Nor do I apprehend the calamities suggested in some of the opinions which hold, or seem to hold, the contrary view. The history of our great profession is writ large in the life and upbuilding of the republic. In every trial and stress of arduous circumstance, they have been foremost in maintaining human right and upholding the cause of human freedom, and nowhere has it shone with more luster than in the story of this commonwealth; and I am glad to have the opportunity to say that in my judgment it has never been composed of more worthy members than it is to-day. Earnest minded, and upright, patriotic, and capable, they need no such prop as this to hold them to their highest standards and best traditions; the exercise, for their protection, by the court of a power which its most ardent advocates must admit to be doubtful, and which we hold to be forbidden and unlawful. To urge that the public may also need protection is to surrender the position, for here we enter on the domain of the police power, which is undoubtedly with the Legislature.

There are decisions which seem to conflict, and some which do conflict, with our present decision. In some of them, however, the question was not presented, and all of them, as said by Mr. Freunde, in his work on the Police Power, can be upheld, where they can be upheld at all, on grounds other than the doctrine for which they are now cited. Thus, in *Ex parte Secombe*, 60 U. S. 9, 15 L. Ed. 565, the court denied an application for a mandamus to a lower court, holding that the admission of one to practice law in such court was a question which rested in the legal discretion of the court. The act of the Legislature in this case was held not to have affected the common-law power of the court on the subject, and the question we are here discussing was in no way presented. In *re Attorney General*, 21 N. J. Law, at page 845, the court, while declaring that the right to pass on the admission of an applicant was one of the inherent powers of the court, were then considering a rule of their own very similar in language to our former law, and, there being no statute on the subject, the question we are now discussing did not arise. In

Splanes' Case, 123 Pa., at page 528, 16 Atl. 481, the court held that, the admission to practice law being a judicial act, a mandamus to a lower court would not be allowed. The judge who delivered the opinion, after resting the decision on this unquestioned principle, goes on to declare that the statute on the subject was an encroachment on the judicial power, paying a fine and deserved tribute to the character of the bar in which we most heartily concur. And in *Goodell's Case*, 39 Wis. 232, 20 Am. Rep. 42, the head-note states the principle contended for by protestants with a quare, and the body of the opinion requires that it should be so stated. The only decision which squarely declares that a statute on this subject is unconstitutional, describing it as an unlawful attempt to deprive the court of one of its essential and inherent powers, is the case of *In re Day*, 181 Ill. 72, 54 N. E. 648, 50 L. R. A. 519. This opinion (and it is an able one) can well be upheld on other grounds, and its force is much weakened by the dissent of two of the judges, who show that in Illinois, also, as a matter of history, this question has always been one of legislative regulation and control. The dissenting judge makes another pertinent suggestion, that, if this is one of the inherent and essential powers of the courts, it is just as inherent in one court as another, and so it might come about that the judges of the Supreme Court and each of the judges of the superior courts might require a widely different set of qualifications, which would establish different rules in every section of the state. As my Lord Coke would say, "the argument ab inconvenienti avaleth much, reader." As said in this able opinion of the Illinois Supreme Court: "The right to practice law is a privilege, and any law conferring this privilege should be general in its operation." There should be no differences in sections and no unreasonable discrimination in classes or individuals, and the qualifications should be established and proclaimed, so that every citizen may know what is required of him; and this can only be successfully and properly accomplished by means of a public statute. In what has been said the court does not express any opinion upon the facts offered in support or denial of this protest; nor must it be for one moment inferred that we speak in disapproval of the action of the protestants. Under a former law, their protest would have been timely. Like the court, they were, perhaps, inadvertent to the pronounced change so recently made, and in any event they did right to take action in the premises; for, if the law has been changed, it should be declared. We know, too, that they acted from entirely disinterested motives and were prompted solely by a desire to do what was best for the good of the commonwealth and of their profession. We hold, however, as heretofore stated, that as the law now stands one who complies with the

formal prerequisites is entitled to become an applicant and to be examined; and, if, on his examination, he shows himself to have competent knowledge of the law, it is the duty of the court to license him; and an investigation into the general moral character of the applicant is no longer required.

It is ordered, therefore, that the applicants be licensed.

OLARK, C. J. (concurring). What the requirements shall be, and, indeed, whether there shall be any, before entering upon the practice of law, medicine, dentistry, pharmacy, piloting, engineering, or any other profession, calling, or vocation, rests within the police power of the General Assembly. *State v. Call*, 121 N. C. 646, 28 S. E. 517; *State v. Biggs*, 133 N. C. 729, 46 S. E. 401, 64 L. R. A. 139, 98 Am. St. Rep. 731; *Cooley, Const. Lim.* (8th Ed.) 745; *Tiedeman, Police Power*, § 87. The usual requirements as to law are 21 years of age, good moral character, an examination and certificate of proficiency by some committee or court designated by the Legislature, and the payment of a license tax. The Legislature at its will can add to or repeal any or all of these requirements. The judicial power of the courts in "admission to the bar" consists solely in determining whether these requirements have been complied with, and in administering the oath if required by the statute. The Legislature may undoubtedly "prescribe qualifications for the office [of attorney] * * * as it may prescribe qualifications for the pursuit of any of the ordinary avocations of life." *Ex parte Garland*, 71 U. S. 333, 18 L. Ed. 366. And then adds that its ruling in that case does not call in question such legislative power, but merely asserts that its exercise cannot be used as a mode of punishment without trial. Though the admission of attorneys "has usually been intrusted to the courts, it has been nevertheless, both here and in England, uniformly treated, not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action." *In re Cooper*, 22 N. Y. 67; 4 Cyc. 900. In England there has not been any one of these requirements from the earliest time down to the present, but any one has been entitled to practice as a barrister; i. e., as counsel and advocate upon being "called to the bar" by one of the Inns of Court, the requisite for which call till comparatively recently has been merely proof that the applicant has eaten a specified number of dinners at one of the four Inns of Court—that is, that for a prescribed time he had had opportunity to acquire a knowledge of law. Now, however, a strict examination by the Inns of Court is required before an applicant is called to the bar by it. Attorneys in England are a distinct body. They cannot address the court or jury, but attend to the "business end" of the legal profession, getting up the brief of the evidence, arranging the fee, and selecting

the barrister who deals with the attorney, and never directly with the client. Attorneys were originally appointed and restricted in number. Afterwards, by act of Parliament, an examination by some one appointed by the court, and proof of good character, was and is still required for these "business agents," but not of barristers. *In re Cooper*, 22 N. Y. 67; 4 Cyc. 901. In this state up to 1754 (chapter 1) lawyers were admitted to practice, it seems, upon appointment by the Governor. By that act an examination as to legal knowledge by the Supreme Court was substituted. In 1777, at the second session (chapter 2, § 6; 24 State Records, 50), an examination by two superior court judges was required. In 1818 a finding of good moral character and proficiency in legal knowledge by the Supreme Court was required before admission to the bar. In 1869 this was repealed, and proof of good moral character before a judge of the superior court and the payment of \$20 was made sufficient. This act remained in force until 1871, when the act of 1818 was reenacted. During those two years many applied to the Supreme Court for examination as formerly, but were refused on the ground of want of power. Under the Revision of 1905 the requirement of a finding of good moral character by the court was stricken out, and for it there was substituted, as sufficient, merely a provision that before the court should examine an applicant for license he must produce a certificate of good moral character signed by two members of the bar of this court.

If this change was an inadvertence, the General Assembly can change it. But this court cannot add to the requirements of the lawmaking body as to lawyers any more than it can to the requirement for entering upon the practice of medicine or dentistry. It is true lawyers are officers of the courts, but so are sheriffs, clerks, and the like, over whose selection the court has no control. Ever since 1754 an oath has also been required by statute, the administering of which is the act of "admission to the bar," before which by production of the certificate of this court the other requirements are conclusively shown to have been complied with. Of course, as the oath is required by statute, that, like any other requirement, can be repealed. It is not required as to other professions. In two states the judges, presumably elderly men and very conservative, having never seen a female lawyer, nor read that they were allowed under the Saxon Hap-tarchy, and doubtless thinking it improper, attempted to add to the legislative requirements, either by construction or a supposed inherent power, a requirement that the applicant must be of the male sex, but the Legislatures of those states promptly enacted otherwise, and female lawyers are numerous now in those states, while here the first lady who applied was promptly admitted (in

1878), and for nearly 30 years since none other has sought entrance.

We do not examine applicants for license by virtue of our judicial functions which by the Constitution (article 4, § 8) authorize this court only "to review upon appeal any decision of the court below upon any matter of law or legal inference," and "to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts," and section 9 gives this court original jurisdiction of claims against the state, our decisions in such cases, however, to be "merely recommendatory." Our examination of applicants for law license is made, therefore, not by virtue of our judicial duties, but since 1868 only out of courtesy and respect to the Legislature. That body up to the Constitution of 1868 created all the courts and defined the jurisdiction and duties of each, and could, therefore, make the examination of applicants a part of the judicial duty of any court. It is otherwise since this court and its duties have been created and defined by the Constitution. In only eight other states are applicants for license examined by the highest court in the state, to wit, in Virginia, South Carolina, Alabama, Vermont, Idaho, Oregon, Montana, and South Dakota. In two states, Arkansas and Mississippi, the examination is made by the district judge; and in four others, Florida, Kentucky, Missouri, and Nevada, the examination is by the district or circuit judge, aided by a committee of lawyers. In one state, Indiana, the Constitution forbids any examination as to legal attainments, and by act of the Legislature the admission to the bar is by a district court upon proof of good moral character. In the other 30 states and in the territories the examination is conducted by boards of practicing lawyers, whose appointment by legislative enactment is provided for in various ways, but is usually vested in the Governor or the court of last resort. In nearly all the states, as in this, the Legislature has committed the course of study and length of study to be prescribed by the courts. In one state the length of time is four years, in several it is three years. In this state it was two years from 1819 to 1869—one year to procure county court license and another year to obtain license to practice in the superior and Supreme courts. From 1871 to 1901 it was only one year. In the latter year it was again raised to two years, and the course of study was enlarged.

The General Assembly having, whether intentionally or not, withdrawn from this court the duty to pass upon the moral character of applicants, having substituted therefor a certificate of character by two members of the bar, we are precluded from going into the charges against these two applicants. We are only empowered to certify that, having filed the certificate of character required by the statute and certified that they are of

legal age, they have thereupon been examined by us and on such examination have been found to possess a competent knowledge to practice law.

BROWN, J. (dissenting). My convictions compel me to dissent from the judgment of a majority of my Brethren; and, as I regard it a matter of vital importance to the profession of the law, I will give my reasons as briefly as I can.

These two applicants have each filed a certificate that he is a person of good moral character, signed by two attorneys of excellent repute. Notwithstanding this, other reputable and high-standing members of our profession protest against licensing these applicants upon the ground that they are men of bad character and unworthy to fill the responsible position of attorney at law, and they offer us evidence which, they claim, tends to prove that one of the applicants has been conducting the general business of a usurer and extortioner, and who has preyed upon and swindled the poor and ignorant negroes of his community. Against the other, it is charged that he was implicated in burning his own store for the insurance money, and it is claimed that both applicants do not possess good moral characters. As to whether the charges have been sustained, I am unable, and it is unnecessary, to say. They have offered absolute denial and strong proof to contradict the charges. The judgment of the court precludes an examination of the evidence upon the ground that the General Assembly of 1905 in adopting the Revisal has taken from this court the right to determine whether an applicant is a person of good moral character, and committed the conclusive and final determination of that highly important matter to any two attorneys authorized to practice in this court who may be selected by the applicant and who may be complacent enough to give the necessary certificate. I am of opinion (1) that the construction placed upon the act is erroneous; and (2) that when the power to grant licenses is possessed by this court, from whatever source derived, the exercise of it by the court is a judicial act, and cannot be controlled in any material feature by the Legislature. Prior to the act of 1905 it is admitted that this court not only passed upon the applicant's legal qualifications, but also upon his upright character. For its own information and guidance, the court formulated rules which the applicant must comply with preliminary to his examination. Among others was the one requiring a certificate of good moral character. For some reason or other, the wisdom of which is not apparent to me, the commissioners in compiling the Revisal of 1905 saw fit to embody these rules of court in the Revisal, and consequently when that compilation was adopted en bloc by the General Assembly these rules of court became a part of the

statute law of the state. It seems to me to be incontrovertible that the possession of a good moral character ought to be and is a necessary legal requirement to admission to the bar, and I cannot for a moment suppose that the eminent and reputable lawyers who compiled the Revisal, or the Legislature which adopted their work, intended to take from this court the right, which it has always exercised, to pass on that question. I say, with entire deference, that such a construction is too narrow and is sticking too much in the bark. "Qui hæret in litera hæret in cortice." Broom, Max. 685. The public policy of our state has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public and to the proper administration of justice, than legal learning. Legal learning may be acquired in after years, but, if the applicant passes the threshold of the bar with a bad moral character, the chances are that his character will remain bad, and that he will become a disgrace, instead of an ornament, to his great calling, a curse, instead of a benefit, to his community, a Quirk, a Gammon, or a Snap, instead of a Davis, a Smith, or a Ruffin.

Is it possible that the insertion of this precautionary rule of court into our statute law has brought about the very thing the rule was intended to guard against, viz., the possible—nay, probable—admission of immoral persons to the bar? Is it possible that it compels this court to grant licenses to persons of bad character notwithstanding the apparent purpose of the statute is to prevent that very thing? I do not think there can be a reasonable doubt that the purpose of the statute, and the motive that inspired its passage, is to keep the legal profession free of bad men. The profession of the law is one of the noblest and most important of all professions. The relation between attorney and client is very confidential, and often involves matters of the greatest delicacy, and it is of the highest possible importance to the welfare of the people of the state that those who are intrusted with their most important and private matters should be men of upright character.

Language is rarely so free from ambiguity as to be incapable of being used in more than one sense, and a literal interpretation of a statute may lead to an absurdity and fail to carry out the real purpose of the Legislature. When this is the case, courts should have recourse to Lord Wensleydale's Golden Rule, 2 App. Cas. 764, and let the spirit and purpose of the law control its letter, and so construe it as to advance the remedy and suppress the mischief aimed at by the framers. "The intention of the Legislature and the object aimed at, being the fundamental inquiry in judicial construction, are to control the literal interpretation of

particular language in a statute, and language capable of more than one meaning is to be taken in that sense which will harmonize with such intention and object and effect the purpose of the enactment." 26 Am. & Eng. Encyc. Law, 602, and cases cited. As illustrative of this idea, common sense accepts the ruling, cited by Plowden, that St. 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of a felony, does not extend to a prisoner who breaks out when the prison is on fire; "for he is not to be hanged because he would not stay to be burnt." So I hold in this case that an act of the Legislature, the undoubted purpose of which is to keep bad men out of an important profession, should not be so interpreted as to easily let bad men in. The words should be interpreted with reference to the object to be accomplished, for the legislative intention is easily deducible from the subject-matter of the statute, and its unmistakable purpose should be given full effect by this court. *Rex v. Hall*, 8 E. C. L. 59; *U. S. v. Caldwell*, 19 Wall. (U. S.) 264, 22 L. Ed. 214; *Opinion of Justices*, 7 Mass. 523. The purpose of the act being to exclude men of bad character from the profession, it follows logically that the certificates of good character are merely a preliminary requisite before the applicant can be examined as to his legal acquirements. They make out a prima facie case, and, if uncontradicted, entitle the applicant to his license if he passes the legal examination. The statute only prescribes what legal effect shall be given to a particular species of evidence if it stands entirely alone and uncontradicted. *State v. Barrett*, 138 N. C. 634, 50 S. E. 506, 1 L. R. A. (N. S.) 626. To hold that, when contradicted and evidence contra is offered, the certificates are conclusive, and this court cannot examine into the truth of the facts stated in them, is to frustrate and destroy the very noble purpose the Legislature plainly had in view. It is substantially holding that the law does not require good moral character, but only certificates thereof. There is a somewhat similar requirement in New Jersey, yet the justices of the Supreme Court of that state hold that they are not limited in their inquiry as to the moral character of an applicant for an attorney's license to the certificate, but will, and are bound, in cases attended with suspicious circumstances, to look behind it. I commend the exalted tone of their opinion, from which I extract the following: "The power of the court to reject the applicant on the ground of moral delinquency is clear and unquestionable. The power, it is admitted, is one of great delicacy and should be exercised with extreme caution, and with a scrupulous regard for the character and rights of the applicant. But, on the other hand, the standing of the profession must not be disregarded, nor must the court shrink from the performance of a clear duty, however embarrass-

sing." Attorney's License Case, 21 N. J. Law, 345. This continues to be the view of that court, for I find a case as late as 1901 wherein the reasons are given at length for refusing license on the ground of disreputable conduct by the applicant. *In re Harris* (N. J. Sup.) 49 Atl. 728.

In discussing the second proposition laid down by me, it is not necessary that I should deny to the General Assembly the power to regulate admissions to the bar. I can admit, for argument's sake, that the General Assembly may commit the right to grant licenses to the Bar Association of the state or to some other agency, if it sees fit to do so. That is all that is decided in the case of *In re Cooper*, 22 N. Y. 67, so much relied on in the opinion of the court. But the proposition contended for by me is expressly held to be law in that very case, viz., that, where power is conferred upon a court of justice to be exercised by it as a court, the action of the court is regarded as judicial, irrespective of the source from whence the power is derived. Nor have the usages and customs of our mother country any bearing upon this question, as seems to be indicated in the opinion. The Inns of Court educated the lawyers in the legal profession and called them to the bar. In case of supposed injustice the candidate for admission could appeal to the 12 judges in their visitorial capacity. They practically represented the judicial authority, although in theory they constituted only a domestic forum of final authority to do what they regarded as proper under the circumstances. The English system is founded upon immemorial usage, and the fundamental idea underlying it is that the court could best ascertain the qualifications of one desiring to practice before it from the judgment of those under whom he had prepared himself for work. We have no such system anywhere in this country, nor anything analogous to it. In this country where the power is conferred upon the courts, or exercised by them upon the principles of the common law, without special statutory authority, it is universally held that the court acts in its judicial capacity in granting admission to the bar. This is the opinion held by Chief Justice Taney, in *Ex parte Secombe*, 60 U. S. 13, 15 L. Ed. 565. Many courts hold that the power to admit is like the power to remove, an inherent power in the court, the exercise of which may be, as it often is, regulated by statute, but the statute does not create it; that its exercise is necessary and incidental to the court for its own protection. *State v. Winton*, 11 Or. 456, 5 Pac. 337, 50 Am. Rep. 486; *Ex parte Smith*, 28 Ind. 47. In *re Day*, 181 Ill. 90, 54 N. E. 646, 50 L. R. A. 519, holds that the admission of attorneys is not the exercise of a ministerial power, but is the exercise of judicial power, and the following language of Selden, J., in *re Cooper*, supra, is quoted with approval: "Attorneys and counsellors

are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature, and hence their appointment may with propriety be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their proper judicial functions." In the *American & English Encyclopedia of Law*, vol. 3, p. 287 (2d Ed.) it is said: "But the admission of an applicant to practice is a judicial act, and the attorney, when admitted, is an officer and member of the court. The Legislature has no power, therefore, to provide that any person possessing certain qualifications must be admitted. It cannot assume judicial powers; and in every case courts are vested with discretion as to whether any applicant is entitled to admission." In support of this the writer cites many cases. The Wisconsin Supreme Court says: "The Legislature has, indeed, from time to time assumed power to prescribe rules for the admission of persons to practice. When these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a co-ordinate branch of the government, without considering the question of power." In *re Goodell*, 39 Wis. 240, 20 Am. Rep. 42. In this case the court intimates plainly that, if the regulation is unreasonable, it will be disregarded. The Supreme Court of Indiana holds that admission to the bar is a purely judicial function, and that the power is inherent in the courts. In *re Leach*, 134 Ind. 671, 34 N. E. 641, 21 L. R. A. 701. The Pennsylvania Supreme Court holds the same, and speaking of an act of the Legislature upon the subject of admission to the bar, says: "Moreover, it is as unwise as it is illegal. It is an imperative command to admit any person to practice law upon complying with certain specified conditions. Yet between the time when the applicant has obtained his certificate of good character from the judge of the district, etc., and the presentation of the same to the court which he seeks to enter, he may have committed some act which would render him an unfit person to practice law or even to associate with gentlemen. No such iron-clad rule would ever be adopted by the judiciary to which the subject properly belongs. No judge is bound to admit, or can be compelled to admit, a person to practice law who is not qualified or whose moral character is bad. The profession of the law is one of the highest and noblest in the world. The relation between attorney and client is very close and involves matters of great delicacy. The attorney is an officer of the court, and is brought into close and intimate relations with the court. Whether he shall be admitted or whether he shall be disbarred is a judicial and not a legislative question." In *re Splane*, 123 Pa. 540, 16 Atl. 481.

I will not discuss the exclusive power of the General Assembly over the matter. Our statute plainly undertakes to vest in the Supreme Court, as a court, the power to grant licenses in these words: "No person shall practice law without first obtaining license so to do from the Supreme Court." The power is not given to the justices as individuals, but to the Supreme Court, which represents the judicial power of the state in its highest form. It is plain to my mind that the qualifications necessary to admission to the bar, as fixed by the act, are that the applicant must be 21 years of age, of good moral character, and of sufficient legal learning. The general grant of power to issue the license necessarily and by plain implication confers upon the court in its judicial capacity the power to determine each of these necessary statutory qualifications. It is admitted that age and legal learning are necessary qualifications. Why is not good moral character likewise a necessary qualification? If it is not a necessary qualification, why require certificates to that effect? Why require them to be filed with the clerk of this court if they are not for the information of the court? Why should the court be informed of the applicant's moral character if the court is not to pass on it? If the court is to pass on it, can the Legislature control the exercise of a judicial function by limiting the evidence to the certificates filed? The Legislature can no more do so than it can limit the court in its investigation of the candidate's legal learning. Note the disastrous effect upon the profession of the law if the court is bound by the certificates. Lawyers on the average are morally no better and no worse than other people. They do not claim to be other than human. There are some black sheep in their ranks as in every calling. One black sheep who wishes to enter can apply to two black sheep who are already in to certify to his good moral character. Result: More black sheep to degrade our noble profession. "Why should a citizen, even if he has committed some offense in the past, be deprived of the privilege of turning his face the other way and making an honorable effort to gain his living by the practice of law?" asks the court. I am one of the last of men to place an obstacle in the way of the penitent who has reformed. But I wish to know that he has in truth reformed; and, to be sure of it, I claim the right to investigate. A desire to enter the ranks of the law is no evidence of repentance of one's sins. I do not know a more profitable field for gifted rascals to exercise their talents in than in the practice of it. This makes it all the more important that the courts should be vigilant to keep them out. "It is not enough," says the Supreme Court of Connecticut, "for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essen-

tial to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices." *County Bar v. Taylor*, 60 Conn. 11, 22 Atl. 441, 13 L. R. A. 767.

To prevent the admission to this honorable and important profession of any one not thus entitled to public confidence, this court, and afterwards the Legislature, adopted these regulations. It is our duty to give them that broad and liberal construction which will effectuate the wise and beneficent purpose intended. It must not be understood from this opinion that I hold the applicants guilty of the charges preferred against them. We are precluded from passing on their guilt by the judgment of the court.

WALKER, J. (dissenting). I concur with Mr. Justice BROWN in dissenting from the opinion of the court. It seems to me clear that the Legislature did not intend to deprive this court of the power to determine who is a fit and proper person to be admitted to practice in the courts of the state, but only to require that the applicant for license should, "before being allowed to stand an examination," file with the clerk a certificate of his good moral character, to be signed by two attorneys who practice in this court, and that this should be prima facie sufficient to entitle him to his license, if otherwise qualified, but it was not intended to make this certificate conclusive evidence. Such a construction would defeat the manifest intention of the Legislature that no person should be admitted to the bar who is not of good repute. Suppose that after a certificate has been given by the two attorneys the applicant should to our knowledge be convicted of a felony, or any infamous offense, or should commit some act of so grave a nature as to admittedly disqualify him for the position of an attorney at law, would this court be bound to issue his license under such circumstances, and can it be imagined that the Legislature intended any such result? And yet under the decision of the court in this matter, the filing of the certificate and the possession of a competent knowledge of the law, would require us to admit an applicant in just such a case. A construction which would impose that duty upon us might so corrupt the administration of justice in the courts that it should not be presumed to be in accordance with the true meaning of the statute. The courts of this country have, therefore, held that statutes similarly worded merely provide that the applicant, as a condition precedent to his examination, shall furnish prima facie evidence of his good character, and they were not intended to restrict the power of the court to finally determine whether or not he possessed the requisite character. The court is therefore not limited in its inquiry as to the moral character of the applicant for an attorney's license to the certificate, but it will,

and is bound by the obligation of the duty necessarily imposed by law, to look behind it in all proper cases. Attorney's License Application, 21 N. J. Law, 845. The Legislatures of the several states have from time to time assumed to prescribe rules for the admission of attorneys to practice at the bar, and the courts have generally acted upon them when they have seemed reasonable, and in deference to the wishes of a co-ordinate department of the government, but the power to decide finally who possesses sufficient character for admission is a judicial function from the nature of the question, and is so regarded by all well-considered authorities. *Ex parte Garland*, 4 Wall. (U. S.) 333, 18 L. Ed. 366; *Matter of Goodell*, 39 Wis. 240, 20 Am. Rep. 42. In *Garland's Case*, the court says: "The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counselors, and are entitled to appear as such and conduct causes therein. From its entry the parties become officers of the court, and are responsible to it for professional misconduct. They hold their office during good behavior, and can only be deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded. Their admission or their exclusion is not the exercise of a mere ministerial power. It is the exercise of judicial power, and has been so held in numerous cases. Attorneys and counselors are not only officers of the court, but officers whose duties relate almost exclusively to proceedings of a judicial nature. And hence their appointment may, with propriety, be intrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their appropriate judicial functions"—citing *Matter of Cooper*, 22 N. Y. 81. So in the case of *Ex parte Secombe*, 19 How. (U. S.) 9, 15 L. Ed. 565, the same court said: "It has been well settled by the rules and practice of common-law courts that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed." 4 Cyc. p. 900 et seq., and *notae*.

The solution of this question does not depend upon the jurisdiction of this court, as supposed in the opinion of the majority, but upon its judicial power; there being a clearly marked difference between the two in respect to this matter. Article 4, § 8, of the Constitution confers jurisdiction upon this court to review matters of law and legal inference, and of certain issues and questions of fact, with the power to issue any remedial writs necessary to give it a general supervision and control over proceedings of the inferior courts. It shall have jurisdiction—that is, the power to hear and determine all such matters—but a moment's reflection will suf-

fice to show that this cannot be all the judicial power the court has. This was merely intended to define and determine its appellate jurisdiction, but not even by implication to deprive it of any part of the broad judicial power given by section 2. There are other matters of a judicial nature which this court may hear and determine other than those which are specified in section 8. Some of its powers are inherent, as being necessary for the preservation of its very existence, its dignity, and the enforcement of obedience to its orders and decrees. There are still others which arise by implication, as being essential to the full and effective exercise of the powers and jurisdiction which have been specifically granted. The two terms are not, therefore, exactly coextensive, although they may generally be considered as practically synonymous. But, whether they are or not the same in meaning, it must be remembered that section 8 refers only to the appellate jurisdiction of this court, and does not by its inclusive words deprive it of the jurisdiction or judicial power which must always reside in every court. Those powers which are implied as being necessary to the exercise of those which are expressed are as much given as if they had themselves been expressed. This is an unquestioned rule of construction, applicable alike to constitutions and statutes. I think, therefore, that no argument in favor of the conclusion of the majority can legitimately be drawn from the language of section 8 of article 4 of the Constitution as limiting the power of this court. Nor do I think any insuperable difficulty is presented by the suggestion that, if the power of the court to pass upon the character of the applicants is inherent, it inheres in all the courts. It belongs, of course, to any court having the power to examine and admit applicants to the practice of law, and this court has been designated for that purpose for nearly a hundred years. If an application could be made to any court, then the particular court to which it is made would have the same power that we have.

The best statement of the principle governing a case like this one is perhaps to be found in *Garland's Case*, namely, that the Legislature may prescribe the qualifications of an applicant, but the court before which he is examined must determine whether he possesses them; that being a judicial and not a legislative function. The application of this simple rule excludes any discussion of the inherent power of the court, and places the decision of the question upon a sensible and practical basis, and one in entire harmony with all our notions of the duties and functions of the different branches of our government. It is unfortunate that the explicit language of the former statute was changed, but I am quite sure it was the result of inadvertence, and was not intended by the Revisers or the Legislature to change

the meaning of the law and to divest this court of a power it has exercised since the first year of its existence.

The case of *Ex parte Thompson*, 10 N. C. 355, which is cited in the opinion of the court, would seem to be an authority against the conclusion that we have been divested by the Revisal of the right to inquire into the character of an applicant. It is true Chief Justice Taylor said that if the act of 1777 appeared, according to the usual rules of interpretation, to convey a peremptory direction to the court to examine the applicants then before the court, it could only yield obedience to the mandate, however striking might be the mischief and impolicy of such a course of legislation. He was then speaking of the qualification of citizenship in this state, which involved a political, and not a judicial, question. It was for the Legislature to say who should be citizens, or who should enjoy the rights of citizenship, such as the right to apply for license to practice law. It was a matter solely of public policy, and it was with reference to the question, in that phase of it, that the Chief Justice said what we have substantially stated. But the court undertook to decide, and did decide, that, notwithstanding the acts of 1777 and 1818 provided for the admission by the court to the bar of a person found to have competent law knowledge and an upright char-

acter, the court could still reject any one who did not have the qualification of citizenship, and even though the act, also, provided that a person coming into this state from any foreign country should be admitted if he had resided in the state one year and exhibited a testimonial of his unexceptionable moral character in the manner therein provided. The court added another qualification to those required by the act; it being deemed essential that it should be possessed by any one who should apply for admission to practice in our courts. The language of the court used in this connection is strong and most impressive. "Viewing the profession of the law as the source from which the superior judicial magistrates must be derived, and from which a large proportion of enlightened and efficient public officers is usually selected, every one must naturally feel solicitous that it should not fall into such hands as would lower it in the national opinion." And again: "No longer a nursery in which merit is trained under the directing hand of experience and qualified to render manly and essential services to the community, the legal profession, 'in its nature the noblest and most beneficial to mankind, in its abuse and debasement the most sordid and pernicious,' would sink into a mere mercenary instrument, without sympathy in the public prosperity, and without hold on the public confidence."

STATE v. KINCAID.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. SEDUCTION—DECLARATION OF OTHER INTERCOURSE—ADMISSIBILITY.

In a prosecution for seduction under promise of marriage, the prosecutrix testified that defendant, as an excuse for not marrying her after pregnancy, said that he was in a mess with another girl, that he would stop with such other girl, and come as soon as he could. Held admissible as declarations renewing the obligation to marry, though tending to show the commission of another offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, § 77.]

2. SAME—CORROBORATIVE EVIDENCE.

Corroborative evidence was also admissible, of statements by the prosecutrix relating such statements by defendant, as a reason why they were not married.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seduction, §§ 77, 83–86.]

3. SAME—TRIAL—CONDUCT OF COUNSEL.

Defendant, in a prosecution for seduction, having admitted illicit relations with one other girl besides prosecutrix, and evidence having been properly admitted of a declaration by him, as an excuse for not marrying prosecutrix, that he was in trouble with still a third girl, it was proper for counsel for the state in his argument to allude to such other sexual offenses.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1674.]

4. CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—TRANSFER OF PROPERTY BY DEFENDANT.

In a prosecution for seduction, it is proper for the state to ask defendant if he had not transferred his property to avoid the result of the indictment.

Connor and Walker, JJ., dissenting in part.

Appeal from Superior Court, Burke County; Justice, Judge.

S. A. Kincaid was convicted of seduction under promise of marriage, and appeals. Affirmed.

Self & Whitener and S. J. Erwin, for appellant. The Attorney General and Isaac T. Avery, for the State.

BROWN, J. The defendant contends that the court erred in admitting testimony that he was living in fornication and adultery with Lillian Davis, and the brief of the defendant's counsel points out the pages of the record alleged to contain such evidence.

It is contended that such evidence is collateral to the issue, and that it constitutes an attack on the defendant's character before he had become a witness, and put his character in issue. Many authorities are cited in support of such contention, which it is unnecessary to review as we think the counsel for the defendant have misconceived the purport and character of this evidence. It was brought out by the state, in chief, in the examination of the prosecutrix who testified as to her seduction by the defendant under promise of marriage, and that sexual intercourse with him had continued for some time. She says, "When I became preg-

nant, I mentioned his promise to marry me. * * * He would say, 'Wait,' and said he was in a mess with a Davis girl. * * * He said he would stop off from the Davis girl, and come in a month or so or as soon as he could, * * * and that the Davis girl had broken open a letter I wrote him."

For the purpose of corroborating Ethel Hood, Mrs. Jennie Hood, her aunt, was permitted over the defendant's objection to testify: "Ethel told me she was going to marry Sidney Kincaid. I asked her when, and she said 'he says he can't marry now. That he was in trouble with the Davis girl.'" All this evidence was received before the defendant was offered as a witness. It was perfectly competent at the time it was offered, and the fact that the defendant afterwards, when examined in his own behalf, denied all relations with Lillian Davis did not make it incompetent. These are declarations of the defendant to Ethel Hood. Conversations with her in which he gives his relations with Lillian Davis as an excuse for postponing the promised marriage with the prosecutrix. These declarations are a part of the res gestæ, so to speak, acknowledging and renewing the obligation to marry, but, at the same time, offering his relations with Lillian Davis as a reason for putting off the performance of the promise. It is elementary learning that declarations of a defendant pertinent to the issue, made in the hearing of a witness, are always admissible against him. *State v. Lawhorn*, 88 N. C. 634. The testimony of Mrs. Jennie Hood was not offered in any sense as "character evidence" against the defendant, but solely as corroborative evidence tending to corroborate Ethel Hood's testimony as to the promise of marriage, and why its performance was so long delayed. The record fails to disclose any testimony whatever as to the relations of the defendant with Lillian Davis, except the declarations of the defendant made to the prosecutrix, offered in chief by the state as evidence of a promise to marry, and as an excuse for postponing the ceremony.

During the argument before the jury, one of the counsel for the state was arguing that the defendant was now living in fornication and adultery with Lillian Davis, after debauching Myrtle Sudderth, and seducing the prosecutrix. The defendant objected to the argument as to the defendant's living in fornication and adultery with Lillian Davis. The court overruled the objection, and allowed counsel for the state to proceed with his argument as to the adultery of the defendant with Lillian Davis, and the defendant excepted. We see no reason why the court should have stopped counsel from commenting upon the defendant's relations with Lillian Davis and Myrtle Sudderth. He practically admitted his illicit relations with the latter, and that he left the state on account of them. His relations with Lillian

Davis, proved by his declarations to the prosecutrix, were properly the subject of comment, and we cannot see from the record that the counsel overstepped the bounds of legitimate criticism. *State v. Horner*, 139 N. C. 603, 52 S. E. 136.

The defendant, being examined in his own behalf, was asked by the solicitor of the state if he had not transferred his property to avoid the result of this indictment. The defendant objected to the question, and the objection was overruled. The witness said that he had done so, and the defendant excepted. We see as little merit in this exception as in the others in the record. It was competent to ask the defendant on cross-examination concerning his acts in reference to this charge against him. It would have been equally as competent to ask him if he had not fled from the charge.

We have examined each exception and find them all without merit. The case seems to have been fairly tried, and we find no error.

CONNOR, J. (dissenting). I concur in the opinion that the declarations of the defendant made to the prosecutrix were competent for the purpose of supporting or corroborating her testimony in regard to the promise of marriage. It was not competent to prove that either at the time they were made or at the trial the defendant was living in adultery with the "Davis girl." The only controverted question in the case was whether, prior and as an inducement to the prosecutrix to surrender her person to the defendant, he promised to marry her. This, if made at all, was some seven years before the trial and several years before the alleged declaration. I concur with Mr. Justice Brown that "the record fails to disclose any testimony whatever as to the relations of the defendant with Lillian Davis, except

the declarations of the defendant made to the prosecutrix." This being true, I do not think that the counsel for the prosecution should have been permitted to argue to the jury "that he was then living in fornication and adultery with Lillian Davis," after the defendant's objection. After his honor had correctly and clearly stated that the declaration was admitted for the sole purpose of corroboration, he was not called upon to introduce evidence to show that he was not living with Lillian Davis, except for the purpose of showing the improbability of his having made the declaration. Whether he was or was not so living was not relevant to the issue. He did, however, expressly deny that he had illicit relations with her, and it is well settled, that being collateral, his denial was conclusive. *State v. Cagle*, 114 N. C. 835, 19 S. E. 766. To permit the attorney for the state to use his declaration, admitted and competent for one purpose only, to persuade the jury that he was guilty of a separate and distinct crime and draw therefrom prejudicial conclusions in regard to his guilt upon this issue, was error. This is especially so after he had denied that he had such illicit relations with Lillian Davis. The testimony developed, on the part of the defendant and the prosecutrix, a course of lewd conduct well calculated to excite disgust, and bring a jury to a verdict of guilty. It is in such case that the rules of procedure and of evidence, based upon experience and reflection, are in danger of being relaxed. The safety of the citizen, when charged with crime, depends upon at least a substantial enforcement of these rules. While the defendant may be guilty, he is entitled to be tried according to the "law of the land." I think that there should be a new trial.

WALKER, J., concurs in dissenting opinion.

KELNER v. COWDEN.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. APPEAL—DISMISSAL—RENEWAL.

When an appeal has been dismissed for failure on the part of the appellant to deposit with the clerk of the appellate court within six months after his case has been docketed, a sufficient amount to pay for printing the record, as provided by section 18, c. 135, Code 1906, Annotated, such appeal may be renewed at any time within two years from the date of the judgment, order or decree appealed from.

2. SAME—REVIEW.

When an order is appealed from, within the time provided by the statute, and the error complained of is based solely on an appealable order not reversed or appealed from, entered more than two years before the appeal is taken, such error cannot be reviewed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3452, 3495.]

3. SAME—REVERSAL.

When an order for the payment of money is so appealed from, and is based solely on a former order making an allowance to attorneys to be paid from the estate of a decedent which former order is null and void, although entered more than two years before the appeal is allowed, the order so appealed from will be reversed.

4. MOTIONS—VOID ORDER.

A void order is not made valid by lapse of time, and ever remains without effect as completely as if never entered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 35, Motions, §§ 84-86.]

(Syllabus by the Court.)

Appeal from Circuit Court, Cabell County.
Bill by R. Kelner against W. K. Cowden, administrator. Decree for plaintiff, and defendant appeals. Affirmed in part, and reversed in part.

Rufus Switzer and Brown, Jackson & Knight, for appellant. Simms & Enslow, L. D. Isbell, and T. J. Bryan, for appellee R. Kelner. Wallace & Fitzpatrick, for appellee O. J. Wilkinson.

McWHORTER, P. R. Kelner, holding a judgment lien of \$81.60 against the real estate of John B. Laidley, filed her bill in the circuit court of Cabell county against W. K. Cowden, administrator of John B. Laidley deceased, and judgment creditors of the said John B. Laidley, which cause was referred to O. J. Wilkinson, a special commissioner appointed for the purpose, to ascertain and report an account showing the real estate of which said Laidley died seised, its nature, where situate, and the value thereof; the dates, amounts, and priorities of the liens, if any, upon said real estate; to whom the said Laidley was indebted, and in what amounts, the date and nature of said claims; to make settlement with W. K. Cowden, as administrator of the estate of said Laidley; and in what parcels of the tract of 240 acres of land known as the "Pennybacker Tract" mentioned in the bill, if any, the defendant Jennie B. Laidley was entitled to dower; and any other matter that any of the parties in interest might require.

The commissioner filed his report in the cause in March, 1900, claiming for services as said commissioner 900 hours at \$.75 per hour, making his charge \$675. On the 21st day of September, 1900, an order was made allowing said account of \$675 to be paid out of the estate. There appears to have been nothing more done in the case until the 21st day of July, 1903, when the following order was made in said cause: "This day L. D. Isbell and T. J. Bryan, attorneys for the plaintiff and the other creditors of said John B. Laidley, deceased, appeared and asked the court to make an allowance to them for their services rendered in this cause, and the court being familiar with the facts and the value of the services rendered by said attorneys, is of opinion that they are entitled to compensation for said services, and doth hereby allow the sum of \$1,800.00 to be paid to said Attorneys out of any funds that may come into the hands of said Laidley's administrator, or any other person or corporation that may have, or may hereafter have funds in their hands belonging to the estate of the said John B. Laidley, deceased, and this shall be and constitute a chargeable lien upon any of the funds aforesaid." Afterwards, in December, 1903, the said Bryan and Isbell and the said O. J. Wilkinson, respectively, filed their several petitions, representing that the said Cowden, administrator of the estate of said Laidley, had received from Huntington Land Company in full settlement and consideration of the judgment held by the said Laidley in his lifetime against Margaret Sands the sum of \$605.81, which sum was paid by virtue of an order entered in this case and of an order entered in the ejectment suit of said Laidley against Sands revived in the name of Cowden, administrator of Laidley, praying for a rule against said Cowden to appear and show cause why he should not pay over to the petitioners, Bryan and Isbell, the said sum of \$605.81 on account of their order for \$1,800, and the petition of Wilkinson praying that the same might be paid to him on account of his claim which he insisted was a preferred claim to be first paid in accordance with the order of the circuit court. Said Cowden, administrator, resisted the said petitions by answer. On the 7th day of January, 1906, the cause was heard upon the proceedings theretofore had, and upon the orders made, allowing to Isbell and Bryan, attorneys, the said \$1,800, and upon the rule against said Cowden and the petition of Wilkinson, commissioner, asking for his fees to be paid out of the money in the hands of said administrator, and upon the answer of said Cowden to the rule and petitions and evidence adduced in support thereof, when the court made an order, directing the said administrator to pay over to Isbell and Bryan and Wilkinson, out of the funds in his hands, each the sum of \$200, to be credit-

ed on their respective claims, and to be allowed as a credit to the administrator on his settlement of said estate. The said Cowden, administrator, obtained an appeal from and supersedeas to the order of September 21, 1900, allowing the fees of commissioner Wilkinson and the order of July 21, 1903, making the allowance to the said Bryan and Isbell, and the order directing the payment to each of said petitioners the sum of \$200, entered on January 7, 1905, which appeal was allowed on the 7th day of February, 1905.

At the September term of this court, 1905, the appellant having failed to print the record as provided by section 18, c. 135, Code 1906, Annotated, and the rules of the court, the appellees, Isbell and Bryan, by their counsel moved the court to dismiss the said appeal which motion was docketed and continued to the court at Charleston, November 21, 1905, at which time and place the motion was heard and the appeal dismissed, and, upon such dismissal, on the application of the appellant an appeal was again allowed. It is now insisted by the appellees that more than two years having elapsed from the entry of the orders allowing the fees claimed by the said O. J. Wilkinson and the allowance made to the said Isbell and Bryan, it was too late to allow an appeal, the two years within which the statute required the appeal to be allowed had elapsed four months before the application was made for the appeal now pending. The order of January 7, 1905, distributing the \$600 of money in the hands of the administrator to the appellees was within the two years within which an appeal could be taken under the statute, and being an order "requiring money to be paid" was appealable under clause 7, § 1, c. 135, Code 1906, Annotated, the distribution was made in payment of the allowances provided for in the former orders. The first order, that of September 21, 1900, cannot be reversed in this appeal by reason of the running of the statute, the matter of the allowance to Wilkinson on account of his fees for making the report being within the power of the court. It appears that the principal objection of the appellant to the allowance to the commissioner was because he had failed to affix to his report the affidavit required by section 5, c. 137, Code 1906, Annotated, verifying the time he was actually and necessarily employed in making his report. This objection was overcome by the return to a writ of certiorari bringing up the affidavit so required, which was made and filed in the cause before making the order of allowance to Wilkinson. The order of January 7, 1905, in so far as it directed payment to Wilkinson, was based solely upon the order of September 21, 1900, which was appealable, unreversed, and not appealed from, and therefore valid, and not reviewable. In *Shumate's Ex'rs v. Crockett*, 43 W. Va. 491, 27 S. E. 240 (Syl. point 1), it is held: "No er-

ror in a final or an appealable decree will be considered upon an appeal not taken within two years from its date."—*Buster v. Holland*, 27 W. Va. 510. And in *Stout v. Manufacturing Co.*, 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843 (Syl. point 2), it is held: "An appeal taken in time from a decree will bring up for review every former order or decree not itself appealable, no matter when entered, and every appealable decree entered not more than two years before the appeal; but it will not bring up for review any appealable decree or order entered more than two years before the appeal. Nor can any error in the decree or order appealed from in time be reviewed, if that error be based solely on an appealable decree or order entered more than two years before the appeal; and furthermore, of course, no error in an order or decree back of such appealable decree, dating over two years back, can be reviewed, no matter what the character of the order or decree in which it was committed." On examination of the authorities of other states, I find that wherever an appeal has been dismissed by reason of the appellant failing to comply with the requirements of the law governing appeals he may have another appeal allowed if applied for within the time prescribed by the statute from the date of the decree or judgment appealed from. In *Johnson v. Polk County*, 24 Fla. 23, 8 South. 414, it is held: "The dismissal of an appeal for failure to comply with some requirement of the law governing appeals does not bar a second appeal, nor a writ of error, taken in due time,"—citing *Harris v. Ferris*, 18 Fla. 81. And in *Yeaton v. Lenox*, 8 Pet. (U. S.) 123, 8 L. Ed. 889: "A party may, after an appeal has been dismissed for informality, if within five years, bring up the case again." *Claimants of Steamer Virginia v. West*, 60 U. S. (19 How.) 182, 15 L. Ed. 594; *United States v. De Pacheco*, 61 U. S. (20 How.) 261, 15 L. Ed. 820; 2 Cyc. 529. The order of January 7, 1905, must be affirmed only as to the direction of the payment to Wilkinson of the sum of \$200 on account of the allowance made to him by the order of September, 1900.

The order of July 21, 1903, however, stands upon a very different footing from that of September 21, 1900. Without any pleading whatever of any kind, making no parties, serving no notice on any one interested as it appears from the order making the allowance "L. D. Isbell and T. J. Bryan, attorneys of John B. Laidley, deceased, appeared and asked the court to make an allowance to them for their services rendered in this cause"; and upon this the court proceeded to make to them the allowance of \$1,800, to be paid out of the estate of a decedent against which they were prosecuting a suit to enforce judgment liens. It cannot be possible that services were rendered by them in this suit to authorize such allowance.

While it appears from the order that the allowance was "for services rendered in this cause," the record does not disclose any such services in this cause, the filing of a short bill and decree of reference. But on the other hand counsel in their brief claim that great and valuable services were rendered by them for the decedent in former years, and say: "That this suit grows out of the hard fought, protracted and bitter litigation running through more than 25 years between John B. Laidley and the Central Land Company of West Virginia, and C. P. Huntington, its receiver, three times before this Court on appeal and decided successively in 30 W. Va. 505, 4 S. E. 705; 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. Rep. 797, and 33 W. Va. 624, 11 S. E. 39, and by federal judges Jackson and Goff several times and finally by the Supreme Court of the United States June 3, 1895, and January 18 and 19, 1900, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91, and 176 U. S. 668, 20 Sup. Ct. 526, 44 L. Ed. 630, and was made up of some 21 or 22 ejectment suits, the one for a tract of land of 240 acres, 140 of which was by Cook's map of Huntington, laid off into lots in the heart of the city; the other 19 against persons to whom the Central Land Company in its life time had sold lots and were held by individuals who had built houses and homes thereon, in all of these suits Mr. Laidley substantially prevailed, recovering the fee to the hundreds of vacant lots, and waiving the fee and accepting the original purchase price with interest on the improved lots, aggregating from \$18,000 to \$20,000, if all was collected; the whole property recovered by Laidley and his vendees found to be worth in the year of 1888 at least \$230,000 (see opinion of Judge Lucas of the Supreme Court, 33 W. Va. at page 640, 11 S. E. at page 45). Some time in June, 1896, industriously and patiently following up a decision of Judge Nathan Goff of the federal Court of Appeals, dissolving an injunction and dismissing Huntington; receiver's bill, John T. Wilson, F. L. Doolittle, and T. J. Bryan [one of the attorneys now resisting this appeal], acting under an order from Judge Doolittle of state court, took possession of this valuable property for Mr. Laidley, who was at the time ill and though on July 9, 1898, before the Hon. J. J. Jackson, judge, contempt proceedings were instituted and vigorously prosecuted against said Wilson, Doolittle, and Bryan, possession of the estate was never returned to the Central Land Company or its receivers and assigns, Judge Goff allowing an appeal and review of said order of contempt upon said Bryan giving bond in the penalty of \$5,000 conditioned to deliver up said land if decision should be adverse; this action and possession of said land by said Bryan, Doolittle, and Wilson inuring to the benefit of Laidley's

estate, and to his creditors, from this blow the Central Land Company, nor its receivers ever recovered, and shortly thereafter conceded utter defeat, sold out the balance of the holdings in West Virginia, gave up the fight and retired from the state." This shows clearly that the allowance of \$1,800 was not for services rendered in this cause, but for a claim against the estate of the decedent of long standing for services rendered in his lifetime; this being so, it was a claim or debt against the estate pure and simple, and if it was intended to prosecute the claim against the estate, proper proceedings should have been taken upon due process, or by filing and proving the same before the commissioner when this cause was before him under the decree of reference, as other claims were proven. This disposes of the appellee's contention that Cowden, the administrator of the estate of Laidley, having no personal interest in the matter of the allowances, is not entitled to appeal, the orders being simply orders of distribution of the estate which he could not question; but we find from the statement of appellees themselves that the circuit court has adjudicated a claim against the estate for services rendered the decedent in his lifetime, years before the institution of the suit in which the allowance was made, and that without notice or pleadings of any kind to enable the personal representative of the estate to make defense. It is well settled that a judgment or decree cannot be entered in the absence of pleadings upon which to found the same, and if so entered it is void. *Moseley v. Cocke*, 7 Leigh (Va.) 224; *McCoy v. Allen*, 16 W. Va. 724; *Roberts v. Coleman*, 37 W. Va. 143, 16 S. E. 482; *Chapman v. Railroad Co.*, 18 W. Va. 184; *Renick v. Ludington*, 20 W. Va. 511, 536; *Bland v. Stewart*, 35 W. Va. 518, 14 S. E. 215; *Pickens v. Love's Adm'r*, 44 W. Va. 725, 29 S. E. 1018; *McNutt v. Trogden*, 29 W. Va. 469, 2 S. E. 328; *Lilly v. Claypool*, 59 Id. —, 53 S. E. 22. The order of July 21, 1903, being wholly without pleadings to support it is a nullity, absolutely void, and being the only basis upon which the order of January 7, 1905, could rest, in so far as it provided for the payment of \$200 each to Isbell and Bryan, the same must be reversed as to such provision. A void order is not made valid by lapse of time and ever remains without effect as completely as if never entered.

The order of January 7, 1905, in so far as it directs the payment of \$200 to Commissioner Wilkinson, is affirmed; and, as to the provision therein for the payment of \$200 each to Attorneys Bryan and Isbell, the same is reversed, and the cause remanded to the circuit court of Cabell county for further proceedings to be had therein according to the principles governing courts of equity.

STATE v. BARRICK et al.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. RAPE—INDICTMENT—SUFFICIENCY.

An indictment charges that defendants "in and upon one Martha Harbert * * * feloniously did make an assault, and her, the said Martha Harbert, * * * did ravish and carnally know," is not bad for failing to aver that Martha Harbert is a female.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 26.]

2. INDICTMENT—SUFFICIENCY—NAME OF ACCUSED.

An indictment which names a defendant as "Charles Foyles, commonly called 'Happy Jack,'" is not bad because of the use of the words "Happy Jack."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 221.]

3. RAPE—CHASTITY OF PROSECUTING WITNESS.

As to evidence of reputation of a prosecutrix upon an indictment for rape touching her chastity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 55-59.]

4. CRIMINAL LAW—JOINT INDICTMENT—SEPARATE TRIALS.

There is no error in a separate trial of one defendant on an indictment for felony against several, simply because the record does not show that the state asked a separate trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1380-1390.]

5. SAME—NEW TRIAL.

A new trial in a felony case will not be granted upon affidavit that the prosecutrix, giving evidence of the crime of rape upon her, has since admitted that the accused was innocent. Her own affidavit making such admission cannot be used to obtain such new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2331, 2332.]

6. SAME—STATEMENT OF PROSECUTING ATTORNEY.

It is not error for a prosecuting attorney, in an opening statement to the jury on a felony trial, to state the facts which he expects to be shown by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1659.]

(Syllabus by the Court.)

Error to Circuit Court, Wetzel County.

Livy L. Barrick and others were indicted for crime. Barrick was convicted, and brings error. Affirmed.

J. W. McIntire, M. R. Morris, John Ross, Jr., and E. Earl McIntire, for plaintiff in error. C. W. May, Atty. Gen., for the State.

BRANNON, J. Livy L. Barrick was sentenced to the penitentiary for 13 years upon an indictment in the circuit court of Wetzel county charging him and Fred Detwiler, Charles Pharet, and Charles F. Foyle with rape upon the person of Martha Harbert, a girl between 17 and 18 years of age.

It is said that the court erred in overruling a demurrer to the indictment. One ground of demurrer is, that Martha Harbert is not alleged in the indictment to be a female. We hold that her Christian name imports that

she is a female. Who would understand it otherwise? Besides that, the indictment states that the defendants "in and upon one Martha Harbert * * * did make an assault, and her, the said Martha Harbert, then and there * * * feloniously did ravish and carnally know." The personal pronoun "her" tells that she is a female. Both these plain points were ruled in Taylor's Case, 20 Grat. (Va.) 825. I will add that, as the charge is that the defendants "ravished and carnally knew" Martha Harbert, it imports, in legal intendment, the feminine gender, as that could not be said of a man.

The other ground for the demurrer is that, in naming Charles Foyle, the words "commonly called 'Happy Jack'" are used. It is only a further description of identity of the person; only an alias, giving another name by which he is called, to meet proof. The law of criminal pleading allows the use of an alias name. 2 Cyc. 79. That name, "Happy Jack," is called by counsel an epithet, and it is said to have been used for derision and ridicule, hurtful to the accused. We do not see force in this. And how could it harm Barrick, when the name applied to another defendant?

The court overruled a motion to strike out all the evidence of Martha Harbert, because she was brought into court upon a cot and reclined upon it while testifying, stating that she was sick. Can counsel sustain the claim that a sutor in court is to lose the testimony of a witness because he appears in court on crutches, or in an invalid chair or cot? No authority is given us for such an extreme stand.

Complaint is made that the court refused to allow answers to some questions whether the witness was acquainted with the reputation of the prosecutrix. Some of the questions did not fix the time of the prevalence of the reputation before the offense, as they must. 4 Elliott on Ev. § 3101. And the questions do not show that the witnesses obtained their knowledge of reputation before the transaction; before the community was agitated, and perhaps divided, in sentiment and opinion as to such reputation; before the *lis mota*. 1 Greenl. Ev. § 461 (1). It has been held that a witness, called to impeach a prosecutrix on a trial for rape, must confine himself to what he knew before the offense. State v. Forshner, 80 Am. Dec. 132; State v. Sibley (Mo.) 33 S. W. 167, 53 Am. St. Rep. 482. I regard this sound law, and think that it would overrule the point. But, aside from these considerations, there is another reason why there is no error in this matter, and that is, that the defense did not state what it was designed to show by the proposed examination. We may guess; but the witness did not answer to let us have his knowledge, nor was it shown what it was expected to develop. It was not stated that the witness knew anything on the subject. Many times has this been held

a bar against such error. It is notable that counsel often overlook this matter in examination of witnesses. *State v. Clifford*, 59 W. Va. —, 52 S. E. 981. In *Handley v. Railroad*, 59 W. Va. —, 53 S. E. 625, it is said to be settled law. This objection applies to several other points of exclusion of evidence.

It is assigned as error that Barrick was separately tried, and that the record does not show that either he or the state asked a separate trial. The state can choose to try defendants jointly indicted either jointly or separately, if the court allows it. *State v. Prater*, 52 W. Va. 132, 43 S. E. 230. Moreover, no objection to a separate trial on the part of the prisoner appears in the record. If the point were tenable, that would have to appear; but he has no right to object. Nor is there anything in the fact that the record does not state that the state elected to have a separate trial. As there was a separate trial, we must assume that the state asked, and that the court granted, it.

It is objected that the record does not show that the stenographer who took the evidence was sworn. We will presume that he was. At any rate, the court heard the evidence, and, though it did use the stenographer's report of the evidence, the court certifies it as the evidence taken on the trial. There is no evidence in the record of the omission of an oath.

Upon a motion for a new trial Barrick filed the affidavit of his sister, Daisy Barrick, stating that the prosecutrix had admitted to her that the defendants were not guilty; that she had gone to the blacksmith shop, where she alleged the offense had been committed, of her own accord; that the defendants were no more guilty than she was; that she would not have prosecuted them, but for persuasion by a certain person, and would not prosecute the case further. A similar affidavit of Zora Bland was filed. Some other affidavits were filed stating that the prosecutrix declared that she would not have begun the prosecution but for such persuasion, and did not desire to go further with it. Barrick also filed an affidavit of the prosecutrix herself, made after the trial and pending a motion for a new trial, stating that she went to the blacksmith shop on the night of the offense of her own accord, and met Livy Barrick in the shop, but that it was not true that he had sexual intercourse with her by force and against her will; that she drank too much, and that she had been persuaded to make the charge, and, having done wrong, wished to right it, as she could not rest and know that Barrick would go to prison for a crime which he did not commit. Martha Harbert had given evidence to the very reverse on the trial, swearing that Barrick forced her to drink liquor, made her drunk, kept her in the shop all night, stripped her clothing from her, and that all four defendants, being present, ravished her; one

choking and holding her while others accomplished the act. All were drinking. After Barrick's trial, and before the decision of his motion for a new trial, Detwiler was tried, and on his trial Martha Harbert gave evidence of accusation, and utterly denied making the statements to Daisy Barrick and Zora Bland and others contained in the affidavits above referred to. She was taken from the trial to a hospital, and while there sick was applied to, to make the affidavit just spoken of as made by her. She swears that she was sick and nervous under the influence of morphia, which was prescribed by a physician to relieve rheumatic pains. Physicians say that she was nervous and weak. Her affidavit was prepared by an attorney acting for the prisoner. She says that she knew little of the paper—did not know 10 minutes later what it contained. The persons who made the affidavit gave evidence of her admissions to the same effect as in their affidavits. It was agreed that their evidence, as also hers, given in the Detwiler Case should be read on the motion of Barrick for a new trial so far as relevant thereto. These admissions of Martha Harbert are not strictly after-discovered evidence. To grant a new trial for after-discovered evidence, this court must see that the evidence is of such character that it ought to change the verdict. Some of the admissions are simply that prosecutrix was persuaded to prosecute, and did not want the accused prosecuted. That may have been from feeling of mercy, felt by many, and does not show an admission of innocence, but is a mere circumstance tending to show it. As to the admission made to Zora Bland, it was contradicted by the prosecutrix and disbelieved by the jury in the Detwiler trial. As to Daisy Barrick, is it not highly improbable that she would be in possession of such an admission long before her brother's trial, as she says she was, and not disclose it to save him? She says she did not disclose it, as her father did not wish her to be a witness. Highly improbable! The second jury disbelieved it, a circumstance which may be considered as bearing on the credit of her and Zora Bland. Can we say that it clearly calls for another verdict? Shall we reverse a fair trial on doubt? New trials on after-discovered evidence, the law says, should be granted with great caution, because such evidence can be gleaned or trumped up in every grave criminal case. 14 Ency. Pl. & Prac. 807. As to the affidavit of the prosecutrix: The accused does not pretend in his affidavit that he will or can by her prove such admission of innocence. It is therefore not newly discovered evidence, to go before the jury by the evidence of the prosecutrix. And she was a witness on the trial. The truth is that all these admissions are to be used to impeach the girl as a witness, and it is everywhere held that verdicts will not be set aside on

after-discovered evidence to impeach a witness on the former trial. *State v. Williams*, 14 W. Va. 851; *Halstead v. Horton*, 38 W. Va. 727, 18 S. E. 953; *Carder v. Bank*, 34 W. Va. 38, 11 S. E. 716. Some cases say that, to set aside a verdict based on false testimony, the witness must be convicted of perjury committed on the former trial. 14 Ency. Pl. & Prac. 810. This shows how slow courts are to annul trials on the ground that a witness swore falsely. If this were not so, where would trials end? But a decisive view of the case is that it is proposed to use Martha Harbert's admission that Barrick is not guilty to overthrow the verdict. "Newly discovered evidence of admissions of a prosecuting witness contrary to his testimony is not sufficient to authorize a new trial. Such evidence is not admissible as the admissions of a party to the action, but can be used only as impeaching evidence, and a new trial will not be granted for this purpose." 14 Ency. Pl. & Prac. 810.

Zora Bland was brought into court after the evidence had been closed, and the state's attorney was making the closing argument, and the court refused to hear her evidence to prove that Detwiler was elsewhere till 1 o'clock at night. This is a discretionary matter and rarely ground for a reversal. *Livingstone's Case*, 7 Grat. (Va.) 658.

The prosecuting attorney, in opening the case to the jury, said: "The information I have, and what I believe the evidence to be, is that she [Martha Harbert] was caught by the neck and held by this defendant and the other defendants, and each ravished and raped her." This is no assertive statement. It cannot be held that the attorney intended it to be taken by the jury as evidence, or that the jury would act on it. It merely is a short statement of what he expected the evidence to be. It is very common for an attorney to make a statement of the salient facts of the case intended to be proved, in order to acquaint the jury with the case, so as to enable them to apply the evidence. "It should develop facts which the testimony is to establish, but none which the party is not in a situation to prove." 1 Bishop, *Crim. Proc.* § 969. It is allowable and usual. 2 Ency. Pl. & Prac. 706; *Dowda v. State*, 74 Ga. 12. Besides, if objectionable, there should have been a request for an instruction to disregard it before it can be used for error. *Landers v. Railroad*, 48 W. Va. 492, 33 S. E. 296. How could it possibly be ground of reversal? *State v. Shawn*, 40 W. Va. 1, 20 S. E. 873; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

The evidence is elaborate and highly conflicting, and the case rests on its weight and credit, and under many cases this court is forbidden to set it aside as contrary to the evidence. We have carefully examined all the points made by counsel, and have been compelled to conclude that we cannot reverse the trial. The case has been fairly tried by

a jury under the supervision of a competent, fair-minded judge. He has carefully considered the application for a new trial, the only important feature of the case under the assignments of error. We have been careful the more as a young man, just 21 years of age, has had put upon him by a jury of his country the stigma of guilt of a deeply heinous crime upon a young girl, hardly out of childhood, under most harrowing circumstances. If guilty, and he has been so found to be by a jury, the penalty is light. It is only another instance of thousands where "King Alcohol" has wrought ruin.

We are compelled to affirm the judgment.

STATE v. DETWILER et al.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. CRIMINAL LAW—TRIAL—ABSENCE OF ACCUSED.

If evidence is taken on a felony trial in the absence of the accused, though it does not appear what the evidence was, a new trial must be granted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2168.]

2. RAPE—EVIDENCE—REPUTATION.

In a prosecution for rape, evidence may be given to prove the general reputation as to unchastity of the prosecutrix, or that she was a common prostitute, to show her consent to the act, but not to establish her incredibility as a witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 55-59.]

3. CRIMINAL LAW—INSTRUCTIONS.

The mere failure of an instruction to say that the evidence must prove guilt "beyond a reasonable doubt" will not reverse.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1922, 1991.]

(Syllabus by the Court.)

Error to Circuit Court, Wetzel County.

Fred Detwiler and others were convicted of crime, and Detwiler brings error. Reversed.

W. G. Snodgrass, for plaintiff in error.
C. W. May, Atty. Gen., for the State.

BRANNON, J. Fred Detwiler was convicted upon an indictment in Wetzel charging him and Livy L. Barrick, Charles Tharet, and Charles Foyles with rape upon the person of Martha Harbert. The demurrer and some other questions raised in the case are disposed of in *State v. Barrick* (decided this term) 55 S. E. 652.

The defendant moved a new trial because he was absent from the courtroom while a witness of his was being examined. It is questioned by the state whether it is proven that the witness answered a question when the accused was absent. It is useless to detail or discuss the evidence on this matter. An affidavit of M. V. Over distinctly states that the witness was asked and answered at least

one question while the accused was gone. We so find the fact, as that affidavit is not overborne. What that question and answer were does not appear; but that is immaterial. Under principles found in the opinion written by Judge Poffinbarger in *State v. Sheppard*, 49 W. Va. 582, 39 S. E. 670, we are compelled to grant a new trial for this case.

State's instruction 6 is contested. We need not consider it, as no objection was made to it. *State v. Briggs*, 58 W. Va. 291, 52 S. E. 218. But it is not open to the objection made by counsel for failure to insert the element of reasonable doubt in the consideration of the evidence by the jury. This ought not be omitted; but it is not ground for reversal. Point 12, *State v. Robinson*, 20 W. Va. 714, 43 Am. Rep. 790. And other instructions presented this matter to the jury. Though not objected to, we are asked to say that State's instruction 8 is bad in not telling the jury they must believe "from the evidence." For myself I would hesitate to condemn it. It is commented upon in *State v. Sheppard*. But it can be corrected on a future trial. The accused was refused his instruction 1. We see no objection to it, but hardly think its refusal error, because its statement of law under the facts is covered by No. 8. These instructions involve no law necessary to be discussed here. They bear on well-known law.

Instruction 2 for defense, refused. There was evidence that, in a quarrel between Barrick and Detwiler, Detwiler told Barrick that, if it had not been for Barrick, he (Detwiler) would not have been in the blacksmith shop where the offense was alleged to have occurred, to which Barrick replied, "Oh! you know we are all guilty." The instruction told the jury that Barrick's statement that all were guilty "could not be considered" as showing Detwiler's guilt, unless he at the time admitted guilt. It took from the jury the power to weigh this evidence to say what its weight was, as Detwiler made no reply to what Barrick said. The instruction is not good.

Instruction 7, asked by defendant, says that if the prosecutrix did voluntarily, and with the same intent that actuated the defendant, or directly or indirectly consented to commit the act of sexual intercourse with the defendant, then such sexual intercourse would not be rape. This instruction is bad. What is the meaning of the words "or directly or indirectly"? Do they refer to the question whether the prosecutrix was intoxicated? The instruction is vague. Besides, I think the real body of it covered by defendant's No. 8. Defendant's instruction 11, refused, asserts the proposition that evidence as to the chastity of the prosecutrix would go to affect both her credibility as a witness and as affecting the question of the probability of the intercourse being voluntary or against her will. The law is clear that evidence may be given by the accused to show the unchastity of the prosecutrix before the alleged rape,

or that she was a common prostitute, because it tends to repel the charge that the act was against her will, and proper for the consideration of the jury on the question whether the act was one of violence or with her consent. But does it go further? Can it be used to impeach the credibility of the prosecutrix as a witness? We do not think it can. Mr. Bishop, in 2 Bishop, Cr. Proc. § 905, after saying that evidence of unchastity may be received, says: "This evidence is sometimes regarded as properly impairing her credibility—a doubtful proposition, and in some cases denied." We find the books and cases generally stating that such evidence is received to show the probability of the woman's consent, and the statement does not include credibility—does not say that it is admitted to show incredibility of the woman as a witness. 1 Wigmore, Ev. § 62. 4 Elliott on Ev. § 3101, says it is received "as bearing upon the question of consent." 23 Am. & Eng. Enc. L. (2d Ed.) 870, says it is received "as bearing on the probability of her consent." See 1 Greenl. Ev. (16th Ed.) § 146 (2); *Smith v. State*, 80 Am. Dec. 368; *Rice v. State* (Fla.) 17 South. 286, 48 Am. St. Rep. 245; *State v. Reed*, 94 Am. Dec. 337. *Commonwealth v. Kendall*, 18 Am. Rep. 469, limits it to show consent. Now, when, in the general run of trials, you go to impeach the credibility, you must limit evidence to general reputation for truth and veracity, and you cannot prove particular acts of crime. In some states you can prove particular offenses, or general reputation as to particular offenses; but our law says that the evidence must be restricted to general reputation for truth and veracity. *Uhl's Case*, 6 Grat. (Va.) 706. As stated in *Clay v. Robinson*, 7 W. Va. 365, that is our rule. Why should proof of general unchastity in a case of rape be admitted to impeach veracity of a witness any more than proof that a witness is a common thief or of bad general character in another case? As judge Lomax said in *Howell's case*, 5 Grat. (Va.) 664, it does not follow, because a female is unchaste, she may not tell the truth. So, instruction 7 is bad as applying evidence of unchastity to prove both want of consent and incredibility of the witness.

We see no objection to instruction 18, telling the jury that no instruction or remark of the court was to be taken as intimating an opinion on the evidence or facts. It is not suggested that the court intimated such opinion. Still the instruction properly states the law, and as the party asked it, and is entitled to an instruction in his own language, we see objection to it. It is correct in telling the jury that they were judges of the evidence and all instructions must be taken together, and unless, applying them as the law to all the facts, they were convinced beyond reasonable doubt of guilt, they must acquit. We think this feature is likely covered by instructions 16 and 20, and perhaps others.

Judgment reversed, and new trial granted.

ANDERSON v. PRINCE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. JUDGMENT—MOTION FOR JUDGMENT—NOTICE.

A notice of a motion for judgment, under authority conferred by section 6 of chapter 121 of the Code of 1899 [Code 1900, § 3786], must indicate with reasonable certainty that the demand or obligation, which it is proposed to reduce to judgment, is that of the defendant; and, if it does not, the court should quash it on motion, made in proper time.

2. SAME—INSUFFICIENCY OF NOTICE—OYER OF INSTRUMENT.

Insufficiency of a notice of a motion for judgment, under said section, for the amount due upon a note not under seal, is not cured by the reading of the note as upon oyer thereof demanded. As proferat cannot be made nor oyer demanded of an unsealed instrument, such a paper cannot be made a part of the pleadings in that way.

3. SAME—QUASHING NOTICE.

Failure to comply with the statute in respect to the docketing of such a notice is not cause of quashing it.

4. SAME—MISDESCRIPTION IN NOTICE.

If the person giving such notice correctly describe himself therein as the payee of the note, the word "assignee," added to his signature to the notice, may be ignored as a mere misdescription of the person, not of the note, and will not sustain an exception on the ground of variance.

5. SAME.

Such addition does not vitiate the notice or preclude judgment in favor of the plaintiff in the capacity accorded him in the body of the notice.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County.

Action by P. H. Anderson against E. R. Prince and others. Judgment for plaintiff, and defendant A. T. Smith brings error. Reversed, and judgment rendered for plaintiff in error.

J. C. McCluer, for plaintiff in error. J. H. Strickling, for defendant in error.

POFFENBARGER, J. In the circuit court of Tyler county, P. H. Anderson recovered a judgment, on motion, after notice, against A. T. Smith, for the sum of \$976.23, with interest, to which judgment Smith obtained a writ of error.

The debt is evidenced by a promissory note, reading as follows: "Friendly, W. Va., April 7th, 1904. Ninety days after date I promise to pay to the order of P. H. Anderson, nine hundred fifty-four dollars. \$954.00. Value received negotiable and payable at with interest. The First National Bank of Friendly, W. Va. Ed. R. Prince." The following indorsement appears on the back of it: "A. T. Smith." On the face of it the following memorandum is stamped: "July 6, 1904, Friendly W. Va., protested for non-payment."

Endeavoring to proceed under section 6 of chapter 121 of the Code, the plaintiff caused the following notice to be served on Smith:

"To Ed R. Prince and A. T. Smith: You are hereby notified that I will move the circuit court of Tyler county on the 9th day of August, being the first day of the next regular term of said Circuit Court, for judgment against you for the sum of nine hundred fifty-four dollars (\$954), with interest thereon from the 7th day of April, 1904, protest fees \$1.25, and costs of such motion on a certain note in writing executed by you, Ed R. Prince, on the 7th day of April, 1904, and payable to me, ninety (90) days after the date thereof, the date being the day and year last herein named, and in the sum of nine hundred fifty-four dollars (\$954) with interest from its date, negotiable and payable at the First National Bank of Friendly, W. Va. At which time and place you may attend and show cause against such motion if you can. Respectfully, P. H. Anderson, Assignee." On the 10th day of August, 1904, the notice was docketed, and on the 17th day of the same month, Smith appeared and moved to quash the notice, charging against it insufficiency in law. The order recites that before so moving he craved oyer of the note and had the same read to him. The court overruled the motion, and the defendant pleaded that he did not owe the note and protest fee, for the amounts of which the plaintiff demanded judgment, and issue having been joined, the case was continued until August 19, 1904, when the parties waiving a jury, the court heard the evidence and rendered the judgment complained of. No service of the notice on Prince having been returned, the order of August 17th recites abatement of the action as to him. As the notice fails to connect Smith with the note otherwise than to apprise him of an intention to take judgment against him on it, the motion to quash should have been sustained. It does not aver that it is his note or that he signed, made or indorsed it, or indicate how he became liable to Anderson by reason of it.

It is unnecessary to repeat here what has been so often said about the liberality with which the courts treat a proceeding by motion under the statute above mentioned. It suffices to refer to the decisions. See *Knox v. Horner*, 58 W. Va. 136, 51 S. E. 979; *County Court v. Miller*, 34 W. Va. 791, 12 S. E. 1078; *Shepherd v. Brown*, 30 Va. 13, 3 S. W. 186; *Board v. Parsons*, 22 W. Va. 309; *White v. Sydenstricker*, 6 W. Va. 46; *Booth v. Kinsey*, 8 Grat. (Va.) 560; *Segouline v. Auditor*, 4 Munf. (Va.) 898; *Lemoigne v. Montgomery*, 5 Call (Va.) 528; *Drew v. Anderson*, 1 Call (Va.) 51; *Cookes v. Bank*, 1 Leigh (Va.) 433; *Graves v. Webb*, 1 Call (Va.) 443; *Stephoe v. Auditor*, 3 Rand. (Va.) 221. According to all these authorities, the purpose of the notice is to acquaint the defendant with the grounds on which he is proceeded against, and must be so plain that he cannot mistake the object of the motion. In proceeding by notice, the formalities of summons, rules,

and declarations are dispensed with. The notice takes the place of the summons and declaration. In *Shepherd v. Brown*, Judge Green treats it as a pleading. So regarded, it should indicate with reasonable certainty upon what obligation, demand, or account judgment is sought; and, to say that it must show, in some intelligent way, that the demand or obligation, which it is proposed to reduce to judgment, is that of the defendant, is to require but little of the plaintiff, and give the defendant the least protection that is consistent with safety to his interests. Escape from this difficulty is attempted by reliance upon the recital of the demand of oyer of the note. On the authority of *Meredith's Adm'r v. Duval*, 1 Munf. (Va.) 77, *Vanmatre v. Giles*, 1 Rob. (Va.) 343, *Jarret's Adm'r v. Jarret*, 7 Leigh (Va.) 91, and *Thompson's Ex'r's v. Boggs*, 8 W. Va. 70, it is contended that the reading of the note made it a part of the notice, and was tantamount to an amendment. This position is untenable. "Profert cannot be made nor oyer demanded unless the declaration avers a sealed instrument." *Riley v. Yost*, 58 W. Va. 213, 52 S. E. 41, 1 L. R. A. (N. S.) 777. In all the cases above mentioned the actions were predicated on sealed instruments. The reading of the note, on oyer demanded, did not make it a part of the notice.

Other assignments of error are as follows: (1) Failure to return the notice to the office of the clerk of the circuit court; (2) failure to docket the notice before the commencement of the term; (3) failure to docket it on the 9th day of August, 1904, the day designated for the making of the motion, and docketing it on the 10th day of August; (4) variance between the notice and the note produced in the description of the payee; (5) omission to describe the plaintiff as assignee in the order of August 10th; (6) rendition of judgment in favor of "P. H. Anderson" instead of "P. H. Anderson, Assignee"; (7) failure of the judgment to follow the notice by omitting to describe the plaintiff as assignee. For the first there is no basis. The record shows the notice was filed in the clerk's office more than 20 days before the date named in it for the making of the motion. If the second and third are irregularities, they were waived by failure to ask a continuance. They constitute no ground for abatement or the quashing of the notice. *Knox v. Horner*, 58 W. Va. 136, 51 S. E. 979. Addition of the word "Assignee" to the signature of Anderson in the notice could not have misled the defendant. In view of the allegation in the notice that the note on which judgment would be asked had been executed by Ed. R. Prince and made payable to Anderson, Smith must have known the plaintiff, by the use of the word "Assignee," had merely misdescribed himself. He could not have been both payee and assignee. At any rate, the use of that word did not misdescribe the note. Nor can we say the plaintiff sued

as assignee, for there is no allegation in the notice that he held the note as assignee.

For the error hereinbefore noted, the judgment must be reversed, the notice quashed, the motion dismissed, and judgment rendered here in favor of the plaintiff in error for his costs, both in this court and in the court below, all of which will be certified.

JONES v. HARMER.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. APPEAL—RECORD—BILL OF EXCEPTIONS.

A bill of exceptions to the opinion of a county court under section 48, c. 39, Code 1906, is a part of the record if the record shows that the bill was signed by the commissioners, or a majority of them, at the same term of court at which the trial took place, although the record fails to show that the bill was otherwise noted thereon.

2. SAME.

Under section 9, c. 131, Code 1906, a bill of exceptions signed by a judge in vacation within 30 days after the adjournment of the term is not a part of the record unless the judge also certified the bill and the order certifying it was recorded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2404, 2405.]

(Syllabus by the Court.)

Error to Circuit Court, Harrison County.

From an order affirming the appointment of Harvey W. Harmer as administrator with will annexed, Isabella Jones brings error. Affirmed.

Haze Morgan, for plaintiff in error. John Bassel, for defendant in error.

COX, J. Isabella Jones, plaintiff in error, complains of an order of the circuit court of Harrison county affirming the action of the county court of that county in confirming the appointment of Harvey W. Harmer as administrator with the will annexed of Robert J. Criss, deceased, made by the clerk of that court in vacation, and in refusing to appoint her as the personal representative of Robert J. Criss. She claims that Robert J. Criss, of said county, died on April 8, 1905, owning personal estate, and leaving surviving a widow, and George J. Criss, his only son and heir at law; that on May 1, 1905, George J. Criss, the son, died intestate, leaving surviving him plaintiff in error and other collateral kindred, his only heirs at law; that the widow of Robert J. Criss waived her right to administer; that, as heir at law and distributee of the estate of George J. Criss, plaintiff in error is also distributee in his right of the estate of Robert J. Criss; that the appointment of Harvey W. Harmer as administrator was made by the clerk within 30 days after the death of Robert J. Criss; that plaintiff in error made application for appointment as personal representative of Robert J. Criss to said clerk within 30 days

after the death of said Criss, and that her application was refused.

At the threshold of this case the question arises whether or not there is a bill of exceptions making the facts upon which the county court acted a part of the record. Without the facts, there is no error apparent in the action of the county court, or in the order of the circuit court affirming that action. The appeal to the circuit court was under section 47, c. 39, Code 1906. Section 48 of that chapter provides for a bill of exceptions to be signed by the commissioners holding the court, or a majority of them, and for mandamus in case of refusal. If this section is the only authority for a bill of exceptions in the cases mentioned in section 47, then no provision is made for the signing of a bill in vacation by the commissioners. No authority for the signing of a bill in vacation being given by that section, under its provisions the bill referred to must be made and signed in term. *Telegraph Co. v. Hobson & Son*, 15 Grat. (Va.) 122; *Winston v. Gilles*, 27 Grat. (Va.) 530; *Welty v. Campbell*, Judge, etc., 37 W. Va. 797, 17 S. E. 312; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; 3 Cyc. 38. If it appeared from the record that the bill was signed at the term at which the trial was had, that would be sufficient to make the bill a part of the record without any other order making it so, because the statute says, in substance, that, if the bill states the truth, it shall be signed by the commissioners, and that the same shall be a part of the record. Under this provision the record must at least show a signing. In this case a bill, or what purports to be a bill, of exceptions signed by two commissioners is copied in the printed record. Appended to this is the following: "A copy. Attest: Charles F. Holden, Clerk of the County Court of Harrison County, West Virginia." There is nothing in the record to show that the bill was signed in term by the commissioners. On the other hand the record fails to show that there was any session or term of court on July 22, 1905, the day the bill was signed by two commissioners. The order of the county court confirming the appointment by the clerk of the defendant in error as administrator was made by the county court in session on July 14, 1905. No continuance of the term beyond that day is shown. On that day the plaintiff in error was granted leave to file a bill of exceptions within 10 days. Eight days thereafter the bill of exceptions in this case purports to have been signed by two commissioners. The record wholly failing to show that the bill of exceptions was signed in term, we must treat it under the facts appearing as signed in vacation. Looking alone to section 48, the bill cannot be treated as part of the record.

Section 9, c. 131, Code 1906, might be invoked to aid this bill. This section provides for the signing of bills of exception in

vacation in certain cases within 30 days after the adjournment of the term. Without here deciding that this section applies to bills of exceptions in a county court, we can say that, if it is applicable, the bill here in question is not saved by its provisions. If this section applies, then its provisions must have been complied with. This section says: "The court may, in vacation, within thirty days after the adjournment of the term, make up and sign any bill of exceptions and certify the same to the clerk of the court, who shall enter it upon the order book of such court." Where the judge makes up and signs a bill of exception in vacation, it must also be certified to the clerk, whose duty it is to enter it upon the order book. There is no order in vacation or otherwise by the commissioners of the county court, or either of them, certifying the bill of exceptions to the clerk of that court, and no entry of such an order of record. Without such order certifying the bill, and its entry of record, the bill is not a part of the record under the provisions of section 9, c. 131. *Wells v. Smith*, 49 W. Va. 79, 38 S. E. 547; *Ketterman v. Railroad*, 48 W. Va. 606, 37 S. E. 683; *Craft v. Mann*, 46 W. Va. 478, 33 S. E. 260; *Bank v. Wetzel*, 58 W. Va. 1, 50 S. E. 886. The mere attestation of the clerk that the bill is a copy is not sufficient. The order certifying must be by the court or judge signing the bill, and be entered on the order book by the clerk.

For want of a bill of exceptions which is a part of the record, we cannot examine the facts, and the order complained of does not appear to be erroneous. It is therefore affirmed.

TOWN OF FULTON v. NORTEMAN.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. MUNICIPAL CORPORATIONS—ORDINANCES—UNJUST DISCRIMINATION.

To be valid, municipal ordinances must be free from such vices as discrimination against the sale or use of articles of lawful trade, merely on the ground of the place of their production, as well as promotive of the purposes for which the power to pass and enforce them has been delegated by the Legislature, or is inherently possessed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 245-254.]

2. SAME — MANUFACTURE OF FERTILIZERS—USE OF DEAD ANIMALS.

A municipal ordinance, declaring it unlawful for any person to bring into the town, the authorities of which passed it, the carcass or dead body (or any portion thereof) of any animal intended for burial, cremation, or manufacture into fertilizer of any kind, and for any person to bury, cremate, or manufacture into fertilizer, or cause to be buried, cremated, or manufactured into fertilizer, any such carcass, dead body, or a portion thereof, so brought in, and for any person to receive such a carcass or dead body within the town, but not prohibiting the bringing in of such carcass or dead bodies for other purposes, nor making it unlawful to manufacture fertilizer in the town from such

materials, discriminates against valuable articles used in lawful trade and business, on the ground of location with reference to municipal lines, in so far as it forbids importation thereof for the purpose of manufacture into fertilizer, and is, therefore, void to the extent aforesaid, although, but for such discrimination, it might be valid as an ordinance promotive or protective of health and restrictive of an injurious and offensive transaction, pursuit or business.

(Syllabus by the Court.)

Error to Circuit Court, Ohio County.

Action by the town of Fulton against William Norteman. Judgment for plaintiff, and defendant brings error. Reversed.

Caldwell & Caldwell and Dovener & Fickelsen, for plaintiff in error. James W. Ewing, for defendant in error.

POFFENBARGER, J. The question presented by this record is whether or not an ordinance passed by the town of Fulton is valid. William Norteman was convicted, in the criminal court of Ohio county, on a charge of having violated it. The circuit court of that county affirmed the judgment on a writ of error. This court granted a writ of error to the two judgments aforesaid.

The material sections of the ordinance read as follows:

"Section 1. It shall be unlawful for any person to bring into the town, the carcass or dead body (or any portion thereof) of any animal intended for burial, cremation or manufacture into fertilizer of any kind.

"Sec. 2. It shall be unlawful for any person to bury, cremate or manufacture into fertilizer, or to cause to be buried, cremated or manufactured into fertilizer within the said town, any carcass or dead body mentioned in Section 1 of this ordinance, or any portion of such body.

"Sec. 3. It shall be unlawful for any person to receive within the town any carcass or dead body mentioned in Section 1 of this ordinance, or any portion of such carcass. In any prosecution under this section, if the delivery of such carcass or portion thereof at any fertilizer plant be proved, it shall be presumed that it was permitted by the owners and operators of such plant and each of them, unless it appear that such person did not know or suspect any such delivery, or that he endeavored to prevent it and gave prompt notice thereof and full information to the mayor before the prosecution."

The material parts of an agreed statement of facts filed in the case read as follows: "It is further agreed that said defendant, Wm. Norteman, did, on the 16th day of May, 1906, in violation of said ordinance, bring into said town portions of a carcass, or carcasses, or dead body or dead bodies of animals, intended for manufacture. It is further agreed that Wm. Norteman, the defendant, was, on the day last aforesaid, in the employ of the Wheeling Butchers' Association, which association operated on said last-named date, and for a long time prior thereto, in the

town of Fulton, a fertilizer plant; that said association was incorporated under the laws of the state for the purpose of manufacturing fertilizer; that dead bodies of animals were used as necessary ingredients in said fertilizer; that said Norteman brought into said town on said day portions of a carcass, or carcasses, or dead body or dead bodies of animals to be manufactured into fertilizer in said town by the said Wheeling Butchers' Association, which said dead bodies of animals were necessary for the conduct of said business as aforesaid; and that, in order to reach the said plant of the said butchers' association it was necessary for said William Norteman to pass into the said town of Fulton. The purpose of this agreed state of facts on appeal to the criminal court is to have the validity of said ordinance tested and adjudicated by said court." The ordinance took effect on the 15th day of May, 1906, and on the next day Norteman violated it, and these proceedings immediately followed.

In presenting the case, counsel for the plaintiff in error discuss, at considerable length, the law relating to the powers of municipal corporations to abate nuisances and the requisites of procedure in the exercise of such power; but the consideration of the validity of this ordinance does not seem to involve extensively legal principles of that kind. The ostensible purpose of the ordinance is not to suppress the business of manufacturing fertilizer in the town, nor does it provide for abatement of the fertilizer plant which the agreed statement of facts shows is in operation in the town. Furthermore, the ordinance is not sufficiently broad, either in the terms used or in the spirit thereof, to prevent or abate, as a nuisance, the transportation of carcasses of dead animals along the streets. It merely inhibits the bringing into the town of such carcasses from beyond its limits, and the burial, cremation, and manufacture into fertilizer of carcasses brought in from the outside. The most that can be said of it is that it inhibits the bringing in of such articles for any of the three purposes named, and this inhibition extends to citizens and residents as well as to nonresidents. Limited and restrained in its operation to this extent, its object can hardly be said to be the suppression of any business as a nuisance. It might be better described, as regards its object, as an ordinance passed, under the general power, given in the charter, to prevent injury or annoyance to the public or individuals from anything dangerous, offensive, or unwholesome, for the purpose of curtailing or limiting a practice which the council deems offensive and unwholesome. It does not prohibit generally the bringing in of the carcasses of dead animals. They may be hauled through the streets from one side of the town to another and deposited beyond its limits, or brought in for any purpose other

than those of burying, cremating, and manufacturing them into fertilizer. Owing to the peculiarity of this ordinance, in respect to the object thereof, as indicated by its terms, the determination of the question presented necessitates a rather extensive inquiry into, and careful consideration of, the legal principles involved. The decisions are uniform to the effect that ordinances must not be oppressive, nor in restraint of trade, nor against common right. They must be impartial and general in operation. A further restriction is that the vesting in an officer or tribunal of power to act arbitrarily or capriciously, in giving or withholding permission to use property in any lawful manner, or to carry on a business or occupation, is not within the competency of a municipal corporation, although it may have the power of regulating the use of the property or the pursuit of such business or occupation. *Smith Municipal Corporations*, § 526; 21 Am. & Eng. Ency. Law, 983, 988. Most of these limitations are generally specified by the courts and law-writers as mere elements of unreasonableness; but, in the final disposition of most of the cases arising under ordinances which are held to be void, the conclusions are that the ordinances, in their operation and effect, go entirely beyond mere abuse of discretionary power and violate some legal right, or contravene some principle of public policy. There is, however, a class of cases in which ordinances have been overthrown apparently on the ground of mere abuse of discretionary power. Here it seems to me to be entirely proper to say the ground of the decision is unreasonableness of the ordinance. Thus, in *Ford v. Standard Oil Company*, 32 App. Div. 596, 53 N. Y. Supp. 48, an ordinance, relating to the inspection of oil by the sealer of weights and measures, which permitted him to charge for such services of inspection $8\frac{1}{4}$ per cent. of the entire value of the oil inspected, and imposed no restrictions upon him and prescribed no rules for the regulation of his conduct, was held to be unreasonable and oppressive. The power of the city of Auburn to cause oil to be inspected and to charge a fee for the service was undoubted, but the mode of the exercise of that power was such as to amount to an abuse of the discretion vested in the municipality by the statute. It required no more trouble and expense to test 1,000 barrels of oil than to test 1, but the ordinance made the cost, in the one case, only a few cents, and, in the other, a large amount of money. In *Buffalo v. Baking Co.*, 39 App. Div. 482, 57 N. Y. Supp. 347, an ordinance providing that all bread baked and sold, or offered for sale, by licensed bakers in the city, should be made into loaves weighing $1\frac{1}{4}$ pounds, and imposing a penalty for its violation, was held to be an unreasonable exercise of police power and an unwarrantable interference with the rights of individuals engaged in trade. The city authorities had

power to regulate the sale of bread, but, in the exercise of that power, they had interfered with the business of manufacturing and selling bread in respect to a matter which did not, in any degree, affect the people injuriously. The ordinance neither corrected nor prevented any evil, real or imaginary, and was in no sense beneficial to the public. Hence, so far as its passage was within the competency of the city council, it amounted to an unreasonable exercise of its powers. For this alone it would have been declared void, but, in the restraint it laid upon trade, it went beyond mere abuse of discretionary power and violated positive law. A strikingly similar ordinance was declared invalid by the Supreme Court of Illinois in *Frost v. Chicago*, 52 N. E. 869, 1 Mun. Corp. Cas. 390. It made it unlawful to cover anything containing fruit offered for sale, with any colored netting, or other material, having a tendency to conceal the true color or quality of the fruit. The court said it was unreasonable and oppressive. The Chief Justice, delivering the opinion of the court, said: "It will be noticed that the provision in question of the ordinance does not make it unlawful to sell decayed or unwholesome fruit, or to practice deception on the public by methods employed in packing or displaying it. From whatever view the ordinance is regarded, it is difficult to see how it can be of any public benefit whatever; and while, ordinarily, that is a question for the municipal legislature, it may be considered by the courts in determining the question of reasonableness. * * * It was shown, and is a matter of common knowledge, that much fruit is shipped and sold wrapped up in tissue paper and in tinfoil, and in packages and baskets covered with wood, all of which material effectually conceals the 'true color and quality' of the fruit, until removed. It would be as reasonable to prohibit the one as the other. Fruit dealers would be subjected to unjust and oppressive discrimination by the enforcement of such an ordinance." A great many ordinances have been held invalid because, in their operation, they imposed restraint upon trade. Under the power of regulation for the accomplishment of some necessary purpose, a reasonable restraint of trade is allowable, but, when the exercise of that power is merely officious, not based upon a state of facts from which it can be seen that it works any beneficial results to the community, or protects the citizens from any injury or evil, the restraint is said to be unreasonable. This is noticeable in cases already cited. Another illustration is found in *Kosciusko v. Slomberg*, 68 Miss. 469, 9 South. 297, 12 L. R. A. 528, 24 Am. St. Rep. 281, holding as follows: "In the absence of an epidemic or other circumstances apparently rendering the ordinance necessary for the preservation of the public health, an ordinance of a town is void which declares it unlawful to bring therein or of-

fer for sale second-hand clothing, without first having produced satisfactory proof to the mayor that such clothing did not come from a locality where contagion or infection was prevailing or had prevailed. Such an ordinance is an unjust and unreasonable restraint of trade." Other decisions proceeding upon the same theory, and coming to the like conclusion, might be cited.

An ordinance is against common right when it denies to one citizen or class of citizens what is permitted to others, or imposes burdens upon one person or class of persons, to which others similarly situated are not subjected. Such ordinances generally relate to the exercise of trade, pursuit of vocations and callings, or the use of property. In such cases, it is plain that the vice of the ordinance is not unreasonableness, but want of legislative power. It is unconstitutional. It denies to the citizen the equal protection of the laws. Thus, in *County of Los Angeles v. Cemetery Association*, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, it is held as follows: "A county ordinance making it unlawful to establish, extend, or enlarge any cemetery within the limits of the county, without first obtaining permission of the supervisors, but impliedly permitting burials in cemeteries already established, without restriction, is both unreasonable in making the right to pursue a lawful avocation depend upon the arbitrary will of the supervisors, and unequal in its operation, in assuming to limit the unrestricted privilege of burial to one class of citizens, and to deny to it another class within the same district, or to make the latter subject to the arbitrary will of the supervisors to grant or to refuse that privilege. Such ordinance is invalid, and cannot be enforced by the county." In *Yick Wo v. Hopkins* and *Wo Lee v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1004, 30 L. Ed. 220, the Supreme Court of the United States made the following declaration of principles: "A municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provisions of the Constitution of the United States if it confers upon the municipal authorities arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected, for the carrying on of the business. An administration of a municipal ordinance for the carrying on of a lawful business within the corporate limits violates the provisions of the Constitution of the United States if it makes arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances." In these cases the ordinance itself did not proscribe certain persons or classes of persons, by name, but did the almost equivalent thing of conferring upon

officers the power to do so, and the court held such power could not be exercised. The acts of the officers, under the ordinance, were regarded as the acts of the municipal authorities, and hence the ordinance itself was declared to be vicious and unconstitutional; just as in *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, the same court declared that, "whoever, by virtue of his public position under a state government, deprives another of life, liberty, or property without due process of law, or denies or takes away the equal protection of the laws, violates that inhibition; and, as he acts in the name of and for the state, and is clothed with her power, his act is her act." In such cases, invalidity seems clearly to be referable, not to unreasonableness in the ordinance, but to lack of municipal power. Often statutes have been held unconstitutional and void because discriminative and in derogation of common right. Thus, in *Wally's Heirs v. Kennedy*, 2 Yerg. (Tenn.) 554, 24 Am. Dec. 511, it is held that every partial or private law which directly professes to destroy or affect individual rights, or to afford remedies which lead to similar consequences, is unconstitutional and void. See, also, *Officer v. Young*, 5 Yerg. (Tenn.) 320, 26 Am. Dec. 268; *Jones' Heirs v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Budd v. The State*, 3 Humph. (Tenn.) 483, 39 Am. Dec. 189. The principles declared in the foregoing cases were held by the same court to be applicable upon the inquiry as to the validity of an ordinance, passed by a municipal corporation which resulted in the following conclusion: "The municipal authorities of the city of Nashville have no power under their charter to discriminate in taxing privileges between merchants and manufacturers and other dealers residing without the limits of the city and members of the same class residing in the city. Such discrimination or special taxation of one class of persons would be beyond the authority of either state or municipal legislation." *Nashville v. Althrop*, 45 Tenn. 554.

Ordinances against common right might, in many instances, be overthrown upon grounds other than that of adverseness to common right. Thus, in *Sayre Borough v. Phillips*, 148 Pa. 432, 24 Atl. 76, 16 L. R. A. 49, 33 Am. St. Rep. 842, an ordinance of the borough of Sayre which prohibited all persons from engaging in the business of peddling, the selling of goods from house to house, by sample or otherwise, without a borough license, and fixed the price of such license at a figure evidently intended to be prohibitive, but, by a proviso, exempted all residents of the borough from the operation of the ordinance, was held invalid. Mr. Justice Williams, in discussing the ordinance in the light of legal principles, said: "It professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough

license, and it fixes the price at a figure that makes, as it was evidently intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially, it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious, but, at the end of the prohibition section of the ordinance, a proviso may be found which exempts all residents of the borough of Sayre from its operation. The proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but injurious competition. That the resident dealer and peddler may enjoy a larger trade, the nonresident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of professional labor, and protect the village lawyer and doctor as well as the village grocer and peddler." To the same effect is *Shamokin Borough v. Flannigan*, 156 Pa. 43, 26 Atl. 780. In federal law, this would be municipal legislation on a subject of exclusive federal control. In state law, it is municipal legislation, respecting a subject concerning which power is rarely, if ever, delegated to municipal corporations, namely, regulation of trade among citizens of the state. The limitations upon the powers of states and municipal corporations to discriminate between persons are perhaps no more rigid than that upon their powers to discriminate between products of different sections, or property situated on opposite sides of municipal lines. In *Greensboro v. Ehrenreich*, 80 Ala. 579, 2 South. 725, 60 Am. Rep. 180, the court held as follows: "Power conferred on a municipal corporation by its charter, 'to pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious or contagious diseases, and to preserve the health of the inhabitants,' does not confer authority to enact an ordinance making it unlawful for any person 'to import, sell, or otherwise deal in second-hand or cast-off garments, blankets, bedding or bedclothes,' with a proviso excepting the sale of such articles when not imported, or which have not been used by persons having infectious diseases." In *Webber v. Virginia*, 103 U. S. 344, 26 L. Ed. 565, the Supreme Court of the United States held as follows: "A statute of Virginia requires that the agent for the sale of articles manufactured in other states must first obtain a license, for which he is required to pay a specific tax for each county in which he sells or offers to sell them, while the agent for the sale of articles manufactured in that state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Held that the statute is in conflict with the commerce clause of the Constitution of the United States, and void. Commerce among

the states is not free whenever a commodity is, by reason of its foreign growth or manufacture, subjected by state legislation to discriminating regulations or burdens." Mr. Justice Field, in delivering the opinion, said: "The agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them, while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and, if this is made to depend upon the foreign character of the articles—that is, upon their having been manufactured without the state—it is to that extent a regulation of commerce in the articles between the states." Though in this case we have nothing to do with interstate commerce, the reason of this decision, and numerous others to the same effect, is applicable. It is the policy of intrastate law, as well as of federal interstate law, that all citizens shall have the same privilege in respect to trade and occupation. Counties, towns, and cities cannot, consistently with the spirit of our laws, arbitrarily erect barriers against one another in the form of ordinances, discriminating between the products of sections, respecting the privileges of sale, or between the citizens of different sections respecting their vocations. Courts condemn ordinances on the ground of discrimination and partiality, respecting persons, institutions, and properties within the boundaries of the corporations, passing them, as readily as those which discriminate against non-residents and institutions, in favor of residents. In *Crowley v. West* (La.) 27 South. 53, 3 Mun. Cor. Cas. 153, an ordinance, the effect of which was to permit four livery stables to be maintained in the business center of the town, while the fifth stable, and all which might thereafter be established, were to be relegated and confined to a designated locality, remote from such center, was declared void and unenforceable by the Supreme Court of Louisiana. Nor does it make any difference, as the case just referred to and others show, that the institution, business, or calling, with respect to which an ordinance is discriminative, is one within the control of the authorities, as regards its location or conduct, under the law relating to nuisances or promotion of health and comfort. Livery stables are of this class. Though not regarded as nuisances per se, conditions, surroundings, and mode of conduct may make them nuisances. As a means of protecting health and suppressing fraud and imposition in trade, an ordinance may, no doubt, establish and enforce regulations, concerning the

packing and display for sale of fruits and other food products as is intimated in *Frost v. Chicago*, cited, but it must deal with the subject comprehensively, and must not, under the guise or pretense of doing so, strike down one practice which, in all material respects, is like others not forbidden. The element of discrimination makes it unjust and oppressive as well as unreasonable. It is intolerable in any sort of legislation, however ample the authority of the legislative body to deal fairly with the subject-matter. There are some apparent, but no real, exceptions, as where classifications are made, for certain purposes, because of material dissimilarity in character, conditions or circumstances.

In determining whether an ordinance is violative of any of the principles hereinbefore adverted to, it is always permissible, and sometimes necessary, to view it in connection with the conditions under which it is intended to, and must, operate. In other words, the facts are to be considered as well as the terms of the ordinance. In *Henderson v. Mayor and Commissioners of Immigration v. North German Lloyd*, 92 U. S. 259, 23 L. Ed. 543, it was declared: "In whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect. Hence a statute which imposes a burdensome and almost impossible condition on the shipmaster as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money for each one of them, is a tax on the shipowner for the right to land such passengers, and, in effect, on the passenger himself, since the shipmaster makes him pay it in advance as part of his fare." In the case immediately following the opinion in those cases, namely, *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. Ed. 550, Mr. Justice Miller said: "If, as we have endeavored to show, in the opinion in the preceding cases, we are at liberty to look at the effect of a statute for the test of its constitutionality, the argument need go no further." Having said this he proceeded to consider all the surrounding facts and circumstances, as well as the results of the execution of the law. In *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578, the following is held: "Reasonableness or unreasonableness of city ordinance is not determined by enormity of some offense which it seeks to prevent and punish, but by its actual operation in all cases that may be brought thereunder." In the opinion in that case, the court considered all the probable and possible instances of oppression and wanton interference with lawful business and conduct that might arise under its operation, taking judicial cognizance of a great many matters of common knowledge, no mention of which was made in the pleadings and evidence. The same thing was done in *Anderson v. Wellington*,

40 Kan. 173, 19 Pac. 719, 2 L. R. A. 110, 10 Am. St. Rep. 175. In *Evison v. Railway Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434, Mitchell, J., delivering the opinion of the court, said: "It is self-evident that a limitation of the rate of speed might be reasonable in the thickly populated and crowded portions of a city, where continuous buildings obstruct the view of approaching trains, and where the noise and bustle of travel and business are apt to prevent people from hearing the approach of a train, which would be wholly unnecessary and unreasonable in the large tracts of sparsely populated territory of a merely rural character, now so often included within the corporate limits of cities." In *Wygant v. McLauchlan*, 7 Mun. Cor. Cas. 420, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. Rep. 673, the Supreme Court of Oregon, said: "Now, it is an admitted fact that there are considerable tracts of land, comprised within the limits of the city, which are sparsely inhabited. As was said by the court below: 'There are within the corporate limits of the city of Portland several large tracts of land, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare.' Under these conditions, it is assuredly not a reasonable regulation, as a police provision, or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance." It is further to be observed, on a view of the decisions to which reference has been made, that, in almost every case of condemnation for unreasonableness, restraint of trade, adversity to common right, discrimination, or want of authority, an apparent ground of authority and color of legality have been discoverable in the terms of the ordinance. But it is not enough that an ordinance is, in some sense or degree, promotive of the purpose for which the power to pass it was given. It must also be free from those elements which the courts have declared to be vicious in legal contemplation. In endeavoring to promote health, preserve order, encourage trade, and abate nuisances, corporate authorities must avoid discrimination, oppression, excess of authority, and other things which are forbidden to them. An ordinance, to be valid, must be within the corporate power, promotive of the purpose for which the power was delegated, or is inherently possessed, and free from the vices of unreasonableness, partiality, arbitrariness, and unconstitutionality. Whether it combines all these requisites is to be determined by its operation and effect, whatever the ostensible purpose or effect, disclosed by its mere letter, may be.

The ordinance under which this convic-

tion was obtained, on its face, bears some relation to the subjects of protection to health and immunity from injury, annoyance, and offensiveness, but its effect is limited to three subjects, burial of carcasses, cremation thereof, and manufacture thereof into fertilizer. These must be regarded as its primary objects. The bringing in of carcasses for such purposes is a mere preliminary incident of their burial, cremation, or manufacture into fertilizer. Bringing them in for other purposes is not inhibited. Prevention of the conveyance thereof along the streets and consequent noxiousness of the air and offensiveness to sight and smell, is not, therefore, the main purpose. Both residents and nonresidents having slaughter houses and butcher shops within the town are at liberty, not only to convey their offal along any street thereof, but also to cremate or convert the same into fertilizer. For aught that appears here, all the slaughter houses and butcher shops of the neighboring city of Wheeling might be removed into Fulton, and the output of fertilizer from the plant immensely increased and the streets more heavily burdened with the offensive materials. Or, by removing their plant beyond the corporate line, all the offal from Wheeling might pass through the streets of Fulton, without violation of this ordinance. While thus operating almost solely and directly upon the manufacture of fertilizer from these materials, that business is not forbidden. It remains a lawful business in the town, a source of profit and means of livelihood to residents and nonresidents who care to engage in it. Foul, nauseating, and unwholesome though it is, the offal from slaughter houses and butcher shops, by reason of the power to convert it into fertilizer, is valuable to its owners. Passing through the industrial plant and the marts of trade, yielding wages to labor and profit to capital, it becomes a power in the realms of agriculture and horticulture. Though it is such an article, as, like the livery stable, hogpen and many other useful concerns, may be subject to municipal control, under the police power, it is an article known to commerce and industry as a thing of value, in which all persons have an equal right to deal and trade, which cannot be denied the privileges of a lawful market therefor on account of the locality of its production, and the owner of which cannot be cut off from such privileges because of his place of habitation, he being a citizen of the state or nation or a foreign country whose citizens or subjects have, by treaty stipulation, the rights and privileges of citizens of this country, respecting industry and trade. Municipal corporations can no more discriminate against it, on account of the place of its production, than they can against second-hand clothing merely because it comes from beyond the corporate limits or between resident and non-resident peddlers, or between livery stables

within the town. So long as the manufacture of fertilizer is recognized and permitted by the authorities of Fulton, as a lawful business, affording a market for offal, or a place in which it is lawful to convert it into fertilizer, the privileges of the market or industry must be equally open to materials used therein without regard to the place of their production. To hold otherwise would be to ignore the legal principles adverted to in this opinion. The fact that it is, in some degree, protective of health and diminutive of offensiveness cannot save it. If it were free from the vices imputed to it, this might bring it within the power of the corporate authorities. But there are two requisites to its validity. It must be promotive of the purpose for which the power is delegated or inherently possessed, and free from any of those things, the presence of which vitiates an ordinance. 29 Am. & Eng. Ency. Law, 986.

For the reasons stated, the ordinance, in so far as it forbids importation of carcasses and dead bodies of animals and portions thereof for manufacture into fertilizer, is void and unenforceable, because discriminative, wanting in generality, and violative of law in its denial of equality in respect to privileges of trade and industry. As to the validity of the inhibition of importation for other purposes, we have no occasion to inquire or decide.

The judgments complained of will be reversed, and the plaintiff in error discharged from further prosecution.

UNDERWOOD TYPEWRITER CO. v. PIG-GOTT.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. APPEAL—APPEALABLE JUDGMENT.

A judgment improperly abating an action upon a ground which precludes further proceedings is appealable.

2. SAME — JURISDICTION — CONSTITUTIONAL QUESTION.

A judgment, founded upon an erroneous construction of a statute, which makes its enforcement conflict with constitutional guarantees, involves the constitutionality of a law, and is, therefore, reviewable, without regard to the amount in controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 173.]

3. STATUTES—CONSTRUCTION.

Whenever an act of the Legislature can be so construed and applied as to avoid conflict with a constitutional provision, and give it the force of law, such construction will be adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 56.]

4. CORPORATIONS — FOREIGN CORPORATIONS — DOING BUSINESS IN STATE.

A foreign corporation, which sells and delivers goods, merchandise, machinery, or other articles of trade and commerce in this state upon orders taken therefor by its agents and traveling salesmen, and forwarded to it, and not otherwise, and transacts no other business

in the state, does not transact or carry on business in this state, within the meaning of section 30 of chapter 54 of the Code, as amended by section 31, c. 35, p. 108, of Acts 1901 [Code 1906, § 2322], and is not required to comply with the provisions of said statute, nor denied by it the power to bring and maintain suits and actions for the enforcement of such contracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 2520–2527, 2540, 2544.]

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by the Underwood Typewriter Company against R. H. Piggott. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

J. Cameron McOluer, for plaintiff in error. Caldwell & Watson, J. T. Piggott, J. D. Cutlip, and R. H. Piggott, for defendant in error.

POFFENBARGER, J. The Underwood Typewriter Company complains, on a writ of error, of a judgment of the circuit court of Wood county abating its action and refusing to allow it to prosecute the same, because it has not complied with the provisions of section 30 of chapter 54 of the Code, as amended by section 31, c. 35, p. 100, of Acts 1901 [Code 1906, § 2322], requiring foreign corporations, to which class said plaintiff in error belongs, to file with the Secretary of State a copy of its articles of association, and obtain from that officer a certificate showing the fact, and record the same in the clerk's office of the county court of the county, or one of the counties, in which its business is conducted, as a condition precedent to the right to do business in this state.

The action was brought before a justice of the peace of said county against R. H. Piggott for the recovery of the possession of one typewriter, of the value of \$100, which said company had sold to the defendant under a contract by which the title thereto was reserved until full payment of the purchase price should be made, and resulted in a judgment for the defendant. After an unsuccessful effort to have the judgment set aside and a new trial granted, in the course of which a special plea was filed, denying the right of the plaintiff to bring or maintain any action in this state, because of its failure to comply with said statute, was filed in resistance of the motion to set aside the judgment, an appeal was taken to the circuit court. There a motion to strike out the special plea was made and overruled, and thereupon the plaintiff filed a special replication to it, showing that it maintains no place of business in this state, and transacts no business here, other than the selling of its machines by sample through agents and representatives, denying that the statute relied upon has any application to it, and insisting that, if it does have such application, it is void, because in violation of the federal interstate commerce law. The hearing on the plea resulted in a judgment that the action abate and stand

abated, until the plaintiff shall have complied with the provisions of said statute.

Two questions relating to appellate jurisdiction are presented, the first of which is whether there is a final judgment, and the second whether the constitutionality of a law is involved, since the amount in controversy does not appear to be more than \$100.

Though the judgment is not final in the sense of disposing of the case on its merits, it is nevertheless final in that it prevents a recovery in the present status of the plaintiff, and is tantamount to a dismissal of its action. This brings the case within the decision in *Carson v. Insurance Co.*, 41 W. Va. 136, 23 S. E. 552. The plaintiff had brought his action of assumpsit in one county on a policy of insurance, and it appeared on the face of the declaration that the loss for which recovery was sought had occurred in another county, and the circuit court, being of opinion that the action should have been brought in the county in which the loss occurred, dismissed it upon demurrer without prejudice. Although this was merely an abatement of the action, this court allowed a writ of error, reversed the judgment, and remanded the cause.

The other question is not entirely free from difficulty. If the circuit court has correctly interpreted the statute, it is violative of the federal Constitution, as will be hereinafter shown; but it will also appear that, upon a proper construction, the statute does not interfere with the right of the plaintiff to sue, and is not invalid. But for the erroneous decision of the circuit court, no constitutional question could possibly arise. The appellate jurisdiction, however, does not seem to be limited to those decisions in which valid laws are held unconstitutional. It extends to cases involving the constitutionality of a law. Wherever the question of constitutionality arises in a case, and enters into the decision, whether that decision upholds or overthrows the statute, the constitutionality of a law must be involved. In most instances it appears in this way. To say that a decision which gives to a statute an effect beyond what the Legislature intended it to have and enforces it in such manner and to such extent as to work an invasion of a constitutional right, is to go a step further, but since the court has power and jurisdiction to interpret laws, and though it erroneously so construes the statute as to produce this result, it nevertheless declares the law of the particular case, and works an injury as serious as if it had held a valid law unconstitutional, or an invalid law free from objection on constitutional grounds. Such decisions thus seem clearly to involve constitutional questions, and this view seems to harmonize with that presented in *Elliott on Appellate Procedure*, § 33, where it is said: "It must fairly appear that a constitutional question is in the record, and that the party who assumes to make the question has a

right to do so, but these things need not conclusively or even decisively appear; for, if it appears, from an inspection of the record, that there is reason for inferring or adjudging that the record does present a constitutional question, jurisdiction is in the Supreme Court. If it were held otherwise, it might deprive a party of the right to a decision by the Supreme Court, since it would leave the question whether the validity of a statute is involved to the Appellate Court, and its decision would shut off the right of a party to invoke the judgment of the tribunal to which jurisdiction over such questions is committed."

In seeking the true interpretation of the statute in question, rules of statutory construction must be observed, one of which is that a statute will never be so construed as to make it conflict with any constitutional provision, if the terms used by the Legislature are susceptible of a meaning, and reconcilable to a view, that are consistent with the organic law. That a certain construction or interpretation of a statute will make its operation and effect violative of a constitutional right, or put it under the ban of a constitutional inhibition, is an admonition to the court that the construction is wrong, if the statute is susceptible of a construction that will make it valid. *Slack v. Jacob*, 8 W. Va. 612; *State v. Workman*, 35 W. Va. 367, 14 S. E. 9, 14 L. R. A. 600; *Bridge v. Kanawha Co.*, 41 W. Va. 658, 24 S. E. 1002; *Roby v. Sheppard*, 42 W. Va. 286, 26 S. E. 278. This rule is founded upon two presumptions. One is that the Legislature intended the statute to be operative and effective. This implies the other, that the Legislature knows the limitations upon its power, imposed by the organic law.

The statute under consideration here extends to foreign corporations the privilege of transacting business in this state, upon complying with certain conditions therein prescribed, and imposes a penalty for doing business in the state without having first complied with them. It was construed by this court, before it was amended, by the act of 1901, in *Toledo Tie & L. Co. v. Thomas*, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925, and held not to have the effect of invalidating contracts made in this state by foreign corporations which had not complied with the requirements of the statute. For reasons which will be hereinafter stated, such corporations must have had the right to sue in respect to such contracts, for a remedy for the enforcement of a contract is an essential part of the contract itself. The decision referred to above recognized such right to sue and enforced it. Regarding the amendment made by section 31, c. 35, p. 108, of Acts 1901 [Code 1906, § 2322], as having wrought a material change in the section, the circuit court has adopted the view that it now forbids the transaction of business in the state by foreign corporations which have

not complied with its requirements, invalidates their contracts, and denies to them the right to sue. This may be correct as to corporations doing business in the state. Whether it is or not we are not called upon to say; but it does not deny to a foreign corporation not doing business in the state power to make a valid contract here, or to bring and maintain an action for the enforcement thereof.

Prior to the amendment that portion of the section which has been altered read as follows: "No railroad corporation which has a charter, or any corporate authority, from any other state, shall do business in this state as the lessee of the works, property or franchises of any other corporation or person, or otherwise; or bring or maintain any action, suit or proceeding in this State, until it shall, in addition to what is hereinbefore required, file in the office of the secretary of state a writing, duly executed under its corporate seal, accepting the provisions of this section and agreeing to be governed thereby, and its failure so to do, may be pleaded in abatement of any such action, suit or proceeding; but nothing herein contained shall be construed to lessen the liability of any corporation, which may not have complied with the requirements of this section, upon any contract or for any wrong." The amendment inserts just two words after the word "railroad" at the beginning of the clause quoted, making it read "No railroad or other corporation," instead of "No railroad corporation." The entire section deals with the question of the right of foreign corporations to do business in the state. The clause quoted, before it was amended, was designed to regulate and limit the power of foreign railroad corporations to do business in the state, and did not relate to any other kind of corporations. So much of it as relates to the bringing and maintaining of any action, suit, or proceeding is limited and restrained in its effect, not only by the general context, the subject-matter and spirit of the section, but also by its immediate context, doing "business in this state as the lessee of the works, property or franchises of any other corporation or person or otherwise." One portion of it deals with the right to contract and the other with the incidental right of remedy for the enforcement of the contract. Statutes forbidding the right to institute and maintain actions, except as a means of enforcing compliance, by foreign corporations, with statutory conditions precedent to the right to do business in the state, are seldom, if ever, found in any state, and when used for this purpose they do not withhold from a corporation, which has failed to comply with such conditions, the right to sue for the enforcement of contracts made before the act was passed, or contracts made between other parties and assigned to them, or contracts made by them without the state. 19 Cyc. 1301. "Unless the statute says so in ex-

press terms, as some of the statutes do, the noncompliance by a foreign corporation with the terms and conditions upon which the domestic law allows it to enter the state and do business will not preclude it, or any one claiming through it, from maintaining an action which is purely *ex delicto*." 19 Cyc. 1304. Reference is made to these general principles to show that the construction contended for by counsel for the defendant in error carries this statute entirely beyond the scope of the general system of law to which it belongs. Moreover, the inhibition to sue shows on its face that its only purpose is to enforce compliance with the conditions precedent to the right to do business in the state. Hence there is no warrant in the letter of the statute for its enforcement for other purposes.

The carrying on of such commercial transactions in one state by a foreign corporation of another, having no place of business in the state in which they take place, as are governed by the principles of interstate commerce law, does not constitute doing business in the state. "Where a portrait company, carrying on business in one state, obtains orders through an agent in another state for pictures and frames, the fact that in filling the orders it ships the pictures and frames in separate packages, for convenience in packing and handling, to its own agent, who places the pictures in their proper places or frames and delivers them to the persons ordering them, does not deprive the transaction of its character of interstate commerce or take it out of the statutory protection of the commerce clause of the federal Constitution." *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 836. In the case just quoted from the state court adopted the view that the portrait company was doing business in North Carolina, and therefore not entitled to the immunity from taxation guaranteed by the federal constitutional provision relating to interstate commerce. In its opinion that court said: "And the question is, could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax, for which its own citizens would be liable? It seems to us that it could not." But the Supreme Court of the United States, in order to reverse the decision of the state court, was driven to the conclusion that the portrait company was not doing business in the state of North Carolina. This is apparent from the following language of the opinion: "But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and 'placing the pictures in their proper

places' [the language of the verdict] meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture." If the portrait company had been doing business in the state in the sense of maintaining a factory, office, or store therein, at which the contracts of sale had been made and the goods delivered, it might have been deemed to have been doing business in the state, and to have subjected itself to the liabilities of domestic corporations, and limited its rights to those of such corporations, and thereby to have deprived itself of the immunities incident to interstate trade under the federal constitutional guaranty. This conclusion and result was avoided by the federal Supreme Court by holding that the mere shipment of the goods in separate packages to itself in Greensboro and then putting the pictures in the frames and delivering them did not constitute doing business within the state.

19 Cyc. 1270 says, under the head of "What Constitutes Doing Business": "These prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents, and engaging in the general prosecution of their ordinary business therein, and they do not apply, therefore, to acts not constituting any part of their ordinary business." At page 1272 the same authority says: "Statutes of the kind under consideration have no application to the case where a corporation sends into the restricting state its traveling agent who solicits orders for its goods, and forwards them, subject to approval, to the home office; the orders being afterwards filled by shipments to the customer. Such an application of the statute would be inadmissible in so far as state statutes are concerned, because, so applied, it would have the effect of imposing a restraint upon commerce between the states or with foreign countries." That a statute, intended to place restraint upon such transactions, in the form of an inhibition to sue or otherwise, would be unconstitutional and void, is established by the decisions of all the courts without any exception, and especially by the Supreme Court of the United States. *Robbins v. Shelby County*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, says: "Interstate commerce cannot be taxed at all by a state, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." To the same effect, see the following cases: *The State Freight Tax*, 15 Wall. (U. S.) 232; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Caldwell v. North Carolina*, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 836; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649; *Brennan v. Titusville*,

153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Stockard v. Morgan, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785. That a state cannot interfere with such transactions by denying the right to sue for the property sold is equally well settled. Hovey's Estate, 198 Pa. 385, 48 Atl. 311; Bateman v. Milling Co. (Tex. Civ. App.) 20 S. W. 931; Reed & Barton v. Walker (Tex. Civ. App.) 21 S. W. 687; American Starch Co. v. Bateman (Tex. Civ. App.) 22 S. W. 771; Manufacturing Co. v. Foster, 4 Dak. 329, 30 N. W. 166; National Cash Register Co. v. Wilson, (N. D.) 81 N. W. 285; Lumber Co. v. Holbert, 5 App. Div. 559, 39 N. Y. Supp. 432; Railway Co. v. Fire Association, 55 Ark. 163, 174, 18 S. W. 43; Lumber Co. v. Improvement Association, 55 Ark. 625, 18 S. W. 1055; Richardson v. Mortgage Co., 194 Ill. 259, 62 N. E. 606; Lumber Co. v. Chappell, 184 Ill. 539, 56 N. E. 794; Miller v. Williams, 27 Colo. 34, 59 Pac. 740. See the text and long list of decisions to the same effect in 19 Cyc. 1280, note 13. In view of such consequences, the rule of construction, hereinbefore referred to, demands that the language of a statute, restricting the right to sue, be limited in its application to transactions which are not within the protection of the federal law relating to interstate trade and commerce.

For the reasons stated, the judgment complained of must be reversed, the motion to strike out the special plea sustained, said plea stricken out, and the case remanded for further proceedings according to law.

THOMPSON v. ADAMS et al.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where a bill in equity shows a want of jurisdiction, the question may be raised for the first time in this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1070, 1166.]

2. RECEIVER—APPOINTMENT—WHEN GRANTED.

A court of equity, upon the application of a common creditor, is without jurisdiction to appoint a special receiver to take charge of a debtor's property, upon the ground of waste or misappropriation thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, § 15.]

3. SAME—COMMON CREDITOR.

Before a court of equity will appoint such receiver, the creditor must have a lien upon or some right to charge the property other than that of being a mere common creditor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 18-23.]

(Syllabus by the Court.)

Appeal from Circuit Court, Harrison County.

Bill by Will Thompson against James R. Adams and others. Decree for plaintiff, and Oliver P. Boughner, defendant, appeals. Reversed, and bill dismissed.

Sperry & Sperry, for appellant. Davis & Davis and E. B. Templeman, for appellee.

SANDERS, J. The plaintiff, Will Thompson, filed a bill in the circuit court of Harrison county, against James R. Adams and others, claiming, among other things, that Adams owned large real estate and personal property; that he was heavily in debt; that he had resided in that county for a number of years, but had left and gone to the state of Ohio to visit relatives; that he was last recognized in Cincinnati, Ohio, since which time he has not been seen nor heard of, although diligent search has been made for him by his relatives and others; and claiming Adams to be indebted to him and many others in large sums of money; that a number of suits were being prosecuted against him, which would mulct him in large and heavy costs; and averring that, by reason of the absence of Adams, his property was going to waste and would greatly depreciate in value, no one being authorized to take possession of and care for it; and asking for a convention of all his creditors and praying for the appointment of a receiver to take charge of his property, and also praying for an injunction restraining certain of his creditors from prosecuting their actions at law against said Adams. The injunction was granted, and the receiver of the personal estate appointed. Oliver P. Boughner was made a party defendant to the suit, but was not enjoined, and, subsequently to the institution of this suit, and during its pendency, he obtained a judgment for \$1,164.96, against the defendant Adams, and others, and filed an answer, setting up this judgment. The cause was referred to a commissioner to ascertain and report, among other things, the indebtedness due and owing by the said James R. Adams, the nature, amount, and if any liens, the priorities thereof. The commissioner reported the appellant's judgment as a common debt, not a lien, upon the real estate of Adams, and held it to be payable pro rata with the other common creditors of Adams, to which report Boughner excepted, but the court overruled the exception and confirmed the report in this respect, and Boughner has appealed.

The question which meets us at the threshold of this case is one of jurisdiction. The plaintiff claims to be only a common creditor of the defendant Adams. He has no lien against him, and avers no ground of equity jurisdiction. The pretentious ground set up is that Adams has left the county and cannot be found; that he owns large real estate and personal property; that he is largely indebted; and that his property is going to waste. This does not entitle him to come into equity and ask for a receiver. He has shown no right to charge the property. He is only a common creditor, and, as such, equity will not entertain him. He must first reduce his claim to a judgment, or lien, after

which, if he files his bill and shows reasons why the court should take charge of the property, a receiver will be appointed. Under our statute (Code 1899, § 28, c. 133 [Ann. Code 1906, § 4031]) a receiver will be appointed where there is danger of loss or misappropriation of the property, or a material part thereof, of a debtor, but this is only done in a proper pending case. It certainly must be at the instance of some one who has a right to charge the property, and the statute does not mean to extend this remedy to every one who claims to be a common creditor. Equity must have jurisdiction independent of the appointment of a receiver. *Rainey v. Freeport, etc., Co.*, 58 W. Va. 424, 52 S. E. 528; *Hogg's Equity Pro.*, § 731; 17 Am. & Eng. Ency. Law, 684; *Harwell v. Potts*, 80 Ala. 70; *State v. Union Nat. Bank*, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209; *Jones v. Schall*, 45 Mich. 380, 8 N. W. 68; *Mahon v. Ongley Elec. Co.*, 156 N. Y. 196, 50 N. E. 805; *Robinson v. W. Va. Loan Co. (C. C.)* 90 Fed. 770. High on Receivers, § 11, is cited to show that, to warrant the interposition of a court of equity by the aid of a receiver, it is essential that the plaintiff should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to the satisfaction of his demand; and, secondly, it must appear that the possession of the property was obtained by the defendant through fraud, or that the property itself, or the income from it, is in danger of loss from neglect, waste, misconduct, or insolvency of the defendant; and to the same effect, *Hogg's Eq. Proc.*, § 734; *Barton's Ch. Pr.*, p. 482, and *Daniel's Ch. Pr.*, vol. 2, § 1717, are cited. Under these authorities the plaintiff's bill cannot find support. In the first place, he has not shown a clear legal right to the property in controversy, nor does it appear that he has a lien upon it, or that it constitutes a special fund, out of which he is entitled to the satisfaction of his claim. And, secondly, it is not claimed that the property was obtained by the defendant through fraud, and, if there is danger of loss from neglect, waste, misconduct, or insolvency of the defendant, this does not mean that any common creditor of the defendant is entitled to the appointment of a receiver, but one who has first shown a right to charge the property, by lien or otherwise, and, when this is shown, if it can be made to appear that there is danger of loss from neglect, waste, misconduct, or insolvency of the defendant, a court of equity will interfere and appoint such receiver.

The defendant Buchner did not demur to the plaintiff's bill, and for this reason it is claimed that he cannot now raise the question of the want of equity jurisdiction. Where it appears from the bill that equity jurisdiction is wholly wanting, it can be taken advantage of for the first time in this

court. This bill is not only defective, but it appears that equity has no jurisdiction, and, this being so, jurisdiction cannot be conferred by failing to demur, and answering. *Cresap v. Kemble*, 26 W. Va. 603; *Pollard v. Patterson*, Ad'mr, 3 Hen. & M. (Va.) 67; *Polindexter v. Burwell*, 82 Va. 507; *Graveley v. Graveley*, 84 Va. 145, 4 S. E. 218; *Collins v. Sutton*, 94 Va. 127, 26 S. E. 415; *Furst v. Banks*, 101 Va. 208, 43 S. E. 360; *South & W. R. Co. v. Comm.* (Va.) 51 S. E. 824.

It is contended that, although the bill cannot be maintained because the plaintiff, Thompson, was not a lien creditor, yet, it being a creditor's bill, the court acquired jurisdiction of the matters involved upon the filing of the petitions of the parties claiming liens upon the estate, and also by the appearance before the commissioner of the parties holding liens at the time of the institution of the suit, named as defendants in the bill. This position is not tenable. When the bill does show an inherent want of equity jurisdiction, its life and existence cannot be extended by the filing of petitions setting up liens, or by appearing before the commissioner and proving liens. It is true that, in some cases, where lien creditors' suits are brought and the plaintiff fails for some reason to maintain his bill, or desires to dismiss it, other creditors who have appeared in the cause can continue its prosecution for their benefit, but this does not apply to cases where the court is without jurisdiction to entertain the original bill.

For these reasons, the decree of the circuit court is reversed, and the plaintiff's bill dismissed.

MORRISON v. FAIRMONT & C. TRACTION CO.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906.)

1. EMINENT DOMAIN—TAKING OF LAND—ACTION FOR DAMAGES.

Evidence of the taking and appropriation of land is admissible under a declaration which alleges that the defendant laid its railroad track along and upon the property of the plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, § 797.]

2. TRIAL—INSTRUCTIONS—MODIFICATION.

One offering an instruction is entitled to have it given in his own language, if it correctly propounds the law applicable to the case, where there is evidence to support it, and where it is not misleading, obscure, or confusing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 668.]

3. APPEAL—HARMLESS ERROR.

Where such instruction is refused, but modified and given, it is not reversible error, if it clearly appears that the instruction, when modified and given, is the same, in legal effect, as the one so offered and refused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4229.]

4. EMINENT DOMAIN—CONSTRUCTION OF RAILROAD—ACTION FOR DAMAGES.

The measure of damages for injury to land resulting from the construction of a railroad, is

the diminution of the value thereof immediately after the construction of the road as compared with its value immediately before such work, assuming such construction to be an instantaneous act; but in determining the value immediately after the construction, the increase, if any, on account of general benefits arising from the construction and operation of the road should be deducted from, and all peculiar benefits derived should be added to, such value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 371-378, 815.]

5. SAME—COMPENSATION.

Where land is taken by a railroad company, peculiar benefits cannot be set off against the value of the land so taken, but the compensation to be paid the owner is the true market value thereof. Benefits can only be set off against damages to the residue of the tract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 18, Eminent Domain, §§ 378-393.]

(Syllabus by the Court.)

Error to Circuit Court, Harrison County.

Action by James H. Morrison against the Fairmont & Clarksburg Traction Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Davis & Davis, George M. Alexander, and Osman E. Swartz, for plaintiff in error. E. D. Lewis and H. W. Harmer, for defendant in error.

SANDERS, J. The plaintiff, Morrison, instituted an action of trespass on the case in the circuit court of Harrison county, against the Fairmont & Clarksburg Traction Company, for the recovery of damages alleged to have been sustained by him. A trial before a jury was had, which resulted in a verdict and judgment for the plaintiff, to which judgment the defendant has applied for, and obtained, a writ of error.

The plaintiff was, at the time of the injury complained of, the owner of a farm containing about 330 acres, lying in Harrison county, which is traversed by the Northwestern Turnpike for about three-fourths of a mile, and the ground of complaint is that the defendant company, being a duly chartered railroad corporation, and acting under a franchise granted by the county court of Harrison county, laid and constructed upon the said turnpike a line of railroad the whole distance of plaintiff's farm. In building its line, it is charged that the defendant damaged the plaintiff's farm in making deep cuts and fills, in tearing down and moving his fences, in destroying and interfering with the ways to and from his residence, and in laying its track along and upon his farm.

The first ground of complaint we will notice is that the court, over the objection of the defendant, permitted certain evidence to go to the jury tending to show that the defendant had actually taken and occupied a portion of the plaintiff's land. Not only was this evidence objected to, but the defendant asked for an instruction telling the jury not to consider it, because not admissible under the declaration; it being claimed that the ac-

tion is for the recovery of damages for injury to plaintiff's farm, and not for land taken, occupied or appropriated. The declaration charges that the railroad was laid along and upon the property of the plaintiff. This allegation, we think, is sufficient under which to admit the testimony. If it is true that the railroad was laid upon the plaintiff's property, this would give him a good cause of action. This the declaration charges, and under the allegation we think the evidence was properly admitted. Then it is insisted that even if the evidence was admissible under the declaration, that still the court should have excluded it because of its indefinite character. It is true the evidence is indefinite, but this goes to its weight, and not to its admissibility. The witnesses do not undertake to fix the quantity and value of land taken separate from the damages to the farm, and, in fact, it may be questioned from the evidence as to whether or not any land was taken. The jury must judge of the value of this evidence. In an action of this kind, such evidence is admissible. We must strive to uphold verdicts, and must never overthrow them upon slight grounds and bare technicalities.

The next reason assigned for reversal is that the court refused to give a certain instruction to the jury, which is as follows: "(4) The court further instructs the jury that no occupancy or inclosure of a public road or highway, no matter how long continued, can give the invader any title or right thereto; and that the defendant under the franchise granted to it by the county court of Harrison county was entitled to occupy any portion of the public highway whether the same had been theretofore encroached upon by the inclosure of the plaintiff or not, and that if the plaintiff had encroached upon said highway and placed his fences thereon the defendant was entitled to remove such fences and to occupy the highway, and the plaintiff can recover no damages by reason of the land so taken and occupied by the defendant." But modified it and gave it in the following form: "(4) The court further instructs the jury that no occupancy or inclosure of a public road or highway no matter how long continued, can give the invader any title or right thereto; and that the defendant under the franchise granted to it by the county court of Harrison county was entitled to occupy any portion of the public highway necessary for its purposes." A party is entitled to an instruction in his own language, if it correctly propounds the law applicable to the case, and is not misleading, and there are facts in evidence to support it. *State v. Irwin*, 30 W. Va. 417, 4 S. E. 413; *Jordan v. Benwood*, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859. Where such instructions are asked a court should, without hesitation, give them. It is a right a party has to couch his instruc-

tions in his own language, and when he has done so, if they fulfill the legal requirements, they should be given. But while this is true, yet what should be the effect after verdict, where such instruction is refused, but modified and given? Can we say that it is reversible error for a court to make a slight or an immaterial change in an instruction? Must instructions be given literally as offered, and if this is not done, must we overthrow the verdict? We cannot so hold. While such an instruction should be given, yet a verdict will not be set aside where this is not done, when it is modified and given, if we can clearly see that the instruction as modified is the same in legal effect as the one offered. From an examination of the foregoing instructions, it is apparent that their legal effect is the same. Furthermore, the evidence would not justify the giving of such an instruction as offered by the defendant. It does not appear that the plaintiff had encroached upon the highway, and built his fences thereon. To call for an instruction there must be some evidence to support it. Before we can say that this instruction was proper, there should be evidence showing or tending to show that the plaintiff had encroached upon the public road and built his fences upon it. The defendant has no ground to complain of the modification of the instruction.

This brings us to the consideration of the motion to set aside the verdict. It is contended that it is contrary to the evidence and the instructions of the court. The court, at the instance of the defendant, gave to the jury the following instruction: "The court instructs the jury that when an action is brought to recover damages where no part of the plaintiff's property has been taken but simply damaged by a public improvement, damages cannot be had unless the property claimed to be damaged has been depreciated in value by the construction of the public improvement; in other words, if the fair market value of the property is as much immediately after the construction of an improvement as it was immediately before the improvement was made, no damages can be sustained and no recovery can be had. Therefore in this case, if the jury believe from the evidence that the defendant took for its corporate purposes no part of the plaintiff's land, and that the fair market value of the plaintiff's farm was as much immediately after the construction of the defendant's railroad as it was immediately before, then the plaintiff has sustained no damages which can be the subject of a recovery in this suit, and the jury in such case must find for the defendant." Counsel for the defendant contend that under the evidence if the jury had followed this instruction, their verdict would have been for the defendant. Therefore the question is presented, not whether the instruction is good or bad, but whether the

verdict is supported by the evidence. In dealing with this question, while in view of the evidence it may not be absolutely necessary to discuss the question of law presented by the instructions, yet in the light of some of our decisions bearing upon questions of this character, it may be well to do so. The defendant introduced no evidence, and the case was submitted to the jury upon that offered by the plaintiff. A number of witnesses were introduced, who estimated the damages to be from \$700 to \$1,000. But it is claimed that several of these witnesses, in fact the most of them, in making their estimates, did so without deducting the benefits derived by reason of the construction of the road. In other words, that their evidence showed that the plaintiff's farm immediately after the construction of the road was worth as much, if not more, than it was immediately before the work of construction began. This is explained by the witnesses to be on account of the increased value of the farm by reason of the construction of the road. Assuming then, for the purpose of a presentation of this question, that this is true, and that the market value of the property immediately after the construction of the road was equal to the market value immediately before, then it will be necessary to determine whether or not by reason of the work of construction—that is, in doing the acts of making the excavations and fills, causing the fences to fall, laying the track upon the plaintiff's land, and destroying the ways to his residence—he suffered damage, and if so, how much; and after determining the amount of damage done to plaintiff's farm, then to deduct the peculiar benefits derived.

The true rule as to the measure of damages, and the one which has been recognized in this state and Virginia, is that peculiar benefits only may be set off against damages to the residue, but not against the value of the land taken. By this rule the landowner is not charged with general benefits—those consisting of an increase in the value of the land common to the community generally. To charge general benefits casts the burden entirely upon the one alleged to be benefited. There are expressions to be found in some cases decided by this court, notably *Stewart v. Railroad Co.*, 38 W. Va. 438, 18 S. E. 604, and *Blair v. City of Charleston*, 43 W. Va. 62, 26 S. E. 341, 35 L. R. A. 852, 64 Am. St. Rep. 837, which indicate that if the market value of the land is as much immediately after the injury complained of as it was immediately before, there is no damage, and the owner is not entitled to recover. If, by these expressions, it is intended to announce a rule of law by which the landowner will be charged with general benefits, they are incorrect. In *Stewart v. Railroad Co.*, supra, it is said that just compensation is that which makes the owner whole, and, in

respect to general benefits or damages resulting from the construction of the road, leaves him in as good a situation as his neighbor, no part of whose land has been taken. In *Blair v. City of Charleston*, supra, it is true that in the third point of the syllabus it is laid down that the measure of damages is such sum as will make the owner whole; that is, if the market value of the property is as much immediately after the injury complained of as it was before, no damages can be recovered, but in the fourth point of the syllabus it is said that in estimating the damages it is proper to abate all peculiar benefits to the property enhancing its value, but not the general benefits derived by the property owner in common with the community at large. Therefore, when the two points of the syllabus are read together, and in the light of the opinion, we conclude that it was not intended to exclude general benefits. Judge Green, in *Railroad Co. v. Foreman*, 24 W. Va. 672, says: "It is well settled that the benefits which may be considered in reduction of damages in such a case as this, are confined to such as are direct and peculiar to the owner of the land, excluding those which he shares with other members of the community, whose property is not taken." The cases of *Mitchell v. Thornton et al.*, 21 Grat. 178, and *Railroad Co. v. Tyree*, 7 W. Va. 699, lay down the same rule, following the case of *James River, etc., Co. v. Turner*, 9 Leigh, 318, where the assessors were required to pay a just regard to the advantages which the owner of the land would derive from the improvement for the use of which his land was condemned. It was held that the advantages to the owner which should be taken in consideration by the assessors were such advantages as had particularly and exclusively affected the particular tract or parcel of land whereof the portion was condemned—not advantages of a general character, which might be derived to the owner in common with the county at large from the improvement. *Upham v. Worcester*, 113 Mass. 97; *Parks v. Hampden Co.*, 120 Mass. 395; *Schaller v. City of Omaha* (Neb.) 36 N. W. 533; *Mills*, Em. Dom. §§ 152, 153; *Lewis*, Em. Dom. (2d Ed.) § 467. As said in *Guyandotte Valley R. Co. v. Buskirk*, 57 W. Va. 417, 50 S. E. 521, a literal enforcement of the rule that if the market value of the residue after the taking is equal to, or greater than, its value before the taking, there is no damage, would plainly charge the landowner with all benefits, general as well as special and peculiar.

The owner not being chargeable with general benefits, he should have the compensation to which he is entitled for damages to the residue of the land not taken, assessed without regard to the nature of the improvement which is to be or is constructed upon the part taken, except in so far as such improvements bear upon the question of pecu-

lar benefits. Disregarding the question of peculiar benefits, the assessment should be made as of the time when the preparations for the proposed work are complete, and as if nothing further were done in the premises. As in this instance, the assessment should be of such damages as the landowner would suffer if the excavations and the grievances complained of had been without the building, or in contemplation of building and operating, a railroad. In no other way can the owner be made whole, and left in the same situation with respect to general benefits as his neighbor, no part of whose land has been taken. We have no evidence of peculiar benefits. There is nothing to show that the plaintiff, by reason of the construction and operation of the road, has derived peculiar benefits. We cannot presume this to be so. Before any deduction can be had on account of benefits, it must appear that they are peculiar. But to apply the rule that the defendant's counsel contend should be applied—that is, if the market value is as much immediately after the construction of the road as it was immediately before, then the plaintiff cannot recover—still under the evidence we could not disturb the finding of the jury. As we have said, the witnesses estimate the damages to be from \$700 to \$1,000, and one witness estimated it to be more than the damages assessed, even after deducting all benefits; and whenever there is any evidence upon which a jury could base its verdict, although it may be in conflict with the great preponderance of the testimony, still under the well-defined rules of this court, the verdict cannot be disturbed. Although the evidence may be weak and conflicting, yet the jury were given a view of the premises. They went upon the ground and saw for themselves, and after having so inspected the premises and heard the evidence, they have found a verdict for the plaintiff. The view alone goes strongly to support their finding. It is claimed that the court erred in admitting the testimony of Peter Horner as to the amount of damages sustained by the plaintiff. This witness showed that he lived near the property in question for more than a year; that he had been at one time a farmer, and that he had been a landowner nearly all his life, and under the authority of *Blair v. City of Charleston*, supra, and *Kay v. Glade Creek & Raleigh R. Co.*, 47 W. Va. 467, 35 S. E. 973, this evidence is admissible.

Upon the whole case, we conclude that the judgment is right, and it is affirmed.

APP et al. v. APP et al.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

1. WILLS—CONSTRUCTION—WHAT LAW GOVERNS.

A will must be construed according to the law of the state where testator died, the will

was probated, his executors qualified, and his estate distributed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 947-950.]

2. EVIDENCE—FOREIGN LAWS—JUDICIAL NOTICE—PROOF.

Courts cannot take judicial notice of the laws of another state, but they must be proved as a fact.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 51.]

3. WILLS — CONSTRUCTION — ESTATES CONVEYED.

Where testator devised his property to his seven children in equal shares, and directed that, should any of his children die without leaving issue, then the share of that child should be divided among the surviving children, the will should be construed according to the law of Pennsylvania, where testator resided at the time he died, as contemplating the death of children without issue during testator's life, and therefore vested a fee in such children as survived him.

4. SAME—EVIDENCE.

Where testator, after bequeathing the residue of his estate to his children in equal shares, directed that, if any child should die without leaving surviving children, such child's share should be equally divided among the survivors, evidence that testator, at the time he made the will, was 84 years old, and that his children were past middle life, was inadmissible to show that testator could not have contemplated the contingency of his surviving any of his children.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1026.]

5. SAME—DECLARATIONS.

In a suit to construe a will, parol declarations of the testator were inadmissible to show what his intention was in making the provision in controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1027.]

Appeal from Circuit Court, Frederick County.

Suit by W. W. App and others against Gertrude C. App and others. From a decree in favor of defendants, plaintiffs appeal. Affirmed.

Robt. M. Ward, for appellants. Wm. M. Atkinson and M. M. Lynch, for appellees.

BUCHANAN, J. This suit was instituted by the appellants to recover from the estate of Albert App, deceased, certain moneys paid to him by the executors of his father, Matthias App, deceased, upon the theory that the right of Albert App to the said moneys under the will of his father ended with his life, and the appellants became entitled to it as remaindermen.

Whether or not Albert App had an absolute, or only a life, estate in the property sued for, will depend upon the construction of his father's will. The parties acquired their rights, whatever they are, under clause or item 3 of the will, which is as follows:

"As to the remainder of my property of every description whatsoever, whether it be real estate or personal property, money, notes, bank deposits, book accounts, or any or all of the above, and of any kind or description not mentioned herein, I direct that

after all provisions herein made for the payment of debts, etc., have been satisfied and complied with, I bequeath the residue of my entire estate to my children share and share alike as follows, to-wit: To my daughter Ellenor, one share, to my daughter Emily, one share, to my daughter Catherine, one share, to my daughter Elizabeth, one share, to my son William, one share, to my son Albert, one share, and to my son John L., one share. And I further order and direct that should any of my children die without leaving surviving children then the share of that child shall be equally divided among my surviving children."

The testator was a resident of the state of Pennsylvania, where he died, and where his will was probated, his executors qualified, and his estate was distributed. His will, as is conceded, is to be construed by the laws of that state. The foreign law was a fact to be proved in the case. *Union Central Ins. Co. v. Pollard*, 94 Va. 146, 152-154, 26 S. E. 421, 36 L. R. A. 271, 64 Am. St. Rep. 215.

By consent of the parties, it was ordered that the published reports of the Supreme Court of Pennsylvania, and the published Code and Acts of the Legislature of that state, might be accepted in lieu of formal testimony, provided the attorneys of the appellants and the appellees, respectively, furnished to each other within the time designated by the order a list of such decisions and statutes as they respectively intended to introduce in evidence and rely upon at the hearing, but that no authorities not so produced should be considered as having been sufficiently offered in evidence.

Lists were furnished by each side as stipulated. In the brief of the appellants' counsel there was a reference to a statute of the state of Pennsylvania, passed in the year 1897; but it was not produced in evidence, and "upon conference with the attorneys after the case was argued and submitted," as stated by the trial court in its opinion, which is made a part of the decree appealed from, "it was agreed, if there was such a statute, it had not been produced in evidence, and therefore, because not produced, in the opinion of the court cannot govern the case." The appellants insist that the burden of proof was upon the appellees in the trial court to prove the law of Pennsylvania pertinent to the subject, which was in force January 5, 1901, the date of the execution of the will of the testator, and that in the absence of such proof it was error for the court to have construed his will upon the authority of decisions prior to the passage of the act of 1897 as though said act did not exist.

The court could not take judicial notice of the laws of another state. *Union Central L. Ins. Co. v. Pollard*, supra. The parties undertook to prove the law of the foreign

state, and upon that evidence the court must determine the question just as it determined other questions of fact involved in the case.

It clearly appears, from the decisions of the Supreme Court of Pennsylvania introduced in evidence, that under the third clause or item of the will Albert App, who did not die until after the testator, took an absolute estate in the property bequeathed to him.

In *Mickley's Appeal*, 92 Pa. 514, 517, it was said by Chief Justice Sharswood, delivering the unanimous opinion of the court, that "It is very clearly settled, both in England and in this state, that if a bequest be made to a person absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy thus given, it shall be construed to mean death, or death without issue, before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life, or, what is practically the same thing, to be subjected to an executory gift over upon the occurrence of the contingency of death or death without issue at any future period within the rule against perpetuities without clear evidence of such an intent."

In that case M. bequeathed one-sixth of his estate to his son J. M., or his heirs, and a like proportion in the same language to two other sons, and the remaining three-sixths in trust for each of his three daughters. He also directed that, "if either of my sons should die without leaving issue living at the time of his death, the share given to such son shall pass to and be divided among such of my children as may be then living, and to the issue of such as may be dead." The sons all survived their father, the testator, and it was held that each took an absolute indefeasible interest in the share bequeathed to him. See, also, *Fritzwater's Appeal*, 94 Pa. 141; *King v. Frick*, 135 Pa. 575, 19 Atl. 951, 20 Am. St. Rep. 889; *Mitchell v. Pittsburg, etc., Ry. Co.*, 165 Pa. 645, 31 Atl. 67; *Galbraith v. Swisher*, 19 Pa. Super. Ct. R. 143, decided in the year 1902.

In the case under consideration, evidence was introduced as to the circumstances surrounding the testator when the will was made, among others that he was 84 years of age and that his seven children were past middle life. The testator's age, it was contended, showed that he could not have contemplated the contingency of his surviving any of his children. There was nothing in his age, or that of his beneficiaries, which affects the legal significance of the will. In *Mitchell v. Pittsburg, etc., Ry. Co.*, *supra*, the first taker was 5 years of age and the testator 53. Their relative ages were relied on as showing that the testator could not have had in contemplation the contingency

of the child's marriage and death without issue during his life; but the court said that suggestion was without merit.

The parol declarations of the testator were offered in evidence to show what his intention was in making the provision contained in the clause of his will now under consideration. This evidence was clearly inadmissible. The inquiry, in construing a will, is, not what the testator meant to express, but what the words used do express. "To such an inquiry evidence of instructions given by the testator for his will, or of his declarations as to what were his intentions in the disposition which he made, or as to the disposition which he intended to make of his property, is obviously inapplicable; and the authorities against its admissibility are numerous and decisive." *Wootten v. Redd's Ex'r*, 12 Grat. 198, 207; *Hatcher v. Hatcher*, 80 Va. 171; *Waring v. Bosher's Adm'r*, 91 Va. 286, 21 S. E. 464; *Allison v. Allison*, 101 Va. 537, 543, 544, 44 S. E. 904, 63 L. R. A. 920.

It is also argued that other provisions of the will—indeed, its whole structure—show that the testator's intention was different from that declared by the trial court.

Without discussing the various provisions of the will, it is sufficient to say that after a careful examination of the whole will we are satisfied it does not show a different intent, and that the construction placed upon the third clause of the will by the trial court is in accordance with the laws of the state of Pennsylvania as proved in the case.

The decree complained of must therefore be affirmed.

THOMPSON et al. v. CAMPER.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

1. ADVERSE POSSESSION—HOSTILE CHARACTER OF POSSESSION.

Where one went into possession of land with the verbal consent of the owner his possession could not ripen into a title in the absence of a clear, positive, and continued disavowal of the owner's title brought home to his knowledge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, *Adverse Possession*, §§ 279, 283.]

2. EJECTMENT—JUDGMENT—PARTIES—DISCLAIMER.

Where a party in possession of land defended an action of ejectment till after verdict, when he disclaimed adverse occupancy of the premises, a motion that judgment be not rendered against him was properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, *Ejectment*, §§ 194–196.]

Error to Circuit Court, Roanoke County.

Action by John H. Camper against Noble E. Thompson and another. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

R. C. Stearnes, for plaintiffs in error. A. A. Phlegar, for defendant in error.

WHITTLE, J. The defendant in error, John H. Camper, plaintiff in the trial court, recovered a verdict and judgment in ejectment against the plaintiffs in error, Noble E. Thompson and M. A. Morgan, for the lot in controversy. The plaintiff was the owner in fee simple of two adjoining lots, situated on the west side of Broad street, in the town of Salem. He resided on one of these lots, and his father-in-law, B. G. Morgan, dwelt with him. In 1879 or 1880, Morgan, with the permission of Camper, erected a dwelling upon the vacant lot, which he occupied as a home until his death in 1903. The title to the lot remained in Camper, and it was continuously assessed for taxation in his name, and the taxes paid by him. After Morgan's death, Camper demanded possession of the lot from M. A. Morgan, who was the decedent's second wife, and, upon her refusal to vacate the premises, instituted this action to recover them.

While numerous exceptions were taken by Mrs. Morgan during the progress of the trial, and many assignments of error are alleged in her petition for a writ of error, it is quite clear that she has no standing in a court of law. She claims the property by virtue of a marriage settlement from her husband, and consequently must rely upon his title.

It is not pretended that Morgan was either a vendee of the property, entitled to a conveyance of the legal title, or that he stood in relation thereto of grantor in a satisfied mortgage or deed of trust. Therefore, M. A. Morgan could not avail herself to the equitable defenses provided in such cases by sections 2741 and 2742 of Va. Code 1904. Morgan had no deed or other paper title to the land, and his widow cannot set up adverse possession under color of title or claim of right as a defense, for the reason that her husband entered with the verbal permission of the plaintiff, and held the land in privity with him and in subordination to his title. Where such is the case, the unbroken course of decision in this state is to the effect that a defendant in an action of ejectment cannot be heard to dispute the plaintiff's title during the continuance of the relation—the principle being that, when one admits the title of another to acquire possession, he cannot deny that title in order to retain it.

The doctrine is thus stated in the leading case of *Clarke v. McClure*, 10 Grat. 305: "A vendee who enters under an executory contract, which leaves the legal title where it was and contemplates a future conveyance, enters in subordination to it, holds under and relies upon it to protect his possession in the meantime. And, in such case, as also in the case of a lessee, mortgagor, cestui que trust, and the like, where one is in under the owner of the legal title, a privity exists which precludes the idea of a hostile, tortious possession which could silently ripen into a title by adverse possession under the statute

of limitations. An entry on land under a parol gift from the owner, and a claim to hold any estate by virtue of the gift is, in its nature, a recognition of the continued existence of a subsisting title in the legal owner, and a claim to hold an estate by gift from the legal owner is a claim to hold in subordination to his title."

So, also, in *Creekmur v. Creekmur*, 75 Va. 430, 436, it is said: "The rule now is that, where possession is originally taken under the true owner, a clear, positive, and continued disclaimer and disavowal of title and the assertion of an adverse right, to be brought home to the knowledge of the party, are indispensable before any foundation can be laid for the statute of limitations. The statute does not begin to operate until the possession, before in privity with the title of the true owner, becomes tortious and wrongful by the disloyal acts of the occupying tenant." See *Rusens v. Lawson*, 91 Va. 226, 21 S. E. 347; *Chapman v. Chapman*, 91 Va. 397, 21 S. E. 813, 50 Am. St. Rep. 846. The Virginia decisions on the subject are cited in the recent case of *Marbach v. Holmes*, 105 Va. —, 52 S. E. 828.

There was no such disclaimer in this case as is contemplated by the authorities, and nothing upon which to rest the defense of adverse possession.

The action of the court in excluding evidence and giving and refusing instructions is also assigned as error. But it is unnecessary to consider that assignment, for, if it were conceded that the trial court erred in the particulars complained of, such error would be harmless and immaterial, since it is manifest that, with the rejected evidence admitted and upon correct instructions, a different verdict could not have been found. *Richmond Ry. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; *Wright v. Independence Bank*, 96 Va. 728, 32 S. E. 459, 70 Am. St. Rep. 889; *Winfree v. First National Bank*, 97 Va. 83, 33 S. E. 375; *Leftwich v. Richmond*, 100 Va. 164, 40 S. E. 651; *Brock v. Bear*, 100 Va. 562, 42 S. E. 307; *Moore v. B. & O. Ry. Co.*, 103 Va. 189, 48 S. E. 887.

There is but one other matter that demands our attention. The defendant, Thompson, was occupying the premises at the time of the institution of the action, and, in accordance with section 2726 of Va. Code 1904, was made a defendant. Afterwards, Mrs. Morgan was also admitted as a defendant; and thereupon they filed a joint plea of not guilty and made common defense until after verdict, when a motion was made that judgment be not rendered against Thompson.

We are of opinion that this motion was properly overruled. If it was the purpose of Thompson to disclaim adverse occupancy of the premises, it was incumbent upon him to have entered such disclaimer at the commencement rather than the conclusion of the litigation. It is not permissible for a defend-

ant to make defense and take chances, and, after an adverse verdict, to escape liability for costs on the theory that he had no interest in the matter in controversy. *Middleton v. Johns*, 4 Grat. 129.

The judgment is without error, and must be affirmed.

PUCKETT v. MULLINS.

(Supreme Court of Appeals of Virginia. Dec. 8, 1906.)

1. WITNESSES—TRANSACTION WITH DECEASED PERSON—COMPETENCY.

Plaintiff gave notice to take depositions, whereupon defendant, who was present with his counsel, was called to testify on plaintiff's behalf as an adverse party, and his deposition was accordingly taken. On a subsequent day plaintiff was introduced as a witness in his own behalf and pending his examination in chief defendant died. After the case was revived, plaintiff's examination was resumed, and his deposition taken over the objection of the administrator. *Held* that, after the death of defendant, plaintiff was disqualified from testifying by Code 1904, § 3346, providing that, where one of the original parties to the transaction is incapable of testifying by reason of death, the other party shall be incompetent to testify.

2. SAME.

Code 1904, § 3349, provides that, if an original party to a contract or transaction with whom it was personally and solely made or had or his agent has been examined as a witness orally or in writing at a time when he is competent to testify and he afterwards dies or becomes incapable of testifying, his testimony may be proved or read in evidence and the adverse party may testify as to the same matters. *Held*, that such section was applicable only where the deceased party had been examined in his own behalf, or, in case of an agent, in the behalf of his principal, and afterwards died.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 722-725.]

Appeal from Circuit Court, Tazewell County.

Suit by Thomas Puckett against Austin Mullins, administrator. From a decree in favor of defendant, plaintiff appeals. Affirmed.

W. H. Werth, for appellant. Chapman & Gillespie, for appellee.

WHITTLE, J. This is a suit in equity, instituted by the appellant, Thomas Puckett, to enjoin the sale of property under a deed of trust executed by him to secure a bond for \$1,290, payable to appellee's intestate, Austin Mullins.

The transactions between these parties embraced numerous items, mostly of small amount, and covered a period of more than 15 years. During that time there were four settlements between them, Puckett in each instance executing a deed of trust to secure the balance ascertained to be due. These sums did not represent distinct debts, but the amount of indebtedness secured by each successive deed was composed of unpaid balances due on the preceding settlement, to-

gether with accumulated interest and intervening debts. The deeds of trust were as follows: The first bearing date June 1, 1887, for \$200; the second, June 11, 1892, for \$590; the third, September 15, 1893, for \$893.59; and the fourth and last deed, June 24, 1902, for \$1,290.

The gravamen of the bill is that the plaintiff was an ignorant, unlearned man, and was under the influence of the defendant, in whom he reposed confidence; that Mullins, taking advantage of these conditions, overreached the plaintiff in the settlements referred to, and failed to allow credit for payments to which Puckett was entitled, and by fraudulent methods of casting accounts made the indebtedness appear larger than it really was. The bill also charged that the balances were attained by compounding interest on previous settlements at the rate of 10 per centum per annum.

There was a demurrer to the bill, and a general denial of its allegations by answer; and for further defense the defendant tendered a plea (under section 2823, Va. Code 1904) by which he averred that the deed of trust of September 15, 1893, secured a bond executed by the plaintiff that day for the amount then due, payable one day after date "with interest from date," which, according to its legal import, only bore 6 per cent. interest (Ward's Adm'r v. Cornett, 91 Va. 676, 22 S. E. 494, 49 L. R. A. 550); and that more than 12 months having elapsed after this renewal before suit was brought, plaintiff's right to rely upon the charge of usury was barred by limitation.

The trial court overruled the demurrer, but, at the final hearing, dismissed the bill.

The appellant relied mainly upon his own testimony to impugn the integrity of the appellee's demand, and his competency as a witness, which was denied, therefore becomes an important question in the case. The matter of his competency arose in this way: The plaintiff gave notice to take depositions, whereupon the defendant, who was present with his counsel, was called to testify on behalf of Puckett, subject to the rules prescribed by statute for the examination of a party having an adverse interest, and his deposition was accordingly taken. At a subsequent day, Puckett was introduced as a witness in his own behalf, and, pending his examination in chief, the defendant died, and the taking of depositions was postponed until the case was revived. The examination of Puckett was thereafter resumed, and his deposition taken over the objection of the administrator.

Austin Mullins having been rendered incapable of testifying by reason of death at the second taking of the plaintiff's deposition, the disqualification of the latter is fixed by the terms of section 3346, Va. Code 1904. Such was the construction placed upon a similar statute in the case of *Keran v. Trice's Ex'rs*, 75 Va. 690, the court there

holding that, although one of the parties had testified in his own behalf and afterwards died, the other party was, nevertheless, incompetent.

It is sought, however, to distinguish the present statute from that construed in *Keran v. Trice's Ex'rs*, but it would seem obvious that there is no substantial difference between the two enactments. The former statute provides that, where one of the original parties to the contract or other transaction "is dead," the other party shall be incompetent, while the corresponding language of the present statute is that where one of the original parties to the contract or other transaction "is incapable of testifying by reason of death," the other party shall be incompetent to testify. There can be no difference in the legal effect of the phraseology of the two statutes.

Judge Burks, delivering the opinion of the court in *Keran v. Trice's Ex'rs*, and was also one of the revisors of the Code of 1837, in which the change in the language of section 3446 was first made. In his address before the Virginia State Bar Association, on the revision of the statute law of the state, he observes: "Let me premise, that the expositor of the Code should keep in mind the rule of construction, that, in a general revision of the statutes of a state, the change of phraseology in a former statute does not necessarily imply an intention to change the law; that is, its meaning. On the contrary, the established rule is that 'the old law was not intended to be altered, unless such intention plainly appears in the new Code.'" Citing *Parramore v. Taylor*, 11 Grat. 242; *Wenonah v. Bragdon*, 21 Grat. 695. See, also, *Harrison v. Wissler*, 98 Va. 597, 36 S. E. 982.

This is a much stronger case for excluding the testimony of Puckett than for the rejection of *Keran's* evidence in the case referred to, for, in the latter, *Trice* had been regularly introduced as a witness and fully examined in his own behalf, whereas in this case *Mullins* was called to testify for his adversary before any other witness had been examined for the plaintiff, and when it was impossible for him to anticipate and rebut the evidence of his adversary.

The value of the decision in *Keran v. Trice's Ex'rs* is also attempted to be impaired by the suggestion that it is not in accordance with the weight of authority elsewhere. However that may be, it is the deliverance of our own court, construing a local statute (and in our opinion correctly construing it), and we are not disposed to depart from the decision as a precedent, except to the extent to which it has been modified by section 3349, Va. Code 1904. It is clear that the foregoing section is pertinent only where an original party, with whom the contract or transaction was solely made or had, or his agent, has been examined in his own behalf,

or, in case of the agent, in behalf of his principal, and afterwards dies, or becomes otherwise legally incapable of testifying, and those representing that side of the controversy prove the oral testimony or read the deposition in evidence. In such case, the adverse party may testify as to the same matters. But the statute manifestly has no application under the facts of this case.

We have carefully scrutinized the evidence, and, with the testimony of *Thomas Puckett* out of the case, there is no escape from the conclusion arrived at by the circuit court—that the plaintiff has utterly failed to establish the essential allegations of his bill by that clear and satisfactory preponderance of evidence required in suits of this character.

There is notable resemblance between this case and that of *Hamilton v. Stephenson* (decided at the present term) 55 S. E. 577, where the court, upon more cogent evidence, denied the prayer to reopen settlements of long standing and order an account.

Upon the whole case, we are of opinion that the decree of the circuit court of Tazewell county is plainly right, and ought to be affirmed.

HATCHER & SHAW v. COMMONWEALTH.
(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

1. INDICTMENT—AMENDMENT—TIME OF OFFENSE.

Where an indictment alleged an unlawful sale of intoxicating liquor on a certain date, there was no error in ordering the indictment to be taken to the grand jury and amended by adding "and at divers other times within the twelve months last past."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, § 513.]

2. CRIMINAL LAW—TRIAL—RECEPTION OF EVIDENCE—ELECTION BETWEEN ACTS PROVIDED.

In a prosecution for the unlawful sale of intoxicating liquor, where several distinct acts were proved, the state should be required to elect on which act it would rely for conviction before the defense is required to introduce its evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1580-1583.]

Error from Corporation Court of Danville. *Hatcher & Shaw* were convicted of the unlawful sale of intoxicating liquors, and bring error. Reversed, and new trial granted.

Withers & Green and *B. H. Custer*, for plaintiff in error. The Attorney General and *Wm. A. Anderson*, for the Commonwealth.

BUCHANAN, J. The plaintiffs in error were indicted at the June term, 1906, of the corporation court for the city of Danville for selling liquor at their place of business in that city without a license to four persons, who were named, and others, "on the — day of March, in the year 1906." After issue had been joined upon the plea of not

guilty, the jury impaneled and sworn, and the attorney for the commonwealth was making his opening statement to them, the court, upon his motion, over the objection of the defendants, ordered the indictment to be taken to the grand jury, which was still in session and was the same grand jury which had brought in the indictment, for the purpose of amending the same by adding the words, "and at divers other times within the twelve months last past," immediately after the words, "on the ——— day of March, in the year 1906." The indictment was so amended and returned into court. After the defendants' motion to quash and their demurrer to the indictment as amended were overruled by the court, they pleaded not guilty, upon which plea issue was joined, the same jury was sworn, and the trial proceeded with, which resulted in a verdict finding the defendants guilty as charged in the indictment, and fixing their fines at \$25 each. The defendants moved the court to set aside that verdict and grant them a new trial, and also to arrest the judgment, but the court overruled these motions, entered up judgment for the fines assessed, and also imposed a further punishment of three months' confinement in the county jail. To that judgment this writ of error was awarded.

The first error assigned is to the action of the court in permitting the indictment to be amended.

Section 3990 of the Code provides that "the court may in cases of misnomer occurring before or in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact." But we have no other statute authorizing indictments to be amended, and section 3990, it is conceded, has no application to this case.

It is said by Mr. Bishop, in his new Criminal Procedure, § 709, that the ancient practice, where an indictment appeared to be imperfect was "to award new process to the grand jury, if the court sat in the same county, to come into court to amend it," or, by whatever means assembled, this body may find a second indictment on the original evidence. Or if, at the arraignment, the grand jurors are present in court, they may there cure by amendment any defects disclosed by plea in abatement."

In the case of *Commonwealth v. Drew*, 3 Cush. (Mass.) 279, Chief Justice Shaw said: "Where it is found that there is some mistake in an indictment, as a wrong name or addition, or the like, and the grand jury can again be appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment avoiding the defects of the first."

Where the grand jury which brought in the indictment has been discharged, another grand jury may bring in another indictment for the same offense, for the finding of one

indictment is no bar to the finding of another for the same crime. The accused cannot, of course, be tried upon both, but the commonwealth may elect on which it will proceed; the better practice is, however, to withdraw the first and proceed upon the second. *Stuart's Case*, 28 Grat. 950, 966, 967; 1 Bish. Crim. L. (7th Ed.) § 1014.

The action of the court in permitting the indictment to be amended and proceeding upon it, after it was returned into court, as if it were a new indictment was, in effect, a discontinuance or an abandonment of the prosecution on the first or original indictment. The defendants moved to quash the new or amended indictment and demurred to it; upon the overruling of their motion to quash and their demurrer, they pleaded not guilty, upon which plea issue was joined, the jury was again sworn and the trial proceeded with. Whether the commonwealth would have had the right, with the consent of the court, to enter a nolle pros. or abandon the prosecution on the original indictment, or what effect such abandonment would have had on the rights of the defendants if both the original and the amended or new indictment had been for the same offense need not be considered, as it is conceded that none of the offenses proved under the amended indictment could have been proved under the original, and no question of former jeopardy was raised in the trial court, or is raised here. We are of opinion that the said assignment of error should be overruled.

The next error assigned is to the action of the court in refusing, at the conclusion of the commonwealth's evidence, to require it to elect upon which sale of liquor it was going to rely for conviction.

The indictment contained but a single count, and under that count evidence had been admitted tending to show a number of distinct sales running over a period of several months.

While a party may be tried upon the same indictment for several misdemeanors of the same nature and upon which the same or similar judgments may be rendered, there must be a separate count for each offense, for he cannot be convicted of more offenses than there are counts. 1 Bish. New Proc., § 460; *Mitchell's Case*, 93 Va. 775, 20 S. E. 892.

This being so, it would seem clear upon principle that the defendants had the right to have the commonwealth make an election. Because of the difficulty the commonwealth has in prosecuting offenses of this kind, or for some other reason, there has been in this class of cases, relaxation of the strict rules as to pleading and the introduction of evidence which generally prevail in criminal cases. When, under these relaxed rules, the Commonwealth has been allowed to allege, and to offer evidence to prove, more than one offense, there does not seem to be any good reason why, at the conclusion of the commonwealth's evidence and before the de-

defendant offers his evidence, it should not be required to elect upon which sale it seeks a conviction. By requiring such an election the prisoner knows what charge it is necessary for him to meet in making his defense. This, in common fairness, he has a right to know. Such a course also saves time and expense by rendering it unnecessary for the defendant to offer evidence to disprove any other charge. It brings the mind of the jury to the consideration of a single sale. Another reason why the commonwealth should be required to elect, where evidence has been introduced as to a number of offenses and there can only be a conviction as to one sale, is that some of the jurors may believe that the evidence of a particular sale is sufficient to convict, while others may think the evidence of that sale is not sufficient, but are satisfied that some other sale has been proved. All of the jurors may think that the accused is guilty and so find him, without, in fact, having agreed that the evidence as to any particular sale was sufficient. The result is that, if there is no election, the accused, who is indicted for one offense, is tried for many and convicted of one, but of which one of the many the court cannot say.

It may be that juries are not likely to be so careless as to bring in a verdict without an agreement on the part of all as to a particular sale, but it is a danger which can be avoided by requiring an election.

This question has not been passed upon by this court or the general court in any reported case. The great weight of authority, however, in other jurisdictions is that the defendant is entitled to have the commonwealth elect at some stage of the trial upon which sale it seeks a conviction. See 1 Bish. New Crim. Proc., §§ 460-462; 2 Wharton's Cr. Law, § 1525; Clark's Cr. Pro., pp. 284, 346; State v. Chesnell (W. Va.) 15 S. E. 412; Hughes v. State, 35 Ala. 351, 362; People v. Jenness, 5 Mich. 305, 327, 328; Goodhue v. People, 94 Ill. 37, 51; State v. Brown, 58 Iowa, 298, 12 N. W. 318; Commonwealth v. O'Hanlon, 155 Mass. 198, 29 N. E. 518; Lebkovitz v. State, 113 Ind. 26, 29, 30, 14 N. E. 363, 597.

The cases are not agreed as to the time such election should be made. The better view seems to be that that question should be left to the discretion of the trial judge to be exercised with reference to the special facts of the case, but, as Mr. Bishop says, whatever is done at the early stages of the trial, plainly as a general rule the election should be required before the prisoner opens his defense. 1 Bish. New Crim. Proc., § 462, and cases cited.

We are of opinion, therefore, that the court erred in not sustaining the defendants' motion that the commonwealth be required to elect upon what sale she sought a conviction, and that, for that error, the judgment complained of must be reversed, the verdict set aside and a new trial granted.

The third assignment of error, which is based upon the refusal of the court to set aside the verdict, need not be considered, as the verdict will have to be set aside for reasons already given.

The fourth and remaining assignment of error—that the court erred in imposing a jail sentence in addition to the fine fixed by the jury—was abandoned in the oral argument, as the question involved in that assignment of error had, since the trial, been decided adversely to the contention of the plaintiffs in error in the case of Quillen v. Com., 105 Va. — 54 S. E. 333.

The judgment complained of must be reversed, the verdict set aside, and a new trial granted.

JONES v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

Error to Corporation Court of Danville.

George Jones was convicted of an unlawful sale of intoxicating liquors, and brings error. Reversed, and new trial granted.

Withers & Green and B. H. Custer, for plaintiff in error. The Attorney General and Wm. A. Anderson, for the Commonwealth.

BUCHANAN, J. The questions involved in this case were all considered in the case of Hatcher & Shaw v. Commonwealth, 55 S. E. 677, in which an opinion has just been handed down.

For the reasons given in that opinion, the judgment complained of in this case must be reversed, the verdict set aside and a new trial granted.

HARRISONBURG HARNESS CO. v. NATIONAL FURNITURE CO. et al.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

FRAUDULENT CONVEYANCES — ACTIONS — EVIDENCE — SUFFICIENCY — GENERAL RULES.

Fraud as against creditors in the sale of property must be clearly and distinctly proved, and cannot be assumed on doubtful evidence or circumstances of suspicion, or from the fact that the dealing was not perfectly clear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 887.]

Appeal from Corporation Court of Roanoke.

Bill by Harrisonburg Harness Company against the National Furniture Company and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Price & Kyle and T. W. Miller, for appellant. Hoge & Penn, for appellees.

HARRISON, J. This bill of injunction was filed in the corporation court of the city of Roanoke by the appellant alleging that it was a creditor of the Firey Furniture Com-

pany which had, with intent to hinder, delay, and defraud the appellant, sold and delivered in bulk, without schedule or inventory, all of its stock of merchandise to the National Furniture Company, Incorporated. The prayer of the bill was, that an injunction be granted prohibiting the appellee from selling or disposing of such merchandise, and that a receiver be appointed to take charge of and hold the same, subject to the future order of the court. In accordance with the prayer of the bill a temporary injunction was awarded. Separate answers were filed by the Firey Furniture Company and the National Furniture Company, Incorporated, each denying in the most emphatic manner every allegation or insinuation of fraud contained in the bill. Evidence was taken, and, upon the final hearing, the court held that the plaintiff had not sustained the allegations of its bill. Thereupon the decree complained of was entered, dissolving the injunction theretofore awarded and dismissing the bill.

This court has repeatedly laid down the principles that govern this class of cases. It is only necessary to advert here to the well-established rule that "fraud" is not to be assumed on doubtful evidence or circumstances of mere suspicion. The party alleging the fraud must clearly and distinctly prove it. If the fraud is not clearly proven as it is alleged, although the party against whom relief is sought may not have been perfectly clear in his dealings, no relief can be had. *Hord's Adm'r v. Colbert*, 28 Grat. 49; *Gregory v. Peoples*, 80 Va. 358, 359; *Engleby v. Harvey*, 93 Va. 445, 25 S. E. 225; *Alsop v. Catlett*, 97 Va. 364, 34 S. E. 48; *Univ. Va. v. Snyder*, 100 Va. 578, 579, 42 S. E. 337.

We are of opinion that the appellant has failed to sustain the allegations of its bill with sufficient clearness to entitle it to prevail in this case.

The decree of the corporation court must be affirmed.

WILLIAMS v. VIRGINIA STATE INS. CO.
(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

INSURANCE—FIRE INSURANCE—POLICIES—CONSTRUCTION.

An insurer issued two fire policies at different times, one insuring a building and one insuring chattels therein. Each policy provided that it should be void in case of any false swearing by the insured "relating to this insurance, or the subject thereof." *Held*, that false swearing as to one policy did not vitiate the other.

Error to Circuit Court, Nelson County.

Motion by C. B. Williams against the Virginia State Insurance Company for judgment on two policies of insurance issued by the company in favor of plaintiff. There was a judgment in favor of defendant, and plaintiff brings error. Reversed and remanded.

Caskie & Coleman, for plaintiff in error.
Brown & Brown, for defendant in error.

HARRISON, J. This proceeding by notice was brought to recover judgment against the Virginia State Insurance Company upon two policies issued by it, to protect the plaintiff from loss or damage by fire. Policy No. 245,030 was issued November 8, 1902, for a term of one year, in consideration of \$10 for \$400 of insurance upon a frame building used for conducting a mercantile business. Policy No. 252,851 was issued December 15, 1902, for a term of one year, in consideration of \$5 for \$200 of insurance, upon certain meat and corn contained in the frame store building mentioned in policy No. 245,030. Each of these policies contained a provision that the entire policy should be void, "in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." A violation of this provision of these policies, by the plaintiff, was relied on by the defendant company as one of its grounds of defense.

Bill of exceptions No. 3, duly taken upon the trial, was to the action of the court in giving, at the request of the defendant, an instruction to the effect that if the jury believed there were any false representations or false swearing as to any of the property insured, the result was to violate both of the policies sued on, and they should find for the defendant.

We are of opinion that this instruction was erroneous. The two policies sued on are as distinct and separate contracts as if they had been made with different companies. The provision in each referred to "this insurance." It did not have, and could not have had reference to any other insurance than that covered by the policy in which it was contained. If there was any false swearing as to the storehouse, it vitiated that policy; if there was false swearing as to the meat and corn, it vitiated the policy taken out upon those articles. The evidence of false swearing, if any, tended to show that it was with respect to the quantity of meat and corn, consumed by the fire, which was insured for \$200 in policy No. 252,851. The instruction, in effect, told the jury, that if they believed there was false swearing with respect to the meat and corn, the result would be to vitiate policy No. 245,030, for \$400, taken out at a different time on the building, and that the plaintiff would not be entitled to recover under it.

There are cases which hold that where different items of property are insured in the same policy and a false statement is made as to a part, there can be no recovery for that as to which no false statement is made; the contract being treated as an entity. *Moore v. Va. F. & M. Ins. Co.*, 28 Grat. 508, 26 Am. Rep. 373. But no authority has been cited in support of the proposition contained in the instruction under consideration, and our own investigation has resulted in failure to find

anything bearing on the subject. The statement of the proposition that false swearing as to one contract of insurance would vitiate not only that policy, but would also vitiate another wholly separate and distinct policy of insurance, taken out at another time, and upon other property would seem to be sufficient to show its fallacy.

As the judgment must be reversed for the error set forth in bill of exceptions No. 3, it is unnecessary to consider other questions raised, for the reason that they are not likely to arise on another trial. Nor would it be proper, under the circumstances, to comment upon the evidence.

The judgment complained of must be reversed, the verdict set aside, and the case remanded for further proceedings not in conflict with this opinion.

SEWARD & CO. v. MILLER & HIGDON. (Supreme Court of Appeals of Virginia. Dec. 6. 1906.)

1. CARRIERS — BILL OF LADING — TRANSFER — EFFECT — ATTACHMENT.

The consignee of fruit, who was the shipper's agent, sold the same while in transit and drew a draft for the price, which he attached to an order on the carrier for delivery as authorized by the bill of lading. The draft was discounted by a bank, and after the fruit was rejected by the purchaser, the consignee's agent resold it to another, who agreed to pay the draft; but, before he did so, the fruit was attached as the property of the consignee. *Held*, that the bank, on discounting the draft, became the owner of the fruit until payment, and was vested with the rights of a mortgagee in possession as against the attaching creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 179-190.]

2. SAME—RECORD.

Where a bank discounted a draft attached to an order on a carrier for the delivery of freight, it was not necessary that it should have the papers recorded, as provided by Code, § 2465, in order to preserve its lien.

3. SAME—RIGHTS OF PURCHASER.

A consignee of certain fruit, after selling the same, drew a draft, attached to an order on the carrier for delivery thereof, which draft was discounted by a bank. The purchaser having refused the fruit on arrival, the consignee's agent sold the fruit to another, who agreed to pay the draft, but did not do so until an attachment was levied on the fruit as the property of the consignee. *Held* that, though the consignee's agent had no authority to sell the fruit after discounting the draft, the acceptance by the bank of payment of the draft from the second purchaser transferred to him all the bank's rights to the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 179-190.]

4. ATTACHMENT — ATTACHING CREDITORS — RIGHTS.

An attaching creditor can acquire through his attachment no higher or greater rights to the property attached than the defendant had when the attachment was levied, in the absence of fraud or collusion by which the attaching creditor's rights are impaired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Attachment, §§ 518-534.]

Error to Corporation Court of Roanoke.

Action by Miller & Higdon against the California Fruit Agency and another, in which Seward & Co. intervened, claiming certain attached property. From a judgment in favor of plaintiff with reference to a portion of the property, intervener brings error. Reversed, and new trial granted.

Smith & King, for plaintiffs in error.
Robertson, Hall & Woods, for defendant in error.

BUCHANAN, J. The defendants in error instituted an action of assumpsit against the California Fruit Agency and California Citrus Union on March 25, 1904, and on the same day sued out an attachment and had it levied on two car loads of oranges standing on the tracks of the Norfolk & Western Railway Company in Roanoke City. Seward & Co., the plaintiff in error, a single individual, filed his petition in that action, claiming that he was the owner of the attached property. Upon issues made up to try the question of whether or not Seward & Co. owned the property attached, or had an interest therein or a lien thereon, there was a verdict in favor of Miller & Higdon, the plaintiffs in the action of assumpsit and defendants in the issues submitted to the jury. Seward moved the court to set aside that verdict. The court sustained the motion in part, and set it aside so far as it found that the plaintiff in error was not the owner of the oranges in car No. 4,825, and granted a new trial as to the ownership of that car, but overruled the motion as to the other car, No. 3,539. To that judgment of the court this writ of error was awarded.

The action of the court in giving instructions numbered 2 and 5 is assigned as error. The objection made to these instructions is that there was no evidence in the case upon which to base them. Another error assigned is to the refusal of the court to set aside the verdict of the jury as to car No. 3,539, because the verdict as to that car, as well as to the other car, was without evidence to support it. These assignments of error may be considered together.

It appears from the uncontradicted evidence in the case that car No. 3,539 was shipped from the state of California in the 7th of March, 1904, by the California Citrus Union to the California Fruit Agency, whose agent lived in Richmond; that he sold the oranges in that car to T. S. Wright, a dealer in Roanoke, and, while the car was in transit from California to St. Louis, in the state of Missouri, directed that it be diverted and carried to Roanoke, Va.; that on the 16th day of that month the said agent drew a draft on Wright for the sum of \$384, the price of the oranges, and attached an order on the Norfolk & Western Railway Company to the draft, directing that company to deliver that car of oranges to Wright on the payment of

the freight and all other charges; that on the next day the draft, with the said order attached, was transferred to the Planters' National Bank of Richmond, and discounted by it, and the proceeds placed to the credit of the California Fruit Agency; that upon the arrival of the car at Roanoke, on the 24th of that month, the purchaser, Wright, who had the privilege of examining the oranges and rejecting them if they failed to come up to representations, did make an examination and refuse to take the oranges, and so notified the agent of the California Fruit Agency; that the agent, who was then in Roanoke, called upon Seward, who resided in Baltimore, in the state of Maryland, over the long-distance telephone, and after explaining to him the condition and quality of the oranges and Wright's refusal to take them, sold them to Seward, who agreed to pay the draft on Wright, which had been discounted and was held by the Planters' National Bank; that on the next day, the 25th of the month, the defendants sued out their attachment and had it levied on the oranges, but Seward did not pay the draft on Wright until after the attachment was levied; and that the bill of lading expressly authorized the carrier to deliver the car upon the written order of the California Fruit Agency, without the bill of lading.

When the Planters' National Bank discounted the draft on Wright, to which was attached the written order of the California Fruit Agency to the Norfolk & Western Railway Company to deliver the car to Wright upon the payment of freight and all other charges, the bank became the owner of the oranges until payment of the draft; for a bill of lading confers upon the person to whom it is transferred the title to the goods; and this, although the transaction is not intended to give the permanent ownership, but to furnish security for advances of money or discount of commercial paper made upon the faith of it. *Dows v. National Bank*, 91 U. S. 618, 23 L. Ed. 214; *Bank v. Logan*, 74 N. Y. 568; 1 Benjamin on Sales (6th Am. Ed.) § 577. The written order to the carrier to deliver had the same effect, under the facts of this case, as if the bill of lading itself had been attached to the draft. *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 445, 447, 7 L. Ed. 189.

The indorsement and delivery of a bill of lading to a bank as collateral security for paper discounted, not only invests the bank with title to the goods, but operates as a delivery of the goods, and the bank in such a case, if not the absolute owner, stands in the position of a mortgagee in possession, and is not required, in order to protect its lien, to have the papers recorded under section 2465 of the Code, as the trial court seemed to think was necessary when it gave the defendants' instruction No. 2. *First Nat. Bank v. Kelly*, 57 N. Y. 34.

When the attachment was levied, the oranges were not the property of the California Fruit Agency. They were either the property of the Planters' National Bank or of the plaintiff in error. If the payment of the draft by Seward was necessary to invest him with title to the oranges, then the bank was their owner when the attachment was levied. If it be conceded that the agent of the California Fruit Agency had no authority to sell the oranges to Seward, because they were no longer the property of his company, yet, when the bank accepted payment of the draft from Seward, all its rights passed to him, and the attaching creditors had no greater rights against the oranges in his hands than they would have had against them if they had remained the property of the bank.

It is a well-settled principle of law that an attaching creditor can acquire through his attachment no higher or greater rights to the property or assets attached than the defendant had when the attachment was levied, unless he can show fraud or collusion by which his rights are impaired. If the property, when attached, is subject to a lien bona fide placed upon it by the defendant, that lien must be respected, and the attachment postponed to it. *Drake on Attachments*, § 223.

There is no suggestion that the Planters' National Bank did not discount the draft on Wright and acquire its rights in perfect good faith; nor is there any evidence that Seward, in purchasing the oranges and in paying the draft, was guilty of any fraud.

We are of opinion that the verdict of the jury was without evidence to support it, and that the court erred in not setting it aside as to both cars of oranges. This being so, it is unnecessary to consider the question, raised by another assignment of error, whether or not, if the evidence had sustained the verdict of the jury as to one car and not as to the other, the court had the right to set aside the verdict as to one car and sustain it as to the other.

It also follows, from what has been said, that instructions Nos. 2 and 5 ought not to have been given, as there was no evidence upon which to base them.

We are of opinion that the judgment complained of should be reversed, the verdict of the jury set aside, and a new trial granted, to be had not in conflict with the views expressed in this opinion.

BROWN v. HOWARD & WHITEHEAD.
(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

APPEAL—RIGHT OF REVIEW—PERSONS ENTITLED—INTEREST IN SUBJECT.

Under Va. Code 1904, § 3454, authorizing a person thinking himself aggrieved by a decree to appeal therefrom, etc., a commissioner, appointed in a decree directing a resale of land

in a suit to subject the assets of the deceased owner to the payment of debts, cannot in his official capacity alone appeal from a decree setting aside the decree for a resale, rendered on a petition against himself alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 939-942.]

Appeal from Circuit Court, Amherst County.

Petition by Howard & Whitehead, trustees, against J. Thompson Brown, a commissioner to resell land for default in the payment of the purchase price, for a decree to set aside the decree for resale. From a decree setting aside the decree for resale, J. Thompson Brown, as commissioner, appeals. Dismissed and remanded.

Brown & Brown, for appellant. Whitehead & Whitehead and Lee & Howard, for appellees.

WHITTLE, J. We are confronted at the threshold of this inquiry by a motion to dismiss the appeal as having been improvidently awarded. In view of that contention, we shall state briefly such facts only as tend to elucidate the question in issue.

For many years a suit in equity, under the short style of Moore & Thompson v. William P. Scott's Administrator (the object of which was to subject the assets of the decedent to the payment of debts), had been pending in the circuit court of Amherst county. In that case Seth Perrow became the purchaser of a small boundary of land known as the "Mill Tract"; and at the April term, 1895, the trial court made a decree appointing the appellant, J. Thompson Brown, a commissioner to resell the land for default in payment of the purchase money. That decree was never enforced, and on the petition of the appellees, Volney E. Howard and J. P. Whitehead, who in their fiduciary capacity claimed the property mediately through Perrow, the court, at the February term, 1905, passed the decree appealed from, setting aside the decree of sale and exonerating the land from the lien for the balance of purchase money alleged to be due upon it. The appellant, as commissioner, was alone made defendant to appellees' petition.

The record fails to disclose that the appellant has any personal interest in the subject-matter of litigation; and it is obvious that setting aside the decree for resale does not constitute an appealable grievance, so far as it affects him in his capacity of commissioner, in contemplation of section 3454, Va. Code 1904. As commissioner, he was a mere ministerial officer of the court, whose powers and duties ipso facto ceased upon the setting aside of the decree of sale.

The persons directly interested in the questions raised by the petition were the creditors and administrator of William P. Scott, deceased, and, as remarked, they were not made parties. The appeal was consequently have to be dismissed; but the case must be remanded to the circuit court of Amherst

county, for further proceedings to be had therein touching the matters sought to be litigated here, after the proper parties shall have been convened for that purpose.

HENRICO COUNTY v. CITY OF RICHMOND et al.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

CONSTITUTIONAL LAW—DISTRIBUTION OF POWERS—EXTENSION OF CORPORATE LIMITS.

Acts 1904, p. 144, c. 90 [Va. Code 1904, p. 468, § 1014a] providing for the extension of the corporate limits of cities, and authorizing the circuit judges to carry out its provisions after ordinance passed by the city affected, is not violative of the Bill of Rights or of Const. art. 3 [Va. Code 1904, p. cxcvii] requiring the legislative, executive, and judicial departments to be separate and distinct as devolving on the judges legislative powers.

Buchanan, J., dissenting.

Error to Circuit Court, Henrico County.

Proceedings by the city of Richmond for the extension of its corporate limits. From the judgment, the county of Henrico brings error. Modified.

The ordinance referred to in the opinion is as follows:

"Be it ordained by the council of the city of Richmond:

"1. That the city of Richmond hereby declare that it is desirable to annex, in pursuance of the act of the General Assembly of Virginia, approved March 10, 1904 (Acts 1904, p. 144, c. 90 [Va. Code 1904, p. 468, § 1014a]), certain territory of the county of Henrico, Virginia, adjacent to the present corporate limits of the city of Richmond, in which is included the town of Fairmount, and to that end the city of Richmond, doth hereby accurately describe the metes and bounds of such territory as follows:

"Beginning at the western city limits as incorporated by an act of the General Assembly, approved February 13, 1867 (Acts 1866-67, p. 635, c. 196), on the southern margin of James River; thence extending westwardly along the southern margin of James River to a point opposite the western face of the old canal lock No. 2, which point is on a straight line extending from the south bank and across James River on a course N. 23 degrees 30' E. to a point on the southern line of Hagan's addition, in the middle of the block between Spruce and Magnolia streets; thence along the southern line of said Hagan's addition in a southeastwardly direction to the western line of Belview street; thence in a northwestwardly direction parallel with Belview street, Blanton avenue and Tabb Road to a point 150 feet south of the south line of Beverly street; thence in a westwardly direction parallel with and 150 feet south of Beverly street to a point 150 feet west of Tabb Road in a northwardly direction to the north line of Beverly street;

thence along a line parallel with and distant about 150 feet south of Westham Road or Cary street, continued; thence in a westwardly direction in a line parallel with and distant 150 feet south of the said Westham Road or Cary street, continued, to a point 150 feet west of Crenshaw avenue; thence in a northwardly direction along a line parallel with and distant 150 feet west of Crenshaw avenue to the centre of the present public alley midway of the block between Grove avenue and Hanover street; thence in an eastwardly direction along the centre line of the present public alley to a point 150 feet west of Roseneath Road; thence in a northwardly direction along a line distant 150 feet west of and parallel with the said Roseneath Road to a point 150 feet north of the Deep Run Turnpike or Broad street, continued, to a point 150 feet west of High Point avenue; thence following northwardly this line parallel with and 150 feet west of High Point avenue to the northern line of the right of way of the Seaboard Air Line Railway; thence following along the southern line of the right of way of the Seaboard Air Line Railway in an eastwardly direction to a point on the extension of the northern line of the property owned by the R. F. & P. R. R. Co. (Formerly the Fair Grounds); thence in a westwardly direction along a line of the northern line of the Fair Grounds property, if projected to the northeast line of the R. F. & P. R. R. Co.; thence in a southwestwardly direction along the northeastern line of the right of way of the R. F. & P. R. R. Co., to the northern line of Leigh street; thence along the northern line of, to the western line of Spotswood avenue; thence in a northwardly direction along the western line of Spotswood avenue to the northern line of the right of way of the Seaboard Air Line Railway; thence in an eastwardly direction along the northern line of the right of way of the Seaboard Air Line Railway to a point 150 feet east of the eastern line of Allen street; thence northwardly parallel with and 150 feet east of the eastern line of Allen street to the alley about 120 feet south of Fritz street; thence eastwardly parallel with and 150 feet south of the south line of Fritz street to the west line of Virginia street; thence northwardly along the western line of Virginia street to a point in line with the northern line of Powell street, projected, which line is about 75 feet south of the south line of Fritz street; thence eastwardly parallel with the northern line of Powell street to a point 150 feet west of the west line of Mitchell street or Lamb avenue; thence southwardly to the northern line of Bacon Quarter Branch; thence along the northern line of said Bacon Quarter Branch in an eastwardly direction to the western line of Seventh street; thence in a direct line to a point 150 feet north of the present corporation line; thence eastwardly parallel

with and 150 feet north of the present corporation line to a point 150 feet east of the eastern line of Seventeenth street; thence southwardly parallel with and 150 feet east of the eastern line of Seventeenth street to a point distant 150 feet north of Fairfield avenue; thence in an eastwardly direction parallel with and 150 feet north of Fairfield avenue to a point in line with the eastern line of a 40-foot street (not named) parallel to and east of Buchanan street; thence in a southwardly direction to a point 150 feet south of Accommodation street; thence in an eastwardly direction 150 feet south of Accommodation street, extended, to a point 150 feet north of Redd street, projected; thence in a southeasterly direction parallel with and 150 feet north of Redd street to the east line of Mechanicsville Turnpike; thence in a northwardly direction along the eastern line of Mechanicsville Turnpike to the northern boundary line of town of Fairmount; thence in an eastwardly direction following the said northern boundary line of town of Fairmount to the center of 22d street, thence in an eastwardly direction parallel with and 150 feet north of 'V' street to a point 150 feet east of 23d street; thence in a southwardly direction parallel with and 150 feet east of 23d street to a point 150 feet north of that section of 'T' street east of 28th street; thence in an eastwardly direction parallel with the eastern section of 'T' street to a point 150 feet north of 'T' street, and to a point 150 feet north of Nine Mile Road; thence in an eastwardly direction parallel with and 150 feet north of the Nine Mile Road to a point N. 42 degrees W. of the point of intersection of 31st street and the Nine Mile Road; thence south 42 degrees east to a point distant 250 feet north of the northern corner of the Oakwood Cemetery property and in a continuation of the straight line bounding said cemetery on the west; thence from this last mentioned point along a line parallel with and 150 feet north and east of the northern and eastern meanderings of Stony Run Branch and Gillie's creek to a point on the south line of the National Cemetery Road; thence along the south line of the National Cemetery Road in an eastwardly direction about—to a point 750 feet east of the eastern line of Malone street; thence along a line parallel with and about 750 feet east of Malone street to a point 150 feet south of Williamsburg avenue; thence in a westwardly direction parallel with and 150 feet south of Williamsburg avenue to a point 150 feet east of the eastern line of Scott street; thence southwardly parallel with and 150 feet east of Scott street, to a point 150 feet south of the southern line of Potomac street, projected; thence in a westwardly direction parallel with and 150 feet south of Potomac street to a point 150 feet west of the western line of 10th street (Fulton); thence in a northwardly direction parallel with and 150

feet west of 10th street (Fulton) to a point 150 feet south of Williamsburg avenue; thence in a northwardly direction, parallel with and 150 feet west of Williamsburg avenue to the present corporation line 150 feet south of Orleans street; thence following along the present eastern, northern and western boundaries of said city to the point of beginning, the metes and bounds of which territory proposed to be annexed appear and may be traced and verified on a map on file in the office of the city engineer of the city of Richmond. (As amended by the ordinance approved August 19th, 1905.)

"2. The city of Richmond doth hereby set forth the necessity for and the expediency of the proposed annexation, that is to say:

"(1) That the crowded and congested conditions, at present prevailing, in almost every section of the city may be relieved by adding sufficient territory to the corporate limits of the city not built upon, but adapted to city improvements, so as to afford cheap and desirable locations for the erection of commodious, healthful and beautiful residences.

"(2) That the present and prospective systems of public improvement of the city, such as the establishment of grades of streets and alleys; the plans of construction of sewers, culverts, drains, and water and gas mains, may be designed, adjusted and made, so as to avoid unnecessary annoyance and damage, necessarily occurring where property is built upon and developed before such systems are designed, acquired and made.

"(3) The fact that a part of the territory proposed to be annexed is already built upon, though without any sufficient system of sewers or other improvements, make it not only expedient, but necessary that some complete system of sewerage be promptly provided for the proper sanitation and improvement of such territory.

"(4) That within the territory proposed to be annexed there are several locations where the houses and population are more or less dense, which necessitate better police and fire protection than the county of Henrico is enabled, with the means at its command, to afford to such communities, and, as a result, it endangers the safety of life and property not only without, but also within the corporate limits.

"3. The city of Richmond hereby sets forth the terms and conditions upon which it desires to make the proposed annexation, and proposes for the future management of the annexed territory the following:

"(1) That the city of Richmond shall assume and provide for the reimbursement of the county of Henrico of a just proportion of any existing debt of said county, if any there be, and shall also make compensation to the county of Henrico for any school house or other public building of said county located within the annexed territory.

"(2) That the tax rate upon the land within the annexed territory shall not be increased

beyond the rate assessed by the county of Henrico for its purposes at the time of the annexation under this ordinance for a period of five years after such annexation, except upon the petition of a majority of the freeholders of such territory presented to the council of the city of Richmond.

"(3) That all revenues derived by the city of Richmond from taxation in said territory during the first period of five years, either on property or from other sources, including licenses, shall be wholly expended by the city of Richmond upon streets, sewers, light, water and other public improvements in said territory; provided, however, that at any time within the said five years the council of the city of Richmond may, by ordinance, set apart a sum equal to twelve per centum of the assessed value, at the time of annexation, of the lands annexed, or of such part thereof as may be determined upon by said council, which sum so set apart shall be wholly expended in public improvements in and for the benefit of the annexed territory, or part thereof, as may be determined as aforesaid; and when said sum shall have been so set apart and said public improvements shall have been begun, the land annexed or part thereof, as aforesaid, shall be subject to city tax rate, and the proceeds thereof shall be paid into the city treasury along with all other taxes and licenses in such territory for general purposes although said five years shall not have elapsed, provided that said sum to be set apart and expended shall be reduced by the sum already expended on said improvements under any other plan of annexation and, provided, said sum also shall be reduced by the amount of any debt of the town of Fairmount, should the said town be annexed to the said city of Richmond as a part of said territory; which however, shall apply solely to the scheme of taxation within the territory of said town of Fairmount; and, provided, further, that out of the proceeds of sale of the next issue of bonds by the city of Richmond after such annexation the said sum equal to the said twelve per centum of the assessed value at the time of annexation, of the land annexed, reduced by the sums hereinbefore mentioned, shall be set apart and expended in said territory as hereinbefore directed, unless said sum has been already so expended.

"(4) That all county levies imposed on persons and property within such territory for the current fiscal year in which said annexation is made shall be paid to the county of Henrico.

"(5) That the taxes assessed, collected and expended during the said period of five years shall be so assessed, collected and kept, that the same may be expended as hereinbefore provided in the territory of the particular ward from which it was so collected until and unless a sum be set apart equal to twelve per centum of the assessed value at the time of annexation of the lands annexed, and

when said sum shall have been so set apart and the public improvements shall have been begun the land annexed shall be subject to the city tax rate.

"(6) That the city of Richmond will, as soon as annexation is accomplished, afford police and fire protection and public school facilities to the citizens residing in the annexed territory; and will, with all reasonable dispatch, afford and furnish other public facilities and improvements to said citizens, as provided by law.

"(7) That in the annexed territory no new streets or alleys shall be opened or projected except with the consent and approval of the council of the city of Richmond.

"4. That the city attorney be, and he is hereby, instructed to institute and prosecute, with as little delay as possible, the necessary legal proceedings in order to annex to the city of Richmond by proper decree or judgment of the circuit court of county of Henrico the territory hereinbefore accurately described, upon the terms and conditions hereinbefore set forth.

"5. This ordinance shall be in force from its passage."

A. C. Braxton, L. O. Wendenburg, for plaintiff in error. H. R. Pollard, C. V. Meredith, Thos. W. Gardner, and J. H. Drake, for defendants in error.

HARRISON, J. The subject-matter of this controversy is the extension of the corporate limits of the city of Richmond. The evidence before the circuit court is not in the record before us, the appellant having appealed solely upon the legal questions involved. Under these circumstances it must be assumed that the evidence was legal, and sufficient to justify the conclusion reached by the circuit court upon all questions of fact.

Prior to the adoption of the Constitution of Virginia, which took effect on the 10th day of July, 1902, the Legislature exercised the power of passing special statutes for the enlargement of the limits of cities and towns, each act authorizing the enlargement of some particular city or town. That the Legislature had this power was determined in *Wade v. City of Richmond*, 18 Grat. 583. The recent constitutional convention deemed it unwise for the Legislature to exercise this power. It, therefore, declared that "the General Assembly shall provide by general laws for the extension and the contraction, from time to time, of the corporate limits of cities and towns; and no special act for such purpose shall be valid." Va. Const. 1902, art. 8, § 126 [Va. Code 1904, p. ccxlii].

Under this constitutional provision, it was impossible for the Legislature to specify by general law what amount of territory should be annexed, or how much the limits of a city or town should be diminished, as the necessities of each would vary according to its size, crowded condition, and financial ability. It was equally impracticable for the Legisla-

ture by general law to determine the terms and conditions upon which such extensions should be made. It therefore became a necessity that the Legislature should select and designate some agency to exercise a judgment on the facts of each case. The constitutional provision to which we have adverted does not limit the Legislature in selecting this agency, but it is left free to select any instrumentality not prohibited by the Constitution.

In obedience to this constitutional provision, the General Assembly, by an act approved March 10, 1904, provided by general law for the extension of the corporate limits of cities and towns, selecting and designating the circuit judges of the state as the governmental agency for carrying out the provisions of the law. Acts 1904, pp. 144-148, c. 99 [Va. Code 1904, pp. 468-473, § 1014a]. The first section of this act provides, among other things: "That whenever it is deemed desirable by any city or town to annex any territory to such city or town, its council shall declare by ordinance, which shall be passed by a recorded vote of a majority of all the members elected to the council, or to each branch thereof, when there are two, that it desires to annex certain territory, and shall accurately describe therein the metes and bounds of the territory proposed to be acquired and set forth the necessity for or expedience of annexation, and the terms and conditions upon which it desires to annex such territory, as well as the provisions which are made for its future management and improvement."

The petition for appeal rests its contention—that the judgment of the circuit court should be reversed—upon two grounds: First, that the annexation statute of March 10, 1904, is unconstitutional and void, because in contravention of the Bill of Rights, which provides "that the legislative, executive and judiciary departments of the state should be separate and distinct;" and is also in violation of article 3 of the Constitution [Va. Code 1904, p. ccxvii] which provides, that, "except as hereinafter provided, the legislative, executive and judicial departments shall be separate and distinct, so that neither exercise the powers belonging to either of the others, nor any person exercise the power of more than one of them at the same time." Second, that the ordinance of the city of Richmond, which was passed in pursuance of the act, is invalid because it does not comply with the law. The constitutionality of the Act is manifestly the main question relied on. The entire petition for appeal is devoted to a discussion of that question, the invalidity of the ordinance being merely suggested without argument.

It is not to be denied that this court may declare an act of the General Assembly unconstitutional. It is, however, a delicate matter to hold that the legislative department of the government has transcended its

powers, and it will not be done except in a case where there is a clear violation of some explicit provision of the Constitution or Bill of Rights. To doubt must be to affirm.

The contention is that this annexation statute devolves upon the court the discharge of purely legislative functions; that its vice, so far as it offends against article 3 of the Constitution, is twofold: (1) "That it authorizes the court, not only to reject the boundaries and the terms fixed by the annexation ordinance, but it attempts to authorize the court to substitute new boundaries and new terms for those rejected;" and (2) that "It not only authorizes the court to ascertain whether the conditions and methods prescribed by the statute have been pursued in the attempted annexation, but it attempts to authorize the court to review the proceedings upon the question of the policy or expediency of the annexation, and to affirm or set aside the annexation according to the court's view of the expediency therefor, regardless of whether the conditions and methods prescribed by the statute have been pursued by the subordinate legislative body attempting to effect the annexation or not, thus requiring a judicial tribunal to pass upon a purely political question involving only considerations of policy and statecraft."

This is the second case that we have been called upon to consider at this term involving a construction of the constitutional provision here relied on. The first was *Winchester & Strasburg R. Co. et al. v. Commonwealth* (on appeal from the State Corporation Commission) 55 S. E. 692. In that case it was contended that the Corporation Commission was an invalid and illegal tribunal, because the constitutional and legislative enactments which created it had concentrated in the commission legislative, executive and judicial powers, in violation of the Bill of Rights and article 3 of the Constitution. In disposing of this contention adversely to those making it, this court said that the administration of the government would be wholly impracticable if the general maxim relied on were strictly, literally and unyieldingly applied in every situation; that the federal government as well as the several state governments abounded with illustrations of the intermingling of such powers in one person or body; that experience has shown that no government could be administered where an unqualified adherence to that maxim was enforced; that the universal construction of the maxim in practice had been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of the other to a limited extent; and that this practical construction of the maxim had been repeatedly recognized with approval by the Supreme Court. For a fuller discussion of the subject and the authorities cited, see

the opinion in the case of *Winchester & Strasburg R. Co. v. Commonwealth* (decided at this term) 55 S. E. 692.

In that case, it is true, the Corporation Commission was created by the organic law, but the authorities there cited applied to cases where the commingling of two or more of these powers was accomplished by legislative enactment only. These cases show that the construction put by the appellant, in the case at bar, upon the constitutional separation of the departments of government is too narrow, and has been very generally rejected.

Duties are devolved upon the court by this statute which, if segregated and taken by themselves, would be technically legislative in their character. But, when the whole statute is read together and its purpose considered, it does not impose upon the court purely legislative functions, such as would make it obnoxious to the constitutional provision invoked. It seems to be admitted by the learned counsel for the appellant that the annexation of territory to a municipality, under general laws, involves both legislative and judicial questions, and yet it is contended that the Legislature should have designated some subordinate legislative body to carry out the provisions of the act, in which case we would have had a legislative body discharging judicial functions.

The initiative in the proceeding provided for by this statute is taken either by the municipality to enlarge its limits, or by those representing the outlying territory, to have the corporate limits extended to them. Like the move to open a new road, it nearly always inaugurates controversy, and often a bitter content. To determine such a controversy there could be no safer or more competent tribunal to ascertain the facts and give judgment in the premises than the courts, although in doing so there would necessarily be determined some questions which were legislative in their character.

Nearly all, if not all, of the questions to be determined under the provisions of this act are questions of fact. The power so much inveighed against in the court to determine the necessity for or expediency of annexation is controlled by the existence of facts and circumstances justifying action. The necessity for, or expediency of, enlargement is determined by the health of the community, its size, its crowded condition, its past growth, and the need in the reasonably near future for development and expansion. These are matters of fact, and, when they so exist as to satisfy the judicial mind of the necessity for or expediency of annexation, then, in accordance with the provisions of the act, the same must be declared. It is manifest that the Legislature, carrying out the provisions of the Constitution, intended, as doubtless did the enactors of the organic law, to require that every annexation should depend upon evidence showing the necessity for or

expediency of annexation, that the terms proposed are reasonable and fair, and the provisions for future management of the territory just.

The Legislature of this state has never given to the constitutional provision, here invoked, the restrictive meaning contended for by the appellant. On the contrary it has always conferred upon the courts of the commonwealth a jurisdiction involving a mingling of powers, some of which are quite as legislative in their character as those conferred by the act under consideration. Many statutes might be referred to showing such instances, but a few only need be mentioned as illustrative of others.

For years in this state the power to levy taxes was conferred upon the old county courts. Until the establishment of the Corporation Commission, the Virginia courts had the power to grant or refuse charters of private corporations, fixing their terms, or amending or modifying the same, possessing the fullest power of creation as well as limitation. For years in this state it has been to the judicial department that the Legislature has delegated the power to determine the opening or closing of the highways in the counties. And until the Constitution of 1849-50 the Legislature exercised the power of granting divorces, and other acts of a judicial character. This legislative construction of the Constitution is entitled to no inconsiderable weight, and cannot be lightly set aside. *Cooley on Const. Lim.* (4th Ed.) pp. 81-83; *Murray's Lessee, etc., v. Hoboken, L. & I. Co.*, 18 How. (U. S.) 272-279, 15 L. Ed. 372; *United States v. Hill*, 120 U. S. 169, 180, 7 Sup. Ct. 510, 30 L. Ed. 627; *Day v. Roberts*, 101 Va. 248, 43 S. E. 362.

This court has recognized with approval this legislative construction of the Constitution. If there is any sovereign power universally recognized as legislative in its character, it is the power to levy taxes; and yet this court has held that the General Assembly had power to confer upon the county courts authority to levy taxes for local purposes. In *re County Levy*, 5 Call, 139; *Harrison Justices v. Holland*, 3 Grat. 247; *Gilkeson v. Frederick Justices*, 13 Grat. 577, 583.

In the case of *Bull et al. v. Read et al.*, 13 Grat. 78, an act of the Legislature which authorized any district of the county of Accomack to determine by a majority vote whether it would accept the terms of the statute for the establishment of free schools was attacked as unconstitutional and void, because the General Assembly, instead of exercising the legislative power exclusively vested in it by the Constitution and enacting the law, had referred it to a vote of the people, and made its existence as a law depend upon the vote of the people. The statute was upheld, the court saying, that "there was a plain distinction between the act to be done by the voters and the legislative function." Citing, among other cases, *Com-*

monwealth v. Quarter Sessions, 8 Pa. 391. In this Pennsylvania case, the question involved was similar to that in the case at bar. The Supreme Court of that state, on page 395, says: "But the erection of a township or the erection of a new district for merely municipal purposes or convenience in the transaction of public business is in no degree similar to the exercise of the lawmaking power. * * * Like the laying out of a public road or highways, or the erection of a bridge, it may require the exercise of judgment and skill, but there is nothing either in the positive provisions of our Constitution, or the genius of our institutions, which prohibits the action of other than legislative bodies. * * * So too, the courts, acting through commissioners are vested with the right to erect new townships, and divide old ones. No one has ever doubted the constitutional right of the Legislature to authorize the exercise of both these jurisdictions by the courts, because it has never been imagined that it bore any resemblance to the power of enacting laws."

In *Ex parte Bassitt*, 90 Va. 679, 19 S. E. 453, section 97 of the Code [Va. Code 1904, p. 60] which authorized the county court to appoint additional justices to the number specified in the Constitution whenever the court should be of opinion that the public service required a greater number of justices, was assailed as an unwarranted delegation of power to the county courts, and in violation of the second article of the Constitution, which declares that "the legislative, executive and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others." The Constitution provided that there should be elected for each district of a county one supervisor, three justices of the peace, one constable, and one overseer of the poor, who should hold their respective offices for the term of two years, the fourth section providing that nothing in the articles should be construed as prohibiting the General Assembly from providing by law for any additional officers in any county. Judge Lewis, delivering the opinion of the court, says: "The Constitution, it will be observed, does not prescribe the manner in which additional officers shall be provided for, but leaves that to the discretion of the Legislature." And further says: "There is here no delegation of legislative power, but the county courts are merely empowered to declare the event, so to speak, upon which the act is to take effect within their respective counties." After citing *Cooley on Const. Lim.* 119, as to the power of the Legislature to delegate to the voters questions involving the expediency of changing municipal limits, the learned judge says: "The same principle applies to the present case, for, if it be competent for the Legislature to submit a matter of local concern to the decision of the voters of the municipality, it is equally competent for it to

submit a similar question to the decision or approval of the county courts."

There has been no case before this court where the constitutional question under consideration arose in a case involving the annexation of additional territory to a city. Many such cases have arisen, however, in our sister states, where statutes similar to ours have been upheld.

In *City of Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813, the statute involved provided for filing with the court a petition setting forth the benefits to be derived and a plat of the territory desired; it provided for a trial, and declared that, if the court find the allegations of the petition to be true and that such territory or any part thereof would receive material benefit by its annexation to such corporation, or that justice and equity require such annexation of the territory or any part thereof, a decree shall be entered accordingly. In holding this act valid the Supreme Court said, on page 430 of 23 Neb., page 815 of 36 N. W.: "We do not understand the statute, however, as clothing the courts with power to legislate in the premises; that is, to determine in the first instance what territory should be annexed. This power is bestowed upon the city council. The evident purpose is to protect the owners of property from being forcibly brought within the corporation, unless one of two facts are made to appear: First, that the territory, or a part of it, will receive material benefit from its annexation to such corporation; that is, if all the territory sought to be annexed will receive material benefits, then a decree will be entered accordingly; if but part receives material benefit, then a decree will be entered only for such part. Second, where justice and equity require such annexation of said territory, or a part thereof, then a decree will be entered according to the facts found. The determination of these questions is a judicial act, and the courts are duly empowered and the question is proper for the courts to consider." The act involved in this case was a general law, the Constitution of Nebraska prohibiting special legislation as applied to any particular municipal corporation.

It would unnecessarily prolong this opinion to quote at length from many other cases which are quite as pertinent as the Nebraska case. See *Forsythe v. City of Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576; *Id.* (C. C.) 68 Fed. 774; *Paul v. Town of Walkerton*, 150 Ind. 505, 50 N. E. 725; *Kelly v. Meeks*, 87 Mo. 396; *City of Burlington v. Leebriek*, 43 Iowa, 252; *Calien v. Junction City*, 43 Kan. 627, 23 Pac. 652, 7 L. R. A. 736; *City of Jackson v. Whiting*, 84 Miss. 163, 36 South. 611; *Foreman v. Town of Marianna*, 43 Ark. 324; *People v. Fleming*, 10 Colo. 553, 557, 16 Pac. 298; *Morton v. Woodford*, 99 Ky. 367, 35 S. W. 1112.

Many authorities are cited by the learned

counsel for the appellant in support of the contention that the act in question is invalid. In most, if not all, of these cases, there was no constitutional provision requiring a general law providing for the extension of corporate limits, and most of them refer to the original incorporation of cities and towns. There is undoubtedly some conflict in the authorities. This conflict seems, however, to arise out of the differences in the terms and conditions of the several statutes, the scope and purpose of each, and the judicial view as to the character of the questions relegated to the courts in each case.

In the case at bar, the manifest purpose of the act was to make the matter of enlarging the corporate limits of a city or town a case to be tried in court. It is, in the highest sense, litigation. Those in favor of the extension and those opposed to it each have rights that should be considered and respected. The act prescribed a method of proceeding by which all the parties concerned are brought before a court of competent jurisdiction, which, it declares, "shall hear the case upon evidence introduced in the manner in which evidence is introduced in common-law cases." The policy of annexation as a public necessity was determined by the Legislature when it enacted this statute providing for its accomplishment when certain conditions were shown to exist. The court is called upon by the statute to express no opinion as to its wisdom as a matter of public policy. It has only to determine, upon the evidence adduced the rights of the opposing parties in the particular case before it; whether, upon the facts and circumstances established by the evidence, the city is entitled to any extension at all, and, if any, how much, and the terms and conditions upon which such extension shall be granted. The power that is devolved upon the court by this statute is not an authority to make laws, and is no greater power than that which, in the evolution of law, society has found it necessary to relegate to the courts in many other instances, and there is as little danger of such power being abused in this instance as in any other.

These considerations lead us to the conclusion that the act here called in question, so far as its validity is involved in this appeal, is not invalid because in conflict with the constitutional provision relating to the separation of the powers of government.

We are further of opinion that the objection to the ordinance is untenable. The ordinance of the city of Richmond, which is the foundation of this proceeding, substantially complies with the statute, and sets forth the case of the city with as much fullness and detail as was practicable under the circumstances.

The order appealed from provides that the annexation therein determined upon shall take effect the day of its entry, February

17, 1906. The suspension of that order during the pendency of this appeal makes it necessary, in order to avoid confusion, to change the time at which the annexation shall take effect. It will, therefore, be provided by this court that the annexation shall take effect from the date of its final order. Subject to this modification, the judgment of the circuit court must be affirmed.

BUCHANAN, J. (dissenting). I am unable to concur in the opinion of the court. The act of the Legislature, whose validity is attacked in this case, confers upon the courts the power to ascertain and determine the necessity for, or expediency of, extending the corporate limits of cities and towns. That power, it was held by this court in *Wade v. City of Richmond*, 18 Grat. 620, was a purely legislative power or function, and that decision is in accord with the great weight of authority.

Section 5, art. 1, of the Constitution, declares [Va. Code 1904, p. ccix] "that the legislative, executive, and judicial departments of the state should be separate." Article 3 of the Constitution provides [Va. Code 1904, p. ccxvii] that, "except as herein-after provided, the legislative, executive, and judicial departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others, nor any person exercise the power of more than one of them at the same time."

The Constitution does provide in certain cases for the exercise of the power of more than one of the departments of government by the same person or tribunal, notably in the case of the State Corporation Commission. But it contains no provision which confers upon, or authorizes the Legislature to delegate to, the courts the legislative power or function of ascertaining and determining the necessity for or the expediency of extending the corporate limits of cities and towns. This being so, it seems clear to me that the act in question is in plain violation of the Constitution, and, for that reason, the judgment complained of should be reversed.

PARK LAND & IMP. CO. v. LANE.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

1. PROCESS—AMENDING RETURN ON SUMMONS.

Refusal of amendment of the return on a summons, after it had been filed and so had become a matter of record, to show that the officer, when delivering a copy to defendant's wife, explained its purport to her, cannot be disturbed, she having testified that he did not explain it to her, and he, while testifying positively that he did explain it, having on cross-examination stated that to the best of his recollection he did so, and admitted that a few days before he made an affidavit in which he stated that he did not remember whether he did or not.

2. SAME—EFFECT OF RECEIVING SUMMONS.

There having been no personal service of the summons, and the substituted service not having been good, because the officer, when delivering a copy to defendant's wife, did not explain its purport to her, jurisdiction of defendant was not obtained because of his receiving the copy from his wife in time to have made defense, though after the return day.

3. SAME—ALIAS SUMMONS.

An alias summons, issued against defendant after the court had set aside the default decree against him because the original process was not served so as to bring him into court, was properly quashed, the cause having been stricken from the docket before the alias summons issued, and not having been reinstated.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 42.]

4. SAME.

The court, when setting aside the default decree, because the original process was not served so as to bring defendant into court, should have set aside the prior decree striking the case from the docket, which would have given plaintiff the right to have sued out an alias summons, and to have proceeded with the suit.

Appeal from Corporation Court of Roanoke.

Suit by the Park Land & Improvement Company against H. L. Lane. From the decree plaintiff appeals. Amended and affirmed.

Scott, and Altizer & Watts, for appellant.
C. W. Allen, for appellee.

BUCHANAN, J. The first error assigned is to the refusal of the court to permit the return upon the original summons against the appellee to be amended upon the appellant's motion.

When the summons was returned and filed, the return on it became a matter of record, and could not be amended without permission of the court. *Goolsby v. St. John*, 25 Grat. 140, 160; 4 Minor, Inst. 937; *Stotz v. Collins & Co.*, 83 Va. 423, 2 S. E. 737; *Freeman on Executions*, § 358. This permission is usually granted upon proper application made in the cause in which the writ or summons issued. But it is not granted as a matter of course, but only in the furtherance of justice and in the exercise of an enlightened discretion after notice to the opposite party. Code 1904, § 3451; 3 *Freeman on Executions*, § 358; *Shenandoah Valley R. Co. v. Ashby's Trustees*, 86 Va. 232, 9 S. E. 1003, 19 Am. St. Rep. 898.

The object of the amendment of a record, as Mr. Freeman says, whether made by the court in the entries on its minutes, judgments, or other proceedings, or by the sheriff in the history of his proceedings as stated in his return, is, or always should be, to obtain a record which shall speak the exact truth. A court will not suffer a proposed amendment to be made without first being satisfied that it is true. 3 *Freeman on Executions*, supra; *Bayley, Petitioner*, 132 Mass. 457. The court therefore properly permitted the

parties to introduce evidence as to the question whether or not, when the deputy sheriff delivered a copy of the summons to the wife of the appellee, he explained its purport to her.

The only persons who appear to have been present at that time were the deputy sheriff and the appellee's wife. The officer, in his examination in chief, testified positively that when he delivered the process to the appellee's wife, he did explain its purport to her, but, on his cross-examination, he stated that to the best of his recollection he did so, but admitted that a few days before he was testifying he had made an affidavit in which he had stated that he did not recollect whether he had or not. The appellee's wife testified positively that the officer did not give her information as to the purport of the summons, but only asked her to hand it to her husband when he returned home. The other two witnesses knew nothing as to what took place when the summons was delivered except what they were told. The sheriff testified that his deputy told him a few days after it was delivered that he had explained its purport. The appellee, on the other hand, testified that his wife told him when she gave him the process, that the officer did not tell her what the paper was, but only asked her to hand it to her husband when he returned home.

If this hearsay evidence was admissible, and it is by no means clear that it was, it is of little value. The trial court saw the witnesses, their manner of testifying, and their bearing. The number of witnesses on each side were the same. Their evidence was in direct conflict. The officer's return and his affidavit to some extent lessened the weight of his testimony, and the court might very properly have held as it did, that it was not satisfied that the proposed amendment was true, and therefore refused to permit it to be made. Indeed, the evidence was of such a character that no matter which way the trial court decided the question, an appellate court would not feel justified in reversing its action.

It is further insisted that the court erred in holding, upon the facts disclosed upon the motion to amend, that the summons had not been duly served on the appellee.

There were two ways of serving process upon the appellee—one by personal service and the other by substituted or constructive service. Although the appellee received from his wife the copy of the summons left with her for him, a few days afterwards in ample time to have made defense to the suit, and from that copy actually learned, or if he had read it carefully might have learned, its contents, the service was not a good personal service. Service upon the wife of appellee was not service upon him. It was not served in the manner required by law to be good

personal service, and besides the appellee did not receive it until after the return day. The service upon appellee's wife was a substituted service, and no proposition of law is better settled than where constructive service of process is allowed in lieu of personal service, the terms of the statute by which it is authorized must be strictly complied with, or the service will be invalid. *Staunton Building, etc., Co. v. Haden*, 92 Va. 201, 205-209, 23 S. E. 285, and authorities cited. *Crockett's Adm'r v. Etter, etc.*, 105 Va. —, 54 S. E. 804.

The last-named decision was a case of substituted or constructive service. A copy of the process was handed to the wife of the defendant, but the return, which complied with the statute in all other respects, failed to show that she was at her husband's usual place of abode when she received the summons. It was held that the service was invalid and that the judgment rendered thereon by default was void.

This giving of information as to the purport of the process is a material requirement of the statute. *Vandiver v. Roberts*, 4 W. Va. 493; *Tompkins v. Wiltberger*, 56 Ill. 385, 389.

In cases of substituted service, the duty of the moving party is fulfilled if he complies in every respect with the law which prescribes that mode of service. *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398. If he does not strictly comply with the requirements of the statute, the service is insufficient, although, as a matter of fact, what was done may have been a better method of giving the defendant notice of the proceeding against him than the method prescribed by law. The statute having prescribed what is necessary to constitute good substituted service, the courts cannot dispense with any of its requirements and substitute something else in place of it.

The remaining assignment of error is to the action of the court in quashing an alias summons issued against the appellee upon the original bill, after the court had set aside the decree rendered against him by default.

That process was issued by the clerk after the cause had been stricken from the docket, and was properly quashed. When the court set aside the decree against the appellee because the original process had not been served so as to bring him before the court, it ought to have set aside the decree striking the case from the docket. This would have given the appellant the right to have sued out an alias summons against the appellee, and to have proceeded with its suit against him. *Goolsby v. St. John*, 25 Grat. 146, 160.

We are of opinion, therefore, to amend that decree in this respect, and affirm, with costs to the appellee as the party substantially prevailing.

WINCHESTER & S. R. CO. et al. v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

1. CONSTITUTIONAL LAW—DISTRIBUTION OF GOVERNMENTAL POWERS—CORPORATION COMMISSION.

Bill of Rights, § 5 [Va. Code 1904, p. ccix] provides that "except as hereinafter provided," the legislative, executive, and judicial departments of the state shall be separate and distinct. Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl, ccll], and the laws passed in pursuance thereof, create a State Corporation Commission for the control of corporations, particularly public service corporations, clothing it with limited legislative, judicial, and executive powers, as necessary to meet the exigencies of the situation. *Held*, that the exercise of such functions by the Commission is not in violation of the Bill of Rights or any requirement of the federal Constitution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 100.]

2. SAME—EQUAL PROTECTION OF LAWS.

Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl, ccll], and laws passed in pursuance thereof, subjecting all transportation companies, in the matter of their public duties and charges, to a Corporation Commission, vested with limited legislative, judicial, and executive powers, is not a denial of the equal protection of law, though other persons and corporations have access to law courts without such extended powers, since no discrimination is exercised as to any one of the class mentioned.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 700, 701.]

3. SAME—DUE PROCESS OF LAW.

Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl, ccll], creating a Corporation Commission, clothing it, as necessary to meet the exigencies of the situation, with limited legislative and executive powers, as well as judicial power, and to which transportation companies are subjected in the matter of their public duties and charges, requires that proceedings before such Commission shall be "by due process of law." The companies are notified and summoned to appear at a specified time and place before such tribunal to show cause why proposed action should not be given effect. They are permitted to be represented by counsel to examine and cross-examine witnesses to produce evidence, and to be heard in their own behalf on all matters, and a right of appeal is given. *Held* not a deprivation of property without due process of law.

4. RAILROADS—TERMINI—CHARTERS—LESSEES.

A railroad company, having been granted a charter to build its line between certain towns, built only to a junction near one of them. After a lease of the road, with the consent of the company, and its lessee and practical owner, the charter was changed by releasing the company from its obligation to construct its line within the city, provided it should construct a depot at a certain place therein, to which trains should be run over a connecting line. Act Feb. 26, 1877, Acts 1876-77, p. 95, c. 110. The lessee accepted such compromise by building the depot, and for many years running trains there. *Held*, that even if the original company had not the financial ability to pay charges afterwards imposed by the connecting line, or construct a new line to the depot, its lessee and practical owner, which was abundantly able to perform the duty, was bound to do so.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 423-429.]

5. SAME.

That it would entail a financial loss to pay the charges imposed by the connecting line or to build a new line would not excuse a non-compliance with the duty of running trains to the terminus, imposed by the acceptance of the charter and its amendment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 105, 113, 114.]

6. JUDGMENT—CONCLUSIVE EFFECT—GROUND OF JUDGMENT—NATURE OF PROCEEDINGS.

Where a town applied for mandamus to compel a railroad to run its trains there, and the writ was refused on the ground that the company was in the hands of a receiver of the federal court, such refusal did not render the matter *res adjudicata*, so as to preclude action as to the same matter, after the discharge of the receiver, before the Corporation Commission.

7. RAILROADS—CORPORATION COMMISSION—TERMINALS.

In proceedings before the Corporation Commission, it appeared that the railroad company was, by amendment of its charter (Act Feb. 26, 1877, Acts 1876-77, p. 95, c. 110), released from building its road to its terminal point, provided it should run its trains in over another line. *Held*, that the connecting line, not made a party to the proceedings by process or notice, was not subject to any order of the Commission as to the running of the trains over its line.

8. SAME—AMENDMENT OF CHARTER—CHOICE OF METHODS.

A railroad company, having accepted a charter to build between two stated termini, and having failed to build to one of them, an amendment (Act Feb. 26, 1877, Acts 1876-77, p. 95, c. 110) was accepted, authorizing it to run its trains into a certain depot in the town over a connecting line. *Held*, that the company could fulfill its duty either by running to such depot over the other line or by constructing its own line thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 105, 113, 114.]

Appeal from State Corporation Commission.

Proceedings before the Corporation Commission by the town of Strasburg to compel the Winchester & Strasburg Railroad Company and its lessee to run trains into Strasburg. From an order granting such relief, the companies appeal. Reversed and remanded.

John G. Wilson and Bumgardner & Bumgardner, for appellants. The Attorney General, Barton & Boyd, A. C. Stickley, and A. C. Braxton, for the Commonwealth.

HARRISON, J. This proceeding was instituted by the town of Strasburg under the provisions of section 156 (b) and section 164 of the Constitution [Va. Code 1904, pp. ccl, cclxl], and the laws passed in pursuance thereof, to compel the Winchester & Strasburg Railroad Company and its lessee, the Baltimore & Ohio Railroad Company, to run their trains from Strasburg Junction, a distance of about one mile, into the town of Strasburg. From the order entered in the premises by the State Corporation Commission, this appeal has been taken by the two defendant railroad companies.

At the outset of our consideration of the questions raised by the petition for appeal,

we are confronted with the proposition that sections 155 and 156, art. 12, of the Constitution of Virginia [Va. Code 1904, pp. ccl, ccll], and the statutes enacted in pursuance thereof, are unconstitutional and void; and that the State Corporation Commission, thereby established, is an illegitimate and invalid tribunal, without power to enter the order complained of. The ground urged in support of this contention is that the Constitution and laws mentioned concentrate in the body thereby created legislative, executive, and judicial functions, and require it to exercise the powers of all three of these departments of government, in contravention of section 5 of the Virginia Bill of Rights [Va. Code 1904, p. ccix], which provides "that the legislative, executive, and judicial departments of the state should be separate and distinct;" and are also in violation of the fourteenth amendment to the Constitution of the United States, for the reason that both the organic law and the legislative enactments operate to deny the equal protection of the laws to that class of companies and corporations over which the Commission is given jurisdiction, and to deprive those companies of their property without due process of law.

This court has recognized the validity of the State Corporation Commission as a legally constituted tribunal of the state, clothed with legislative, judicial, and executive powers. *Atlantic Coast Line v. Commonwealth*, 102 Va. 599, 46 S. E. 911; *Norfolk, etc., Co. v. Commonwealth*, 108 Va. 294, 49 S. E. 39.

In the last-named case, at page 295 of 108 Va., page 41 of 49 S. E., it is said: "The State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental power for the regulation and control of public service corporations. For that purpose it has been clothed with legislative, judicial, and executive powers."

The concentration of these three powers of government in the Corporation Commission is not in contravention of the Bill of Rights. That declaration is part of the Constitution, which expressly provides that "except as hereinafter provided, the legislative, executive, and judiciary departments shall be separate and distinct," thereby recognizing the well-accepted view that the administration of the government would be wholly impracticable if that general maxim were strictly, literally, and unyieldingly applied in every possible situation.

The federal government, as well as the state governments, abounds with illustrations of the intermingling of such powers in one person or body. The British Constitution fully recognizes the wisdom of keeping separate these three great departments of the government, and yet it furnishes a most conspicuous illustration of the fact that it is impossible for any government to literally fulfill the terms of that maxim without any

qualification—the House of Lords is a part of both the legislative and of the judicial branches of that government. It is undoubtedly true that a sound and wise policy should keep these great departments of the government as separate and distinct from each other as practicable. But it is equally true that experience has shown that no government could be administered where an absolute and unqualified adherence to that maxim was enforced. The universal construction of this maxim in practice has been that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments, but that either department may exercise the powers of another to a limited extent. This practical construction of the maxim has been recognized with approval by the Supreme Court of the United States.

In the case of *Calder v. Bull*, 3 Dall. (U. S.) 386, 1 L. Ed. 648, which has been frequently cited, it appeared that the Legislature of the state of Connecticut had undertaken to set aside the judgment and award a new trial in a private litigation which had been concluded in the courts of that state. This action of the Connecticut Legislature was attacked in the Supreme Court of the United States, and, amongst other things, it was charged to be invalid because it was a legislative invasion of the judiciary department of government. No one denied that this was true, but the court held that, under the Constitution of Connecticut, the Legislature could perform judicial functions, and that there was nothing in the federal Constitution with which such a state of affairs conflicted; that the Legislature of Connecticut "acted in a double capacity as a house of legislation with undefined authority, and as a court of judicature in certain exigencies." *Patterson, J.*, in *Calder v. Bull*, 3 Dall. (U. S.) 394-395, 1 L. Ed. 648. In pointing out that this combination of Legislature and court in one body was not in violation of the federal Constitution, *Iredell, J.*, in the same case, adverted to the fact that the House of Lords in England was the supreme appellate court of that country; and *Cushing, J.*, said that "although the act (of the Connecticut Legislature) is a judicial act, it is not touched by the federal Constitution."

The same point was reiterated by the Supreme Court in *Satterlee v. Matthewson*, 2 Pet. (U. S.) 380, 413, 7 L. Ed. 458, in which the court said: "There is nothing in the Constitution of the United States which forbids the Legislature of a state to exercise judicial functions. * * * It may safely be affirmed that no case has ever been decided in this court upon a writ of error to a state court, which affords the slightest countenance to this objection."

The doctrine that it is competent for a state to unite in one board or tribunal some of the legislative, executive, and judicial

powers of the government, as well as the further proposition, that when a state does this, it violates no prohibition of the federal Constitution, and that any such question is one for the determination of the state, its action in the matter being accepted as final, is well supported by the more recent case of *Dreyer v. Illinois*, 187 U. S. 71, 84, 23 Sup. Ct. 28, 32 (47 L. Ed. 79) in which Mr. Justice Harlan, delivering the unanimous opinion of the court, says: "Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons, belonging to one department, may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state, and its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the fourteenth amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. 'When we speak,' said Story, 'of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link or dependence, the one upon the other, in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution.' Story's Const. (5th Ed.) 398. Again: 'Indeed, there is not a single Constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it.' Story's Const. (5th Ed.) 395." See, also, *Reetz v. Michigan*, 188 U. S. 505, 23 Sup. Ct. 890, 47 L. Ed. 563; *Lieberman v. Van De Carr*, 199 U. S. 552, 26 Sup. Ct. 144, 50 L. Ed. 805.

A further ground of objection urged to sections 155 and 156 of the Virginia Constitution, and the laws passed in pursuance thereof, is, that in so far as the Constitution and laws of Virginia subject the companies mentioned in those sections, in the matter of their public duties and charges, to the control of a commission clothed with legislative, executive, and judicial functions, and deny to them access to the law courts of the state, which are not clothed with "legislative, executive, and judicial functions," such as every other person, private or corporate, has access to, said Constitution and acts make a discrimination against such companies and deny to them the equal protection of the

laws, and deprive them of their property without due process of law.

There is no denial of the equal protection of the laws when all persons in like condition and under like circumstances are treated in the same way, made liable to the same regulations, and subjected to the same penalties for failure to comply with the just requirements of such regulations. The jurisdiction complained of applies alike to all companies and persons engaged in the business of transportation, and there is no discrimination against any railroad or other transportation company, or in favor of any person, who engages in the business of a common carrier. All stand alike, and are dealt with alike. The Supreme Court of the United States has, in many cases, held that the fourteenth amendment does not impair the right of the states to classify any subjects with which their laws deal, provided only that the classification is a reasonable and not a mere arbitrary one, without any reason to support it.

In *Barbler v. Connolly*, 113 U. S. 32, 5 Sup. Ct. 860, 28 L. Ed. 923, it is said: "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its action, it affects alike all persons similarly situated, is not within the amendment."

In *Missouri Ry. Co. v. Mackey*, 127 U. S. 209, 8 Sup. Ct. 1163, 32 L. Ed. 107, it is said: "The objection that the law * * * deprives the railroad companies of the equal protection of the laws, is even less tenable than the one considered. It seems to rest upon the theory that the legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of our legislation is special, either in the object sought to be attained by it or in the extent of its application * * * such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws because it is special in its character. * * * When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions." See, also, *Kentucky Ry. Tax Cases*, 115 U. S. 322, 6 Sup. Ct. 57, 29 L. Ed. 414; *Pac. Ex. Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Magoun v. Ill. Trust & Sav. Bk.*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1087; *Tinsley v. Anderson*, 171 U. S. 106, 18 Sup. Ct. 805, 43 L. Ed. 91; *Orient, etc., Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Field v. Barber Asphalt Co.*, 194 U. S. 621, 24 Sup. Ct. 784, 48 L. Ed. 1142.

In the last case cited, the doctrine announced in many other cases is reiterated in

these words: "It is not the purpose of the fourteenth amendment, as has frequently been held, to prevent the states from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred, or liabilities imposed."

That the appellants are not deprived of their property without due process of law is clear from what has been already said, and the authorities cited.

In *Iowa, etc., Co. v. Iowa*, 160 U. S. 393, 16 Sup. Ct. 345, 40 L. Ed. 467, it is said that "it is clear that the fourteenth amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

The constitutional provision, creating the Corporation Commission, expressly directs and requires that the proceedings before it shall be by "due process of law." Under that proceeding, the railroad companies are duly notified and summoned to appear at a specified time and place before an impartial tribunal provided by law to hear and determine the matter in dispute, and show cause, if any they can, why a suggested or proposed action should not be given effect. At such hearing the railroads are allowed, as a matter of right, to be represented by counsel, to examine and cross-examine witnesses, to produce any and all legal evidence in their behalf, and to be fully heard in their own behalf on all matters of law or fact which they may desire to allege or put forward in their own defense. And all this before any decision or action adverse to their interests can be rendered. It has been held that the right of appeal is not an essential element in "due process of law." *Reetz v. Michigan*, 188 U. S. 508, 23 Sup. Ct. 390, 47 L. Ed. 563. Out of abundant caution, however, the constitutional provision, authorizing this proceeding, also authorized an appeal by the railroads from any decision of the Commission in such proceedings with which the railroads may be dissatisfied. And whereas, in almost every other case involving the rights of individuals, the right of appeal is addressed to the sound discretion of the appellate court, yet in this case the appeal is given to railroads absolutely, as of right; and whereas, in most appeals involving the rights of individuals, there is a jurisdictional amount limit, yet in this case the railroads are given an appeal without limit as to the amount involved. It is difficult to conceive of more complete provision for "due process of law" than is secured to the parties concerned by these proceedings.

That the state has the inherent power of

regulating and controlling public service corporations operating within her borders and of prescribing the facilities and conveniences which shall be furnished by them, is no longer an open question in this country. The just regulation and control of such companies has been a difficult problem for many years. The Virginia State Corporation Commission, as created and defined by article 12 of the Constitution, was devised as a solution of that problem. The exigencies of the situation made it necessary that the Commission should be clothed, to some extent, with legislative, executive and judicial functions, and in view of what has been said, and in the light of the authorities cited, we are of opinion that the sections of the state Constitution, and the statutes enacted in effectuation thereof, from which the State Corporation Commission derives its existence and its powers, violate no provision of the federal Constitution, and are in conflict with no principle essential to the preservation of liberty. It follows, therefore, that the State Corporation Commission is a legitimate and valid tribunal, with full power to determine the subject matter of controversy presented by this proceeding.

We are further of opinion that the Corporation Commission did not err in disregarding the objection urged by the appellants to the sufficiency of the petition filed as the foundation of this proceeding by the town of Strasburg. The petition was quite sufficient to inform appellants of the grievance complained of and the remedy asked for. The elaborate and comprehensive answer filed by the appellants shows conclusively that they were fully informed as to the case they were to meet and defend.

The power and authority of the Corporation Commission being established, we come now to consider its action with respect to the subject-matter of this controversy.

It appears from the record that in April, 1867, the Winchester & Strasburg Railroad Company was granted, by the Virginia Legislature, a charter to build a railroad from the town of Winchester, in Frederick county, to the town of Strasburg, in the county of Shenandoah. The road was not built as contemplated by the charter, but was constructed so as to pass about one mile west of the town of Strasburg, where it formed a junction with the Manassas Gap Railroad. In July, 1870, the Baltimore & Ohio Railroad Company leased the Winchester & Strasburg Railroad, and from that time until now has controlled and operated the same under successive contracts of lease, by the terms of which it bound itself to conform in all respects to the legal obligations of its lessor. The Winchester & Strasburg road not having been completed, as contemplated by its charter, to the town of Strasburg, the matter was brought to the attention of the Legislature, and by an act approved February

26, 1877, Acts 1876-77, p. 95, c. 110, the original charter granted in 1867 was modified with respect to completing the road to the town of Strasburg upon certain terms and conditions set forth therein. This act recites the charter obligation to construct the railroad to the town of Strasburg; its construction in fact to a point on the Manassas Gap Railroad, near the town of Strasburg; and that by means of the use of the Manassas Gap Railroad, the Winchester & Strasburg Railroad Company was willing to run, or procure to be run by its lessee, trains to the town of Strasburg at and from a convenient and suitable depot to be erected or constructed on the line of the Manassas Gap Railroad, in the limits of the town of Strasburg, at or near the Caton Crossing, and is willing to treat and regard said depot, when so erected or constructed, as a regular station on its road for such trains as are accustomed to stop at stations of a similar character and dignity on its own road, and, by the acceptance of the provisions of this act, signifies its assent to the amendment of its charter as therein made and provided. After these recitals, it is enacted that the Winchester & Strasburg Railroad Company is released from the obligation of the charter to further construct its road, and relieved of all penalties or forfeitures for any failure to so construct it to the town of Strasburg or to further comply with the terms of its charter in reference thereto; provided "the said company shall erect or construct, keep, and use for the convenience of the people of Strasburg and vicinity the depot aforesaid, and provided further that upon the failure of the said company to so keep said depot, the provisions of this act shall be deemed and held to be null and void." The true intent and meaning of this act is, on its face, declared to be to treat and regard the keeping of the depot at or near Caton's Crossing in the town of Strasburg as a full compliance with the terms of the charter of the company with reference to the town of Strasburg.

The record shows that the Baltimore & Ohio Railroad Company, lessee, is practically the owner of the Winchester & Strasburg Railroad; that the capital stock of the last-named company is 6,000 shares, of which the Baltimore & Ohio owns 5,680 shares; that the officers of the two companies are the same; and that the control and operation of the Winchester & Strasburg Railroad has been in the hands of its lessee, the Baltimore & Ohio, since it was constructed. The Baltimore & Ohio Railroad Company accepted the terms of the compromise act of 1877 by building the depot in the town of Strasburg, and running its trains thereto until the latter part of the year 1896, a period of about 19 years. About that time the Baltimore & Ohio Railroad Company ceased to run its trains to that station, and has since failed to comply with the terms of the act of 1877,

or to comply with the terms of the original charter granted in 1867, which obligated the Winchester & Strasburg Railroad Company to build its line to the town of Strasburg. The conclusion reached by the State Corporation Commission was, "that under all the facts and circumstances appearing to the Commission in this proceeding, it necessarily follows that the Winchester & Strasburg Railroad Company was, and is, under a public obligation to the state of Virginia to operate its road and its trains as a continuous operation into the town of Strasburg, and to the depot erected by it in said town in accordance with the requirements of the act referred to; that the Baltimore & Ohio Railroad Company, as lessee, under the terms of the lease of said railroad undertook to carry out the said public legal obligation, and is, therefore, now legally bound to do so."

We are of opinion that there is no error in this conclusion. It is unnecessary to decide whether the appellants shall run their trains to the Caton Crossing Depot in pursuance of their obligation to do so under the act of February, 1877, or in pursuance of their original charter obligation to run them to the town of Strasburg. It is immaterial to the citizens of Strasburg which of these methods is adopted. In any aspect of the case, appellants are bound to run their trains to the town of Strasburg, and it is for them to adopt the means of properly performing that duty.

It is contended that the Winchester & Strasburg Railroad Company has not the financial ability to run its trains to the town of Strasburg in either of the two ways open to it, and that it is therefore impossible for it to obey the order of the Commission.

The record shows that this company receives in consideration of the lease of its road to the Baltimore & Ohio a 4 per cent. annual dividend upon its stock. This sum appropriated to the discharge of its public duty would seem to have been sufficient in the last 10 years, during which it has failed to perform that duty, to have put it in a position to run its trains into the town of Strasburg. But, be that as it may, there is no suggestion in the record that the Baltimore & Ohio Railroad Company is not financially able to perform this duty, and it has, as lessee, undertaken to carry out and perform the public legal obligations of the Winchester & Strasburg Railroad Company, and is therefore legally bound to do so.

It is further contended that the appellant companies can no longer use the one mile of the Manassas Gap Railroad Company, heretofore used by them, except upon terms with the Southern Railway Company, the present owner, so onerous as to preclude the acceptance of the same; and that to construct their own line for the distance of one mile to the town of Strasburg would entail a loss in view of any business that would result from such construction.

We are of opinion that there was no error in the action of the Corporation Commission in declining to admit the evidence offered in support of these contentions. These companies sought and accepted the obligation imposed upon them by the terms of the act of February, 1877, and they cannot now be permitted to disregard that obligation merely because they find it onerous or unprofitable. Nor can they be excused from their charter obligation to complete their own road, if that is necessary to take their trains to the town of Strasburg, because they find it will cost them more to do so than the resulting business would justify. It must have been contemplated when the charter was granted that it would cost something to build this mile of road. At any rate, by accepting the charter, appellants obligated themselves to construct it, and reiterated and acknowledged that obligation in the act of February, 1877. We do not see that the question of financial or other convenience is involved in this case. These two companies are carrying on their operations in violation of their obligation to run their trains to the town of Strasburg, and the sole question is whether or not they are to be permitted to continue to disregard this plain obligation and public duty, at the expense of the public convenience and right.

It is further contended that the matter involved in this proceeding is *res adjudicata* by reason of the action of this court in the mandamus proceeding of the Town of Strasburg v. Winchester & Strasburg Railroad Company and Others, reported in 94 Va. 647, 27 S. E. 493.

This contention cannot be sustained. In 1897 the town of Strasburg applied to this court for a writ of mandamus to compel the appellants to make provision for running their trains to the town of Strasburg. The writ was denied because the court would have been powerless to make the writ effectual; it being a fundamental principle in the law of mandamus not to grant that extraordinary remedy when to do so would be fruitless and unavailing. At the time the writ was asked for the Baltimore & Ohio Railroad Company, and all the railroads leased or controlled by it, including the Winchester & Strasburg Railroad, were in the hands of receivers appointed by the Circuit Court of the United States for the District of Maryland. The established doctrine of both the state and federal courts was recognized and followed that the receivers could not be disturbed, nor their operation of the Winchester & Strasburg road interfered with, by any court other than that which appointed them. The merits of the question presented by the petition in that case were not touched, and nothing was concluded by the action of this court in refusing the writ. An order, denying a writ of mandamus, is not such a judgment as concludes further inquiry as to the grounds on which the writ is sought. Booth v. Strippleman, 61 Tex. 378. The refusal to grant the

writ on one day will not prevent the court from granting the same writ on another day, if the ends of justice require it.

At that time this court was powerless to enforce any relief, and therefore granted none. But now the conditions are wholly different. Not only is there now no receiver and no other court in control, but there is a tribunal, since established by the Constitution and laws of the state, with exclusive original jurisdiction to hear and determine such controversies, and to require transportation companies to perform their public obligations and to comply with the provisions of their charters and the laws of the commonwealth.

We are of opinion that the town of Strasburg had the right to apply to the Corporation Commission for relief from the grievance it complains of, notwithstanding the action of this court in denying to it the writ of mandamus applied for in 1897.

While the conclusion reached by the Corporation Commission, that the appellants are bound to run their trains into the town of Strasburg, is, as we have seen, free from error, the form of the order is plainly erroneous. So far as necessary to be quoted, the form of the order is as follows: "That the said two companies, the Winchester & Strasburg and the Baltimore & Ohio Railroad Company do, on or before the 1st day of October, 1906, make arrangements and put themselves in condition to comply with the terms of the act of February, 1877, so that on and after that date, the said 1st day of October, 1906, they shall by means of the use of the track of the Manassas Gap Railroad, said track being now controlled, owned, and operated by the Southern Railway, run or procure to be run, trains on reasonable schedules to said town of Strasburg, that is to and from the depot or station erected as shown in the evidence within the limits of said town of Strasburg at or near Caton Crossing."

The Southern Railway Company had not been served with any process or notice, as required by law, and was not a party to the proceeding. Under such circumstances it was error for the Commission to make any order affecting the rights of the Southern Railway Company.

It was further error to require the appellants to adopt the mode provided by the act of February, 1877, as a means of reaching Strasburg with their trains. Appellants have a choice of two methods of running their trains into the town of Strasburg, that provided for by the act of February, 1877, and that provided for by the original charter of 1867. The order should, therefore, have required the appellants to run their trains to the depot at Caton Crossing in the town of Strasburg, within a given time, leaving them to determine which of the two ways mentioned they would adopt as a means of complying with such order; failure to per-

form which would subject appellants to the penalties provided by law in such cases.

For these reasons the order complained of must be reversed, and the case remanded to the Corporation Commission for further proceedings not in conflict with the views herein expressed.

KEITH, P. (concurring). There is one point involved in this case upon which I wish to state my position.

I do not doubt that it was competent for the state to create a Commission and confer upon it executive, legislative, and judicial functions without trenching upon any provision of the Constitution of the United States; but the Commission, in the exercise of those powers, must acquire jurisdiction over the parties to be affected by its action by due process of law, and conform its proceedings to the law of the land. When, in the exercise of its legislative functions, it has in obedience to the law of the state summoned persons, natural or artificial, before it to protect their rights, it has done what is not required to be done by the fourteenth amendment to the United States Constitution, and what it might have omitted to do, so far as that instrument is concerned; but when it comes to enforce its rules and regulations and to adjudge the penalties for their violation, a stage has been reached at which the fourteenth amendment throws its aegis over the litigant, who must be summoned to appear and permitted to defend in accordance with the law of the land, and this right to be summoned to answer is not satisfied by the antecedent summons and appearance before the Commission at a time when the adoption of the rule or regulation was under consideration. The Commission may exercise legislative and judicial functions, but cannot confuse and blend them in one procedure, but when considering the adoption of a regulation is in the exercise of one department or head of its authority, and, when passing upon the violation of such regulation, is exercising a wholly separate function, and is to be controlled by wholly different considerations in order to meet the requirements of due process of law and to adjudicate rights in accordance with the law of the land.

BENNETT v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Dec. 6, 1906.)

1. JURY—VENIRE FACIAS—SUFFICIENCY.

Va. Code 1904, § 4018, provides that the writ of venire facias, in case of felony, shall command the officer to summon a specified number of persons to attend the court wherein accused is to be tried, and the jury so summoned may be used for the trial of all cases which may be tried at that term. An indictment against accused was pending in a court when a venire facias was issued for the trial of a

third person under indictment for a felony. At the time of the issuance of the writ accused was in another state though not a fugitive. *Held*, that he could not complain because the jury summoned under the writ was used for his trial.

2. CRIMINAL LAW—CONTINUANCE—DENIAL OF APPLICATION.

Accused was forced to trial in the absence of a material witness on the assurance of the court that the witness would be produced before the evidence closed. After all the witnesses had been examined the court adjourned the case from time to time to await the appearance of the absent witness who finally appeared and testified. *Held*, that accused was not prejudiced by the action of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1515.]

3. SAME—SEPARATION OF JURY.

One was charged with an offense not of such a character as to make it necessary to keep the jury together. The court, after the examination of all the witnesses present, adjourned the case from time to time for an absent witness. Some of the jurors, during the adjournments, attended to their own business elsewhere than at the courthouse, and others were used in the trial of other cases. It was not suggested that the jury were contaminated, nor did it appear that they were prejudiced by the adjournments. *Held*, that accused was not entitled to reversal of a judgment of conviction because of such separation of the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 2039-2047.]

4. SAME—NEW TRIAL—GROUNDS—SUFFICIENCY.

A new trial in a criminal case for newly discovered evidence, chiefly impeaching, is properly denied.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2331, 2332.]

Error to Circuit Court, Franklin County.

W. H. Bennett was convicted of unlawfully wounding another, and he brings error. Affirmed.

P. H. Dillard, for plaintiff in error. The Attorney General and Wm. A. Anderson, for the Commonwealth.

CARDWELL, J. Plaintiff in error, W. H. Bennett, was indicted on January 2, 1906, in the circuit court of Franklin county for a malicious assault, and appeared in court on the 15th day of March, 1906, and asked for and secured a continuance of his trial to March 19, 1906, when at his instance a further continuance was granted to the 22d day of March, 1906, on which day the trial commenced. When the case was called for trial, one S. J. Dudley, a witness for plaintiff in error, who had been theretofore recognized, failed to appear, and plaintiff in error again asked for a continuance on account of Dudley's absence, but the trial was proceeded with, the court stating that the witness would be gotten before the evidence was closed. After all the witnesses present had been examined, and the witness Dudley not appearing, the case was adjourned to March 31, 1906, and on that day Dudley, being again

absent, the case was adjourned to April 10, 1906, at which time Dudley appeared and testified, and the case was given to the jury; whereupon the jury found plaintiff in error not guilty of malicious wounding, but guilty of unlawful wounding, as charged in the indictment, fixing his punishment at one year's confinement in the state penitentiary, which verdict the court on June 5, 1906, refused to set aside on the motion of the plaintiff, made in due time, but which the court took time to consider, and rendered judgment in accordance with the verdict.

Upon three grounds we are asked to reverse this judgment: First, because of the refusal of the court to quash the *venire facias* under which the jury, trying the plaintiff in error, was summoned; second, because the court forced plaintiff in error to trial in the absence of the witness Dudley, upon a promise to have the witness before the end of the trial; and, third, because of the refusal of the court to grant a new trial on the ground of after-discovered evidence.

It appears that the *venire facias* was regularly and properly issued for the trial of one Toad Holly, who was under indictment pending in the circuit court of Franklin county, in accordance with section 4018, Va. Code 1904, which is as follows: "The writ of *venire facias*, in case of felony, shall command the officer to whom it is directed, to summon 16 persons of his county or corporation, to be taken from a list furnished him by the clerk issuing the writ, who are qualified in all respects to serve as jurors, to attend the court wherein the accused is to be tried on the first day of the next term thereof, or at such other time as the court or judge may direct. At one term of the court only one jury shall be summoned, unless the court or judge thereof otherwise direct; and the jury so summoned may be used for the trial of all the cases which may be tried at that term, both felonies and misdemeanors."

It is contended for plaintiff in error that as he was in the state of West Virginia, where he had gone to live, though not a fugitive from justice, it was not contemplated that he should be tried at the term of the court to which this *venire facias* to try Holly was issued; that if the court had intended to use the jury summoned pursuant to this *venire facias* for the trial of all the cases at that term, the same should have been shown on the face of it; and that the *venire facias* was no *venire facias* so far as plaintiff in error was concerned, or so far as any one else was concerned, except the man Holly, for whose trial it was directed as shown on its face.

As supporting these contentions *Hoback's Case*, 104 Va. 871, 52 S. E. 575, is relied on. In that case the vice was in the writ, and the court simply held that in effect there was no writ at all; while, in this case, the objection is not

for an alleged irregularity in issuing the writ, but to the use of the jury summoned thereunder for the trial of plaintiff in error.

The indictment of plaintiff in error was pending in the court when the *venire facias* in question was issued, and the record shows affirmatively that every requisite of this statute, *supra*, was strictly and literally complied with. The statute is "that the jury so summoned may be used for the trial of all the cases that may be tried at that term." It does not require the name of every one to be tried to appear thereon, nor that the writ shall show on its face that the jury summoned may or will be used for the trial of all cases at the term of the court to which the jury is summoned; nor that the persons to be tried shall be in actual custody at the time the writ issues. We are of opinion, therefore, that there is no merit whatever in the contentions of plaintiff in error with respect to the *venire facias* under which the jury trying him was summoned.

The court is further of opinion that there is no merit in plaintiff in error's second assignment of error, which relates to the refusal of the court to continue his case because of the absence of the witness, Dudley, upon the promise that the witness should be present before the end of the trial. Whether the evidence of this witness was or was not material is left to conjecture, as none of the evidence in the case, except such as was heard by the court on the motion for a new trial on the ground of after-discovered evidence, appears in the record.

In *Cremeans' Case*, 104 Va. 860, 52 S. E. 362, 2 L. R. A. (N. S.) 721, relied on as sustaining this assignment of error, the opinion of the court does condemn in unmistakable terms the practice of proceeding with the trial of one accused of a crime in the absence of a material witness for the defense, upon the condition that the evidence of the absent witness could be used as the basis for a new trial should his attendance not be secured until after the verdict; but the judgment was affirmed on the ground that it was made to appear subsequently that as "no such witness in fact existed" the accused could not complain that the motion for a continuance was erroneously overruled, as he had not been prejudiced thereby.

In the case at bar, while the court is not at all inclined to approve of the practice indulged in by the trial court of forcing one accused of crime into trial in the absence of material witnesses, upon the assurance merely that if they arrive before verdict they can testify, we are unable to see that the plaintiff in error has been or could have been prejudiced by adjourning over his case from time to time during the same term of the court to await the examination of his witness, Dudley, who was detained at his home by sickness. The argument that plain-

tiff in error might have been injured by the necessary delay in his trial would be equally as forceful if adjournment of the trial had been from day to day during its continuance. In either case this court would not be justified in reversing the judgment of the trial court unless it could be seen from the record that the accused was or might have been injured by the delay caused by the adjournment of his trial from day to day or from time to time during the term. *Cremeans' Case*, supra.

Nor is there any merit in the contention that the plaintiff in error is entitled to a reversal of the judgment of the trial court because "the jury was discharged from time to time covering a period of about three weeks, many of them went home attending to their business elsewhere than at the courthouse, others were taken by the court and used in the trial of other cases." The charge against plaintiff in error was not of such a character that it was necessary to keep the jury together, and if it was proper to adjourn the jury from day to day without requiring them to be kept together, etc., it was equally permissible to adjourn them from time to time during the continuance of the same term. It is not even suggested that the jury were contaminated by contact with the "outer world"; nor any facts or circumstances shown from which it could be seen that he might have been prejudiced by the adjournment of the jury as stated. In such a case, whether there should be an adjournment, pending trial, is peculiarly within the province of the trial court, subject, however, to review as in other cases; but on review in an appellate court the exercise of this broad and necessary discretion will not be cause for reversal if it appears from the whole case that the accused has not been prejudiced. *Taylor v. Commonwealth*, 77 Va. 695.

The remaining assignment of error is the refusal of the court to grant plaintiff in error a new trial on the ground of after-discovered evidence.

In considering this motion, the court below heard the witnesses orally as to the evidence they would have given at the trial if they had been called to testify, and the counter evidence adduced by the commonwealth to show that the alleged ground for a new trial did not exist. This evidence is certified in the record, and, after a careful examination of it, we deem it only necessary to say that the court below was plainly right in ruling that the after-discovered evidence offered by plaintiff in error was "chiefly impeaching, and as a whole was not sufficient to justify it in setting aside the verdict." *Johnson's Case*, 104 Va. 881, 52 S. E. 625; *Nicholas' Case*, 91 Va. 741, 21 S. E. 364; 16 Am. & E. Enc. L. 534; *Hunt v. State*, 81 Ga. 140, 7 S. E. 142.

The judgment of the circuit court is affirmed.

ORMAND MINING CO. et al. v. BESSEMER CITY COTTON MILLS et al.

(Supreme Court of North Carolina. Dec. 11, 1906.)

LOGS AND LOGGING—RESERVATION OF TIMBER—TIME FOR REMOVAL.

Where a deed reserved all the woods and timber, and stipulated that if the grantee should divide up the land in lots and begin the erection of any building on any lot, the right to the timber thereon should terminate, the assignee of the reservation was not liable to the grantee for timber cut before the happening of the event which was to terminate the right.

Appeal from Superior Court, Gaston County; Bryan, Judge.

Action by the Ormand Mining Company and others against the Bessemer City Cotton Mills and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Tillett & Guthrie, for appellants. O. F. Mason and Burwell & Cansler, for appellees.

CLARK, C. J. The plaintiff holds under mesne conveyance certain lands and mineral rights from one Pinchback, whose deed to plaintiff's grantor, contains the following exception or reservation: "All the woods and timber is reserved by me," with the addition that if the grantee should "divide up the land referred to in lots and begin the erection of any building on any lot then I shall have no further right to any timber on said lot after any building is begun." It is true, as contended by plaintiff, that "a deed purporting to convey all the wood and timber therein described vests in the grantee a present estate of absolute ownership in said timber defeasible as to all timber not removed within the time required by the terms of the deed." *Lumber Co. v. Corey*, 140 N. C. 462, 53 S. E. 300; *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 862; *Bunch v. Lumber Co.*, 134 N. C. 116, 48 S. E. 24. It is also true, as further contended by the plaintiff, that, when in a contract for sale of standing timber "no time is specified within which it shall be cut and removed, the law presumes this shall be done within a reasonable time."

But that is not this case. Here the land was conveyed in fee with an exception or reservation of the timber. In such case, if a time or event is specified upon which the timber must be cut, the reservation expires upon the happening of the event or expiration of the time—as here upon beginning "the erection of any building upon any lot." If there is no limitation to indicate when the reservation or exception shall expire, then the grantee must give notice for a reasonable time that the grantor must cut or remove the timber included in his reservation, and if this is not done after such reasonable notice, then the reservation or exception falls and all rights thereunder cease and determine. Whether the right to cut timber is a

grant, or a reservation, it expires at the time specified. When no time is specified a grantee of such right takes upon the implied agreement to cut and remove within a reasonable time. He has bought the timber for that purpose, whereas, when a grantor of the fee reserves or excepts the timber, he is not providing for timber cutting, but reserving a right, and should be entitled to hold till this is put an end to by the grantee giving notice for a reasonable time so that the grantor may elect to cut or sell this right to another. It may be difficult, perhaps, to reconcile all the decisions, but, we think, this is a summary of the true, just and equitable principles applying to such contracts. As such contracts have greatly increased in number and importance, it will be more useful to thus state plainly and clearly the rules we think applicable, and by which we shall be guided, than attempt to reconcile all the precedents. In this contract, the event upon which the reservation should terminate is stipulated for and is when the land is divided into lots and the erection of any building is begun on any lot, then the grantor "shall have no further right to any timber upon said lot."

In holding that the plaintiff can recover of the defendant (who is assignee of the reservation) for timber cut on any lot before the happening of the event which it was agreed should put an end to the reservation, there was error.

WALKER, J., did not sit on the hearing of this case.

PARKS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 11, 1906.)

RAILROADS—RIGHT OF WAY—ACQUISITION BY USE—RIGHTS ACQUIRED.

A railroad company, by entering on and occupying a right of way, acquired at the end of two years from the construction of the road not only an easement to use the right of way, but also to carry therefrom, by the use of drains carefully constructed, the surface water accumulating thereon, subject to the limitation that it does so without negligence and unnecessary injury to the adjoining lands.

Appeal from Superior Court, Wilkes County; Council, Judge.

Action by C. L. Parks against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. New trial.

This action was brought for the recovery of damages alleged to have been sustained by the negligent construction of a drain or culvert, called in the pleadings and testimony, a "trunk" under defendant's roadbed, whereby the plaintiff's land is washed, overflowed, and injured. The pleadings and undisputed testimony show that plaintiff was at the time of the construction of the railroad and has at all times since been the

owner of a tract of land containing 90 acres, on one side of which is a hill, and the other side lying on the north bank of the Yadkin river. That some 16 years ago the Northwestern-North Carolina Railroad Company entered upon said land, and constructed its roadbed and track through said land. No right of way was granted or condemned over the land, nor has any proceeding for condemnation or compensation been instituted by the plaintiff. The said railroad is now the property of defendant corporation. The plaintiff describes the manner in which his land is affected by the construction of the road as follows: "The land lying north of the railroad is upland, and a large hill side, eight acres in all, which drains through to this trunk; all open land. My land on the south side of the railroad is lower than on the north side. The point where the trunk runs is 150 yards from the river. When it rains the water accumulates from the land above, and runs down and on through the trunk, taking earth, and when the water gets below the trunk it spreads out over the land, and distributes the dirt, etc. There is no other way for the water to go except through this trunk. Some 200 yards from the trunk is a branch which passes under the track of the road. The branch is lower than the trunk. * * * The water accumulates in the side ditches of the railroad as it flows down from the hill above, and is thereby carried to the trunk, and the water goes through the trunk, and spreads out over my land. * * * When the road was first built there was a wooden trunk through which the water flowed, and this rotted out and another and larger one of pipe was put in. The water goes through this pipe with greater force than formerly. * * * There is no more water that goes on this land through the trunk than would have gone over it if there had been no railroad. The only difference is that, instead of spreading out over the entire six acres, it is collected in the side ditches of the road, and then cast in a body through the trunk. The drain way is about the lowest point, and is a place where the water would naturally flow to." Bud Parks the brother of plaintiff says that he knows the land; that it is hill land, north of the road, and several acres of it. Some of it is pasture land. The natural flow of the water from the north hill land would be to and over the land lying to the south. It would be distributed but for the railroad. The water is collected in the side ditches, and, as collected, goes through the trunk. The testimony in regard to the damage is very conflicting. His honor submitted the following issue: "Did defendant damage plaintiff's land as alleged in the complaint?" There was an issue directed to the amount of the damage. The defendant requested his honor to instruct the jury that upon all the evidence they should answer the issue "No." This was declined, and defendant

excepted. His honor instructed the jury upon the first issue that, although there was no more water went on plaintiff's land since the construction of the road than before, still, if it so constructed its road as to permit the water passing along the natural drainage and flow, but so as to collect in its side ditches the water coming from the watershed above, and which would have naturally flowed upon the six acres of land, and conveyed this water in its side ditches to the trunk, and if there became concentrated and permitted to go through the trunk on to plaintiff's land, and carry with it dirt and other matter, such water and dirt and other matter being distributed over plaintiff's land, defendant having furnished no sufficient and proper drain beyond the trunk to take water away, and on to the river at lower part of plaintiff's land, then the jury would answer the first issue "Yes," if they find that thereby plaintiff's land was damaged. To which defendant excepted. There was judgment upon the verdict, and defendant appealed.

Manly & Hendren, for appellant. Finley & Hendren, for appellee.

CONNOR, J. (after stating the case). The plaintiff's land forms a watershed to the Yadkin river. Prior to the construction of the railroad, the water found its way down the hill side, spreading over the bottom land, and either percolated through the soil or passed over the surface into the river. It was necessary in the construction of the railroad to make a roadbed of the usual width, which operated as a barrier or dam to the natural flow of the water. Coming down the hill, unless carried off by side ditches, the water percolated through the roadbed, endangering the solidity of the track. To avoid this danger, the company cut a side ditch into which the water flowed, finding its way to the lowest point along the north side of the roadbed. At this point it ponded, rendering it necessary to provide an outlet to the river. For this purpose the company, at the time of constructing the road, put in the roadbed under the track, a wooden trunk or drain. This was done some 16 years ago. During the year 1890, as alleged in the complaint, this drain was enlarged, and a pipe inserted through the roadbed. This pipe was, we assume, no longer than the width of the roadbed at its base, thus throwing the water from its mouth on to plaintiff's lower lands. It does not appear whether the wash was on the right of way or beyond it. We assume that it was on the plaintiff's land over which defendant had acquired an easement, by virtue of the provision of its charter, after two years from the construction of the road. The water passing through the culvert was surface, or such as fell when it rained upon the watershed above the track. There is no evidence that the company diverted any water from a natural watercourse. It is conceded that the defendant has not in-

creased the flow of surface water; that is, that any more surface water went through the culvert than formerly passed over plaintiff's land, either before the road was built or with the under drain. The plaintiff does not complain of the construction of the roadbed and track through his land or the manner in which the side ditches are constructed. It is well settled that, for the entry upon and taking his land "for railroad purposes, he should have sued within two years from the construction, and that by his failure to do so, it shall be presumed that the land upon which the road may be constructed, together with 100 feet on each side of the center of the road, has been granted to the company by the owner, and it acquired a good right and title to the same, so long as the land may be used only for the purpose of the road, and no longer." *Barker v. Railroad*, 137 N. C. 214, 49 S. E. 115; *McCaskill's Case*, 94 N. C. 746; *Railroad v. Olive* (N. C. at this term) 55 S. E. 263. The defendant insists that the right, with the accompanying easements, thus acquired by the company, are the same in all respects, as if the land had been condemned or granted for railroad purposes. An examination of the decisions of this court does not show that this question has been heretofore directly presented or decided. In the cases involving the rights and duties of railroad companies, in respect to their rights of way, no distinction has been suggested or made between the several methods of acquisition. In *McCaskill's Case*, which was the first of a series found in our Reports, the right was acquired under the statutory presumption arising after two years' occupation, and the right was treated as coextensive with a condemnation or grant. In *Brinkley v. Railroad*, 135 N. C. 654, 47 S. E. 791, the question was presented whether, upon a right acquired in this way, the company could, without being liable to the owner, change the grade, and relocate its track on the right of way. *Montgomery, J.*, discussing the question (cited *Blue v. Railroad*, 117 N. C. 644, 23 S. E. 275; *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779, and *Shields v. Railroad*, 129 N. C. 1, 39 S. E. 582), says: "In these cases it was decided that railroad companies, if they should need the whole of the right of way for railroad purposes, had the right to the use of the whole. Some of these uses were mentioned in the decisions, viz., roadbed and drains, side tracks, and houses for their employes, warehouses, etc." The court held that the company was not liable for making a change in the grade, etc. In *Sturgeon's Case*, supra, it is said: "What reasonable meaning can be attached to the words 'for the purposes of the company,' except that the land should be used for such purposes as are conducive and necessary to the conducting of the business of the company; that is, of safely and rapidly transporting and conveying passengers and freight over its rail-

roads? That is the whole business of the company. They need land for no other purpose than to properly construct their roadbeds and drain them, build side tracks, etc." *Fleming v. Railroad Co.*, 115 N. C. 676, 20 S. E. 714. It would seem that, in the light of what has been said by this court, as well as upon the reason of the thing, when the landowner acquiesces for two years, after the construction of the road over his land, with full knowledge of his legal rights, and of the extent of the rights accruing to the company by such occupancy, that he assents to the acquisition of the easement in the same manner and to the same extent as if the land had been condemned. We would find it exceedingly difficult, if not impracticable, to draw any line of distinction between the rights acquired by the different methods prescribed by the law. As we held in *Hodges v. Telegraph Co.*, 133 N. C. 225, 45 S. E. 572, for any additional burden not necessary for "railroad purposes" placed upon the land covered by the right of way, the owner is entitled to compensation.

What rights pass to the company in regard to disposing of surface water in the drainage of its roadbed, or what elements of damage are considered in fixing compensation, when the land is condemned or surrendered by the owner by acquiescence in regard to surface water? This question was first considered and decided by this court in *Railroad v. Wicker*, 74 N. C. 220, in which *Rodman, J.*, adopting the rule laid down by the Supreme Court of Massachusetts, said: "A distinction is taken between cases in which the ponding is caused by the obstruction of a natural or artificial drain way; and when it is caused by the alteration of the previous grade or slope of the land, by which the surface water on defendant's land is prevented from running off as it was accustomed to do. In the first of these cases it is held that the resulting damage should not be estimated in measuring the compensation to the landowner; but that in the second it should be." This case has been uniformly approved and followed by this court. The only difficulty consists in the application of the rule. In that case the question discussed was ponding surface water. In *Willey v. Railroad*, 98 N. C. 263, 3 S. E. 485, *Smith, C. J.*, said: "In condemnation, everything necessary and incident to the original making and subsequent operating the road must be intended to have passed as against the owner of the condemned land." In *Bell v. Railroad*, 101 N. C. 21, 7 S. E. 467, *Davis, J.*, says: "The water drained by the defendant's ditches was all surface water, except occasionally after heavy rains, the water from the Dismal Swamp would spread over the surface of the ditch"—citing *Wicker's Case*, supra, as establishing the principle that draining off surface water was one of the "legal incidental damages" which is assessed in condemnation proceedings. *Adams*

v. Railroad, 110 N. C. 325, 14 S. E. 857; *Fleming v. Railroad*, supra. In *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027, 61 L. R. A. 833, *Douglas, J.*, says: "In the present case the plaintiff occupies the singular position of being the upper and lower landowner by virtue of the same piece of land." After describing the way in which the plaintiff was damaged, he says: "This is diverslon, and it is now well settled that neither a corporation nor an individual can divert water from its natural course." In *Mizell v. McGowan*, 120 N. C. 134, 26 S. E. 783, *Faircloth, C. J.*, said: "The defendants are permitted not to divert, but to drain their lands, having due regard to their neighbor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural stream through or by the lands of the plaintiff. This license must be conceded with caution and prudence." *Parker v. Railroad*, 123 N. C. 71, 31 S. E. 381. We conclude, therefore, that the defendant, by entering upon and occupying plaintiff's land for railroad purposes, acquired, at the end of two years, from the construction of the road, an easement permitting it to use 100 feet from the center on either side for railroad purposes, which includes the right to construct the roadbed and to carry from it by the use of drains carefully constructed the surface water accumulating on the right of way. In exercising this right, care must be taken to avoid, by the use of all reasonable means, all unnecessary damage to the lands over which it has a right of way. The landowner must have known, when he acquiesced in the acquisition of the easement by refraining from suit, that the company would be compelled to protect its roadbed and track from surface water. He knew the "lay" of his land and what effect the construction of the road would have upon the flow of the water, and the means necessary to prevent ponding and injuring the upper land and the roadbed. He made no complaint for 16 years, during which he says there was a wooden trunk carrying the surface water in the same quantity, and through the same land as the pipe does. He says, and this is self-evident, that the new drain does not increase the flow of the water; and he further says that the drain is about the lowest point, and is where the water would naturally flow. The contention of the plaintiff is well stated in the brief of his counsel, saying: "Plaintiff alleges that the defendant should have carried the water collected in its side ditches to the branch on the west, or the ditch on the east, or trunked it to the Yadkin river on the south, about 100 yards distant from the railroad. And, in not doing this, the construction and drainage of the road was negligently and improperly done." Neither of these contentions were submitted to the jury. They were instructed that if the water was concentrated by flowing down

the side ditches at the trunk, and permitted to go through the trunk on to plaintiff's land, defendant was liable. This view eliminated the question of negligence; and withdrew from the jury the fact that defendant had acquired an easement to drain the surface water by carrying it through the roadbed, provided there was no other reasonably convenient way to dispose of it, and that there was no negligence in the construction of the drain. It is not clear from the testimony of plaintiff whether defendant could not, by the exercise of reasonable care, and without unreasonable expense, have carried the water to the branch, and thereby disposed of it without injury to plaintiff. He says in his direct evidence that the branch was lower than the point at which the trunk was placed. In his cross-examination, he says otherwise. We think that the true test of plaintiff's liability is whether the means adopted were reasonable, or such as a prudent man so situated, having regard to his own and his neighbors' rights and property, would have taken to dispose of the surface water. It may be that, if railroad companies were required to condemn, or, at least, institute proceedings for that purpose, before constructing their roads, etc., and have their rights and duties settled, many of the difficult and perplexing questions which have arisen would have been avoided. The policy of the state, when the construction of railroads first attracted attention was otherwise. Conditions have changed, lands increased in value, and rights deemed of little value when the roads were built, have become of importance. The courts, while endeavoring to have the law work out substantial justice, cannot change their decisions to meet these conditions. The defendant is entitled to drain the surface water from its roadbed, subject to the limitation that it does so without negligence, and unnecessary injury to the lands of defendant. Of course what we have said has no application to lands over which rights of way have not been acquired. These questions have been discussed and settled in other cases. This conclusion results in a new trial. It may be proper to say that the real questions in controversy could be more clearly presented by a reformation of the pleadings. It does not very clearly appear what the plaintiff's cause of action is or the damage which he claims. The proper issues in such cases may be found in *Brown v. Power Co.*, 140 N. C. 334, 52 S. E. 954, 3 L. R. A. (N. S.) 912; and *Oandler v. Electric Co.*, 135 N. C. 12, 47 S. E. 114. In this way the plaintiff recovers for damage up to the time of the trial not exceeding five years, and for the permanent easement which is required by the payment of the judgment. The issues thus framed would eliminate the exceptions of his honor's ruling upon the question of damages.

New trial.

SHEPARD v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. TELEGRAPHS—FAILURE TO DELIVER MESSAGE—PRESUMPTION OF NEGLIGENCE—BURDEN.

Though negligence of a telegraph company will be presumed from a week's delay in delivering a message, the presumption may be rebutted, and it is not necessary that the rebutting evidence preponderate, the burden being upon the plaintiff to show negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, § 61.]

2. SAME—ELEMENTS OF DAMAGE.

In an action for a negligent delay in delivering a telegram, the jury could give only fair recompense for the anguish suffered and an instruction that they might be guided by "their own feelings" was erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 69, 70.]

3. SAME—MENTAL ANGUISH—PROOF IN AID OF PRESUMPTION.

The fact that mental anguish is presumed to result from a negligent delay in delivering a telegram announcing the death of a close relation does not preclude direct proof on that point.

Appeal from Superior Court, Henderson County; Justice, Judge.

Action by D. M. Shepard against Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Merrick & Barnard, for appellant. Holmes & Valentine and B. A. Justice, for appellee.

CLARK, C. J. The court charged the jury: "The message not having been delivered until a week afterwards, the law presumes negligence on the part of the defendant company, but it is not such a presumption as could not be rebutted. But it requires proof on the part of the defendant by the greater weight of the evidence that it did exercise due care in the effort to deliver the message." The first paragraph was correct, the latter incorrect.

The burden of the issue as to negligence was upon the plaintiff. If no evidence had been offered in rebuttal, the court might have told the jury that if they believed the evidence to answer that issue "Yes." But when evidence was offered in rebuttal it was not incumbent upon the defendant to prove it by a preponderance of testimony, but, upon all the testimony, it was the duty of the plaintiff to satisfy the jury by a preponderance of the evidence that the defendant was guilty of negligence. This has been recently discussed. *Board Education v. Makely*, 139 N. C. 35, 51 S. E. 784, citing a very apposite passage from 1 Elliott, Ev. § 139: "The burden of the issue—that is, the burden of proof in the sense of ultimately proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence—never shifts, but the burden or duty of proceeding or going

forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a prima facie case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So, the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a prima facie case or presumption in favor of the second part. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party, or because the scales are equally balanced."

In criminal cases, when a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder and the burden is on the prisoner to prove all matter in mitigation or excuse to the satisfaction of the jury (*State v. Matthews*, 55 S. E. 342) and, when a totally independent defense is set up, as insanity, which is really another issue, *State v. Haywood*, 94 N. C. 847, the burden of that issue is on the prisoner. But the burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of fact, remains on the state throughout, and, when evidence is offered to rebut the presumption of fact raised by the evidence, the burden is still on the state to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an alibi, for example, which goes to the proof of the act. *State v. Josey*, 64 N. C. 56.

Nor can we approve his honor's instruction that the jury had "a right to take into consideration their own feelings." If this were correct, damages would depend, not upon evidence, but upon the difference in the feelings of the individuals composing a jury. A jury has no right to do more than give the plaintiff a fair recompense for the anguish he suffered from the negligence of the defendant, the amount to be determined, not by their own feelings, but by the evidence. *Cashion v. Tel. Co.*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160.

The plaintiff testified that he was greatly grieved and it almost killed him because he could not be at his father's deathbed and funeral. This evidence was competent. It is true that where close relationship exists mental anguish is presumed, but this does not exclude the more direct proof by the plaintiff's own testimony. In *Thompson v. Tel. Co.*, 107 N. C. 456, 12 S. E. 427, a similar exception was said to be "without merit." See, also, *Hunter v. Tel. Co.*, 135 N. C. 465, 47 S. E. 747, where it is said that mental anguish "is a matter of proof, and may be inferred from all the surrounding circumstances, as well as the personal testimony of the

plaintiff." In *Harrison v. Tel. Co.*, 55 S. E. 435, *Brown, J.*, says that "the condition of the mind is as susceptible of proof as the state of the digestion, and can be proved by the personal testimony of the sufferer." But for above errors in the charge there must be a new trial.

In re SHELTON'S WILL.

(Supreme Court of North Carolina. Dec. 4, 1906.)

1. WILLS—PROBATE—REVOCATION—EVIDENCE—DECLARATIONS OF TESTATOR

Under Revisal 1905, § 3115, requiring that a revocation of a will by a writing shall be entirely in the testator's handwriting or be attested as in case of the execution of a will, evidence of declarations of a testator after the date of a purported revocation on the margin of the will, tending to show that he did not write the alleged revocation, was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 696.]

2. SAME.

In proceedings for the probate of a will, on the margin of which a purported revocation by the testator was written, where it was admitted that the will itself was genuine, evidence as to declarations of the testator as to how he was going to leave his property, made before the date of the purported revocation, was inadmissible.

3. EVIDENCE — DEMONSTRATIVE EVIDENCE — HANDWRITING—COMPARISON—ARGUMENT OF COUNSEL.

In a probate proceeding, it was error for counsel for the propounder of the will to show revocatory words on the margin of the will to the jury, and point out differences in the formation of the letters between the signature on the margin and the signature to the will.

4. APPEAL—PRESENTATION OF QUESTIONS—ARGUMENT OF COUNSEL.

Error in argument of counsel was not ground for reversal, where the court's attention was not called to it, and no exception was taken at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1424, 1500.]

5. WILLS — PROBATE — REVOCATION — BURDEN OF PROOF.

In probate proceedings, where a will bearing a purported revocation on its margin was introduced in evidence, the burden of proving that the will had been legally revoked, and that the revocation was found in a secure place as required by statute, was on the contestant of the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 663.]

6. APPEAL—HARMLESS ERROR—RULINGS AS TO EVIDENCE.

Error in imposing on the propounder of a will the burden of showing that a purported revocation was not genuine was not prejudicial to the contestant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4052.]

7. WILLS — PROBATE — TRIAL — VERDICT AND FINDINGS—SUFFICIENCY.

In probate proceedings, where the court submitted the issue whether the paper writing propounded for probate and every part thereof was the last will and testament of decedent, the answer "Yes" was not ambiguous though the will bore on its margin a purported revocation.

Appeal from Superior Court, Lincoln County; Bryan, Judge.

Proceedings by A. F. Shelton for probate of the will of F. M. Shelton. From a judgment granting probate, the administrator of the estate of F. M. Shelton appeals. Affirmed.

This was a civil action wherein A. F. Shelton appeared as propounder for probate of a paper writing as the last will of F. M. Shelton, who died on January 25, 1905, and the administrator of the estate of F. M. Shelton appeared to contest the probate. The paper writing executed by F. M. Shelton in 1902 was offered in evidence as his will. The following words were written in ink on the margin thereof, to wit: "This will I this day make void and of no effect. Jan. 16, 1905. F. M. Shelton." The contention of the contestant was that said words revoked the paper writing as a will. Evidence was introduced by the propounder and contestant. Many exceptions were taken by contestant to the admission and exclusion of testimony, to the charge of the court and other rulings of his honor. The following issue was submitted to the jury: "Is the paper writing propounded for probate, and every part thereof, the last will and testament of F. M. Shelton?" to which the jury answered "Yes." Upon this verdict, the court gave judgment that the paper writing, excluding the words on the margin thereof, was the last will and testament of F. M. Shelton. The caveator appeals.

Ruffin & Preston, for appellant. Clarkson & Duls, Tillett & Guthrie, and C. E. Childs, for appellee.

BROWN, J. We will not discuss serialim the 27 exceptions set out in the record, but will consider only such phases of the case as we deem necessary. The learned counsel for the caveator, in an able argument and carefully prepared brief, has pointed out many alleged errors in the record, none of which are in our opinion sufficiently serious to warrant another trial of the issue. It is plain that the testator did not revoke the will by "canceling, tearing, or obliterating the same." It seems to be generally held that a cancellation, obliteration or erasure made after the execution of a will, which does not in fact destroy some portion of the material substance of the will, does not constitute a revocation thereof. *Lewis v. Lewis*, 2 Watts & S. (Pa.) 455; *Ladd's Will*, 60 Wis. 188, 18 N. W. 734, 50 Am. Rep. 355; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Gardner v. Gardner*, 65 N. H. 220, 19 Atl. 651, 8 L. R. A. 383; *Wolf v. Bollinger*, 62 Ill. 368; *Matter of Miller*, 50 Misc. Rep. 705, 100 N. Y. Supp. 344; *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121; *Underhill on Wills*, § 229; *Redfield on Wills*, *p. 318. The words written on the blank margin of this will do not touch any part of the will proper. It is unnecessary, however, to discuss this

feature of the case because the jury have in effect declared that the writing alleged to have been made by the testator purporting to revoke his will was not in fact made by him.

It is contended that his honor erred in permitting the propounder to prove by Mattie Shelton the declarations of the testator made the day before he died, tending to prove that testator did not execute or write the alleged revocation, and referring to and speaking of his last will. His death occurred January 25, 1905. The alleged revocation is dated January 16, 1905. These declarations did not tend to explain the meaning of anything contained in the writing, but only to prove that it was not the testator's act. To make it a valid revocation within the language of our statute (Revisal 1905, § 3115), it is essential, among other requirements, that the entire writing including the signature should be in the testator's handwriting, inasmuch as it is not attested by witnesses. We will not either review or undertake to reconcile the conflicting decisions upon the admissibility of such evidence. It seems to be generally held that the declarations of a testator are not competent upon the question of the interpretation of the contents of his will, but as to the admissibility of declarations made by the testator upon the question of the factum of the will the authorities are divided. This court seems long since to have aligned itself with those favoring the admission of such evidence and it has been so classified by other courts. In *Tucker v. Whitehead*, 59 Miss. 594, the Supreme Court of that state says: "There are few questions in the law upon which authorities are more hopelessly in conflict than upon the admissibility of declarations of a deceased testator in support or in rebuttal of a supposed revocation of a testamentary paper. It has engaged the attention and elicited the logic of the greatest jurists who have adorned the bench of this or any country. Against the admissibility of such evidence are to be found the names of Kent, Story, and Livingston, and in favor of it, those of Walworth, Ruffin, Lumpkin, and Cooley. Certainly, we can hope to add nothing to the strength of an argument on either side, which has already been exhausted by such men as these." To the names of the great lawyers, who support the admission of such evidence, we will add the name of Henderson, who says, in the case of *Reel v. Reel*, 8 N. C. 268, 9 Am. Dec. 632: "To our minds, to reject the declarations of the only person having a vested interest, and who was interested to declare the truth, whose fiat gave existence to the will, and whose fiat could destroy, and in doing the one or the other could interfere with the rights of no one, involves almost an absurdity, and [with due reference to the opinions of those who have decided to the contrary, we say it] they are received, not upon the grounds of their being a part of the *res gestæ*, for whether

they accompany an act or not, whether made long before or long after making the will, is entirely immaterial as to their competency; those circumstances only go to their weight or credit with the tribunal which is to try the fact, and the same tribunal is also to decide whether the declarations contain the truth or are deceptive, in order to delude expectants and procure peace. The English books are full of cases where the declarations of the testator were received, and without any objection as to their competency; generally the question being as to their weight."

This language is quoted by Professor Wigmore as supporting the admission of such evidence as one of the exceptions to the general rule excluding hearsay. Volume 3, § 1738. The controlling authority of this case was acknowledged in 1882 by this court, in an opinion by Judge Ruffin, in the following language: "The admissibility of the evidence rejected in the superior court was, as a general principle at the common law, determined in *Reel v. Reel*. The discussion in that case was full, and the decision is to be regarded by succeeding judges, not only with respect, but, in my opinion, as authoritative. For this reason, I must say, I do not consider that question open to dispute." *Howell v. Barden*, 14 N. C. 448. In this case, Judge Ruffin gives very cogent reasons why the evidence should be received. The *Reel Case* was again cited and approved in 1888, in *Patterson v. Wilson*, 101 N. C. 597, 8 S. E. 342, by Mr. Justice Merrimon, as follows: "The case of *Reel v. Reel*, 8 N. C. 248, 9 Am. Dec. 632, cited by the learned counsel for the appellant, has no application here. That was a contest of the will then in question—the purpose was not to interpret it and ascertain its meaning. The evidence as to what was said by the supposed testator was for the purpose of showing that he did or did not execute a valid will. In such case, no doubt, the pertinent declarations of the testator for proper purposes might be evidence." The syllabus in *Reel v. Reel* was made and published many years before either of the cases approving it were decided, and that syllabus interprets the opinion as holding that declarations of a testator made at any time subsequent to the execution of a will, which go to show that it is not his will, are admissible, and that it is the general principle deducible from that case. Such is the interpretation placed upon it by Judge Merrimon, and by the accurate reporter of *Patterson v. Wilson*, *supra*, who states the law tersely and correctly when he says: "While, under some circumstances the declarations of a testator are competent upon the question of the factum of the will, they are not competent upon the question of the interpretation of the contents of the will." In *Waterman v. Whitney*, 11 N. Y. 168, 62 Am. Dec. 71, this *Reel v. Reel Case* is spoken of as a leading case on this subject, and as upholding the admissibility of the testator's

declaration made after the execution of the will, in which he stated its contents to be materially different from what they were. Contestants offered to prove that at various times between the date of the supposed will and the death of Reel he had repeatedly mentioned the substance of the will left in the hands of Blackledge, and that, according to those declarations, the contents of the paper offered for probate were utterly variant from the will left with Blackledge. There were evidently two defenses set up in the *Reel Case*, viz., undue influence, and that the writing offered was not Reel's true will, but a fraud and imposition perpetrated by Blackledge. The declarations were offered in support of the latter contention. This is shown most clearly by the brief of Judge Gaston, counsel for contestants, who says: "The object of the evidence was to show by Reel's repeated declarations what he believed to be the will he had signed, in order with the other facts proved to establish a fraud." In the case before us the propounders have offered evidence, however strongly it may be contradicted, tending to prove that the writing on the margin, purporting to be a revocation, is a fraud and forgery. To corroborate such evidence, they offer the declarations of the testator made after the date of the writing, and shortly before he died, tending to show that he had not revoked or destroyed his will, and that he knew nothing of such revocation. This evidence is offered to prove fraud in the factum as much so as in Reel's Case. In the *Evans' Will Case*, 123 N. C. 117, 31 S. E. 267, *Reel's Case*, and *Howell v. Bardon*, *supra*, are cited and approved. In that case, declarations of the testatrix were admitted as competent, although held to be insufficient, to show that the writing offered was not her will.

Declarations of this kind are admitted as an exception to the general rule rejecting hearsay, because the testator has peculiar means of knowledge, and may be supposed to be without motive to speak other than the truth. He differs from a grantor in a deed, because, when his declarations are made, he has not parted with his property, but retains control over the subject-matter until his death, and he must be presumed to know what disposition he has made of it. In *Sugden v. St. Leonards*, L. R. 1. P. D. 154-225, Chief Justice Cockburn reasons strongly in favor of the admission of such evidence, as follows: "The testator must be taken to know the contents of the instrument he has executed. If he speaks of its provisions, he can have no motive for misrepresenting them except in the rare instances in which a testator may have the intention of misleading by his statements respecting his will. Generally speaking, statements of this kind are honestly made, and this class of evidence may be put on the same footing with declarations of members of a family in matters of pedi-

gree." In the same case, Sir George Jessel, Master of Rolls, who is regarded by Prof. Wigmore as the greatest English judge of the century, declares, in substance, that all the reasons in favor of any exception to the hearsay rule exist in the case of a testator declaring the contents of his will. Furthermore, says he: "The court should be anxious, not narrowly to restrict the rules of evidence, which were made for the purpose of furthering truth and justice, but, guided by those great principles which have guided other tribunals in other countries in admitting this kind of evidence generally, to admit it at all events in the special case we have under consideration." We are not without support in this country. Practically the same kind of evidence was admitted in the following cases: *Conoly v. Gayle*, 61 Ala. 116; *Patterson v. Hickey*, 32 Ga. 159; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Scott v. Hawks* (Iowa) 77 N. W. 467, 70 Am. St. Rep. 228; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *Muller v. Muller*, 108 Ky. 511, 56 S. W. 802; *Lamble's Estate*, 97 Mich. 49, 56 N. W. 223; *Lane v. Hill*, 68 N. H. 275, 44 Atl. 393, 73 Am. St. Rep. 591; *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604. In the latter case the declarations of testator that he had signed a will were held admissible in corroboration of other evidence, as "the declaration of the only party having a vested interest to declare the truth," approving *Reel v. Reel*. In *Tynan v. Paschal*, 27 Tex. 300, 84 Am. Dec. 619, declarations were received to show the execution of a will and to rebut the inference of a revocation. In *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460, the declarations of the testatrix were admitted to aid the jury in determining whether a mutilation of a will had been made by the testatrix or by some other person. We think, so far as the administration of the law in this state is concerned, the question may be regarded as settled. This exception to the general rule prohibiting hearsay, however, does not make competent the testimony of the witness, Mollie Beatty, by whom contestants offered to prove statements made by the testator in November, 1904, "as to how he was going to leave his property." This will was made in 1902, and there is no allegation made of any fraud in the factum. It was evidently admitted during the whole course of the trial to be the testator's will, unless it had been revoked by the words written on its margin. The case was tried on this theory. The declarations to Molly Beatty could not constitute a revocation in themselves, for that must be in writing, and they were made before instead of after the date of the writing offered as a revocation. It is generally agreed that the declarations of the testator may not be received to explain, change, or add to a written will, nor can it be revoked by parol. 1 Redfield on Wills, 496. We see no view in which

such evidence was competent on this trial. We have carefully considered the several exceptions to the admission of testimony in respect to the handwriting of the revocatory words. While his honor may have erred in some instances in his rulings relating thereto, yet the alleged improper testimony was so colorless, and tended to prove or disprove so little, that we regard the errors as harmless.

The contestant assigns error, because counsel for propounder in his argument showed the revocatory words on the margin of the will to the jury, and pointed out differences in the formation of letters, etc., between the signature on the margin and the signature to the will. This was erroneous, as is held in *Fuller v. Fox*, 101 N. C. 119, 7 S. E. 589, 9 Am. St. Rep. 27, but the contestant failed to call the court's attention to it, and took no exception at the time, as the record shows. We have examined carefully contestant's prayers for instructions, as also his motions to set aside the verdict as ambiguous and for judgment upon the verdict as rendered, and will consider them together. With all deference for the learned counsel for the contestant, we think they have an erroneous idea about the character of the issue, and the burden of proving the revocation, and, having succeeded in impressing their view as to the latter upon his honor, we think they cannot complain of the charge to the jury. When the paper writing purporting to be the testator's will was offered by the propounder, he did not necessarily or in fact offer the revocatory words written on the margin of the paper containing the will. He offered only the will dated January 15, 1902. This must necessarily be so, for the revocation is no part of the will, and had he been compelled to offer it as a part of the will, because written on the margin of the same paper, the effect would be to destroy the very will the propounder was offering for probate. The revocation was not a cancellation technically, nor was it a mutilation, and, therefore, needed no explanation upon the part of the propounder of the will. After the propounder had offered the will, and proved its execution, as required by law, if the jury believed the evidence, he was entitled to a verdict to the effect that the paper writing was the last will and testament of F. M. Shelton, unless the contestant could prove that it had been revoked. The burden of proving that the will had been legally revoked was as much upon contestant as it would have been to prove undue influence, had such been the ground of contest. It was then up to contestant to go forward with his proof, and to offer the revocation in evidence, and to prove its execution, or that it was all in testator's handwriting and found in a secure place, as required by statute. So far as the record discloses, no question seems to have been made in the superior court about the security of

the place, and his honor's charge plainly relieves contestant from proving that essential fact. The case appears to have been tried solely upon the contested fact of the genuineness of the handwriting of the alleged revocation and the signature thereto. His honor charged that, "If the jury find that the paper writing was properly executed, and the testator was sound in mind, then they should answer the issue 'Yes,' unless they further find that the will was revoked by the writing on the margin of the paper. This writing puts the burden on the propounders of the will to explain it, and it devolves upon the propounders to account for this, and it is not the will of the testator, F. M. Shelton, until they do so, to the satisfaction of the jury. The law presumes that the will is revoked. This writing on the margin is prima facie evidence of revocation, and the propounders must rebut it." Thus the court placed upon the propounders the burden to prove the negative facts that the revocation and signature were not in the handwriting of testator, and that it was not found in a secure place, and gave contestant the full benefit of a prima facie case. This relieved the contestant from proving at first hand any of the statutory essentials necessary to constitute a valid revocation, and puts the burden upon the propounder to disprove them all. When he proved the will, he had to disprove the revocation. While this is erroneous, we see no reason why contestant should complain, as it was done at his request. It was far more than he was entitled to. There is plainly no ambiguity in the verdict as contended by contestant. The issue is in the form always submitted in contests growing out of the probate of wills. It is contended by contestant that, as the marginal words, "This will I this day make void and of no effect. Jan. 16, 1905. F. M. Shelton," were a part of the paper writing, as introduced by propounder, the verdict was therefore ambiguous and unintelligible. The marginal words were not offered as any part of the will of the testator. The paper writing propounded and established by the verdict as the will of F. M. Shelton is the one dated July 15, 1902, and the marginal words are no part of it.

We have examined the record in this case with care, and all the exceptions of contestant, and we find no error of which he has just cause to complain.

No error.

LINEBARGER et al. v. LINEBARGER et al.
(Supreme Court of North Carolina. Dec. 4, 1906.)

1. WITNESSES — COMPETENCY — TRANSACTION WITH DECEDENT.

Under Revisal 1905, § 1631 (Code, § 590), providing that a person interested in the event shall not be competent to testify against an executor as to transactions with the decedent, the wife of a contestant of a will, whose title

to the real estate of the decedent will be affected by the result of the contest, is incompetent to testify as to the declarations of the decedent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 644-649.]

2. WILLS — CONTEST — EVIDENCE — DECLARATIONS OF DECEDENT.

In a will contest, declarations by testator before the execution of the will as to undue influence brought to bear to procure its execution are admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 416.]

3. SAME — VALIDITY — UNDUE INFLUENCE — SUFFICIENCY OF EVIDENCE.

Declarations of a testator, without proof of any acts on the part of a legatee or devisee, are insufficient to show undue influence invalidating the will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 436.]

4. SAME — TRIAL — SUBMISSION OF SPECIAL ISSUE.

In a will contest, where there was sufficient evidence to present a question for the jury as to undue influence by only one of the devisees, a special issue may be submitted as to the validity of the will as to that one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 745.]

5. SAME — ADMISSIBILITY OF EVIDENCE — DECLARATIONS OF DEVISEE.

In a will contest, on the submission of a special issue as to whether a certain devisee exercised undue influence over the testator, the evidence being insufficient to show undue influence by any other devisee or legatee, evidence as to declarations by the devisee before the execution of the will may be considered by the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, 416.]

6. SAME — MENTAL CAPACITY.

On a caveat to a will of a testator who was 81 years old at its execution, on the ground of undue influence, the age of the testator, and his mental and physical condition, may be considered by the jury.

Appeal from Superior Court, Catawba County; Bryan, Judge.

Action by Caroline Linebarger and others against H. D. Linebarger and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed and remanded.

Propounders, appearing in the record as plaintiffs, offered for probate a paper writing, purporting to be the last will and testament of Fred H. Linebarger, deceased. Caveators, appearing as defendants, filed a caveat, averring that said paper writing was not the last will and testament of said Fred H. Linebarger for that, "It was obtained by the undue influence of Caroline Linebarger, Hosea Linebarger, Marvin Linebarger and other persons in their behalf." Thereupon an issue was submitted to wit: "Is the paper writing offered for probate, and every part thereof, the last will and testament of Fred H. Linebarger, deceased?" The jury having responded "No" to the issue, judgment was rendered accordingly, and propounders, having noted exceptions to his honor's rulings set forth in the opinion, appealed.

Witherspoon & Witherspoon, for appellants. W. C. Femister, M. H. Yount, and Self & Whitener, for appellees.

CONNOR, J. (after stating the case). Propounders proved the execution of the alleged will by the subscribing witnesses thereto, and that at the time thereof the alleged testator was of sound mind, etc., and read the same. By the provisions of said paper writing, the alleged testator gave his entire estate, both real and personal, except several pecuniary legacies, to his wife, Caroline Linebarger, for life, remainder to two of his sons, being the youngest, Hosea and Marvin Linebarger. He gave to six of his children \$20 each, to one child \$15, to two sons \$40 each and to the children of two deceased daughters \$1 each. He named his wife and another person executors. The paper writing was executed November 27, 1903, and he died March 15, 1905. It was offered for probate April, 1905. For the purpose of showing undue influence, caveators offered to show the declarations made by the alleged testator before and subsequent to the execution of the paper writing, also declarations of one of the devisees. To the admission of this class of testimony propounders excepted. It appeared that the alleged testator was, at the date of the paper writing, 81 years of age, and that Caroline Linebarger was his second wife. There was nothing in the testimony of the subscribing witnesses indicating mental incapacity, nor was there any evidence from this source showing undue influence or fraud. Among other witnesses introduced to show declarations of the alleged testator was Mrs. Susan Linebarger, wife of one of the caveators. Propounders objected to her competency to testify to declarations of the alleged testator, because of section 1631, Revisal 1905 (Code, § 590). It is clear that if the caveators succeeded in their contention, the husband of the witness, as one of the heirs at law, became the owner of an undivided interest in the real estate. It is well settled by a number of decisions that the wife immediately upon the seisin, either in law or deed, of the husband, becomes entitled to "an inchoate right of dower or estate in the land" of her husband. *Gatewood v. Tomlinson*, 113 N. C. 312, 18 S. E. 818; *Gore v. Townsend*, 105 N. C. 228, 11 S. E. 160, 8 L. R. A. 443; *Trust Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435. She therefore had an interest in the property dependent upon the result of the controversy, and, under the ruling in *Pepper v. Broughton*, 80 N. C. 251, was incompetent. The exception to the admission of her testimony must be sustained. This ruling would result in a new trial. As, however, other exceptions are made in the record, and will probably arise in another trial, it is our duty to dispose of them at this time.

The declarations of the testator fall within three classes, and their admissibility depends upon different principles and exceptions. Caveators proposed to show declarations which it is claimed tend to show undue influence made prior to the execution of the

paper writing. Mrs. Kale testified that prior to the death of her first husband, which was two years before the death of Mr. Linebarger, he said in her presence that he wanted the law to make his will, each child to have his part; that he did not intend to make a will unless "they all" persuaded him to do so. Mr. Gant testified that during the month of April, 1900, while at Mr. Linebarger's house, he said: That "he didn't see much pleasure, that they terrified him day and night, he saw no peace." Witness asked him, who? He said "Ma and Hosea, to make a will to Hosea and Ma." That he had heard Mr. Linebarger say repeatedly that he wanted his property divided equally among his children. That in 1901 he had another conversation with Mr. Linebarger, in which he complained of the conduct of Hosea and his wife, to whom he referred as "Ma." One Helderman testified that, at some date not fixed, but which by reference to certain matters of public history we may fix at some time during the year 1903, Mr. Linebarger said to him that "Hosea and his last children wanted him to make a will; but he said he wanted all his children to fare alike when he was dead and gone." One Monroe Gordon testified that some time during the year 1903 Mr. Linebarger said to him that his wife wanted him to make a will to her and her two boys, but that he was not going to do that; that he could not eat, sleep, and work; that he could not live many years. The only evidence of declarations made subsequent to the execution of the paper writing were those testified to by Mrs. Susan Linebarger. We find no testimony showing that any acts on the part of propounders, or any other person, of undue influence or fraud. That the declarations of the testator regarding the execution of his will indicating the state of his mind, etc., made contemporaneously with or so near thereto as to fall within the principle of *res gestæ*, are competent in an issue of *devisavit vel non*, is well settled. 1 Redf. on Wills, 542. In *Shaller v. Bunnstead*, 99 Mass. 112, Colt, J., says: "It is always liable to be impeached by any competent evidence that it was never executed with the required formality, was not the act of one possessed of testamentary capacity, or was obtained by such fraud or undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented." In so far as the declarations tend to show undue influence, we think that they are competent. While the authorities respecting the extent to and purpose for which such declarations may be admitted are not uniform, we think that, at least in this state, those offered here were competent. 1 Green (16th Ed.) 760. Eliminating the testimony of Mrs. Susan Linebarger, we find no evidence of declarations made

subsequent to the execution of the paper writing.

This relieves us from the discussion of the much vexed question as to the extent to and purpose for which such declarations are admissible in this state under the rulings in *Reel v. Reel*, 8 N. C. 248, 9 Am. Dec. 682, and *Howell v. Barden*, 14 N. C. 442. Interesting discussions of these cases, as related to the current of authority upon this question, will be found in *Shailer v. Bumstead*, supra; *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *In re Hess's Will*, 48 Minn. 504, 51 N. W. 614, 31 Am. St. Rep. 665, and notes; *Meeker v. Boylan*, 28 N. J. Law, 274, 289; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 393, and notes. Caveators proposed to show declarations of Hosea Linebarger made prior and subsequent to the execution of the paper writing, tending to show undue influence by him. There was no declaration regarding any act done by said Hosea. The exception to this testimony presents a difficult question. It is elementary learning that a party's declarations against his own interest, or those claiming under him, are always competent; this being one of the settled exceptions to the hearsay rule. It is equally well settled that when the persons whose declarations are sought to be shown is alive they are not competent against strangers, or those claiming a common, but not joint, interest. That persons taking a devise, or bequest, in a will have a community of interest, but not a joint interest, is well settled. "Upon the question whether a declaration of a legatee made after the execution of a will is admissible to show that it was procured by undue influence, there is a conflict of authority. The majority of the cases reject such evidence, reasoning, on general principles, that no one should be concluded by unauthorized statements of others with whom he is in no way associated or identified in interest. The admission of a legatee is evidence against the will where he is the sole beneficiary under it; but the interests of legatees under a will are several, not joint. Each claims independently of the others, and his interest should not be affected by the acts or declarations of the other legatees." 1 Underhill on Wills, 163. The question is presented and discussed in *Shailer v. Bumstead*, supra: "The admissions of a party to the record against his interests are, as a general rule, competent against him; and this rule applies to all cases where there is an interest in the suit, although other joint parties in interest may be injuriously affected. But it does not apply to cases where there are other parties to be affected, who have not a joint interest, or do not stand in some relation of privity to the party whose admission is relied upon. A mere community of interest is not sufficient. Devisees and legatees have not that joint interest in the will which will make the ad-

mission of one admissible against the other legatees. The separate admissions of each made after the act, that the will was procured by their joint acts of fraud or undue influence, cannot be permitted to prejudice the other. Such statements are only admissible when they are made during the prosecution of the joint enterprise. Admitting, for the present, that any interest in a will obtained by undue influence cannot be held by third persons, however innocent of the fraud, and that the gift must be taken tainted with the fraud of the person procuring it, still it by no means follows that the interest of the other innocent legatees should be liable to be divested by the subsequent statements of the parties procuring the will. Such a rule would violate all sense of right, and is not sustained by the decisions. The admissions of a legatee made prior to the date of the execution are rejected for the reason that, if made before he becomes a legatee, they are not declarations against his interest." 1 Underhill on Wills, 163. Of course if there be a conspiracy, or the undue influence be either the result of a common design or be committed jointly or in concert, the acts and declarations of the parties engaging therein would be admissible in the same way and to the same extent as in other like cases. In *Gash v. Johnson*, 28 N. C. 289, the question came up in a rather peculiar way, and while in the opinion the court expressly says that the declaration of one of the legatees in regard to undue influence is not competent against the others, it is decided that because he was not a party to the record, the will being propounded by the executor alone, such evidence is immaterial to affect his rights as devisee. In that case the contest was between the executor, who alone propounded the will in common form, and the caveators. It would seem from the decision in *McRaney v. Clark*, 4 N. C. 608, that the declarations of one of the legatees or devisees are competent as against himself. The usual and statutory method of proceeding in this state, when a caveat is filed, is to summon all persons in interest to make themselves parties. *Revisal 1905*, § 3136. It is suggested by Judge Daniel, in *Gash v. Johnson*, supra, that the court should direct that a special issue be drawn "for the jury to find" whether the paper writing propounded, or any part thereof, and if any, which part, is the last will and testament of the testator? It may be that, under an issue so drawn, the declarations of one or more of the legatees could be received as against the interest of such legatee when such declarations affected the validity of the legacy or devise made to such declarant.

That there are practical difficulties in the application of this rule is apparent. We are impressed with the views of Mr. Justice Craig, expressed in *McMillan v. McDill*, 110 Ill. 47: "In the case under consideration, the

court, in deciding the question, admitted the declarations only as against the party who made them; but this did not relieve the evidence of its injurious effect. The evidence was admitted upon the issue involved in the case. It was incompetent as against the other defendants, and, as it could not affect the issue without affecting the other defendants, it was, in our judgment, incompetent to go to the jury on the issue involved. If the interest of the devisees had been joint, the evidence might have been admitted against all of them, as we understand it to be a rule of evidence where the parties have a joint interest in the matter in suit, an admission made by one is in general competent evidence against all. But here the devisees did not have a joint interest under the will, but they had separate interests in one subject—the validity of the will—as held in *Dietrich v. Dietrich*, 1 Pen. & W. (Pa.) 806. If this was a case where a judgment could be rendered against one of the defendants without affecting the rights of the others, there might be some ground for admitting in evidence the declarations as against the defendant who made them; but such is not the case. The only question here is as to the validity of the will, and testimony which defeats one defendant—one devisee—defeats all, and a judgment against one necessarily defeats all. While it might be proper to defeat a will on the admissions of a party who was a sole devisee, it would be manifestly unjust, where there are several devisees, to suffer the rights of all to be concluded and swept away by the admissions of one, and these admissions made in their absence and without their knowledge or sanction. If the admissions here could have gone to the jury and affected the rights of none but the one making them, no error would have been committed; but such was not the case. The admissions, notwithstanding the ruling of the court, went to the issue *devisavit vel non*, in which all the devisees were equally interested." It is true that the declaration offered in that case was that the testator was mentally incompetent. It may be that a distinction exists between declarations of this character, which go to the validity of the entire will, and those amounting to admissions that the declarant who has a legacy or devise, under the will, admitted that he had exerted undue influence or practiced a fraud upon the testator. There is not a scintilla of evidence in this record that Marvin ever spoke to his father, to his mother, or to Hosea, in regard to the will. He denies that he did so, and no one contradicts him. He expressly says that Marvin had not done so. There is no evidence, other than Mr. Linebarger's declarations before the will was made, that Mrs. Caroline Linebarger had talked with her husband in regard to his will. It would therefore be manifestly unjust that Hosea's declarations regarding his own conduct, for his own bene-

fit, should be used against them. Excluding the declarations of Hosea and of Mrs. Susan Linebarger, we are of the opinion that, measured by the standard applied by this court in *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175, there is not sufficient evidence to be submitted to the jury to show undue influence as against Mrs. Linebarger and Marvin.

The declarations are not inconsistent with the final determination of Mr. Linebarger to make the will as we find it. He said: That it was hard to make a will—that he wanted the law to make his will. That he would not make a will unless they persuaded him. That they terrified him day and night. That he saw no peace. This was in April, 1900, whereas he did not make a will until November, 1903. That he wanted his property divided equally between his children. That his first wife's children were as near to him as his second, and it was a hard thing to have to do. Monroe Goodson says that he said: "I want my land to go to my first chaps." That they, meaning Hosea, would curse him. That was Hosea. He didn't say the old lady cursed him, or that Marvin did so. His land was worth about \$2,000, and he had, it appears, about \$1,200 in money. His honor instructed the jury that if they found that the paper writing was executed, as testified to by the witness to it, they would answer the issue "Yes," unless they found from the evidence by the caveators, first, that undue influence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator. In regard to the declarations, he said that they afforded no substantive proof of undue influence, and were not admitted for that purpose; and, before the caveators could recover, it was necessary that they should prove that undue influence was in fact actually exerted upon the testator by other evidence than his own declarations. This instruction was correct, and is sustained by the authorities and the reason of the thing. In *re Hess's Will*, supra. It would be an exceedingly dangerous innovation upon the statute which requires a will to be executed according to the formalities prescribed, to permit it to be set aside upon mere declarations of the testator in regard to undue influence, unaccompanied by any act on the part of any person. Measured by the standard laid down by his honor, we think that he should have instructed the jury that there was no evidence upon which they could find against the will as to Mrs. Linebarger and Marvin. We can see no reason why a special issue may not be submitted to the jury, as suggested in *Gash v. Johnson*, supra, directed to the interest of Hosea. In that event, as we have seen, the declarations of the testator made prior to the execution of the will, coupled with those of Hosea, would be competent to be considered by the jury on the issue thus presented. The propounders excepted to certain parts of his

honor's charge in regard to insanity. While we find no suggestion of insanity, either in the caveat or the evidence, in passing upon the question as to whether the will was procured by the undue influence of Hosea, the age of the testator, his mental and physical condition, and other relevant facts would be competent to be considered by the jury. The propounders attempted to raise the question that there was no evidence to be submitted to the jury by a motion for judgment of non obstante veredicto. This was not the proper motion, and his honor could not have rendered judgment notwithstanding the verdict. It is evident, however, that it was their purpose to move for judgment upon the whole evidence.

We are of the opinion that, as to Caroline and Marvin Linebarger, eliminating the incompetent testimony, the motion should have been allowed. The cause should be remanded for a new trial, in accordance with the principles announced herein.

New trial.

HOKE, J., concurs in result.

SHAW v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina. Dec. 11, 1906.)

CARRIERS—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Under Revisal 1905, § 2628, providing that a railroad company shall not be liable for injuries to a passenger while on the platform of a car, in violation of the printed regulations of the company, posted in a conspicuous place, inside of its passenger cars, where it furnished room within such cars sufficient for the proper accommodation of its passengers, the company was not liable for injuries to a passenger who, after the porter called out the name of the station at which she intended to alight, and while the train was still moving, went upon the car platform in violation of the printed regulations so posted, and was injured by the sudden jerking of the train, though she went upon such platform in the bona fide belief that the train had come to a full stop, and though a reasonably prudent person under the same circumstances would have so believed and acted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1386.]

Clark, C. J., and Hoke, J., dissenting.

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by Bessie Shaw against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. New trial granted.

This was a civil action tried before Bryan, judge, at Mecklenburg superior court, for the recovery of damages for injuries sustained by plaintiff as the result of an alleged fall from the front platform of one of the defendant's passenger cars while a passenger thereon on the night of February 26, 1905, at a point about three-quarters of a mile west of Matthews, N. C., which fall, it is

claimed, was caused by the sudden and violent jerking of the train. The court submitted the usual issues of negligence, contributory negligence, and damage. The jury found the issues for the plaintiff and assessed her damages. From the judgment rendered, defendant appealed.

Burwell & Canaler, for appellant. Stewart & MacRae and Tillett & Guthrie, for appellee.

BROWN, J. Plaintiff was a passenger on defendant's passenger train going to Matthews, N. C. In the car in which she was traveling was the following printed notice posted up at the time in a conspicuous place: "NOTICE! Passengers are prohibited from going on PLATFORMS or between CARS while the train is in motion, and are warned not to allow their HEADS or LIMBS to project from CAR WINDOWS." The evidence is conflicting, but there is much evidence tending to prove that plaintiff went out on the platform of the car and was injured thereon while the train was moving and before it had come to a stop. Section 2628, Revisal 1905, reads as follows: "In case any passenger on any railroad shall be injured while on the platform of the car, or on any baggage, wood or freight car, in violation of the printed regulations of the company posted up at the time in a conspicuous place inside its passenger cars then in the train, said company shall not be liable for the injury: provided said company, at the time, furnishes room inside its passenger cars sufficient for the proper accommodation of its passengers." It is not contended that plaintiff went out on the platform for lack of room inside the car, because it appears from her own testimony that she had a seat; nor did she go out at the invitation of the defendant's agent. Her testimony is that the train was not in motion when she went on the platform.

The following instruction was given by the court to which defendant duly excepted: "If the jury shall find that, when the plaintiff went upon the platform, she did so in the bona fide belief that the train was not in motion, but that it had come to a full stop, and that a reasonably prudent person under the same circumstances would have so believed and so acted, then you are instructed that section 2628 of the Revisal of 1905 would not apply, although the train had not actually come to a full stop, and, in this view, if you shall find that the defendant was guilty of negligence, as alleged in the complaint, you will answer the first issue 'Yes.'" The rule of the defendant company, which we have quoted, is given, when the terms of the statute have been complied with, the force and effect of a law of the state prohibiting passengers from going out on the platform of moving trains and barring a recovery for injuries sustained under such circumstances. In other words, when the railroad company complies with the statute, and the passenger

voluntarily violates the rule posted for his protection, and he is consequently injured, the law refuses him a right of action. The passenger's conduct is not to be governed entirely by the doctrine of contributory negligence as expounded by the courts, but rather in the light that there is no actionable negligence—no cause of action. The statute is made for the protection of passengers as well as for that of the railroad company, and specifically relieves the company from any liability when the passenger violates its provisions. The vice in the quoted instruction is that it gives to the passenger the benefit of the rule of the prudent man as if the matter were being considered under the second issue and solely in the light of contributory negligence. The instruction reads into the statute something that is not there and practically places upon the railroad company the responsibility for the passenger's error. However inadvertent such error, the passenger, and not the carrier, is to blame. His honor assumes that the train was moving (how fast he did not state), and declares that the statute does not apply if the plaintiff entered upon the platform in the bona fide belief that the train was not moving, and if a reasonably prudent person under similar circumstances would have so believed and so acted. This practically nullifies the force and effect of the statute, and leaves it for the jury to determine when they will apply the statute, and when not. It is a very simple and easy matter by observing outside objects or the earth itself to tell when a train is at a standstill, and it imposes no hardship upon a passenger to require him to be certain as to that before entering upon the platform. The carrier owes no duty to be upon the lookout for passengers who violate the printed rule and go on the platform when prohibited, and the engineer and those in charge of the train have a right to suppose that passengers will remain in the car until it comes to a full stop, and they have a right to act accordingly. The statute contains no exception to its general provision, and in plain terms relieves the company from liability in the case of a passenger injured while on the platform of a moving train when the company, as in this case, has complied with its terms. In *Denny v. Railroad*, 132 N. C. 340, 43 S. E. 847, it is held that a passenger who voluntarily goes upon the platform of a moving train for the purpose of alighting at the station, and is injured by reason of a jerk in the train, is not entitled to recover therefor, and Mr. Justice Connor, speaking of the duty of the engineer, says: "He cannot be supposed to know or anticipate that passengers, in defiance of the rules, have gone upon the platform and are standing upon the steps of the car while in motion." See, also, *Railroad Co. v. Hawk*, 72 Ala. 112, 47 Am. Rep. 403.

In the case before us, as in *Denny's Case*, there is no suggestion that the conductor was

upon the platform and no evidence that plaintiff was invited to go out there preparatory to leaving the train. The fact that the porter called out the station name before reaching the station was no invitation to go upon the platform, for at that time the train was running rapidly, and only after the announcement did it begin to slow down. In *Smith v. Railroad*, 88 Ala. 538, 7 South. 119, 7 L. R. A. 323, 16 Am. St. Rep. 63, it is said: "The mere announcement of the name of a station is not an invitation to alight; but, when followed by a full stoppage of the train soon thereafter, is ordinarily notification that it has arrived at the usual place of landing passengers. * * * Comparing all the cases, we deduce that, when the name of the station is called, and, soon thereafter, the train is brought to a standstill, a passenger may reasonably conclude that it has stopped at the station, and endeavor to get off, unless the circumstances and indications are such as to render manifest that the train has not reached the proper and usual landing place." To the same effect are the following cases: *England v. Railroad (Mass.)* 27 N. E. 1; *Railroad Co. v. Holmes*, 97 Ala. 332, 12 South. 286; *Mitchell v. Railroad*, 51 Mich. 236, 16 N. W. 338, 47 Am. Rep. 566; *Railroad v. Green (Ill.)* 25 Am. Rep. 255; *Minock v. Railroad (Mich.)* 56 N. W. 780.

It is contended by defendant that there is a material variation between the allegation of the complaint and plaintiff's proof, in that she alleges in her complaint that the train was moving when she entered on the platform, and in her testimony she states that it was at a standstill. It is unnecessary that we consider this, as the complaint may be amended before another trial.

New trial.

HOKE, J. (dissenting). I cannot concur in the decision of this case, and am of opinion that, by an erroneous application of a wholesome principle, the decision of the court may work great injustice to the plaintiff in the further trial of the cause. The objection urged against the validity of the present trial and held for error in the opinion of the court is that the charge of the judge contravenes a rule of the company made and posted pursuant to the statute (Revisal of 1905, § 2628) which forbids passengers from going on the platform when the train is in motion. I think the statute is a wise one, and the rule a reasonable regulation when reasonably interpreted; but I cannot think that any correct or reasonable interpretation of this rule would uphold or sustain the objection made to the charge on the facts of the present case.

These facts show that, about a mile from Matthews station, there had been a wash-out which had been recently repaired, and the employes of the defendant had been instructed, or were accustomed, to stop or slow down at this place. There was no tes-

timony that plaintiff was aware of this custom or of these instructions. The theory and testimony of the plaintiff was that at the time of the occurrence plaintiff was a passenger on the defendant road, going from Charlotte to Matthews, a station about 10 miles out, in the nighttime. On approaching Matthews, near which town she lived, the porter on the train came through the first-class car, where plaintiff was, and called out "Matthews." The train immediately began to slow down, and plaintiff got up from her seat and started to go out. She had her grip in her hand and her baby on her arm as she went towards the front door, and by the time the plaintiff had reached the front door the train had almost stopped, and when witness got to the platform it had stopped. The train then gave a violent jerk, and plaintiff was thrown down and seriously injured. Another witness for the plaintiff said that the train had slowed up and looked to him like it stopped when it got even with the washout, and then gave a sudden jerk and went forward. Yet another witness for plaintiff stated that the train had gotten very slow at the washout, but he did not think that the train had quite stopped. The theory of the defendant was that the train had never gotten slower than five miles an hour at this point; the testimony of the defendant being that it was running from five to ten miles an hour.

Presenting the theory and testimony of the defendant, the court charged the jury, among other things, that the general rule is that passengers who are attempting to go on or off a moving train in violation of the rules of the railroad company cannot recover for injuries received by them. This being so, if the jury find that, at the time plaintiff was injured, there was a printed notice posted up in a conspicuous place warning passengers not to go on the platform while the train was in motion, and plaintiff went upon the platform, under the erroneous impression that it was slowing up for her station, and while upon said platform plaintiff was thrown therefrom as a result of a sudden jerk or movement of the train, which was slowing up for a washout, then the court charges that the plaintiff was guilty of contributory negligence in going on the platform while the train was slowing up, which negligence on her part would be the proximate cause of the injury, and the jury should answer the second issue, "Yes." That, even though the jury should find that the defendant was guilty of negligence in failing to warn the plaintiff that the train was slowing for the washout, and not for the station, or in causing the train to be suddenly and violently jerked forward while at the washout, yet, if the jury find that plaintiff went on the platform of the car while it was in motion in violation of the printed regulation of the company, posted in a con-

spicuous place in the car, and was injured on account of a sudden jerk or movement of the car while on the platform preparing to alight, then the court charges the jury that the plaintiff was guilty of contributory negligence which would be the proximate cause of the injury. Again, if the jury find, by the greater weight of the evidence, that there was a rule properly posted in the car, forbidding passengers to go on the platform while the train was in motion, and she went on the platform while the train was running from five to ten miles an hour and was thrown, in that event she would be guilty of contributory negligence.

In presenting the theory and evidence for the plaintiff, the court charged the jury as follows: "If the jury shall find, by the greater weight of the evidence, that shortly before reaching Matthews, on the night referred to in the complaint, the defendant's employé went through the passenger coach in which the plaintiff was riding and called 'Matthews,' and that immediately thereafter the train began to slow up and gradually ran slower and slower, until it came to a full stop, and that the plaintiff while the train was slowing up went towards the platform, believing that the train had stopped for the station, and in so doing acted as a reasonably prudent person would have acted under the same or similar circumstances, and while so upon the platform the train, without warning to her, was suddenly jerked forward by the defendant's employé, and by reason of said sudden jerking forward the plaintiff was thrown from the said platform to the ground, and thereby injured, as alleged in the complaint, then the jury are instructed that this was negligence on the part of the defendant and they will answer the first issue, 'Yes.'" And further, at the request of the plaintiff, gave the following special instructions: "If the jury shall find that, when the plaintiff went upon the platform, she did so in the bona fide belief that the train was not in motion, but that it had come to a full stop, and that a reasonably prudent person, under the same circumstances, would have so believed and so acted, then you are instructed that section 2628 of the Revisal of 1905 would not apply, although the train had not actually come to a full stop, and, in this view, if you find that the defendant was guilty of negligence, as alleged in the complaint, you will answer the first issue, 'Yes.'"

We have held, in several well-considered decisions in this state, that the charge to the jury must be considered as a whole in the same connected way in which it was given, and on the presumption that the jury did not overlook any portion of it; and if, when so considered, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be re-

garded as erroneous. Applying this rule to the charge now considered, I think by fair intendment it could only mean that, while the plaintiff could not recover if she entered on the platform when the train was in motion in violation of a rule of the company properly posted, yet the rule would not apply if she took that position after the porter had called the station, and when the train, immediately after such call, had come to a stop, or so near it, that the plaintiff, in the exercise of reasonable care, could not discover whether it had stopped or not. So interpreted, I think the charge a correct one on the facts presented, and that the rule only applies and prevents recovery where the passenger voluntarily goes on the platform when the train is perceptibly in motion; and does not, and was never intended to apply to cases like the present, where the passenger goes on the platform by the implied invitation of the defendant's employes when its train had come to a stop, or so nearly so that the passenger could not tell whether it was moving or not.

The opinion of the court, as I understand it, in upholding a contrary view, applies and extends the rule to a case which is not in its spirit nor within its letter, by any fair or reasonable construction; and, in its practical effects, may, and frequently will, enable a carrier, by invitation of its employes, reasonably relied upon, to entice a passenger to his hurt, injure him by gross negligence and escape with impunity. The interpretation put upon this rule and statute is not only not grounded in right reason, but is not supported by any well-considered authority. There are several decisions which hold that the mere call of a station does not amount to an invitation to a passenger to go on the platform for the purpose of alighting while the train is still in motion. But no such decision was made on facts similar to those presented in the case we are considering, where the porter called the station, the train slowed up, and either stopped, or came so near it that its motion could not be observed. The better-considered authorities hold that this amounts to an implied invitation to the passengers to step on the platform for the purpose of alighting, and if, in so doing, a passenger is injured by the negligence of the company's employes, the plaintiff can recover. In the case of *Railroad v. Meyers*, 62 Fed. 367, 10 C. C. A. 485, being a decision of the Court of Appeals of the Seventh Circuit, Fuller, Circuit Judge, Jenkins, Circuit Judge and Grosscup, District Judge, present and taking part in the decision, it was said: "It is urged that there is exemption from liability here by reason of the provision of the statute of Indiana (Rev. St. 1881, § 3928), which declares: 'In case any passenger on any railroad shall be injured on the platform of a car, or any baggage, wood, or freight car, in violation of the printed regulations of the

company posted up at the time in a conspicuous place inside of its passenger car then in the train, such company shall not be liable for the injury, provided said company at the time furnished cars sufficient for the proper accommodation of the passengers.' It was found by the jury that, on the inside of the door of the car in which the defendant in error was riding, the company had placed a notice warning passengers from riding on the platform when the train was in motion. This statute was obviously intended to absolve the company from responsibility for damages to passengers imprudently and improperly standing or riding upon the platform, but we cannot conceive that it was designed to apply to a case of a passenger justifiably leaving a car; the platform being the only mode of egress, and the defendant in error being there by invitation of the servant of the company for the purpose of alighting, and was not, we think, riding upon the platform within the meaning of the statute"—citing *Buel v. Railroad*, 31 N. Y. 314, 88 Am. Dec. 271; *Railroad v. Miles*, 88 Ala. 256, 6 South. 696. And in 6 Cyc. 638, it is said: "It will, in general, constitute negligence on the part of a passenger who violates a regulation made by a carrier with reference to the safety of passengers, and for an injury resulting from such violation he cannot recover; but the passenger may properly rely on the discretion of the person in charge of the conveyance as to what would be safe conduct. Thus, while it is usually in violation of the rules to ride on the platform of a moving train, yet, if this is by the express or implied direction or consent of the person in charge of the train or car, it will not be imputed to the passenger for negligence." And in 5 Amer. & Eng. Ency. 678, in note 1, it is said: "The regulation forbidding passengers to stand on the platform of a car while the train is in motion being reasonable and proper, a passenger who is injured while standing on the platform, in violation of such regulation, is guilty of contributory negligence and cannot maintain an action to recover damages. But the passenger who remains there only long enough to ascertain that the train has not stopped does not violate the regulation prohibiting passengers from riding on the platform."

These authorities, I think, state the correct doctrine, and, applied to the facts of the case before us, will show that the trial has been free from reversible error. There could be no better illustration of the wisdom of this position than the facts disclosed in the record. As heretofore stated, the plaintiff, on the train for the second time in her life, ignorant of any washout or of any directions or custom of the company to make a stop at the washout, hears the porter call "Matthews," the station to which she was going. The train immediately slowed up. The plaintiff, acting on the call, in connection with the slower motion of the train, goes to the

door for the purpose of alighting, and, when she steps on the platform, the train is at a standstill, or so near it that, in the exercise of ordinary care, she cannot tell that it is in motion. It was in presenting this theory and the evidence tending to support it that the alleged error was committed, and it seems to me that a mere statement of the testimony is a complete answer to the position.

I am of opinion that, both on reason and authority, the verdict and judgment should be upheld.

CLARK, C. J., concurs in the dissenting opinion.

W. P. PARKER & CO. v. CONTINENTAL INS. CO.

(Supreme Court of North Carolina. Dec. 11, 1906.)

1. APPEAL—RECORD—PRESUMPTIONS.

Revisal 1905, § 4750, requires service of legal process on a foreign insurance company licensed to do business in the state by leaving the same with the insurance commissioner, and provides that no other service shall be valid. *Held* that, where there was no specific finding by the trial judge that defendant insurance company was licensed to do business within the state, it would be presumed, on appeal, in support of his determination that a service otherwise made was valid, that such was not the fact.

2. INSURANCE—FIRE POLICY—ACTION—INCONSISTENT DEFENSES.

Where, in an action on a fire policy, insurer denied liability because of an alleged violation of an iron-safe clause, it could not thereafter successfully plead failure of plaintiff to file proofs of loss, to defeat a recovery.

3. SAME—IRON-SAFE CLAUSE—BREACH.

Where a fire occurred within 30 days after a policy was issued and an iron-safe clause therein allowed 30 days for making the inventory and the opening of books which were required to be kept in the safe, there was no breach of such iron-safe clause.

4. APPEAL—RECORD—PRESUMPTIONS—LIMITATIONS.

Revisal 1905, § 4809, provides that no insurance company shall limit the time for the commencement of an action to less than one year after accrual thereof or to less than six months from the time a nonsuit is taken in an action brought on a policy within the time originally prescribed. *Held* that, where suit was brought on a policy within 12 months and a nonsuit taken, but the record on appeal failed to show when the new suit was commenced, it would be presumed, in support of the court's judgment in favor of plaintiff, that it was begun within the time required.

Appeal from Superior Court, Burke County; O. H. Allen, Judge.

Action by W. P. Parker & Co. against the Continental Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover the sum of \$1,500 alleged to be due on a fire insurance policy, issued November 8, 1901, by the defendant to the plaintiff on a stock of goods, which were destroyed by fire November 18, 1901. The summons was issued May

14, 1904, and served on Avery & Ervin, local agents of the defendant company at Morganton. The defendant entered a special appearance and moved to dismiss the action because the summons had not been properly served, and the defendant was not, therefore, before the court. This motion was based on the ground that the defendant is a foreign corporation and the summons should, therefore, have been served on the state insurance commissioner, as required by the Acts of 1903, p. 768, c. 488, § 6 (Revisal 1905, § 4750), where such a company has been licensed to do business in this state. The court overruled the motion, but without finding any facts. Defendant excepted to the ruling. The defendant denied its liability on the policy upon these several grounds: (1) That no proofs of loss had been filed, the policy providing that the loss shall not be payable until 60 days after such proofs have been received. (2) That the plaintiff had not complied with the provisions of the iron-safe clause contained in the policy, by making an inventory of the stock of goods, and keeping a set of books showing a complete record of the business and by preserving the inventory and books securely locked in a fire-proof safe. The policy requires the inventory to be taken within 30 days after the date of the policy, unless one had already been made within the 12 months prior thereto, and directs that the books shall show the condition of the business from the date of the inventory. (3) That this action was brought on May 7, 1904, nearly 2½ years after the fire, which occurred on November 18, 1901, whereas the policy requires that any action thereon shall be commenced within 12 months next after the fire. A suit for the same cause of action was brought February 28, 1902, in which it appears, at least inferentially, that a nonsuit was taken, and this action was brought within six months afterwards. There was evidence tending to show that proofs of loss were filed with the company's agent in January or February, 1902, and that \$20 had been paid to the agent, it being the balance due on the premium, and also evidence as to the loss and the value of the goods which had been destroyed by the fire. The jury returned a verdict for the plaintiff, and, from the judgment thereon, the defendant appealed.

Avery & Ervin, for appellant. J. F. Spaulhour, for appellee.

WALKER, J. (after stating the case). The motion to dismiss the action was properly denied. The Revisal 1905, § 4750, does require service of legal process upon any foreign insurance company, licensed to do business in this state, to be made by leaving the same with the insurance commissioner, and it provides that in such a case no other service shall be valid. But it does not appear affirmatively in this case that the defendant

is a licensed company. In the absence of any statement of the facts by the presiding judge, we must assume that he found such facts as would sustain his ruling. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360. Error in the decisions of the lower court is never presumed here, but the contrary, and he who alleges such error must show it. The defendant had the right to have the facts stated by the judge, but, in the absence of any request from it to the judge so to do, the failure to do so was not error. *Millhiser v. Balsley*, 106 N. C. 433, 11 S. E. 314; *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848; *Carter v. Rountree*, 109 N. C. 29, 13 S. E. 716; *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320. We must, therefore, presume that his honor found as a fact that the defendant was not duly licensed, and that section 4750 of the Revisal did not apply, but that the process had been properly served under the Revisal 1905, § 440. There may be a presumption that the defendant was licensed, as the law never presumes a wrong to have been committed or that a person willfully violates the law, and, even if it exists, it is not a conclusive presumption, but may be rebutted, and we must again assume that the judge found that it was contrary to the fact. In *Fisher v. Insurance Co.*, 136 N. C. 218, 48 S. E. 667, it was admitted that the defendant was not licensed, and that the act of 1903, p. 766, c. 438 (Revisal 1905, § 4750) did not therefore, apply. But that case is, in principle, an authority for our ruling in this one, though the service was there made on the secretary of the Corporation Commission, as we assume in this case the existence of a fact which was admitted in that case.

The defendant having denied its liability to the plaintiff on the policy by alleging that there was a violation of the iron-safe clause, whereby the policy became null and void, it cannot now successfully plead the failure of the plaintiff to file proofs of loss and defeat his recovery. It cannot blow hot and cold, so to speak, at one and the same time. When it insists that proofs should have been filed, it asserts of course the validity of the policy, for why file proofs of loss under a void policy? There can be no loss under such a policy. This defense, therefore, is inconsistent with that of noncompliance with the iron-safe clause, which implies that the policy is invalid. The one necessarily excludes the other, and in the sense that an election must be made between them. This is a most just and reasonable rule, and we have held, in accordance with it, that a denial of liability by a fire insurance company dispenses with the necessity of filing proofs of loss. *Gerringer v. Insurance Co.*, 133 N. C. 407, 45 S. E. 773. If the plaintiff had made the required proof, he would have been met with the denial by the defendant of any liability whatever for the loss. It would be unjust to permit the company thus to trifle with a policy holder. We are not speaking of inconsistent pleas, which are allowable, but of defenses which

are, in substance, opposed to each other. The one excludes the other and is a waiver of it.

The defendant is not any more fortunate in its next defense. It appears that the policy was issued on November 8, 1901, and the fire occurred on November 18, 1901, within the 30 days after the policy was issued. The iron-safe clause allows 30 days for making the inventory, and the books are not required to be opened until the inventory is completed, for the record of the business, as shown by the books, must date from the completion of the inventory, or from the expiration of the 30 days allowed in making it. So the full time for doing neither one of these acts had elapsed when the fire occurred. We have decided in a case having all the essential features of this one, so far as this defense is concerned, that, in such circumstances, the defendant cannot avail itself of any breach of the stipulations in the iron-safe clause, because there has been no such breach and could not have been any. *Bray v. Ins. Co.*, 139 N. C. 360, 51 S. E. 922.

The remaining position of the defendant is equally untenable. This action was commenced within six months after the discontinuance of the former action upon the same policy, even if it had been discontinued, which does not appear very clearly in the record. The Revisal 1905, § 4809, provides that no insurance company shall limit the time within which an action may be commenced to less than one year after the accrual of the cause of action, or to less than six months from the time a nonsuit is taken in an action brought upon the policy within the time originally prescribed. Such a stipulation in the policy is a contractual limitation, and has been held by this court to be valid when it does not conflict with any provision of the statute. *Dibrell v. Ins. Co.*, 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678; *Muse v. Ins. Co.*, 108 N. C. 240, 13 S. E. 94. But the law has been changed by the Legislature, as we have shown, since the decision in *Muse's Case*, in which it was held that the suit must be brought within 12 months after the loss occurred and not afterwards, and it must be the same suit which was commenced within that period and prosecuted to judgment, and not a new suit brought upon nonsuit taken in a former action which was itself begun within the 12 months. Revisal 1905, § 4809. In this case the facts are that a suit was commenced within the 12 months and a nonsuit taken therein, but when it was entered is not distinctly shown. The record in the action "in which the nonsuit was entered" was put in evidence, but it does not accompany the transcript. We must assume that it appeared from that record that this suit was brought within six months after the nonsuit, because that finding of fact sustains the court's ruling, and we do not presume error, as we have already said in considering a former exception.

The defenses set up in this case are of an extremely technical character. They were sufficient, indeed, if they had been supported by the necessary proof, and the defendant, for its own protection, had a perfect right to plead them. But we will not make any inferences in its favor in order to supply defects in the evidence. So far as the merits of the defenses are concerned, it seems that there was some evidence for the jury upon the question of waiver, which his honor submitted to them, and they have found against the defendant. But, however this may be, it does appear that the plaintiff has paid the consideration for the insurance and has sustained a loss, and that he has substantially complied with the terms and conditions of the policy. When this is shown, and there has been good faith on the part of the insured, there is no reason why the law should require anything more. *Willis v. Ins. Co.*, 79 N. C. 285.

We find no error in the rulings of the court below.

No error.

C. A. WEBB & CO. v. TRUSTEES OF MORGANTON GRADED SCHOOL.

(Supreme Court of North Carolina. Dec. 11, 1906.)

CONTRACTS — CONDITION PRECEDENT — PERFORMANCE.

Plaintiffs proposed to purchase certain school bonds from defendants at specified prices "when legally issued to the satisfaction" of plaintiff's attorney and inclosed a certified check as a guaranty to faithfully carry out the proposal. *Held*, that satisfaction of plaintiff's attorney was a condition precedent to plaintiff's liability under such proposal, and that where such attorney refused in good faith to recommend the bonds, defendants were not entitled to forfeit the deposit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 1310, 1311.]

Appeal from Superior Court, Burke County; O. H. Allen, Judge.

Action by C. A. Webb & Company against Trustees of Morganton Graded School. From a judgment for plaintiff, defendants appeal. Affirmed.

The Legislature of North Carolina by chapter 455, p. 802, Laws 1903, incorporated the Morganton Graded School naming trustees thereof, and by chapter 174, p. 188, Laws 1905, authorized the said trustees to submit to the voters of the said Morganton school district a proposition for the issue of school bonds to the amount not exceeding \$20,000, running 40 years from date of issue, bearing interest at a rate not exceeding 6 per cent. At an election held pursuant to the provisions of said act, said trustees were authorized to issue the said bonds in accordance with the said proposition. Pursuant thereto the said trustees advertised for bids for said bonds to the amount of \$15,000. On July 27, 1905, the plaintiff C. A. Webb, doing business

under the firm name and style of C. A. Webb & Co. submitted to said board a proposition to buy said bonds, as follows: "For the \$15,000 of coupon bonds of Morganton graded school district due and payable 40 years from date, with option of prior payment at the expiration of 20 years from date, drawing interest at the rate of 5 per cent., payable semiannually, both principal and interest payable at the First National Bank of Morganton, to be dated September 1, 1905, we will pay you par and interest, and a premium of \$630, and furnish free blanks upon the delivery of the same to us at Asheville, when legally issued to the satisfaction of our attorney. We herein inclose certified check for \$500 as guaranty to faithfully carry out this proposition." At the time of submitting said proposition, plaintiff inclosed a certified check on the Battery Park Bank of Asheville for \$500, indorsed to the president of the board of trustees, as follows: "Pay to the order of John H. Pearson upon our failure to comply with our contract this day made for the purchase of fifteen thousand dollars, Morganton graded school bonds (dated) July 27, 1905."

At the time of said proposition the defendant trustees were in correspondence with a number of bankers and brokers, dealers in securities of that character. Without advising with counsel, said trustees had before that time offered to sell bonds maturing in 20 years instead of 40 years; the plaintiff, instead of expressing a preference for bonds running 20 years, was of the opinion that said trustees were not authorized to issue said bonds, but did have authority to issue the bonds due and payable 40 years from date with option of prior payment at the expiration of 20 years from date. Immediately upon filing said proposition the said trustees ceased to negotiate with the proposed purchasers of its school bonds, and caused publication to be made; that the said bonds had been sold to the plaintiff. The plaintiff submitted to his attorneys in the city of Boston, a certified copy of the act authorizing the said issue of bonds, and all other certified records which had, at that time, come into the hands of the plaintiff, which tended to show the legality of said bonds, with a request that said attorneys render a legal opinion in respect to the legality thereof. That on August 8, 1905, the said attorneys, Storey, Thorndyke, Palmer & Thayer, gave to the plaintiff their opinion in writing, saying: "The statute provides for bonds 'running 40 years from date of issue' and the notice of election provides for bonds 'to run 40 years from date of issue.' In our opinion the bonds must run for 40 years without option of prior payment. This result, apparently, does not coincide with your contract, or the contention of the board. Awaiting the further papers which you are to send us, and also awaiting your instructions as to whether in the circumstances we

shall proceed to complete the examination, we are, etc." Immediately upon receipt of said opinion, plaintiff submitted same to defendant board of trustees, advising said defendant that because of the failure of said attorneys to approve and pass the validity of the character of bonds mentioned in said contract, said plaintiffs would not take up and pay for the bonds mentioned in said contract unless the defendant would submit the facts with reference to said maturities to the superior and Supreme Courts of North Carolina, for an early decision upon the question as to whether said bonds should run for a period of 40 years or could be issued so as to provide for an optional payment at the expiration of 20 years. Said proposition was declined by said board. The said board sent said check to the Battery Park Bank at Asheville for collection and withholds the same, refusing to surrender to the plaintiff. Subsequently the defendants sold the said bonds to the amount of \$15,000 for a premium of \$2.50 on the \$100. Plaintiff introduced the deposition of Henry Ware, Esq., a member of the firm of Storey, Thorndyke, Palmer & Thayer, who testified that he had been engaged for over 9 years in examining records and papers relating to municipalities in North Carolina. That he examined the records, etc., relating to the issue, by the defendant trustees, at the request of the plaintiff, and was of opinion that the bonds issued either in accordance with the contract of purchase, that is, payable 40 years from that date, with the option of prior payment at the expiration of 20 years, would not be, or have been, legally authorized, for the reason that the statute, authorizing the bonds, required them to run 40 years from date, and did not authorize said trustees to make them payable at an earlier date, either absolutely, or at its option. That he communicated said opinion to the plaintiff on August 8, 1905. He says: "I gave the said opinion in absolute good faith, honestly believing that I was correct in the same and I still so believe." The defendant moved for judgment upon the pleadings which being denied there was an exception. Thereupon his honor submitted the following issue to the jury: "Did the attorneys advise against the legality of the bonds as alleged in the fifth article of the complaint? Answer: Yes." There were certain exceptions to the testimony and the rulings of his honor specifically set forth in the assignments of error, and appearing in the opinion. Judgment being rendered for the plaintiff, the defendants duly excepted and appealed.

Avery & Avery, for appellants. Avery & Ervin, C. A. Webb, and W. C. Newland, for appellee.

CONNOR, J. (after stating the case). The terms of the proposition made by plaintiff to purchase the bonds issued by defend-

ant, "when legally issued to the satisfaction of our attorneys" are plain and unambiguous. Similar provisions are frequently found in contracts for purchasing bonds, loaning money, buying stocks, building houses, purchasing land, etc. They are regarded as both wise and reasonable, and uniformly sustained by the courts. In regard to the purchase of municipal bonds, the value of which for sale on the market is so largely dependent upon the approval of counsel skilled and learned in the laws controlling their issue, it is a most prudent provision. In the light of the frequent litigation growing out of the issue of such bonds, often disastrous to holders, to purchase them without some such protective provision, would be imprudent and unsafe. However this may be, parties have the legal right to make such contracts, and it is the duty of the courts to give the language a fair and reasonable interpretation. When so interpreted, we can have no doubt that the approval of the attorneys, as to the legality of the issue, honestly and fairly expressed, was a condition precedent to the completion of the purchase. We may not interpolate into it any other language or give it any other construction. It is uniformly held by the courts that, in the absence of any allegation and proof of bad faith or arbitrary conduct on the part of the person selected to pass upon the validity of the bond or performance of the contract on the part of the person seeking its enforcement, his approval is a condition precedent, and is essential to the right to demand performance. It is usually held that, when it appears from the pleadings that such provision is a part of the contract, the failure to aver compliance is demurrable.

In *Young v. Jeffreys*, 20 N. C. 357, it appeared that certain persons had made subscriptions for the purpose of building a Methodist church. The work was to be done according to specifications and accepted by the commissioners appointed to pass upon it. The objection being made to the payment of the subscriptions that the work had not been accepted, and that such acceptance was a condition precedent to the payment. Gaston, J., sustaining a motion for judgment by defendants, said: "There is nothing unreasonable, much less illegal, in such a condition. Whether a work of art has been done with proper materials and in a workmanlike style is an inquiry on which honest differences of opinion may prevail even among persons skilled in the art, and on which men of ordinary pursuits are very unfit to pass. It is, therefore, in agreements for works of this kind, a prudent and common stipulation for the prevention of controversies, that the construction of the work shall be determined by some persons in whose judgment the parties have confidence. If, however, the judgment of the forum ap-

pointed by the parties is to be disregarded, or revised by a court and jury, the stipulation is unmeaning." Wharton, Cont. 593. If the contract is to be performed to the satisfaction of another, the decision of such person, if honest, is final, no matter how unreasonable. *Brown v. Foster*, 113 Mass. 136, 18 Am. Rep. 463. In *Church v. Shanklin*, 95 Cal. 626, 30 Pac. 789, 17 L. R. A. 207, the contract was made to depend upon the perfecting title to certain property "to the satisfaction of Church & Cory, Attorneys." Patterson, J., said: "The record fails to show that Church & Cory refused to express satisfaction with the plaintiffs' title through any fraudulent or improper motive. * * * It was doubtless the object of the parties to avoid disputes and expensive litigation, certainly, some effect must be given to the stipulation contained in the agreement. To hold that the opinion of the court as to the validity of the title can be substituted for that of the arbitrators, would defeat the intention of the parties and, in effect, make a new contract for them. This, the court has no right to do. The parties saw fit to make Church & Cory the umpires between them, and if the latter exercised their best judgment in good faith and with an honest intention of determining the question as to the validity of the title, their conclusion is final and binding."

In *Mich. Stone, etc., Co. v. Harris*, 81 Fed. 928, 27 C. C. A. 6, the same question arose upon the construction of a contract for the purchase of municipal bonds, the language being: "We to furnish you with certified transcript of proceedings evidencing legality of issue to the satisfaction of your attorneys prior to the delivery of same." Judge Lurton said: "The subject-matter of this contract was the negotiable bonds to be issued for street improvements to be made under a contract between the city and the plaintiff in error. They had not been issued when this agreement was entered into. It was a most reasonable and prudent thing for proposing purchasers to stipulate for some security against the invalidity of such bonds before being required to receive and pay for them. The plain meaning of this contract was (1) that plaintiffs in error were to furnish certified copies of the proceedings under which these bonds were issued. (2) Defendants in error were to fairly and honestly submit this record, when furnished, to the judgment of the counsel selected by them. (3) The counsel, thus selected, must not capriciously and arbitrarily reject the bonds, but on the record, honestly and fairly give his judgment as to their legality. * * * The buyers employed counsel, a gentleman particularly skilled in the matter of the validity of municipal bonds, and submitted this evidence to him, and procured his opinion. * * * The question of the validity of the bonds was to be settled by the opinion of a third per-

son, whose judgment was to be a legal opinion based upon the law and facts touching these bonds. Neither party would be concluded by an opinion rendered arbitrarily, and without the honest intent of deciding fairly and rationally. The contract seems to come fairly within the principle applicable to contracts under which settlements between parties are made dependent upon the certificate of some third person. The rule in such cases, is that, in the absence of fraud, or such gross misconduct as would necessarily imply bad faith, or the failure to exercise an honest judgment, the action of such third person should conclude the parties." *Kihlberg v. U. S.*, 97 U. S. 398, 24 L. Ed. 1106; *Railroad v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; *Averett v. Lipscomb*, 76 Va. 404. There is no suggestion that the gentlemen selected by plaintiffs' attorneys to pass upon the validity of the bonds were not competent, or that they did not honestly and in good faith investigate and give their opinion upon the question submitted to them pursuant to the contract. While we have not undertaken to investigate or express any opinion respecting the validity of the bonds proposed to be issued, containing the 20-year option, we regard it as sufficiently serious to arrest attention and, in the absence of controlling authority, cause counsel to decline to express satisfaction of their validity. Certainly the question cannot be said so free from doubt as to suggest an arbitrary refusal to approve them. We do not think that the correspondence or negotiation leading up to the proposition material. The proposition made by plaintiff and accepted by defendant was the result of such negotiation and their relative rights and liabilities must be ascertained and declared upon the plain and unambiguous language found therein. We concur with his honor's rulings upon the several exceptions. The issue submitted to, and found by, the jury, in the light of the contract, settled the right of the plaintiff to the relief demanded. The exceptions to the answers of Mr. Ware cannot be sustained. Nor was the proposed testimony of Mr. Ervin material.

The judgment was correctly rendered upon the pleadings, and the verdict is, and must be affirmed.

ROBERTS v. ROBERTS.

(Supreme Court of North Carolina. Dec. 11, 1906.)

1. PARTITION—CONSENT DECREE—REPORT OF COMMISSIONERS—CONFIRMATION.

Where after judgment in partition appointing commissioners was entered by consent of the parties, the commissioners' report was filed with the clerk, and no exception was taken thereto within 20 days, the report stood confirmed without a formal decree as provided by Code 1883, § 1896.

2. SAME—NOTICE OF PROCEEDINGS.

Commissioners were appointed to partition land under a consent decree in 1887, and filed their report with the clerk on June 30th of that year. No exceptions were ever filed or objections made to the confirmation of the report and in April, 1906, without further notice to defendant or his counsel, plaintiff procured an order confirming the report. *Held*, that if the proceeding be regarded as pending in the superior court in term time under Acts 1887, p. 518, c. 276, providing that whenever any civil action or special proceeding begun before a clerk shall be sent to the superior court, the judge shall have jurisdiction, and it shall be his duty to proceed to hear and determine the matter in controversy, etc., defendant was bound to take notice of such orders and decrees as were made in the case in term time without special notice.

3. SAME.

Where no exceptions were filed to a report of commissioners in a partition proceeding during the term which followed the filing of the report, plaintiff was entitled to a decree of confirmation as a matter of law.

4. SAME—ENTRY OF ORDER—NUNC PRO TUNC.

Where no exceptions were filed to the report of commissioners in partition proceedings at the term succeeding the filing of the report in July, 1887, an order confirming the report made in term time in 1906, should be considered as entered nunc pro tunc.

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Partition by W. S. Roberts against H. C. Roberts. From an order, denying defendant's motion for confirmation of a partition decree, he appeals. *Affirmed*.

N. Y. Gulley and W. P. Brown, for appellant. Frank Carter, Moore & Rollins, and H. C. Chedister, for appellee.

BROWN, J. It appears from the record and findings by the court below that on January 19, 1881, the plaintiff brought a special proceeding against the defendant before the clerk of the superior court for the purpose of partitioning certain land between the plaintiff and defendant which they held as tenants in common. Issues of fact having been raised by the pleadings, the case was transferred for trial to the superior court. It was regularly called for trial at June term, 1887, and a jury was impaneled to try it. After the jury had been impaneled, the judgment which appears in the record, appointing commissioners for partition, was entered by consent of the parties. The commissioners, so appointed, partitioned the land between plaintiff and defendant, and filed a report of their proceedings with the clerk of the court on July 30, 1887. No exceptions were ever filed, and no objection in any form made, so far as the record discloses, to the confirmation of the report. At April term, 1906, without giving special notice to the defendant or his counsel, the plaintiff procured an order confirming the report which had been filed since July 30, 1887.

The contention of the defendant is that the proceeding for partition was not pending either in the superior court in term or before

the clerk, but that it had been abandoned 19 years before, and was pending nowhere. We are of opinion that his honor very properly denied the motion. There was no discontinuance of the proceeding for lack of continuous process or for any other reason. *Penniman v. Daniel*, 91 N. C. 431. The consent decree was a final judgment of the court adjudicating the rights of the parties to a partition. If the cause was pending before the clerk, then no order of confirmation was necessary when the report was filed in 1887. If no exception thereto was filed in 20 days, the report stood confirmed by law without a formal decree. Code 1883, § 1896. If we regard the proceeding as pending in the superior court in term, by virtue of chapter 276, p. 518, Acts 1887, then the defendant was bound to take notice of such orders and decrees as were made in the orderly course of legal procedure in term time. No special notice was necessary. Inasmuch as no exceptions were filed to the report of the commissioners during the term which followed the filing of the report, the plaintiff had a right to a decree of confirmation of this decree. The order made in 1906 by Judge Moore in term time may be justly considered as entered nunc pro tunc, and was no more than the plaintiff was clearly entitled to, even if necessary. *Bright v. Sugg*, 15 N. C. 492; *Long v. Long*, 85 N. C. 415.

Affirmed.

STATE v. FRISBEE.

(Supreme Court of North Carolina. Dec. 11, 1906.)

CRIMINAL LAW—LIMITATION OF PROSECUTION—STATUTES.

Under Revisal 1905, § 3621, making it a felony for one to maliciously assault another with a deadly weapon by waylaying, etc., and section 3291, defining a misdemeanor as an offense not punishable by death or imprisonment in the state's prison, and Acts 1870-71, p. 94, c. 43, punishing by fine or imprisonment a person convicted of an assault, with or without intent to kill, a prosecution for an assault with a deadly weapon with intent to kill is a prosecution for a misdemeanor, and not for malicious mischief, defined by section 2676 as willfully injuring personal property with malice to the owner, and is barred in two years by section 3147, providing that all misdemeanors, except for "malicious mischief, and other malicious misdemeanors," shall be presented within two years after the commission of the same, the words "other malicious misdemeanors" being intended to describe an offense of which malice is a necessary ingredient, as in the case of malicious mischief.

Appeal from Superior Court, Buncombe County; Moore, Judge.

Lee Frisbee was convicted of an assault with intent to kill, and he appeals. *Reversed*.

The defendant was charged in the indictment with unlawfully, willfully, and maliciously assaulting Floyd Brown, on May 1.

1903, with a deadly weapon, to wit, a certain pistol and knife, with a four-inch blade, with intent to kill and murder the said Floyd Brown, and to his great damage, contrary to the form of the statute and against the peace and dignity of the state. The defendant moved to quash the indictment. Motion overruled, and he excepted. There was evidence that the assault was made more than two years before the finding of the indictment. The defendant, in apt time, requested the judge to charge the jury that, if the assault was committed more than two years before the bill was found, they should acquit. This instruction was refused and the defendant excepted. The jury returned a special verdict to the effect that the assault occurred on April 12, 1903, and the indictment was found August 4, 1905, or more than two years after the offense was committed, and asked the opinion of the court upon the facts so found. If the indictment is not barred by the statute of limitations, they found the defendant guilty, but, if it is barred, they found him not guilty. The court adjudged the defendant guilty, and, from the judgment upon the verdict, the defendant excepted, and appealed.

J. S. Styles, for appellant. The Attorney General and Frank Carter, for the State.

WALKER, J. (after stating the case). The Revisal of 1905, § 3147, provides that all misdemeanors, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same and not afterwards, unless any of said misdemeanors shall have been committed in a secret manner, when it may be prosecuted within two years after the discovery of the offense. If the crime alleged in the indictment to have been committed by the defendant is not a malicious misdemeanor, he was improperly convicted.

There was no such distinct offense at the common law as a malicious assault, for all assaults were but misdemeanors punishable by fine and imprisonment, and the circumstances of aggravation could be taken into account by the court only in fixing the punishment. Clark, Cr. Law (2d Ed.) p. 229; 1 McClain, Cr. Law, § 255, 262, and 280; 1 East, Pl. of Crown, 436; People v. Petit, 3 Johns. (N. Y.) 511; Com. v. Barlow, 4 Mass. 439; Bacon's Case, 1 Lev. 146; and Green v. People, 3 Colo. 68, where an interesting history is to be found of the origin and development of the law upon this subject. Referring to the common law as it existed in the early years of the reign of James I, it is there said that "at that early time Coke and Bacon were bitter rivals in politics and practice at the bar, neither Sir Matthew Hale nor Sergeant William Hawkins had then been

born, nor had the Star Chamber been abolished, and trial by wager of battle was lawful. The common law was then emerging from the gloom of black letter, the mysteries of Norman-French, and the intricacies of the old feudal law, and beginning to assume, under Coke and Bacon, that system and symmetry which Hale and Hawkins afterwards assisted in developing, and Blackstone perfected, 100 years later, in the king's English. The common law was not, in the early days of James, what enlightened jurists have since made it. The case of Sir Walter Raleigh furnishes an illustration of a difference in the application of the law at least. Upon a written inquisition, uncorroborated by witness or circumstance, without being confronted with his accuser, Raleigh was convicted of high treason by the verdict of a jury, upon which he was consigned to prison, and finally brought to the block." The felonies of that day appear to have been numerous and peculiar, and much difficulty is experienced in ascertaining the law of ancient times so far as it relates to the grade of an aggravated or malicious assault. So anxious was the ancient common law for the safety of the subject that every act done against another which might imperil his life was held to be felonious, as the Year Books will show, but the rigor of the law was relaxed in more modern times, and, as civilization and enlightenment advanced, until the reign of Edward IV, when the ancient maxim which required the intention to be taken for the deed "*voluntas reputatur pro facto*" was not applied so strictly and began to grow obsolete, and the offense of assault with intent to murder was regarded as a high misdemeanor, punishable only at discretion, the intent being merely a circumstance of aggravation and not essential to impart criminality to the act. 1 Hawks, P. C. (8th Ed.) 111; Green v. People, *supra*. East says that, in the earliest ages of our law, it seems to have been considered that the bare attempt to commit murder was felony, but that idea was soon exploded, though still the attempt is punishable as an aggravated misdemeanor at common law; and he cites, as an illustration, the case of Mt. Bacon who was indicted for lying in wait to kill the master of the rolls and convicted, whereupon he was sentenced to fine and imprisonment and to find surety for his good behavior for life and to acknowledge his offense at the bar of the court of chancery. 1 East, P. C. p. 411. We have now a statute denouncing as a felony a malicious assault and battery committed with any deadly weapon upon another by waylaying or otherwise, in a secret manner, with intent to kill. Revisal 1905, § 3621. In this state an assault with a deadly weapon and with intent to kill was never a felony. By Acts 1868-69, p. 408, c. 167, § 8, it was punishable infamously or by imprisonment in the penitentiary,

but the doctrine that a crime is a felony where the punishment is confinement in the state's prison did not obtain with us until Acts 1891, p. 173, c. 205, § 1 (Revisal 1905, § 3291). Such an assault, therefore, was a misdemeanor. *State v. Swann*, 65 N. C. 330, although under the existing statutory definition, if it had then applied, it would have been a felony. *State v. Clark*, 134 N. C. 710, 47 S. E. 36. Act 1868-69 was repealed by Acts 1870-71, p. 94, c. 43, and, since the passage of the latter act, the crime of assault, even with a felonious or malicious intent, has been classed simply as a misdemeanor. The offense described in the indictment in this case cannot be malicious mischief, as suggested in the argument, for that is, at common law, the willful destruction of some article of personal property belonging to another with malice towards the owner (*State v. Robinson*, 20 N. C. 129, 32 Am. Dec. 661; *State v. Helmes*, 27 N. C. 364; *State v. Manuel*, 72 N. C. 201, 21 Am. Rep. 455), and under the statute it is the willful injury of personal property, whether it is destroyed or not, with malice to the owner (Revisal 1905, § 2676). The law on this subject is explained in *State v. Martin*, 141 N. C. 832, 53 S. E. 874. When, in the Revisal of 1905, § 3147, the Legislature used the words "other malicious misdemeanors" which immediately follow the words "malicious mischief," it evidently intended to describe offenses of which malice is a necessary ingredient to constitute the criminal act, as in the case of malicious mischief, and it was not the purpose to include within the exception from the operation of that section such offenses as would be misdemeanors even in the absence of malice, and where malice, if present, would be only a circumstance of aggravation which the court might consider in imposing the punishment. This, we think, is clear, and is in accordance with Blackstone's view of such misdemeanors as they existed at the common law. Speaking of assaults, batteries, wounding, and like offenses, he says that, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage to his subjects, they are indictable and punishable with fines and imprisonment, and more severely when committed with any very atrocious design, but that they are, nevertheless, mere misdemeanors, and the aggravation attending their commission does not change their nature as crimes, though it may increase the punishment. 4 Blk. 216. It is to be noted that there are a class of malicious misdemeanors known to our law which will satisfy the words of the statute referring to them generally by that name. But assaults are not among them, even though they may be committed with malice.

Upon the special verdict, judgment should have been entered for the defendant, and he is entitled to an acquittal and discharge,

as the alleged crime was barred by the statute. *State v. Morris*, 104 N. C. 837, 10 S. E. 454.

Error.

YORK v. WESTALL.

(Supreme Court of North Carolina. Dec. 11, 1906.)

1. COMPROMISE AND SETTLEMENT—VALIDITY—CONSIDERATION.

Where the vendor of land gave plaintiff permission to remove timber therefrom, and extended the time beyond the original agreement by parol and the vendee had notice of such extension at the time of his purchase, an agreement between the vendee and plaintiff that the plaintiff might remove the timber already cut, but would relinquish any further right to cut timber, was based on a sufficient consideration.

2. FRAUDS, STATUTE OF—INTEREST IN REALTY—STANDING TIMBER—COMPROMISE.

An agreement, whereby plaintiff was permitted to remove from land held by a vendee timber cut under a parol agreement with the vendor, but that he should relinquish any further right to cut timber thereon, was not within the statute of frauds.

Appeal from Superior Court, Burke County; O. H. Allen, Judge.

Action by W. H. York against W. H. Westall. From a judgment in favor of plaintiff, defendant appeals. Reversed, and new trial ordered.

This action was brought to recover damages for a trespass committed in entering upon the lands of the plaintiff, and cutting and removing timber trees therefrom. The land formerly belonged to R. L. Wilson, who entered into a written contract with the defendant, Westall, and others, on March 24, 1903, whereby he agreed to sell to them for \$126, all the merchantable pine, poplar, and oak timber trees on the said tract of land, to be cut and removed therefrom within two years from that date. The plaintiff bought the land from Wilson, and it was conveyed to him by deed dated October 19, 1904. He alleges in his complaint that the defendants failed to cut and remove the timber within the two years allowed to them for that purpose in the contract, but that they unlawfully entered upon the land after the expiration of that time, and cut and removed from the premises many valuable trees, amounting to about 3,000 saw logs, though claiming the right to do so under their contract with Wilson, to the plaintiff's damage \$500. The defendant avers in his answer: That, when the plaintiff purchased the land from Wilson, and received the deed therefor, he was notified by Wilson that the defendants were the owners of the merchantable pine, poplar, and oak timber trees then on the land, and that the time for cutting and removing the same had been extended from March 24, 1905, the date of the expiration of their former contract, for one year after that date, and that Wilson intended to insert the said agreement for an extension in the deed to York,

but omitted to do so by the mistake and inadvertence of the draftsman of the deed, and that the trees which the defendants were entitled to cut and remove were not considered by Wilson and York in fixing the purchase price of the land. That afterwards, on December 13, 1905, the plaintiff and the defendants came to an understanding and agreement with each other in regard to the controversy between them about the trees, and it was then agreed that the defendants should have all of the saw logs that had been cut on the premises prior to December 13, 1905, and that the plaintiff should have all of the merchantable pine, poplar, and oak timber trees still standing, which would yield, by estimation, about 50,000 feet of lumber; and it was further agreed in consideration thereof that the defendants would no longer insist upon the right to cut the timber trees still remaining on the land, and that the plaintiff would make no claim on account of the trees which had already been cut, or the saw logs which had been removed from the premises after March 24, 1905. That the defendant has not, since said agreement was made with the plaintiff, cut any timber trees on the land, or removed any saw logs therefrom. That the trees and saw logs for the cutting and conversion of which this action was brought, are the same described in that agreement, and which the defendants had theretofore removed from the land, and that this suit was brought in violation of the express promise of the plaintiff not to hold the defendant liable for the cutting and removal of the same. Among others, the defendants tendered the following issue: "Did the plaintiff release and discharge the defendant from liability as alleged in the answer?" The court refused to submit the issue, and the defendants excepted, as they did to the issues submitted by the court, which with the answers thereto were as follows: "(1) What was the value of the timber trees cut and removed by the defendant, W. H. Westall, from the land which is described in paragraph 1 of complaint after the 24th day of March, 1905? Answer. \$150.00. (2) What damage, if any, was done to said land by the defendant in cutting and removing timber trees from the same after March 24, 1905? Answer. \$25.00." Judgment was given for the plaintiff upon the verdict, and the defendant appealed.

Self & Whitener and S. J. Ervin, for appellant. Avery & Ervin, for appellee.

WALKER, J. (after stating the case). We are unable to perceive why the issue which was tendered by the defendants was not a proper one. It was directly raised by the answer of the defendant, Westall, the only one of the two defendants named in the summons, who was served. The case was prosecuted against him alone. The rule is established that an agreement to compromise and

settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this too without any serious regard to the special merits of the controversy or the character or validity of the claims of the respective parties. The real consideration which each party receives in contemplation of law under the settlement is not to be found so much in the mutual sacrifice of any rights as in the bare fact that they have settled their dispute, which is considered to be of interest and value to each one of them. 8 Cyc. p. 505 et seq. They give and take, so to speak, not knowing precisely what will be the outcome if they should bring their controversy to the test of the law and subject it to the uncertainties of litigation. Under such circumstances, there is no good reason why the mutual concessions of the parties, resulting in a settlement of their dispute, should not be upheld. In discussing the law of contracts, with reference to the consideration sufficient to support them, Mr. Parsons says that the prevention of litigation is a valid and adequate consideration, for the law favors the settlement of disputes, and on this ground a mutual compromise is sustained. It is not only a sufficient, but a highly favored, consideration, and no investigation into the character or relative value of the different claims involved will be entered into, for the purpose of setting aside a compromise, if of course the parties are engaged in a lawful transaction, it being enough if the parties to the agreement thought at the time that there was a question between them—an actual controversy—without regard to what may afterwards turn out to have been an inequality of consideration. 1 Parsons on Contracts (5th Ed.) pp. 438, 439. So in *Barnawell v. Threadgill*, 56 N. C. 58, this court, by Battle, J., citing *Leonard v. Leonard*, 2 Ball. & Best, 178, and quoting the words of Lord Chancellor Manners, says: In the case of a compromise as distinguished from a release, "both parties are ignorant of their rights, and the agreement is founded on that ignorance, and the party surrendering may, in truth, have nothing to surrender; and whether the uncertainty rests upon a doubt in point of fact, or a doubt in point of law, if both parties are in the same ignorance, the fairness of the compromise cannot be affected by a subsequent investigation and result." And in *Williams v. Alexander*, 39 N. C. 209, the court thus refers to the subject: "While the title is thus in contestation, or while he [the defendant] is claiming them as his property, and the plaintiff holding them as hers, they agree, in order to put an end to the dispute, to divide the property. The compromise of a doubtful right, fairly entered into, with

due deliberation, will be sustained in a court of equity. It is reasonable and proper it should be so. Parties must be at liberty to settle their own controversies, by dividing the property in controversy, and public policy upholds the right." *Mayo v. Gardner*, 49 N. C. 359, is also directly in point on this phase of the question, and the court there mentions with approval the statement of the law, as contained in *Parsons on Contracts*, *supra*. It was said on the argument, that the ruling of the court below was based upon the idea that there was no consideration to support the agreement, and, for that reason, we have discussed the proposition at some length. Analogous cases are *Mathis v. Bryson*, 49 N. C. 508; *Findly v. Ray*, 50 N. C. 125; *In re Lucy*, 21 Eng. Law & Eq. 190. The defendant agreed to withdraw all claim to the standing trees, and to abandon all interest he acquired under the contract with Wilson, and the plaintiff, on his part, in consideration thereof, agreed to waive or release all claim for damages for the trespass alleged to have been committed by the defendant. This was the contract, as we understand it to have been made, and we do not see why it is not enforceable, or why the plaintiff should be allowed to repudiate it and recover damages contrary to his solemn agreement.

The plaintiff's counsel, however, contended that the agreement was void under the statute of frauds. It may now be considered as settled, in this state at least, that a contract for the sale of standing timber is within the statute of frauds. *Brittain v. McKay*, 23 N. C. 265, 35 Am. Dec. 738; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744; *Moring v. Ward*, 50 N. C. 272; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Green v. Railroad*, 73 N. C. 524; *Mizell v. Ruffin*, 113 N. C. 21, 18 S. E. 72; *Drake v. Howell*, 133 N. C. 162, 45 S. E. 539; *Hawkins v. Lumber Co.*, 139 N. C. 160, 51 S. E. 852; *Ives v. Railroad* (at this term) 55 S. E. 74. But this is in no sense a contract for the sale or conveyance of land or any interest therein, but an agreement for the adjustment of differences between the parties where, under the circumstances, no deed from the defendant to the plaintiff was necessary to consummate the arrangement. The plaintiff had only a claim for damages, and the defendant, Westall, had acquired the right to cut the timber during the extended period by parol, and we do not see why he could not relinquish it in the same way. This agreement between him and Wilson did not operate to pass any interest or estate in the trees, as it was not in writing, but it did have the legal effect to confer upon the defendant a license or privilege to enter upon the land, and cut the remaining timber. This very question arose

in *Green v. Railroad*, 73 N. C. 524, where the same kind of contract was made orally between the parties, and the court, after holding that while it could not be enforced specifically as an executory agreement, not having been reduced to writing, decided that "the contract amounted to a license to the defendant from the plaintiff to enter his land, and cut and cord wood. As soon as the wood was cut, it became personal property, and it matters not whether the plaintiff himself cut and corded the wood he sold to the defendant, or whether under the contract he used the labor of the defendant to cut and cord it." See *Ives v. Railroad* (at this term) 55 S. E. 74.

It may be that the defendant intended to assert an equitable estoppel as against Wilson and the plaintiff, upon the ground that Wilson had agreed before the two years expired, and when the defendant perhaps still had time to cut the trees then standing on the land, that he would extend the time for cutting them one year longer, and that the defendant, relying upon the agreement, refrained from cutting during the remaining portion of the two years and that the plaintiff, York, at the time he purchased the land, had actual notice of this agreement, and consented to abide by it, and that, in consideration of his said consent and promise so to do, he was allowed a reduction in the price asked for the land. Whether this constitutes a good equitable estoppel, and will render the license to enter upon the land and cut the trees irrevocable, or will estop Wilson, and his assignee, York, from pleading the statute of frauds, if any interest or estate in the standing trees passed to the defendant, and that statute applies, is a question we need not decide, as we do not think it is sufficiently raised by the pleadings, nor have we formed an opinion in regard to it. We leave it open for future consideration, should it arise. We do not think the defendant has pleaded any matter which entitles him to reform the deed of Wilson to the plaintiff, York. The averments of the answer are not sufficient to show any such mutual mistake of the parties to that deed as would induce a court of equity to correct it. Whether such an equity exists in favor of the defendant (he not being a party to the deed), or whether he can avail himself of the facts out of which the supposed equity is said to have arisen, as an equitable defense to this action, are also questions not before us, although discussed on the argument.

There was error in the ruling of the court by which the issue was rejected, and for this a new trial is awarded as to all the issues in the case.

New trial.

BIRD v. UNITED STATES LEATHER CO.
(Supreme Court of North Carolina. Dec. 11, 1906.)

1. MASTER AND SERVANT—PERSONAL INJURIES—FELLOW-SERVANT ACT—APPLICATION.

The fellow-servant act (Priv. Laws 1897, p. 83, c. 56) applies to a corporation engaged in manufacturing, in aid of which it owns and operates a railroad.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 354-374.]

2. MASTER AND SERVANT—PERSONAL INJURIES—QUESTIONS FOR JURY.

Plaintiff, a foreman in charge of a gang of workmen, was employed in moving and unloading cars, which it was the duty of an engine crew employed by the same master to bring near the point for unloading and leave on a grade properly braked or scotched. *Held*, that, on plaintiff being injured by a collision caused by the cars so left on the track running down the grade against those on which plaintiff was standing, he was entitled to have the question of the negligence of the engine crew submitted to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1051-1067.]

3. SAME—EVIDENCE—SUFFICIENCY.

In an action by a servant for personal injuries, evidence examined, and *held* to sustain the finding of the jury that the plaintiff was not guilty of contributory negligence.

4. SAME—FELLOW SERVANTS.

A servant attending to his own work in a customary manner was not required to anticipate the negligent act of fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 674, 677.]

Appeal from Superior Court, McDowell County; Cooke, Judge.

Action by V. W. Bird against the United States Leather Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

There was evidence tending to show: That defendant was a corporation engaged in the business of manufacturing leather and extracting tannic acid, and also owned and operated about 10 miles of steam railway, standard gauge, in and about their plant at Old Fort, N. C., having their own engines, cars, crews, etc. That plaintiff, an employé of defendant company and foreman of a lot of hands engaged in unloading cars of defendant, on or about December 20, 1904, was injured under the following circumstances: The defendant had a railway track laid on their grounds at Old Fort, running from the bark shed to the chipper house. Here the cars entered the chipper house shed, were moved along the track opposite the chipper machines, placed at intervals, and unloaded. This track, as it approached the chipper house shed, was on a downward incline, and the method pursued here was for the engine and crew of defendant company to push the loaded cars to a point near the chipper house shed, where they were stopped and left by this crew, and scotched or held by brake till the chipper house crew was ready to unload them. That the engines were not al-

lowed under the shed, but, when the cars were to be unloaded, plaintiff and his gang pushed them along under the chipper house shed, unloaded the cars, moving them along, when they were done at the further end of the shed, where they were taken by the switching engines and carried away. On this occasion plaintiff and his hands were engaged in unloading cars under the shed, and were moving the cars along the track so as to put them in position for unloading, and in the performance of his duty plaintiff got on the cars to apply the brakes and stop them at the proper point. That plaintiff had one foot on one car and one on the other when applying the brakes, and that plaintiff was following the customary way of using the brakes in cars of that kind. That these cars were of different heights, one being a Southern Railway car, 12 to 14 inches higher than the other, coupled by a goose neck. If they had been of the same height, he could have placed his feet on the body of each car and probably have escaped an injury. That while plaintiff was in this position, in the act of applying the brakes, several other tannery cars, which had been left on the track by the engine crew some 30 steps away, moved from their position and rolled down the incline, striking the car on which plaintiff was standing, causing a collision, and doing plaintiff severe injury. Plaintiff testified that he had given no orders to any of his men to move the cars which were on the incline. Testifying as to the duties concerning them, plaintiff stated on examination: "I don't know who put the brakes on those tannery cars [those on the incline]. The engine gang did that. It was their duty to bring the cars there and stop them on the incline, and it was the duty of my force to bring them down when we were ready to unload them." J. C. Moore, witness for plaintiff, testified: "We were moving the cars into place when plaintiff jumped up on it to put the brakes on and stop them at the proper point. I was pushing it down, and about a second after Bird got up the tannery company's car hit me on the back. I looked around and saw plaintiff's foot caught between the cars." The three ordinary issues in actions for negligence were submitted: (1) Negligence of defendant. (2) Contributory negligence of plaintiff. (3) Damage. Verdict and judgment for plaintiff, and defendant excepts because the court declined to charge, as requested, that on the entire evidence, if believed, the jury should answer the first issue "No," and the second issue "Yes."

E. J. Justice, for appellant. Hudgins & Watson and Frank Carter, for appellee.

HOKE, J. (after stating the case). The court is of opinion that neither objection assigned for error by defendant can be sustained. The facts show that defendant, a corporation chiefly engaged in the manufac-

ture of leather and extraction of tannic acid in connection with, and in aid of, its primary purpose, owns and operates a railroad, having its own engines, cars, crew, etc., and in such case the court has held that the act known as the "fellow-servant act" (chapter 56, p. 83, Priv. Laws 1897) applies, and will affect the right of litigants for actionable negligence occurring in the department or portion of their work. *Hemphill v. Lumber Co.*, 141 N. C. 487, 54 S. E. 420. This being true, the judge below could not have properly charged, as requested, that there was no evidence to go to the jury on the first issue. The testimony in the case shows that plaintiff, engaged in the performance of his duty, was injured because some cars stopped on an incline 30 steps away, commenced to move, and, rolling down an incline, struck the car on which plaintiff was standing doing his work, and caused the injury. These cars were placed there by the engine crew, and should have been securely stopped by brake or scotched on the incline to remain till they were moved into the yard by plaintiff's force. He had given no order for moving these cars, and to move them upon him without warning at the time, and engaged as plaintiff then was, was very likely to cause injury to some one; and the injury resulted. There is no explanation given by direct evidence as to the starting of the cars, but it can hardly be explained without imputing negligence to some of the defendant's employes. Certainly the great probability is either that the engine crew, whose duty it was to place and scotch these cars, had not done their work properly, or some one of the force, without direction and without the exercise of proper care, had started the cars at this inopportune time. In either case the plaintiff was entitled to have the question go to the jury. In *Fitzgerald v. Railway*, 141 N. C. 530, 54 S. E. 391, the court has held: "Under the fellow-servant act, which operates on all employes of railroad companies, whether in superior, equal, or subordinate positions, if the plaintiff, a hostler of the defendant, was injured as the proximate cause of the negligence of his helpers in shovelling

coal from a car into a tender, the defendant is responsible. Direct evidence of negligence is not required, but the same may be inferred from acts and attendant circumstances, and, if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Applying these principles to the facts disclosed, there was no error in refusing request of defendant on the first issue.

On the second issue, the court is of opinion that there is very little evidence that tends to show contributory negligence, and certainly none that would justify the charge requested by defendant. The plaintiff testified that he was applying the brakes in the customary and usual way when he was injured by a collision with these cars that had rolled unexpectedly down the incline. Stationed between two cars loaded with bark, it is not likely he could have noted the approach of the other cars, and the evidence shows clearly that he did not note their approach. So far as appears, he was in the customary position to do the work and he had taken the best one that was open to him. He was not injured at all by reason of the position he had taken as affected by the condition and action of the cars or hands where he was then working; and he was not, under the circumstances of this case, required to anticipate a negligent act on the part of the engine crew or his own co-employes. *Beach on Contributory Negligence*, § 38.

The case is not unlike that of *Hudson v. Railway* (at the present term), 55 S. E. 103, and the court is of opinion that there is no error shown which gives defendant any just ground of complaint.

No error.

CARNEY v. REASE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

1. ANIMALS—HIRE AND USE—BAILMENT—HIRING—DEVIATION FROM CONTRACT.

The question whether, when a horse is hired for only a particular trip, it is used for a further trip, such deviation from the contract will alone render the hirer liable for the horse dying during the use by the hirer, without proof that its death came from its use for the further trip, discussed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 72, 74.]

2. SAME—LOSS OF ANIMAL.

If a horse hired to work in a wagon while at work become exhausted and sick, the hirer, knowing its condition, must desist from so working it, else if it die, he will be liable for its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Animals, §§ 71, 73.]

(Syllabus by the Court.)

Error to Circuit Court, Wetzel County.

Action by J. L. Carney against A. B. Rease and others. Judgment for plaintiff, and defendants bring error. Affirmed.

W. G. Snodgrass and E. L. Robinson, for plaintiffs in error. E. B. Snodgrass, M. R. Morris, and Pressley D. Morris, for defendant in error.

BRANNON, J. Rease, Heasley, and Dale, partners in drilling oil wells, hired of Carney a horse to be used in a wagon with a horse of the firm in hauling tools and supplies in the oil field. The horse was so used five days, and returned to Carney. Three days later the firm sent its driver to him to hire the horse of Carney again. The horse was wanted, along with a horse of the firm, to haul an oil well stem. Carney says it was to be hauled to Littleton, nine miles; whilst the driver, introduced by the plaintiff, says it was to be used to haul the stem to the Johnston well four miles further than Littleton. On Friday the horse worked in the wagon in hauling the stem to Littleton. On the next day it was worked hauling the stem to the Johnston well, and in hauling another stem for repair from the Johnston well to Littleton. The team staid over Saturday night at Littleton. Sunday morning the horses started from Littleton back home to Carney's, drawing two empty wagons. These three days were very hot July days. When the team came to a point eight miles from Littleton, the Carney horse died. Carney brought suit before a justice, which went by appeal to the circuit court of Wetzel county, and, upon the close of the plaintiff's evidence, the defendants, offering no evidence, demurred to the plaintiff's evidence, and the court having given judgment for the plaintiff, the defendants brought the case here.

The plaintiff claims that the horse was hired only for the trip from Carney's to Littleton, and that the use of the horse for the additional distance of four miles and re-

turn, hauling a stem, was outside the contract, a misuse of the horse, and that that further use alone, without proof that the horse's death came from that additional service, renders the defendants liable. Here is a volume of conflicting cases and texts. There is much authority for the position that when an animal is hired for a fixed time, and the bailee continues to use him longer, or where he is hired to drive to a certain place by a certain route, and the bailee drives him to a different place, or by a different route, or beyond the place contemplated by the contract, such departure from the contract is a conversion of the horse, for which the owner may maintain trover. 2 Cyc. 812; 8 Am. & Eng. Ency. L. (2d Ed.) 752. If a loss of the animal occur, so that it cannot be returned, under this rule the hirer would be responsible. Story on Bailments, § 413; 1 Tucker, book 2, 359. Likely this is the rule sustained by greater authority. Under this rule, mere departure from the contract makes the party liable, no matter whether the loss came from such departure or not. But another line of cases holds that such departure from the contract does not alone of itself impose liability, but it must appear that the loss was because of such departure. Van Zile on Bailment, § 127; Farkas v. Powell (Ga.) 13 S. E. 200, 12 L. R. A. 397. Which line does our law follow? In Spencer v. Pilcher, 8 Leigh (Va.) 535, a slave was hired with the understanding that he was to be employed on a farm, whereas he was taken on a voyage on a boat down the Ohio and Mississippi rivers, and was drowned on the voyage. This case cannot be quoted for the rule of absolute liability because of mere departure from the contract, for the reason that the slave perished while being used in violation of the contract. The same as to Harvey v. Skipwith, 16 Grat. (Va.) 393, where a slave was hired under an explicit agreement not to use him in blasting rock, but he was so used, and in such use was injured from a blast. In Harvey v. Epes, 12 Grat. (Va.) 153, is a full discussion of this subject. Slaves were hired to be worked on a railroad in Amelia county, but were worked on the railroad in Chesterfield county, and, while working in Chesterfield, sickened and died. The court held that the working of the slaves in Chesterfield was not, of itself, a conversion making the hirers immediately responsible for their value, whether occasioned by such wrongful act or not; but that, to make them liable, it must be found that the death was occasioned by the act of removing and working the slaves in Chesterfield county. So, our law is that mere deviation from the contract will not alone render the hirer liable for the loss of a hired horse. The opinion in Harvey v. Epes, construes, I think correctly, the case of Spencer v. Pilcher, as holding this rule. Counsel for Carney rests his case largely on the rule of absolute liability; but I do not think even if there were a contract limiting the use of the

horse, there could be a recovery on that ground, since it does not appear that the death of the horse occurred during, or came from, the use of the horse on the trip from Littleton to the Johnston well. There is no evidence of misuse of the horse on the extra trip. True, it is proven that the horses were heated that hot day; but that is very usual, not abuse. That does not create liability. There is no showing that the death of the horse was caused by the extra trip. That trip was in the same line of work for which the horse was hired. He did not die during that trip. Hence, under *Harvey v. Epes*, there can be no recovery because of such deviation from the contract. Likely, if the horse had died while on the extra trip, the presumption would be that the extra trip was the cause of the death, throwing the burden on the hirer to disprove that fact. The doctrine of *Harvey v. Epes* is considered as sound in a note by Freeman in 12 Am. Dec. 621. I consider the other rule extreme and hard. See *Doolittle v. Shaw* (Iowa) 60 N. W. 621, 26 L. R. A. 866, 54 Am. St. Rep. 562, citing the *Harvey Case*, and holding its principles. President Lincoln, as counsel, successfully maintained this position in *Johnson v. Weedman*, 5 Ill. 495.

But the matter just discussed is discussed because it seems proper to do so, as counsel so strongly summon it to their aid, though it may be regarded as obiter, since we do not find that the hiring was limited in time or work, so as to be special. Carney introduced the driver as his witness, and he says there was no limited contract. Carney indefinitely says there was. Perhaps, under a demurrer, we should take Carney's statement, but for considerations supporting the driver. Carney does not say that he imposed any limit on the use of the horse. Carney had hired the horse to the defendants, knowing it was to do general hauling in the drilling business, without limitation of time or place of work or use. The horse was returned after five days' use, and in three days the driver went to get the horse again, and we may look upon this as a hiring similar in character to the former hiring, or a continuation of it. All that Carney says to prove a limited contract is that when asked whether the driver told him what he wanted with the horse, Carney answered, "He said he wanted to take a stem to Littleton." This was a mere remark of the driver, hardly a contract of limitation.

Whilst so far there is no ground of recovery, we think there is a ground for recovery. If it appears that the driver misused the horse, negligently used it, there is a liability. There is evidence that the horse was hot and tired when it got back to Littleton Saturday night. The driver, Swick, says so, and thus was apprised of the fact that the heat and labor affected the horse. Next day on the road, in great heat, it is proven by Musgrave that as the team passed his house he saw that the horse was ailing, lag-

ging back on the singletree, and asked Swick what was the matter with it, and Swick replied that the horse was sick, "given out," and they wanted to get him home, if they could, "but didn't know whether they could or not." Musgrave said the horse was just about able to walk. Postlewait states that Swick told him that, on the trip, going over to Littleton and the Johnston well, the horse got too hot, and he brought him back to Littleton, and started next morning and noticed coming up Knob Fork hill that the horse "began to fag." This was before the team reached Musgrave's. Thus, Swick knew the horse was hot Saturday, and on Sunday knew the horse was exhausted and sick from the terrible heat or other cause. We are allowed to say that he must have been very sick, as he died only a mile and a half from Musgrave's. Does it need authority to show that it was Swick's duty before he reached Musgrave's, and surely at Musgrave's, to stop using the horse, and unhitch him from the two wagons? Story on Bailments, § 405, says that if a hired horse is exhausted the hirer is bound to abstain from using the horse, and if he pursues his journey with the horse, he is liable for all the injury occasioned thereby. He says not only that, but also that the hirer must procure a farrier if to be had. The same is laid down as to a sick horse in 2 Cyc. 312, note. See *Higman v. Camody*, 57 Am. St. Rep. 33. But Swick drove the horse on that boiling day a mile and a half, the last half mile up a hill of heavy grade, until he died. The testimony of Swick betrays a consciousness that he had not used the horse right.

For this reason of negligent misuse of the horse we affirm the judgment.

WHITEHOUSE et al. v. JONES et al.
(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

1. QUIETING TITLE — JURISDICTION — REMEDY BY EJECTMENT.

One in actual possession of land under superior title may go into a court of equity to remove the cloud over his title arising from a claim under color of title thereto by another under an inferior adverse title. That he might sue in ejectment does not deny him jurisdiction in equity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 9.]

2. SAME.

When, in a contest in ejectment between two adversary titles to land, judgment has been rendered in favor of one of them, and the claimant of the adversary title still claims notwithstanding the judgment against him, and disquiets the actual possession of the successful owner, the latter may go into a court of equity to have injunction and relief, proper in the case, to quiet and give peace to his title and possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, § 4.]

3. SAME—RELIEF GIVEN—INJUNCTION.

Equity, having jurisdiction to remove cloud over title to land and quiet title, may, as in-

cident to relief, enjoin the cutting of timber by the claimant under the bad title.

4. APPEAL—OBJECTIONS NOT RAISED BELOW.

An exception to the taking of a deposition, made while it is in progress, though noted in the deposition, must be brought to the notice of the court before hearing on the merits begins below by motion to suppress, else it will not be regarded in an appellate court.

5. CANCELLATION OF INSTRUMENTS—VOID INSTRUMENT.

Equity has jurisdiction to cancel an instrument of title to land at the suit of one in possession under good title, though such instrument be void on its face.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Cancellation of Instruments, § 1.]

(Syllabus by the Court.)

Appeal from Circuit Court, Putnam County.

Bill by W. F. Whitehouse and others against R. A. Jones and others. Decree for plaintiffs, and defendant Mary Patton Hudson appeals. Affirmed.

Simms & Enslow, for appellant. Brown, Jackson & Knight and J. H. Nash, for appellees.

BRANNON, J. A grant from the state of Virginia, March 3, 1796, to Samuel Hollingsworth, for 100,000 acres of land in Kanawha county. Title under this grant came to Mathias Bruen, and at his death it was partitioned among his devisees; the partition deeds dating May 16, 1850, under the decree. One of the lots in this partition was of 2,500 acres, in Putnam county, which came to the ownership of the plaintiffs in this suit, the Whitehouses. The Hollingsworth grant excludes three prior grants of tracts of 300, 400, and 500 acres, and in the assignment of said 2,500-acre tract in said partition deed such parts of said 300 and 500 acre prior grants as lie within the bounds of the 2,500-acre tract, as also 50 acres surveyed for Michael Shilverdecker, were excluded. No forfeiture for taxes of the 2,500-acre tract or the 100,000-acre tract, of which it is a part, arises. There were four Lockhart surveys antedating the Hollingsworth grant, the three mentioned above, and one of 200 acres; but the 200-acre one is not excluded by said grant or said assignment of the 2,500-acre tract. It lies nearly all in the 2,500-acre tract. The said four prior Lockhart grants became forfeited to Virginia for taxes, and Henry O. Middleton obtained a grant from the state of West Virginia, February 23, 1835, for a tract of 1,137 acres in Putnam county, intending, likely, to rest his title on the forfeiture of the Lockhart title. This Middleton grant takes in part of the Lockhart tracts of 200, 300, and 500 acres, but none of the 400 acres, and takes in a large part of the 2,500-acre tract claimed by the plaintiffs. Benjamin P. Byram purchased of Middleton a half interest in the 1,137 acres, but Robert Patton became purchaser of the Byram half by executory contract. Benjamin P. Jones is a grandchild

and David Jones a son of Benjamin Byram. Martha Ann is the wife of David Jones. They are devisees under Byram's will. The legal title to the Byram share is in his said heirs or Middleton. Middleton's administrator c. t. a. conveyed to Robert Patton the Middleton half, Patton thus becoming owner of it all, and it passed from him by conveyance to Nancy Patton, and from her to her two children, Mary Patton Hudson and Oliver Patton. This Middleton tract was sold in 1877 for delinquency for taxes, but in 1882 was redeemed from this sale in a proceeding by the commissioner of school land for its sale by payment of taxes to the year 1881, inclusive. This land was left off the taxbooks for more than five years after the year 1881, and thus was forfeited to the state, and R. A. Jones and Mary P. Hudson asked the commissioner of school lands of Putnam county to institute a suit to sell the land (788 acres of the Middleton, still claimed by them) in order that they might redeem, and the commissioner did institute suit, and Jones, Hudson, and Patton filed an answer admitting the forfeiture and asking to be allowed to redeem, and an order was made allowing them to pay taxes for five years, and directing the land to be put on the landbook on payment of the money for redemption, though no amount was fixed. The money was not paid in redemption before this suit was brought. This proceeding was begun and concluded on the same day, without notice to any one or reference to a commissioner, as required by the Code in such a proceeding.

In 1877 Robert Patton, J. W. Heavenier as administrator with the will annexed of Henry O. Middleton, and Benjamin P. Jones, David Jones, and Martha Ann Jones, the last three as devisees under the will of Benjamin P. Byram, brought an action of ejectment in the circuit court of Putnam county against Russell Landers, George R. Crago, James Marten, William Carter, Albert Dean, and George Landers to recover the tract of 1,137 acres. An order shows that in the action W. F. Whitehouse, H. B. Whitehouse (since dead), F. M. Whitehouse, F. C. Whitehouse, E. N. Whitehouse, and Louisa Whitehouse, recited as landlords of Carter and Crago, defendants in the ejectment, were made defendants in said action along with their lessees, and pleaded not guilty. They are owners of the 2,500 acres under said partition. On the trial verdict and judgment were rendered for the defendants. When Jones, Hudson, and Patton procured the order of redemption above mentioned, the owners of said 2,500-acre tract, W. F. Whitehouse, F. M. Whitehouse, E. N. Whitehouse, and Louisa Sheldon, née Louisa Whitehouse, claiming said 2,500 acres, brought this suit in equity in the circuit court of Putnam county against R. A. Jones, Mary P. Hudson, Oliver A. Patton, and others, alleging the superiority of

their title over that of the defendants, stating that the plaintiffs had been in possession and paid taxes since 1865 and that defendants were not in possession, and stating that the defendants by said redemption proceeding, by offering the contested land for sale and lease, by disturbing the plaintiffs' tenants on the land, by notifying them that they owned and claimed the land, and by entering upon the land and cutting timber needed for the development of coal from the land, were casting cloud and doubt over the title, and praying that the grant to Middleton of said 1,137 acres be held invalid as against the title of the plaintiffs and be removed as cloud over the same, and that the defendants be enjoined from asserting title to the plaintiffs' land under said Middleton title, and that an injunction be awarded restraining the defendants from taking possession of the land and cutting timber upon it, and from in any way interfering with the quiet and exclusive possession of the land by the plaintiffs, and from taking any steps to redeem the land under the decree above mentioned allowing such redemption. The defendants demurred to the bill, but the court overruled it. They filed an answer. The decree perpetually enjoined the defendants from taking possession or cutting timber on the land, or in any manner interfering with the quiet and exclusive possession of the plaintiffs, and from taking further steps by payment of money or otherwise to redeem the lands under the order giving leave to redeem, and from entering the land on the lawbooks, and holding the Middleton grant for the 1,137 acres invalid and of no force as against the title of the plaintiffs to the land in controversy. Mary Patton Hudson appealed.

Equity jurisdiction: This is the first question. An argument against it is that the plaintiffs should have gone into the proceeding brought by the state to sell the Middleton land as forfeited, and set up their claim, and resisted redemption, instead of bringing an independent suit. But that was begun and ended by final decree of redemption in one day. *R. A. Jones, Mary P. Jones, and Oliver Patton*, claimants of the Middleton land, filed a petition with the commissioner of school lands, admitting forfeiture and asking him to bring suit to sell the land, in order that they might redeem, and he filed a petition, they answered, and a decree allowing redemption upon payment of only five years' taxes, when much more was due, was made. The proceeding was so irregular and informal as hardly to be called a suit. No process, no parties, no adequate description of the land or title, no reference to a commissioner, no order of publication to afford interested persons any notice of the proceeding, and the whole done and closed, from beginning to end, in one day. It was so contrary to the requirements touching such a proceeding in chapter 105, Code 1899 [Code

1906, p. 1396], as to be considered a void proceeding. The bill in the present case brands it as a fraud upon the court and as designed to get a secret and fraudulent redemption, and the facts seem to warrant the charge. But, in any view, how can it be said that the Whitehouses ought to have gone into that suit when they had no notice of it, no means of notice as required by law; knew nothing of it till it was ended by final decree? True, this court has held that a proceeding by a commissioner of school lands to sell cannot be enjoined. *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682. That was a regular suit, and effort was made to stop it before decree, to oust the jurisdiction, when full relief could be had in it. Here the object was, not to enjoin the prosecution of the suit, as it had ended, but to enjoin the party from paying the money to redeem under the decree and from restoring the land to the taxbooks as of good title. Indeed, it was not simply that. It is a suit to cancel a title and declare it invalid. And I will say that it is not perceived why equity will not enjoin action under a decree that clouds a paramount title just as readily as it will enjoin the use of a deed or grant working that result. 6 Am. & Eng. Ency. L. (2d Ed.) 160, 167. The decree is a muniment of title, no less than a grant; and, if it works to becloud the good title, why will not equity restrain its use? The claimant of the inferior title has procured it. It is his muniment of title, wrongfully used, just like a junior grant. The injunction here sought, not to enjoin proceeding in court, but to restrain payment under it and restoration of the land to the taxbooks. Equity will in advance prevent acts casting cloud over title. *Moore v. McNutt*, cited; 6 Am. & Eng. Ency. L. (2d Ed.) 159.

This decree being void, as shown by its record, is there equity jurisdiction to remove the cloud of that decree? There is a preponderance of judicial decision holding that, where a deed or other instrument of title is void on its face, it makes no cloud over title, so as to justify jurisdiction in equity; but where it is not void on its face, and evidence outside of it must be found to show its invalidity, there is jurisdiction. There has been great protest against the soundness of the first proposition. Who can be blind to the fact that a recorded deed manifesting hostile claim is an actual cloud over title, though it turn out to be void? Does it not impair market value or wholly prevent sale? Is it not a constant source of disquietude? Who would buy the land under its ban? You require a purchaser to know, or guess, in advance of decision, that the deed is void. It is, in many instances, a most difficult law question whether a deed is good or not good. Everybody is not a judge or lawyer. And the best lawyers and courts differ on such questions. Practically, actually, there is no

sound reason in the rule. But the argument is that the deed falls of its own weight, and shows on its face imperishable evidence of its invalidity, so that there can be no loss of evidence, and that a court of law can pass on the question, and give relief by giving the land to the true owner, disregarding the void deed. This is true; but is this relief as complete, full, and adequate as that in equity? The rule is that, if it is not, equity will grant such relief. A judgment in ejectment does not cancel the adverse title, but defeats it on the principle of estoppel by record, or *res judicata*. Now, here again may come a grave question on which judges and lawyers may differ; that is, whether the judgment at law does operate to invalidate the deed. Equity, however, cancels the deed in words, leaving no room for doubt, and puts a quietus upon it. In *De Camp v. Carnahan*, 26 W. Va. 839, Judge Johnson said, as I say, that the legal remedy is not complete; that it is a decree in equity, which cancels the deed that gives finality and rest. I have said the weight of authority is the other way; but there is authority to support the position this court, with unanimity, now lays down. *Hogg's Eq. Princ.* 80, lays down broadly that "it is wholly immaterial whether the instrument sought to be canceled is void, or only voidable. Equity will, in either case, lend its aid." We cannot, however, say that the text is supported by authorities there cited, though the logic is with it. We find that 6 Cyc. 290, lays down the rule as generally prevalent that, where the deed is void on its face, equity gives no aid, but says the rule has been severely criticised. 17 Ency. Pl. & Prac. 286, says the rule is not sound, as an "instrument void on its face as a matter of law, or whose invalidity will necessarily appear in proceedings to enforce rights under it, seriously diminishes the market value of the property." That great writer on Equity Jurisprudence, Pomeroy, in his work (section 1899), condemns the rule. He says judges assert the rule, and would not themselves buy land under the void cloud. The great Chancellor Kent said: "I am inclined to think that the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face or from proof taken in the cause, and that these assumed distinctions are not well founded." *Hamilton v. Cummings*, 1 Johns. Ch. 517. He admitted a conflict of decision, but cited old cases to sustain him. In *Day Co. v. State*, 68 Tex. 526, 4 S. W. 865, we find this strong argument by the court: "A defendant, who asserts claim even under an instrument void on its face, cannot be heard to say that it has not such semblance of validity as to create a cloud upon the title to property which it professed to convey that will

prejudice the right of the real owner if it be not removed. He cannot be heard to say that others will not attach to it the same degree of faith and credit as a title-bearing instrument which he in good faith gives to it, and that, to the extent of the doubt or cloud thus cast upon the real title, its holder is injured or is likely to be injured." Mr. Bigelow, in note to *Story's Eq.* (13th Ed.) § 700, says that as a new question much can be said in support of the position we take. *Tiedman's Eq.* § 543, criticises the rule. He says the void deed is a defect of title affecting the property, and that a refusal of "equitable relief inflicts a pecuniary loss" on the owner, and that as long as the deed stands uncanceled it works damage. We have in this state no case, so far as we know, binding us to the unreasonable rule above stated. *De Camp v. Carnahan*, cited, so far as it goes, justifies the jurisdiction. The syllabus in *Simpson v. Edmiston*, 23 W. Va. 675, looks the same way. *Waldron v. Harvey*, 54 W. Va. 603, 46 S. E. 603, 102 Am. St. Rep. 959, may be cited for the sound rule, as it holds in point 21 equity jurisdiction to remove cloud by vacating a void judicial sale. We therefore are free to hold that equity has jurisdiction, at the call of one in actual possession under good title, to remove a cloud from his title to land arising from an adverse claim under a deed or other muniment of title, though it be void on its face. In *Virginia (Yancey v. Hopkins)*, 1 Munf. 419 Judge Tucker asserted the broad proposition of jurisdiction to cancel a tax deed. He did not distinguish a tax deed from other cases. In *Va. Coal Co. v. Kelly*, 93 Va. 332, 24 S. E. 1020, the broad rule given is equity jurisdiction to remove cloud "though the deed be void on its face." So in *Carroll v. Brown*, 28 Grat. (Va.) 791. These were tax deeds; but the court did not isolate them from other cases. Those cases require the plaintiff to be in possession even in tax sale cases, while our cases entertain a suit in equity for a suit to cancel a tax deed, though the party is not in possession. *Simpson v. Edmiston*, 23 W. Va. 675. I cannot see why; but the doctrine is firmly established. For myself I cannot see why equity will annul a tax deed void on its face and not do so in the case of another instrument.

Against equity jurisdiction it is suggested that equity has no right to try conflicting titles to land, and *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 896, is cited. That case is that, where the plaintiff is not in possession, equity will not entertain a suit to enjoin permanent damage to land, though it be irreparable, where title to the land is in dispute, and there is no independent ground of jurisdiction other than to enjoin such damage, but will grant a temporary injunction against the acts of injury pending a suit at law to set-

the title, either already instituted or to be brought. In that case the plaintiffs were not in possession, but the defendants were. In this case the plaintiffs were in possession; the defendants not. There is the difference, and that calls for the application of the old principle, vindicated by time, necessity, and reason, that one in possession may appeal to the equity court to save his superior title from harm by any claim, pretense of title, or other steps by one who has no title, but who is casting cloud and doubt on his title. The old law was that one in possession could not have ejectment against a beclouder not in possession. The common law would not relieve him; but equity stepped in to dispel the cloud, actually present or imminent, and give peace to the better title. And though our present ejectment statute does allow one in possession to sue one not in possession, but claiming title, that statute does not oust equity jurisdiction existing before the Code of 1849. This is the jurisdiction of equity to dispel cloud over title, nowhere established better than in West Virginia by numerous cases. *Logan v. Ward*, 58 W. Va. 366, 52 S. E. 398; *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557, pt. 19. *Hogg's Eq. Princip.* 80. Many other cases might be cited. This shows that the suit is one proper for equity; but to successfully maintain the bill the plaintiff must have both actual possession and superior title—that is, the best title. *Logan v. Ward*, 58 W. Va. 366, 52 S. E. 398; *Hart v. Shaffer*, 45 W. Va. 709, 31 S. E. 905. We find the plaintiffs to have such title, as will be discussed below. This is enough to sustain equity jurisdiction—that is, to remove cloud.

But there is another distinct ground of equity intervention, and that is the jurisdiction for quieting title. The distinction between the two heads of jurisdiction is somewhat refined, yet there is a difference. Equity has jurisdiction to remove cloud for one in possession under the better title, though he has not vindicated it at law; but one who, in one or more actions of ejectment, when it was a mere possessory action—not, as now, a real action—had sustained his title, might call on equity to give him peace by quieting title. *Stark v. Starr*, 6 Wall. (U. S.) 402, 18 L. Ed. 925. Now one trial and judgment in ejectment is conclusive of title between the parties, and there is no reason why, when a party defeated in ejectment keeps on denying its effect and disquieting his adversary in possession, he should not be stopped from so doing. A judgment in ejectment does not, in words, cancel the instruments of title of the defeated party. It operates only as *res judicata*; but equity will wipe them away, and thus quiet title as far as human power could do so. 17 *Ency. Pl. & Prac.* 277; *Sharon v. Tucker*, 144 U. S. 533, 12 Sup. Ct. 720, 36 L.

Ed. 532. Possession seems to be necessary to enable the true owner to maintain such a bill; but it is not clear that it should be so nowadays. 17 *Ency. Pl. & Prac.* 305; 6 *Pom. Eq.* §§ 723, 724. The title of the plaintiffs in this case was vindicated in the action of ejectment, and, the judgment being conclusive, gives them equity jurisdiction to save their title from harassment by the continued assertion of the defeated title, under the head of jurisdiction to quiet title; and that success in ejectment performs the further office, under the head of jurisdiction to remove cloud, of showing paramount title. Counsel for defense says that there was adequate remedy at law. I think, as stated in *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682, and *Stearns v. Harman*, 80 Va. 48, that, though in possession, plaintiffs could maintain ejectment against the defendants, though out of possession. Before the Code of 1849 this was not so; but it is so under our Code. But the jurisdiction of equity to remove cloud over title and to quiet possession was established long before the ejectment statute as it now is, and the change of the statute giving wider remedy does not oust the jurisdiction of equity. And the title had already been held to be in the plaintiffs in one ejectment, and as, after it, the defendants still claimed and asserted title to the disquietude of the possession, the equity power was needed to enjoin this harassment and cancel the title papers on which the defendants based their claim. So there can be no question of jurisdiction in equity.

The bill of the plaintiffs presents the cutting of timber as ground for equity jurisdiction. Our cases hold that equity will take jurisdiction to restrain trespass to realty only where two conditions both exist, namely: "That title must be undisputed or established by legal adjudication; and the injury must be irreparable." *Cressap v. Kemble*, 26 W. Va. 603. The judgment in ejectment and other allegations of the bill show good title in the plaintiffs; but the other element, irreparable injury, is not present, for our court has over and again held that cutting timber is not irreparable damage, unless the party is insolvent, and equity makes the injured timber owner look to the common law in an action for damages. *Loyd v. Blackburn*, 57 W. Va. 217, 50 S. E. 741; *Marcum v. Marcum*, 57 W. Va. 285, 50 S. E. 248. It seems to me that this doctrine is now—always has been—unsound. Timber is of such inestimable value for building and repairing houses and fences, and for fuel and other purposes. It takes half a century or more to regrow it when once removed. A trespasser, without title, cuts it to-day, to-morrow, and on. Must you sue him in suit after suit for each day's or week's depredation? Or will you wait until he gets through, then have a long lawsuit? The timber is gone forever. The party has become insolvent. The remedy is not full

and adequate. Still it is abundantly settled that equity will not interfere merely to stop cutting timber. There being no allegation of insolvency, this is not ground for equity jurisdiction under the above doctrine, and, if jurisdiction rested alone on injunction to prevent cutting timber, it would not give it; but there is jurisdiction under other heads—removal of cloud and quieting title. Cutting timber, the true owner being in possession, disturbs and disquiets that possession and damages the land, as it is a violent invasion of the land. Nothing could more disquiet. This differentiates this case from the rule just stated. And under the head of removal of cloud cannot there be such injunction as incidental to that relief, and to effectuate it? I would narrow the objectionable rule as much as consistency with those cases would allow. Therefore there is no error in the decree in enjoining the cutting of timber.

As to title: That of the plaintiffs is the older. Their title, under the Hollingsworth grant, dates from 1796; that of the defendants, under the Middleton grant, from 1865. That is enough to settle the title. The defendants cannot appeal to the Lockhart grants as older and excepted from the Hollingsworth grant. Those parts of the Lockhart 800 and 500 acre tracts within the plaintiffs' 2,500-acre tract are excepted out of it, not claimed by the plaintiffs, not recovered by them, as they recover only what is in their deed for the 2,500 acres. Moreover, the defendants do not claim derivatively from the Lockhart grants. They were lost to the state by forfeiture—ended—and the land can be claimed only under the Middleton grant by the defendants. As to the Lockhart 200 acres, it was not excepted out of the Hollingsworth grant, and that grant conveys title to it. If Lockhart yet owned it, or the defendants, the plaintiffs would get it by the statute of limitation; but why remark this, when the defendants do not own the Lockhart under its old grant? And Middleton's right under his grant would be barred and pass by the statute to the plaintiffs; but why this remark, since an elder claim does not need the statute? Only an inferior title needs it. The plaintiffs had had possession since 1865. The proof shows the fact. It seems to be thought by the defendants that the plaintiffs assert that when the Lockhart senior tracts were forfeited, as stated in the answer, the forfeiture inured to the benefit of the Hollingsworth grant, though the Lockhart tracts were excepted from it. No such claim is set up, nor could it be, because the Lockhart tracts that were excepted from the Hollingsworth grant never were a part of it, and could not go to its benefit by forfeiture. Forfeiture could not spread the Hollingsworth grant over those excepted tracts. *Logan's Heirs v. Ward*, 58 W. Va. 386, 52 S. E. 398. The plaintiffs' title included none of them but the 200 acres; it being within, and not excepted from, the

Hollingsworth grant. As to the 2,500 acres of the plaintiffs, it was the elder title, and need not appeal to the forfeiture of the Middleton grant; but, when it was forfeited, it passed instantaneously to the owners of the 2,500 acres under the Constitution. No redemption could affect the right of the plaintiffs so acquired by forfeiture. It is proven that the owners of the 2,500 acres were in possession and paid taxes since 1865. The Middleton was drowned in the plaintiffs' title, added to it, showing that the colorable title under the Middleton grant was lost to the defendants and passed to the owners of the 2,500 acres, the plaintiffs in this suit. Another reason why the title of the plaintiffs is superior to that of the defendants is that the judgment for the defendants in ejectment is conclusive as *res judicata* to show the superiority of the title of the defendants in that suit and the plaintiffs in this suit. The declaration claimed a tract of 1,137 acres and described it as in the Middleton grant. The plaintiffs were Robert Patton and Middleton's executor and the heirs and devisees of Byram, under whom the defendants in this case claim. The defendants in that suit were tenants of the Whitehouse heirs, and those heirs, except one dead, are plaintiffs in this suit. The Middleton grant and deeds, carrying down its title to plaintiffs in the ejectment, were given in evidence by the plaintiffs, and the Hollingsworth grant and transfers bringing title down to the defendants were in evidence. Thus that ejectment was an open contest between the selfsame titles, for the selfsame land, between the same parties and privies in estate, as are involved in this chancery suit. It will not do to say, as the answer says, that the suit was against squatters, when it was against the tenants of the Whitehouses and the Whitehouses themselves. It will not do to say that the ejectment was lost because the court held that it ought to have been in the name of the state, because Middleton's land had been forfeited, when the trial record does not show that forfeiture entered into the trial at all, and it appears that at its date there was no forfeiture perfected and the land had been redeemed. The answer admits that the plaintiff sued on the Middleton title to recover the land on its strength. That judgment is clearly conclusive to repel the Middleton and prove its inferiority to the Whitehouse title. No matter what the ground of decision, it concludes the claim of the defendants. The record, however, proves it to have been a trial of the two competing titles.

It is assigned as error that the court did not pass on an exception to a deposition. Counsel accepted service of notice, and appeared, and, after several questions had been asked, excepted because notice was given only three days before, not allowing time to communicate with his client. But we do not know where the client resided. An excep-

tion stating such a fact is not evidence. We cannot see whether the notice of three or four days was enough. Again, it was the duty of the defense to show the court by evidence where the clients lived, and move to suppress the deposition, so that, if suppressed, it could be retaken. And as to exceptions to questions: The court was not bound to pass on them without a request. No motion to suppress was made. *Vanacoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927; *Long v. Perine*, 41 W. Va. 314, 23 S. E. 611. *Barton's Oby.* § 223, says that exception for want of notice or other irregularity in depositions comes too late after hearing has begun. So says *Hogg's Eq. Proced.* § 503. *McCandlish v. Edloe*, 3 Grat. (Va.) 390, is distinct authority for this. 6 *Ency. Pl. & Prac.* 591. In a law case the exception must be before the jury is sworn. *Jones v. Lucas*, 1 Rand. (Va.) 268.

Complaint is made that the defendants are enjoined from paying money under the order of redemption in toto, when there was some of their land not involved with the plaintiffs' land. The proposition was to redeem 788 acres, part of the Middleton land. Certain it is that the 788 acres lie wholly or partly in the plaintiffs' land. How can we say that it is not all in the plaintiffs' land? We do not know its location, so as to say that any part of the land to be redeemed is outside the plaintiffs. Aside from that sufficient consideration, there stood that void order of redemption. It was to be used to the prejudice of the plaintiffs. It could not be divided. As it was to be used to their prejudice, could they not wholly enjoin its use? And it cannot harm the defendants as to any part of the 788 acres not in the plaintiffs' land, or prevent a proceeding to redeem it.

We affirm the decree.

MULLINS v. SHREWSBURY et al.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

1. HUSBAND AND WIFE—CONVEYANCES BETWEEN.

A conveyance of land by a wife to a husband, he not executing it, they living together, is void.

2. EQUITY—LACHES.

Laches is not imputable to one in possession of the land claimed by him.

3. ESTOPPEL—DECLARATIONS.

Estoppel in pais will not bar the assertion of title to land, where the representation comes only from one's ignorance of his title arising from ignorance of law, and without intent to mislead.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 128-135.]

4. SAME—BY CONDUCT.

To bar one of his right to land by estoppel by conduct, his representation must have been made with intent to mislead, or with reasonable ground to believe that it will so operate.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, § 126.]

5. SAME.

To bind one by estoppel from his conduct, he must have reasonable ground to anticipate that another will change his position, or in some way act on faith of it, to his detriment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 124, 142.]

6. SAME.

A guardian, as such, petitions a court to sell land of infants, stating in her petition that her husband died seized of it, and that it descended to his heirs, and sells part under decree in the case. The land, in fact, belongs to her, not to her husband. She is not barred by that suit from asserting her own title to land not so sold conveyed by one of the heirs to a stranger.

(Syllabus by the Court.)

Appeal from Circuit Court, McDowell County.

Action by Abigail Mullins against F. C. Shrewsbury and others. Decree for plaintiff, and defendant Shrewsbury appeals. Affirmed.

E. C. Marshall, for appellant. Cook & Howard, for appellee.

BRANNON, J. Abigail Steele, wife of Allen Steele, being owner of several tracts of land at what is now the village of Iaeger, in McDowell county, conveyed them, by deed dated April 3, 1893, to her husband; they then living together. He laid off some of the land into town lots in the village. Steele died July 8, 1898. Steele did not unite in said deed. Abigail Steele was appointed guardian of the infant children of her husband and herself, and filed a petition in the circuit court to obtain authority to sell the said land. In her petition she stated that her husband had died owner of the land, and that it vested in his children as his heirs. Her petition did not set up her deed to her husband, or state the manner in which he was supposed to have title, but simply averred that he had died seized of the land. A decree was entered in the case authorizing Mrs. Steele, as guardian, to sell the land or parts of it, and she did sell some of the lots under the decree and reported the sales to court, which were confirmed, and she made deeds for some of the lots under such sale. That suit was brought in September, 1898, and the sales were made during the year 1898. One of the heirs having become of age, A. L. Steele conveyed his eighth interest in the land to F. C. Shrewsbury by deed February 28, 1903. On September 29, 1903, Abigail Mullins, she having married the second time, brought the suit we now have in hand against Shrewsbury and the heirs of Steele for the purpose of declaring void and annulling the deed which she had made to her husband and the deed which A. L. Steele had made to Shrewsbury. Shrewsbury made defense by demurrer to the bill and answer. The demurrer was overruled. Shrewsbury filed an answer in which he set forth the suit which Mrs. Steele as guardian had brought to sell the land of her husband, as above stated,

claiming that it constituted a bar by way of estoppel against the right of Mrs. Mullins to impeach either of said deeds to his prejudice. To that part of the answer the plaintiff filed a written exception, claiming that that part of the answer relying upon such estoppel was not in law a good defense to the bill. The court sustained said exception, and thus decided that no such estoppel operated against the plaintiff. A decree was pronounced in favor of the plaintiff, declaring void and annulling both the deeds aforesaid, and Shrewsbury appeals.

The deed from Abigail Steele to her husband was utterly void in law. At common law a wife could not by her deed convey land to her husband. Our statute says that no deed from a married woman shall be valid unless her husband joins therein. So both by statute and common law that deed is void. *Smith v. Vineyard*, 58 W. Va. 96, 51 S. E. 871. The husband did not sign this deed. Even if he had done so, though the question is not involved in this case, I would think that the deed would be void, because a man cannot grant to himself. The provision of our statute requiring the husband to join was intended to protect the wife against improvidence, and applies to deeds to third parties, and we should not construe our statutes so as to enable a husband to defraud his wife by getting hold of her property by a deed from her and him to himself. It has been so decided in *Rico v. Brandenstein*, 98 Cal. 465, 33 Pac. 490, 20 L. R. A. 702, 35 Am. St. Rep. 192.

It is hardly necessary to say much about the demurrer to the bill, and it does not seem to be relied on in argument. The only ground to which our attention is called under the demurrer is that the plaintiff was barred by laches. It was less than a year from the date of the deed to Shrewsbury to the date of the suit. Of course, that is no laches. True, it was ten years and more from the date of the deed from Mrs. Steele to her husband; but Mrs. Steele was in possession all the time along with her family, and was not called upon to sue. Shrewsbury was not in possession. Laches will not be imputed to one in possession of land for delay in resorting to equity to establish his legal title or maintain his rights. *State v. Sponangle*, 45 W. Va. 415, 32 S. E. 283, 43 L. R. A. 727; 18 Am. & Eng. Ency. L. (2d Ed.) 1245; *Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 608, 102 Am. St. Rep. 959. If Shrewsbury says that he can rely on the time during which Mrs. Mullins failed to sue her husband or his heirs, we can say that the relation of the parties excused delay. 18 Am. & Eng. Ency. L. (2d Ed.) 113. And then, too, she was ignorant of the law making her deed void. This would excuse her from the laches as held in *Cranmer v. McSwords*, 24 W. Va. 594.

But the great point of reliance for Shrewsbury in the case is the alleged estoppel

against relief to the plaintiff by reason of her having brought the suit as guardian to sell the land as land owned by her husband descending to his heirs, and receiving dower money from the sales under that suit, as stated in her petition in that suit. Here note that she does not seek to take from a purchaser any land sold under a decree in that case. Whether she could do that we do not say; but it is proposed in this suit to take from Mrs. Mullins her clear legal title to land not sold in that suit, not because she participated in or induced the conveyance by A. L. Steele to Shrewsbury at the time it was made by consent thereto, or acquiescence therein, or by express or silent admission of the right of A. L. Steele. The claim is that, because she as guardian filed a suit against the heirs to sell the land as theirs, and received money for her dower in the lots which were sold under that suit, to which Shrewsbury was no party, he can rely on the admission of Mrs. Mullins of her husband's title in the record of that suit as conclusive proof of no title in her, and validate Shrewsbury's purchase of A. L. Steele. An admission in pleading in a suit may be admissible as an item of evidence against a party in favor of a stranger to the suit, but only as an item of evidence. If the admission is not true, it is not binding or conclusive on behalf of the stranger. Of course, it is not an estoppel by record. It is only an item of evidence. *Wilson v. Powder Co.*, 40 W. Va. 419, 21 S. E. 1035, 52 Am. St. Rep. 890; *Hast v. Railroad*, 52 W. Va. on page 407, 44 S. E. 155. Nor is it an estoppel by conduct—that is, in pais—as it is not an act done in the transaction in question, moving and inciting Shrewsbury's purchase; not an act of Mrs. Mullins done in the purchase by Shrewsbury intended to further it. It is simply the case of a stranger relying on the admission of a party in a suit of a given state of facts, not in fact true, made with no purpose to induce the sale, made years before the sale, not declared by Mrs. Mullins, directly or indirectly, at the time of the sale, to be true, but simply assumed by Shrewsbury, at his own risk, as true. In fact, I do not see that it falls under the head of estoppel in pais. It is not the case, or one similar thereto, where one having title and seeing another about to purchase admits title in the party offering to sell. That is fraud. But in the present case it is an admission made at a time years past in a wholly different transaction. And there is no privity or relationship between these parties. 4 Am. & Eng. Dec. in Eq. 360. Mrs. Mullins did not by that suit authorize or induce Shrewsbury to act upon the case of herself and the heirs. "The reason of the rule ceases at once, when a stranger to the arrangement seeks to avail himself of the statements, which were not made as a basis for him to act upon. They are, for a stranger, evidence against the party making the statement, but no more than evi-

dence which may be rebutted; between the parties they form an estoppel in law. The doctrine is that, where one states a thing to another with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement." 7 Robinson's Prac. 247.

But, if we place it under the head of estoppel in pais, it does not bar Mrs. Mullins from relief:

1. She is not shown to have known, as a matter of fact, when she sued to sell the land as guardian, that her deed to her husband was void. If she did, why did she sue to sell the land as her husband's? Why did she buy several heirs' interest, as she did? She swears she did not know the deed was void. She was an illiterate woman. Women not engaged in the active affairs of life are not held to that standard of liability, based on knowledge of law, by which men are tried. It has been asserted that "the presumption of law is that women are not well informed of their rights." *Dunham v. Chatham*, 73 Am. Dec. 233. Mrs. Mullins, before she brought that suit, had been advised by counsel that her deed bound her, and that she had better bring a suit to sell some of the land as the land of her children for their support. There is much law to support the position that ignorance of title, arising from ignorance of law, excuses a party generally. I shall not discuss that matter, as applied to other transactions, for where the question is whether a party by his conduct has estopped himself from setting up his title, even if his ignorance of his right comes from ignorance of law, that ignorance excuses him from loss of it by estoppel by conduct, because such estoppel involves moral turpitude and intentional wrong and deception. There must be intent to mislead to another's injury, or reasonable ground to believe it will do so. *Atkinson v. Plum*, 50 W. Va. 104, 40 S. E. 587, 58 L. R. A. 788; *Bates v. Swiger*, 40 W. Va. 420, 21 S. E. 874; *Brant v. Va. Coal Co.*, 93 U. S. 326, 23 L. Ed. 927; *Pomeroy, Eq. § 807*. Ignorance of law will exclude laches. *Cranmer v. McSworbs*, 24 W. Va. 595. There is stronger reason why it should excuse from the operation of an estoppel. Can it be said that Mrs. Mullins by her suit to sell had it in view to mislead Shrewsbury to purchase in the future? That she even dreamed of such a result? Can it be said that by taking money for dower from the sale of lots made by her she induced Shrewsbury thereafter to purchase, or intended to do so, or dreamed of doing so? Can Shrewsbury say that by so doing she has intentionally or fraudulently or wrongfully misled him to make the purchase? The law is that to bind one by such estoppel he must have reasonable ground to anticipate that another will change

his position or in some way act on the faith of it to his detriment. *Ewart on Estoppel*, 155. To be bound by such an estoppel the party must know his rights. "Acts and declarations of a party based on innocent mistakes as to his legal rights will not estop him to assert the same." 16 Cyc. 733. See 4 Am. & Eng. Dec. Eq. 269; *Smith v. Sprague* (Mich.) 77 N. W. 689, 75 Am. St. Rep. 384; *Pomeroy, Eq. § 806*. Point 13, in *Western Mining Co. v. Peytona Co.*, 8 W. Va. 406, says: "The statements, acts, or acquiescence of the owner or claimant of land are generally evidence against him, under all the circumstances, more or less forcible; but, unless they are vitiated by actual fraud, or culpable negligence tantamount to actual fraud, and are relied on by another as the foundation of material action or acquiescence, they do not estop the owner of the land from asserting or proving his title or boundary." "To constitute an equitable estoppel that will operate to transfer title to property, the party estopped must have been apprised of the true state of his own title, and must have been guilty of fraud, actual or constructive, or of negligence so gross as to imply fraud, and the other party must, not only be destitute of all knowledge of the true state of the title, but of any convenient means of acquiring such knowledge, and he must have relied upon the admissions of the party estopped to such an extent as that he will be injured by allowing their truth to be disproved." *C. & O. R. Co. v. Walker*, 100 Va. 69, syl. pt. 5, 40 S. E. 633, 914.

2. Another reason why an estoppel does not operate is that Shrewsbury was not a party to the suit. *Pomeroy, Eq. § 813*.

3. Another reason why the estoppel does not operate is that the suit relied upon to operate as such was in 1898, and Shrewsbury bought in 1903. "The party affected must have immediately or promptly acted upon the matter of estoppel to his detriment." *Hogg's Eq. Princ.* 143. See 4 Am. & Eng. Dec. Eq. 265.

4. Another reason against the estoppel is that the suit relied upon as such was brought by Mrs. Steele, not in her own right, not to affect her title, but it was in her capacity as guardian. A suit brought in one's representative capacity is not on the party's own right, but in other right, and does not generally bind the individual rights of the party. *Bigelow on Estoppel*, 334; *Wright v. De Groff*, 14 Mich. 164. "When two rights unite in the same person, they are considered as in different persons." "Whenever a person sues, not in his own right, but in the right of another, he must, for the purpose of estoppel, be deemed a stranger." 7 Rob. Prac. 260. To hold it an estoppel would tend to induce the guardian to hide the right of the ward in the interest of himself.

In this case it is proposed to take away

from Mrs. Mullins, without fault or fraud or intentional culpability, or the shadow of any wrong, her clear title to land without deed as required by law upon the principles of mere estoppel. Here we ought to apply the principles stated in *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 267: "While the owner of land may by his acts in pais preclude himself from asserting his legal title, it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be effected by parol evidence of a doubtful character." In cases of personal property, the doctrine may be more readily applied, but, as to taking land from its true owner by mere estoppel, it is different. *Pomeroy's Eq.* (3d Ed.) § 807, makes this distinction, saying that as to land there must be fraudulent intent to estop the party from asserting his legal title.

We think it clear that the decree of the circuit court is right, and therefore affirm it.

STATE v. BANKS.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

CRIMINAL LAW—BILLS OF EXCEPTIONS—SUFFICIENCY.

A case in which the bills of exceptions are insufficient; neither the evidence taken in the case nor the instructions in question being made a part of the record.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 15, *Criminal Law*, §§ 2831, 2832.]

(Syllabus by the Court.)

Error to Circuit Court, Lincoln County.

Levi Banks was convicted of unlawful shooting, and brings error. Affirmed.

Marcum & Marcum, for plaintiff in error.
C. W. May, Atty. Gen., for the State.

McWHORTER, P. This is a prosecution against Levi Banks upon an indictment found in the circuit court of Logan county at the July term, 1903, for unlawfully, maliciously, and feloniously shooting one Jonah Ferguson. The case was tried at the November term of Logan court, 1903, when the jury returned a verdict of not guilty of malicious shooting and wounding, but guilty of unlawful shooting; and Banks was sentenced to the penitentiary for three years. The case was brought here on writ of error, and the judgment reversed, and the case remanded for a new trial. See 55 W. Va. 388, 47 S. E. 142.

At the May term, 1905, of the circuit court of Logan county, when the case was again called for trial, defendant moved for a continuance and presented his petition praying for a change of venue, and the court entered an order removing said cause to Lincoln county circuit court for trial. On motion of the

prosecuting attorney of Lincoln county, the case was docketed on the 6th day of June, 1905, in the circuit court of Lincoln county; and on motion of the defendant the case was continued until the seventh day of the next regular term. On the 11th day of September, 1905, when the case was called, the defendant moved the court for a continuance until the next term, and filed his affidavit in support of his motion, and the cause was again continued, and at the December term, when the case was called, the defendant, by his counsel, suggested a diminution of the record of the proceedings of the cause in the circuit court of Logan county, and suggesting that the record as certified by the clerk of the circuit court of Logan county was not complete, and that all orders, proceedings, and recognizances therein had not been copied and certified to the clerk of the Lincoln county circuit court as required by law, and moved the court for a ruling against the clerk of Logan circuit court requiring him to certify to the clerk of the circuit court of Lincoln county a complete record of the proceedings, which motion was overruled, and the defendant by counsel moved the court to strike the case from the trial docket for want of a complete record as stated, which motion was also overruled. The defendant then moved for a continuance on the ground of the absence of Loudon White, a material and necessary witness for the defendant, and introduced evidence to show his materiality, which motion for continuance was overruled. Under the direction of the court a jury was impaneled and sworn in the case, and after hearing the evidence returned a verdict against the said Banks of guilty of unlawful shooting and wounding as charged in the indictment. Defendant moved the court to set aside the verdict and grant a new trial, because the same was contrary to the law and the evidence, and because the jury had been improperly impaneled and sworn over the objection of the defendant, which motion was overruled, and judgment entered against the defendant, fixing his term of imprisonment at one year. The defendant relies for his defense here upon the fact that the record as certified to the clerk of the circuit court of Lincoln county from the clerk of the circuit court of Logan county failed to show any order of the circuit court of Logan county transferring the case to Lincoln county.

A writ of certiorari was awarded the state in this court to the clerk of the circuit court of Logan county, and in return to such writ the said clerk of Logan county circuit court certified to this court the order of the 3d of May, 1905, transferring the case on the motion of the defendant from said Logan circuit court to Lincoln circuit court for trial. This return of the writ shows the existence of the order of removal of the case and completes the record. The case having been docketed without objection in Lincoln circuit court, and continued therein for two

terms on the motion of the defendant, and it now appearing that the order of removal had been duly entered in the circuit court of Logan county, the judgment cannot be reversed because of the incompleteness of the record as it appeared at the time of the trial in Lincoln circuit court. In *Shifflet v. Commonwealth*, 14 Grat. 652, Syl. point 5, it is held: "Where, upon the motion of the prisoner, the venue is changed, and the record sent by the clerk of the court from whence the trial is removed, to the court to which it is sent, does not show that the indictment was found by the grand jury, but the prisoner is tried and convicted, upon a writ of error to the Court of Appeals, that court may direct a certiorari to the court from whence the case was sent, for a better record; and, if it appears from the record returned that the indictment was found by the grand jury, the judgment will not be reversed."

The further assignments of error relied upon by the defendant are to the action of the court in overruling the defendant's motion for a continuance, upon which it is alleged that evidence was taken, and in giving to the jury certain instructions on behalf of the state over the objection of the defendant, and in refusing to give instruction No. 5, asked for by the defendant, and in refusing to set aside the verdict of the jury and grant him a new trial on the grounds that the verdict was contrary to the law and without evidence to support it. The evidence in the case, either in support of defendant's motion for continuance or that given upon the trial, is not made a part of the record by sufficient bills of exceptions, and cannot be looked to in the case, neither are the instructions so given and refused made a part of the record by proper bills of exceptions, and without the evidence the judgment will be presumed to be right. The fact that the evidence and instructions are not made a part of the record by the bills of exceptions, and the insufficiency of the bills, is clearly within the rulings of the court in the various cases recently decided by this court. See *Tracey v. Carver*, 57 W. Va. 587, 50 S. E. 825; *Railway Company v. Joyce* (W. Va.) 52 S. E. 498; *Parr v. Currence*, 58 W. Va. 523, 52 S. E. 496; *Dudley v. Barrett*, 58 W. Va. 235, 52 S. E. 100; *Schwarzchild & Sulzberger Co. v. Railway Company* (W. Va.) 53 S. E. 785.

The judgment will have to be affirmed.

HARRIS et al. v. NEAL et al.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

CHARITIES—APPLICATION OF DOCTRINE OF CY PRES.

A case in which the plaintiffs fail to bring their cause within the doctrine of cy pres, if said doctrine should be held to be in force in this state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Charities, §§ 91-93.]

(Syllabus by the Court.)

Appeal from Circuit Court, Wood County. Bill by T. A. Harris and others against J. B. Neal and others. Decree for defendants, and plaintiffs appeal. Reversed, and bill dismissed.

H. P. Camden, for appellants. Talbott O. Bullock, for appellees.

McWHORTER, P. Andrew G. Clark, a practicing physician of the city of Parkersburg, on the 21st day of July, 1893, made and signed his last will and testament, written wholly in his own handwriting, which will starts out in the following manner:

"Sept. 24, 1892, was my 83rd birthday & conscious of a gradual progressive diminution of vital force & that the end may come at any time, I do make this, in my own hand writing, my last will & testament.

"I remit to those indebted to me all charges for professional services whether by note or open account" etc.

After providing for the payment of various bequests and legacies he disposes of the residue of his property as follows:

"All the residue & remainder of my estate real & personal of which I shall die seised & possessed, or to which I may be entitled at the time of my decease my executor's will convert into money as soon as may be without sacrifice & hand over to Drs. T. A. Harris, W. N. Burwell, John H. Kelly, T. B. Camden & W. H. Sharp, in trust, for the purpose of purchasing the Gale property at the eastern end of Market street, or other suitable property, for the establishment of a city hospital—The amount of this hospital bequest I suppose will be about ten thousand dollars—It is the desire of the testator that the sick poor should be treated without charge or with as little expense as possible, though so far as the testator is concerned the plans, management & conduct of the hospital are left to the judgment & discretion of the above-named trustees. It may be that others will contribute additional sums so as to place the institution on a larger & more useful scale;" and named and appointed J. B. Neal and Kinnauld Snodgrass executors of his said will without bond.

On the 10th day of November, 1902, the said will was admitted to probate in the county court of Wood county. The trustees named in the residuary clause of said will providing for the establishment of said hospital, being of opinion that the sum so appropriated by the will, although amounting to more than two and a half times, and probably three times, more than the testator supposed would be in the fund, would be insufficient to carry out the purpose of the testator in the manner indicated by him in his will, filed their bill in the circuit court of Wood county making the executors, Neal and Snodgrass, defendants to the bill, praying the court to instruct the plaintiffs in the bill "as to their power, rights and duties under

the said will and to interpret the same as to whether the purchasing of the privilege of beds for the sick poor in hospitals already erected, established, and equipped and invest the principal in good and safe paying interest bearing securities would meet the requirements of the said will of the said deceased, and if so, to instruct your orators as said trustees accordingly"; and for general relief. The subpoena in chancery seems to have been served personally on the executors, Neal and Snodgrass, but they made no appearance to said bill in any manner or form, nor does it appear that said cause was matured at rules for hearing. Depositions of the several plaintiffs and of Neal and Snodgrass, purporting to be taken in February, 1903, to be read as evidence on behalf of the plaintiffs, are copied in the record, which depositions of the plaintiffs themselves express their several opinions as to the sufficiency of the fund provided by the will to carry out its provisions in the manner indicated by the testator. And on the 11th day of August, 1903, the circuit court entered the following decree, which is the only decree or order of any kind or character appearing to have been made or entered in the cause:

"This cause came on this day to be heard upon the bill and exhibits filed therewith; upon the depositions of sundry witnesses taken, filed and read on behalf of the plaintiffs; and was argued by counsel for plaintiffs. Upon consideration whereof, the court is of opinion, and doth adjudge and decree, that the true construction of the will of Andrew G. Clark, deceased, is that the said Andrew G. Clark by his declaration contained in his will, which is as follows: 'All the residue and remainder of my estate real and personal of which I shall die seised and possessed or to which I am entitled at the time of my decease, my executors will convert into money as soon as may be without sacrifice and hand over to Drs. T. A. Harris, W. N. Burwell, John H. Kelly, T. B. Camden and W. H. Sharp, in trust for the purpose of purchasing the Gale property at the east end of Market street or other suitable property for the establishment of a city hospital'—meant and intended thereby that said remainder referred to in said clause of his will should be applied by his trustees either to the purchase of the Gale property or some other property leaving the property to be purchased at the discretion of his said trustees, and that upon this property so purchased they were to establish a city hospital at which the sick poor were to be treated without charge or with as little expense as possible, giving to his said trustees full discretion in the plan, management, and conduct of said hospital. Wherefore, the court doth adjudge, order and decree as follows: That the said trustees T. A. Harris, W. N. Burwell, John H. Kelly, T. B. Camden and W. H. Sharp do and shall invest the amount of money in their hands from the estate of An-

drew G. Clark, deceased, as set apart by him in his said will for the purpose of purchasing land and the establishment of a city hospital thereon; in some real property and establish thereon a hospital for the city of Parkersburg, using their best discretion in the selection of the property to be purchased by them, at which hospital the sick poor shall be treated without expense or with as little expense as possible; and that the plan, management, and conduct of the said hospital when so established shall be left to the best judgment and discretion of the said trustees named in the said will, to wit, T. A. Harris, W. N. Burwell, John H. Kelly, T. B. Camden and W. H. Sharp; and it is further by the court ordered that the attorney's fees and all costs connected with this cause shall be paid out of the funds in the hands of said executors of the estate of Andrew G. Clark, deceased." From this decree the plaintiffs in the bill appealed to this court and assigned as error that the court "has misconstrued the will of said Andrew G. Clark, deceased, and has limited the powers of your petitioners, and has deprived them of all discretion in the premises, except to invest the funds in the manner prescribed by said decree."

It is contended by counsel for appellants that the clear intention of the testator to devote the residuary fund to charity and the particular kind of charity was specified by him, and they ask for such a construction of the will as will enable them to devote the fund to the particular charity mentioned so as to effectuate what was the primary purpose and intention of the testator, and they claim to have shown that the testator's mode of administering his charity has failed, and that the court should administer it under the doctrine of cy pres at least, in a modified form; that is, that as it cannot be carried out in the exact mode prescribed by the testator that the trustees be authorized to administer the trust in a manner as nearly that indicated by the testator as may be so as to substantially carry out his purpose and intention. Appellants contend that the prime object of the testator was to provide relief for the sick poor of the city of Parkersburg. A careful reading of the clause in question will not sustain that contention. The fund is created "for the purpose of purchasing the Gale property at the eastern end of Market street, or other suitable property, for the establishment of a city hospital. * * * It is the desire of the testator that the sick poor should be treated without charge or with as little expense as possible" leaving "the plans, management and conduct of the hospital to the judgment and discretion of the trustees named," but no power or discretion is given the trustees to divert the fund to any other mode of carrying out the purpose of the testator in providing for a city hospital and incidentally thereby to extend the benefits thereof to the sick poor of the

city of Parkersburg. And the testator suggests that by the contributions of additional sums by others the institution might be placed on a larger and more useful scale, clearly indicating his purpose to provide a city hospital at which the sick poor might receive benefit. It is not made to appear that any effort has ever been made to either buy the Gale or any other suitable property or to procure a lot and erect a building for the purpose set forth in the will, nor that anything has been done to enlist the interest of philanthropists or charitably disposed persons to augment the fund to enable the trustees "to place the institution upon a larger and more useful scale." The several trustees, in giving their testimony, simply express their opinions, or conclusions as to the impracticability of providing and maintaining a hospital with the fund left by the testator for that purpose. The language of the will is free from doubt, and the intention of the testator is plainly and intelligibly expressed; and when this is so the courts will refuse to apply technical rules of construction.—30 A. & E. L., 663. "The expressed intention of the testator, to be ascertained from the whole will, must govern when not in conflict with any settled rule of law or property."—4 *Cur. Law*, 1898, and cases cited. And it is there further said, "It is the duty of the court to construe the will which the testator has made and not to speculate as to his intention, or to make a will for him. Hence there is no room for construction when the intent clearly appears from the four corners of the will itself." The testator, Andrew G. Clark, supposed, when he made his will, as distinctly therein expressed, that the residue of his estate applicable to the purpose intended by him was only about \$10,000, but that it would be sufficient for a beginning, and he evidently contemplated a growth of the institution after it should be established; and this beginning was to be made with the supposed amount of \$10,000, when in fact it turns out to be not far, if any, short of three times the amount named. Dr. Clark was a practicing physician, evidently of fair standing in his profession as well as otherwise in the community, having considerable property which he seemed to know how to distribute or dispose of when preparing to depart this life. He seemed to be capable and intelligent, and he has expressed his intention plainly and intelligibly without ambiguity, leaving no room for construction.

The appellants having failed to make such case as will authorize the court to so construe the will as to allow the appellants to administer the funds provided in the residuary clause thereof in a manner other than that clearly expressed by the testator therein, for the reasons herein stated the decree entered in the cause by the circuit court of Wood county will be reversed, and the bill dismissed.

STATE v. NETHKEN et al.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

1. INTOXICATING LIQUORS—SALES TO INTOXICATED PERSON—EVIDENCE.

On the trial of an indictment, charging the defendant, as a licensed dealer in spirituous liquors, with having sold or given, to an intoxicated person, such liquors, knowing, or having reason to believe, him to be intoxicated, the state must prove, as a part of her case, that the defendant had such a license.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 29, *Intoxicating Liquors*, § 264.]

2. SAME—LICENSE.

Proof that the defendant obtained, from the county court of the county in which the sale is alleged to have been made, permission to obtain a license to carry on such business, at the time and place at which the sale is alleged to have been made, and was then and there so engaged, makes a *prima facie* case against the defendant on the issue whether he had such license.

3. SAME—WHAT CONSTITUTES INTOXICATION.

Intoxication, within the meaning of section 16 of chapter 82 of the Code of 1899 [Code 1906, § 928], is such a mental condition of a person, due to the use of liquor, as attracts the observation of, or becomes known to, others, or gives them reason to believe the person is intoxicated; and the testimony of a bystander to such a mental state of the person to whom a sale is made will sustain a finding, by a court or jury, on the question of intoxication.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 29, *Intoxicating Liquors*, § 177.]

(Syllabus by the Court.)

Error to Circuit Court, Randolph County.

George Nethken and others were convicted of a violation of the liquor law, and bring error. Affirmed.

Jared L. Wamsley and W. E. Baker, for plaintiffs in error. C. W. May, Atty. Gen., for the State.

POFFENBARGER, J. On the verdict of a jury, finding them guilty, as licensed retailers of spirituous liquors, of unlawfully selling and giving away such liquors to one John Riggleman, a person intoxicated at the time, George Nethken and Truman Nethken were adjudged, by the circuit court of Randolph county, to pay a fine of \$50, to which judgment they obtained a writ of error. All the errors assigned go to the sufficiency of the evidence. The court overruled a motion to exclude it from the jury, and, after verdict, a motion to set the same aside and grant them a new trial.

Sufficiency of the evidence to prove that the defendants conducted their saloon business, under the protection of a license therefor, at the time the sale in question was made, is challenged. A copy of an order, made by the county court of said county, showing their application for such license, approval of their bond, and direction that such license issue, was introduced as evidence, and it was shown that they were conducting a barroom at the place, and within the time, specified in their application and the order; but no evidence

was adduced to show that, pursuant to the order, they applied to, and obtained from, the assessor of the county the certificate which the law required him to issue in such case, or paid the license tax to the sheriff or collector, both of which seem to be essential prerequisites to the right to carry on such business. The statute says: "Such certificate shall be produced by the applicant to the officer to whom the state tax is to be paid; and his receipt for such tax, written on the certificate, shall be sufficient license, while it remains in force, to the person and for the purpose specified in the said certificate, except so far as is otherwise provided in this chapter." Code 1899, c. 32, § 11 [Code 1906, § 923]. Though there is much law for the position that the possession of such a license may be established, for the purposes of such a prosecution as this, by proof of the admission of the defendant, this court, in *State v. Whitter*, 18 W. Va. 306, decided that proof of his having conducted a public barroom was insufficient for such purpose. We do not question the soundness of that decision, but a very important circumstance is added here. The defendants expressed, in the most deliberate, formal, and solemn manner their intention to conduct a barroom and sell such liquors, under a license, at the time and place at which it was shown they had been doing so. A rule of evidence, of frequent and extensive application by the courts, is that, when an intention to perform a given act has been proved and subsequent performance of the intended act shown, there is a presumption that the intention continued and was executed, unless the contrary appears. The presumption is one of fact, amounting to evidence, upon which a jury or court may act. Many illustrations of the application of the rule will be found in the decisions referred to in 1 *Greenleaf on Evidence*, § 14k, and 22 *Am. & Eng. Ency. Law*, 1241. Its application here clearly establishes a *prima facie* case, imposing upon the defendants the alternative of overthrowing it with counter evidence, or submitting to it. They chose the latter, and their appeal to the court on this point is necessarily fruitless.

An effort to escape is founded on the very slender fact that the license permit was granted to Geo. Nethken & Bro., and the indictment is against "George Nethken and Truman Nethken, trading as George Nethken and Bro." In view of the fact that the defendants were conducting a saloon at the time and place designated in the permit, we think the jury were authorized to find as they did on the question of identity.

The only witness who testified on the question of the sale to Rigglesman, while intoxicated, said: "Well, as I said before, I seen him get liquor when he was pretty full." In response to the question, "It is a matter of whether or not you seen him get liquor when he was intoxicated," he said, "I think I have." His testimony shows, too, that he was a very

unwilling and evasive witness. Upon his testimony, the jury could well find that the person to whom the sale was made was, at the time, obviously under the influence of liquor, and, as the defendants, or their clerk, were present at the time and had the same opportunity for observation as the witness, that they also were aware of his condition. According to a decision of this court, such a condition amounts to intoxication, within the meaning of the statute. "Intoxicated," within the meaning of the statute, is such as attracts observation and becomes known to others." Judge Holt, in *Halstead v. Horton*, 38 W. Va. 727, 733, 18 S. E. 953. Owing to a typographical error, the words "a mental condition" were evidently dropped out of the passage quoted from the opinion. Decisions of other courts sustain this view of Judge Holt. *Smith v. People*, 141 Ill. 447, 31 N. E. 425; *Wadsworth v. Dunnam*, 98 Ala. 610, 13 South. 597; *Lafler v. Fisher*, 121 Mich. 60, 79 N. W. 984.

Perceiving no error in the judgment, we affirm it.

WARD v. MOORE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

VENDOR AND PURCHASER—CONVEYANCE—DEFICIENCY—ABATEMENT IN PRICE.

Where a purchaser of land seeks an abatement of the purchase money on the ground of a deficiency in the quantity of the tract, the burden is upon him to establish such deficiency, and unless he does so by sufficient evidence, no abatement can be decreed.

(Syllabus by the Court.)

Appeal from Circuit Court, Pocahontas County.

Bill by Wirt C. Ward against H. C. Moore and others. Decree for defendants, and plaintiff appeals. Modified and affirmed.

McNeil & McNeil and C. W. Harding, for appellant. L. M. McClintic and H. S. Rucker, for appellees.

SANDERS, J. On the 10th day of July, 1901, Wirt C. Ward and Elihu Hutton conveyed to H. C. Moore, J. W. Lawton, J. C. Moorehead, and R. W. Moorehead, the timber upon two certain tracts of land in Pocahontas county, for a stipulated sum, part of which was paid in cash, the residue being payable in two equal installments in one and two years. For the deferred payments the purchasers executed their notes to Ward, he retaining the usual vendor's lien to secure the same. A portion of the purchase money, after the maturity of the notes, remaining unpaid, Ward filed his bill in equity for the purpose of enforcing the vendor's lien. The defendants answered the bill, alleging a deficiency in the quantity of the two tracts of land, the timber upon which was conveyed to them, and claiming to be entitled to an abatement of a portion of the purchase money

on account of such alleged deficiency. The plaintiff replied generally to the answer, and depositions were taken by both sides to the controversy. Upon a final hearing, the court decreed an abatement from the purchase money in favor of the defendants, as prayed for in their answer, from which decree the plaintiff appealed.

As to whether or not this is such a case as would entitle the defendants, under their contract with the plaintiff, to an abatement from the purchase money paid for the timber, we are not called upon, from the state of the record, to determine, because we are met at the outset with the proposition that the defendants have not shown a deficiency in the quantity of the land. Therefore, it is unnecessary for us to deal with the question as to whether or not the sale was by the acre, or whether or not the plaintiff was guilty of actual or legal fraud in the transaction. The defendants carry the burden of proof, and before a court of equity can decree to them an abatement from the purchase money on the ground that the land is deficient in quantity, it must be shown by them that there is a deficiency, and what such deficiency is. Upon a most careful consideration of the evidence, we fail to find sufficient evidence upon which to decree that there is a deficiency in the quantity of the land sold. We feel that the evidence relied upon is too indefinite, and falls short of that proof which should be required in cases of this character.

This being our conclusion, it is unnecessary to detail the evidence, or argue the facts. To do so expounds no legal principle, and can certainly serve no good purpose, as it would not be useful in other cases.

The decree of the circuit court, in so far as it decrees an abatement of the purchase money, is reversed, and a decree here entered in favor of the plaintiff for the unpaid purchase money, with its accrued interest; and in all other respects said decree is affirmed.

HEADLEY v. HOOPENGARNER et al.
(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

1. LANDLORD AND TENANT — LEASE — CONSTRUCTION.

The word "grant," "demise," or "lease," in a lease for years, creates a covenant in law for good title and quiet enjoyment of the lands demised during the term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, §§ 111, 471.]

2. MINES AND MINERALS—OIL AND GAS LEASE — CONSTRUCTION.

The ordinary oil and gas lease, giving the lessee for a term of years the right to mine and operate for oil and gas, is not a sale of the oil and gas in place, and the lessee has no vested estate therein until it is discovered; but, when found, the right to produce becomes a vested right, and, when extracted, the title vests in the lessee, and the consideration or royalty paid for the privilege of search and production is rent for the leased premises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, § 201.]

3. SAME—RENT—ROYALTY.

When a lease is given for the purpose of mining and operating for oil, in consideration of one-fifth of one-eighth of all the oil produced being delivered to the lessor as royalty; and where, in a division order executed by all the interested parties, fixing and defining their relative interests in the oil produced, the lessor agrees to accept one-fifth of one-sixteenth, and directs the delivery to him of that amount as his portion, he will be estopped to claim more than that amount, as against the parties to said agreement and those acquiring interests in the lease subsequently thereto.

4. GUARDIAN AND WARD—SALE OF WARD'S LAND—RIGHTS OF PURCHASER.

Where, in a summary proceeding instituted under chapter 83, Code 1899 [Code 1906, §§ 3228-3245], for the purpose of selling the undivided interests of infants to the oil and gas in certain lands inherited by them from their father, one purchases the interests of the infants sold thereunder and agrees to pay a stipulated royalty therefor, he will not be relieved from the payment of such royalty, after the sale is confirmed and deed made, on the ground that the father, in his lifetime, disposed of one-sixteenth of all the oil and gas produced on said lands; nor can such proceedings be reopened and corrected, but they are final and conclusive upon all the parties thereto, except for after-discovered mutual mistake of material facts or fraud, and, where relied upon, such mistake or fraud must be clearly and distinctly alleged and proved.

5. SAME—TITLE ACQUIRED.

A summary proceeding for the sale or lease of infants' lands, under chapter 83, Code 1899 [Code 1906, §§ 3228-3245], is a judicial proceeding, and the maxim, "caveat emptor," strictly applies thereto. The court sells only the title, such as it is, of the parties to the suit, and it is the duty of the purchaser to ascertain for himself whether the title of those parties may not be impeached or superseded by some other and paramount title; and the purchaser will not be relieved from his purchase, nor from paying the purchase money, though he has acquired no valid title to the land so purchased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, §§ 390, 395.]

6. SAME—LIABILITIES OF PURCHASER.

Where, under such summary proceedings, the purchaser, by the terms of the decree and deed, is required to pay to the infants four-fifths of one-eighth of all the oil produced, and the guardian, in their behalf, signs division orders directing that one-half of that amount be delivered to him as the share of the infants, and in compliance therewith that amount is delivered to and accepted by the guardian for several years without demanding the full share of his wards, this will not estop the infants from claiming that part of the oil which the guardian did not receive. Nor will those infants, who have continued to receive the oil in the same proportion since their majority, be estopped from claiming their full share.

7. INFANTS—ESTOPPEL.

While the doctrine of estoppel in pais applies to infants of years of discretion, for intentional fraudulent conduct, in favor of one who is misled thereby, yet estoppel by contract and for mere silence does not apply to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 135.]

8. GUARDIAN AND WARD — UNAUTHORIZED ACTS OF GUARDIAN.

The acts of a guardian, without authority and in excess of his powers, with reference to his ward's estate, do not operate as an estoppel against the infants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guardian and Ward, § 293.]

9. MINES AND MINERALS—OIL LEASE—FORFEITURE.

In a deed made by a guardian, conveying the oil and gas in certain lands of his wards, it is provided that the lessees, among other things, shall deliver as royalty to the infants, or their guardian, in tanks or pipe lines, free of cost to them or their guardian, the proportionate share of the one-eighth of all the oil produced and saved from the undivided interest of the infants in the land sold; and it is further provided that if the purchaser fails to comply with and do and perform all the things required by him to be done and performed, or any of them, then from the time of so failing to perform the same, or any of them, all rights, estates, interests, and privileges under the decree and sale shall become forfeited and revert to the infants. *Held*, that under the facts of this case there was no forfeiture and reversion, and the action of ejectment was properly enjoined.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County. Bill by Mansfield Headley against H. L. Hoopengarnier and others. Decree for plaintiff, and defendant the Colonial Oil Company and others appeal. Reversed and remanded.

Van Winkle & Ambler, W. N. Miller, A. B. & R. F. Fleming, and C. Powell, for appellants. J. H. Strickling and K. C. Moore, for appellee.

SANDERS, J. This is a suit in equity, brought in the circuit court of Tyler county by Mansfield Headley against H. L. Hoopengarnier and others. Upon a final hearing the court below decreed for the plaintiff, and from this decree an appeal has been allowed.

Thomas J. Headley, the father of Mansfield Headley, was the owner, in his lifetime, of two contiguous tracts of land in Tyler county, containing 24 and 46 acres, respectively. On the 6th day of February, 1896, Thomas J. Headley and his wife granted to the South Penn Oil Company one-half of the oil and gas within and underlying the 46-acre tract of land, and on the 14th day of April, 1897, said Thomas J. Headley and wife granted to L. R. Loomis one-half of the oil and gas within and underlying the 24-acre tract of land. Both of these grants were recorded in the clerk's office of the county court of Tyler county; the one to the South Penn Oil Company on the 1st day of April, 1896, and the one to Loomis on the 14th day of April, 1897. Thomas J. Headley died, intestate, soon after the execution of the grant to Loomis, leaving surviving him his widow, Mary Jane Headley, and five children, Mansfield, Elisha, Albert, Florence, and Susannah, infants. Mansfield became of age on March 17, 1899. Elisha Le Masters was appointed guardian of the infants, and on the 17th day of March, 1899, as such guardian, he united with Mary Headley, the widow, and Mansfield Headley, the adult, in a lease to H. L. Hoopengarnier, M. W. Wharton, and S. A. Karnes & Co., leasing for oil and gas these two tracts of land. Inasmuch as the guardian had no authority to make it, this lease was ineffective to pass the interest of the infants, and on the 8th day

of August, 1899, the said guardian filed his petition in the circuit court, reciting, among other things, the execution of the lease by the widow, the adult, Mansfield, and petitioner, as guardian of the infants, and filed the lease as an exhibit with his petition. It set out the advantage it would be to the infants to sell or lease their interest in and to the "undivided seven-eighths of all the oil and of all the gas within and underlying said tract of land," reserving unto said infants their proportionate share of the one-eighth royalty of oil not sold, and prayed for authority to make such sale. On the same day the court entered a decree authorizing said sale, and the guardian reported that he had sold, at private sale, the undivided interest of the infants in and to the undivided four-fifths of the seven-eighths of all the oil and of all the gas within and underlying said tract of land to the original lessees, Hoopengarnier, Wharton, and Karnes & Co., and the court entered a decree confirming the sale. On the same day the guardian made a deed to the purchasers for the oil and gas sold. By various assignments the undivided seven-eighths working interest came on the 23d day of April, 1900, into the hands of N. S. Snyder and W. L. Mellon, and they were the owners of such working interest when in that month oil was first struck on the 24 acres. The interests which the South Penn Oil Company and Loomis had acquired by their conveyances from the ancestor, Headley, and his wife, had never been discovered by the lessees, and consequently had never been taken into account by them, until they came to divide the royalty interest in the oil. Oil being struck first on the 24 acres, the question arose as to what interest Loomis owned, and a division order was agreed upon, signed by Mansfield Headley, Elisha Le Masters, guardian, N. S. Snyder, L. R. Loomis, and W. L. Mellon, giving to Mansfield Headley one-eightieth of the royalty, to Le Masters four-eightieths, and to Loomis five-eightieths thereof, and to Snyder and Mellon the seven-eighths working interest. Later oil was discovered on the 46 acres, and another division order was agreed upon, identical with the first, with the exception that the South Penn Oil Company received the five-eightieths royalty. On the 21st day of December, 1900, Snyder and Mellon assigned the whole of the working interest to Henry Goodkind and Phillip Kleeberg, and on the 2d day of January, 1902, Goodkind & Kleeberg assigned the same to the Colonial Oil Company.

The operators of the leasehold divided the royalty as stipulated in the division orders until some time in July, 1903, when Mansfield Headley instituted his suit in chancery against the lessees and their assigns, claiming that inasmuch as the original lease reserved one-eighth royalty, and as it was void as to the infants, the entire one-eighth should be accounted for to him alone. At the same time Le Masters, guardian of the infants, two of whom had, in the meantime, become of

age, and the two thus becoming of age, instituted their suit in ejectment against the Colonial Oil Company, which was then in possession of the property, to recover possession of the same. This suit was based on the theory that the decree in the summary proceeding case required the purchasers to pay four-fifths of the royalty oil to the guardian, and provided that a failure to comply with the terms of the lease should operate a forfeiture, and that, inasmuch as the purchasers had paid only two-fifths, the right, title, and interest of the infants should revert back to them. The Colonial Oil Company, Goodkind, and Kleeberg filed their answer and cross-bill to the bill of Mansfield Headley, in which they set up the lease executed by Mansfield Headley and others and the summary proceeding case, and insist that under the lease Mansfield Headley was entitled to one-fifth of the royalty, and the infants to four-fifths thereof, subject to the widow's dower, and they plead the lease and record in the summary proceeding case as an estoppel. They also plead the division orders signed by Mansfield Headley as an estoppel, and ask by way of affirmative relief that all questions be settled and that the ejectment suit be enjoined. An injunction was granted. Answers were filed by South Penn Oil Company, Eureka Pipe Line Company, Snyder & Mellon, and the guardian, Le Masters, and his former wards, Albert and Florence. Depositions were taken, and on the final hearing the court decreed that the lessees should account to the heirs for the full one-eighth royalty. The questions to be determined are: First, are the Headley heirs entitled to participate in the full one-eighth royalty? and, second, are the lessees and their assigns liable to account for the additional one-sixteenth of the oil over and above the one-sixteenth that has gone to the Headley heirs, and in addition to the one-sixteenth which has been given to the grantees of the ancestor, Headley?

It is contended by plaintiff's counsel that there is no implied covenant of warranty in an oil and gas lease. This is based upon the theory that the lease from the Headley heirs to Hoopengartner, Wharton, and Karnes & Co. was a sale of the oil in place, and passed a fee-simple estate, and not merely a lease or rental contract. If this claim were correct, and had it been a grant of the oil in place, creating an estate in fee, then the authorities unanimously hold that there is no implied covenant of warranty, but that such covenant must be expressed in the deed; but, also, on the other hand, if the title passes an estate for years, with a reversion to the lessor, then there need be no express warranty of title or for peaceable and quiet enjoyment of the demised premises, but such covenant is implied in law. Where the lease contains such language as the one we have here, which says, "have granted, demised, leased, and let, and by these pres-

ents does demise, grant, lease, and let, unto the party of the second part," it is universally held that there is an implied covenant of title for quiet and peaceable enjoyment for the purposes of the lease, when there is no statute restricting or qualifying the meaning of such words. This is not an open question in this state. In the case of *Knotts et al. v. McGregor*, 47 W. Va. 566, 35 S. E. 899, this is held to be the law, wherein it is said: "In a lease for oil and gas, there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease." "With respect to estates less than freehold, covenants for title were from the earliest times implied, not only from the words of leasing, 'such as "demise," "concessi," or the like,' but even from the relation of landlord and tenant; and such is the law at the present day, unless where, as in some of the United States, it has been altered by legislation." Rawle on Covenants (5th Ed.) § 272. In 18 Am. & Eng. Ency. Law (2d Ed.) 612, it is said: "It is a well-settled rule at the present time that the law will, in the absence of any express covenant, imply a covenant on the part of the lessor for the quiet enjoyment of the premises by the lessee." And we find, in *Black v. Gilmore*, 9 Leigh (Va.) 446, 33 Am. Dec. 253, that, while the court did not expressly say that words of a lease imply a covenant for quiet enjoyment and good title, yet it held that where a conveyance is of a grantor's estate, words of a lease do not amount to a covenant for quiet enjoyment, and in the discussion of this question the distinction is drawn that, where the conveyance is of the fee, no implied covenant arises, but otherwise where it is a demise for years, and passes an estate less than the fee. To the same effect is *McClenahan v. Gwynn*, 8 Munf. (Va.) 556; the second point of the syllabus being: "Where a lease is assigned, and the assignee is evicted through a defect in the lessor's title, he may sue the lessor for compensation." Mr. Minor, in his work (volume 2, at page 707), says: "A warranty is implied wherever, upon the conveyance of a freehold, there is a reversion in the grantor and the land is held of him." And we find in *Lomax, Digest*, vol. 2, pp. 320, 321, treating of this subject: "Lord Coke says, if a man make a lease for life by the word 'dedi,' reserving rent, and adds an express warranty, it will not take away the warranty in law; for the lessee will have his election to vouch by force of either of them. The doctrine of implied warranties still exists where estates tail or for life are created by the word 'dedi' or 'give'; and the donor does not part with the reversion. * * * Words of a lease, in consequence of a freehold estate (it would be otherwise in the conveyance of a term for years), do not amount to an implied warranty." And on page 329: "There are some words which, when used in particular contracts, will create

a covenant. Thus the words 'grant' or 'demise,' in a lease for years, create a covenant in law for the quiet enjoyment of the lands demised during the term. And if the lessee be evicted by the lessor, or by any other person claiming a lawful title to the land, he may bring an action thereupon." "The words 'grant' and 'demise' in a lease for years create an implied warranty of title and a covenant for quiet enjoyment." *Stott v. Rutherford*, 92 U. S. 107, 23 L. Ed. 496. In *Barney v. Keith*, 4 Wend. (N. Y.) 502: "If an estate for years be granted by an indenture of lease, the words 'grant and demise' import covenants of warranty and for quiet enjoyment." And in *Frost v. Raymond*, 2 Caines (N. Y.) 188, 2 Am. Dec. 228, Chief Justice Kent, in an able discussion of this question, points out what words, contained in a lease, will imply a warranty of good title and for quiet enjoyment, and the words contained in the lease which we have here are embraced in his holding. And in *Tone v. Brace*, 11 Paige, Ch. (N. Y.) 566, we find: "The provision of the Revised Statutes that no covenant shall be implied in any conveyance of real estate does not extend to implied covenants of warranty as to the quiet enjoyment of the demised premises in a lease of a term of years, creating a mere chattel interest in land. Such a lease is not, in the ordinary acceptation of the term, a conveyance of the land." And in *Kinney v. Watts*, 14 Wend. (N. Y.) 38, we find: "At common law certain words, when used in a conveyance of real estate, of themselves import and make a conveyance in law, as 'dedi,' 'concessi,' 'demisi,' etc. As if a man by deed demise land for years, and the lessee is ousted, covenant lies upon the word 'demisi.' No doctrine is more familiar or better settled." And again we find, in *Grannis v. Clark*, 8 Cow. (N. Y.) 39, the same doctrine, and in speaking on the subject the court says: "Therefore, when a man demises lands to which he has not any title, an action of covenant will lie against him, although the lessee never entered; for he is not bound to commit a trespass. * * * It is perfectly clear, therefore, that the words 'demise' and 'grant' import a covenant that the lessor had authority to make a valid lease of the premises." And in *Pomfert v. Ricraft*, 1 Saunders (Eng.) 322, it is held that in the conveyance of an estate less than a fee, as for a term of years, a covenant of title and quiet enjoyment is impliedly warranted. And in note 2 to this case we find: "As where a lessee is ousted, either by the lessor himself or another person who has a prior title, an action of covenant lies against the lessor on the implied covenant in law upon the word 'demise.' * * * But it is not necessary, in order to support this action that the lessee should be actually evicted. For the word 'demise' implies a power to lease. Therefore, where a man demises lands

to which he has not any title, an action of covenant will lie against him, although the lessee never entered; for he is not bound to commit a trespass." And in *Holder v. Taylor*, Hobart (Eng.) 46, the same doctrine is announced, and in note 1 thereto it is said: "Implied covenants, or covenants in law, and such as the law raises or implies, though not expressed. Thus the word 'demisi' or 'concessi,' in a lease for years, imports a covenant on the lessor's part that he has a power to lease, and also for quiet enjoyment during the term; and, if the lessee or his assignee be evicted by any one having title, he may maintain an action upon such implied covenant." See authorities there cited. And in the case of *Conrad v. Morehead*, 89 N. C. 34, the court says: "Hence it has been held that, where land has been granted for a term of years by the words 'demise' or 'grant,' without any express covenant for quiet enjoyment, the lessee or his assigns, if ousted by rightful title, may sustain an action on the implied covenant that the lessor warranted that he had a good title at the time of the execution of the deed creating the lease. This is because the word 'demise' implies the power of letting, as the word 'grant' that of giving." And in *Lovering v. Lovering*, 13 N. H. 518, in speaking upon this subject, the court says: "All covenants between lessor and lessee are either covenants in law or express covenants. Illustrations of this class are to be found in the effect of the words 'grant,' 'demise,' etc., from which the law implies a covenant that the lessee shall hold and enjoy the term against all lawful incumbrances." And in *Wisconsin, in Eldred v. Leahy*, 31 Wis. 546, it is said: "At common law a covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words made." Also, in *Maeder v. City of Carondelet*, 26 Mo. 112, it is declared that, "although a covenant for quiet enjoyment is implied from the word 'demise,' in a lease, this implication will not be raised where it is expressly stipulated in the lease that nothing therein contained shall be construed to imply a covenant for quiet enjoyment." In *Dexter v. Manley*, 58 Mass. 14, we have the same doctrine, and in *Young v. Hargrave's Adm'r*, 7 Ohio, 354, we find: "In a lease for life, containing no express covenant for quiet possession, no word but 'dedi'—'I give'—can be held to imply such warranty." Now, then, we find that in a conveyance of an estate less than a fee, as for a term of years, that a covenant of warranty of title and for quiet and peaceable enjoyment is implied.

Then the question is, does the lease convey a fee-simple estate, or an estate for years? This is the ordinary oil and gas lease, with a reversion to the grantors, for the purpose of mining and operating for oil and gas, laying pipe lines, building tanks, stations, and struc-

tures thereon, and, in consideration thereof, to pay as royalty a one-eighth part of all the oil produced and saved from the leased premises. While we have some cases which may be construed to hold that the ordinary oil lease, investing the lessee with the right to remove all the oil in place in the premises in consideration of a certain stipulated royalty, is, in legal effect, a sale of a portion of the land, yet these cases do not conform to many others, which treat such contracts only as leases, and a conveyance for a term of years, and not to pass an estate in fee. We do not think the lease in question can be so construed as to be other than a contract which passes only an estate for years. "A lease is a contract for the possession and profits of lands and tenements on the one side, and the recompense or rents on the other, or, in other words, a conveyance to a person for life, years, or at will, in consideration of a rent or other recompense." 18 Am. & Eng. Ency. Law (2d Ed.) 597. And a lease is defined to be, by Blackstone, properly a conveyance of lands or tenements in consideration of rent or other recompense, made for life, for years, or at will, but always for a less time than the lessor hath in the premises, because, if it be for the whole interest, it is more properly an assignment than a lease. In fact, there is no difficulty in determining the requisites of a lease. There is no difference of opinion as to that. The definitions are uniform, but the difficulty is in always determining whether or not the particular paper or contract falls within the definition. Applying the definition to the contract here, and we find that it falls clearly within the true meaning of the word lease. It conveyed an estate less than the lessor had in the premises; it was to remain in force for the term of three years from its date, and as long thereafter as oil or gas, or either of them, was produced from the premises by the lessees; it contained the usual words essential to its operation, which are, "grant, lease and let"; it gives to the lessees the right to the possession of the lands for oil and gas operations, with the profits derived therefrom; and, on the other hand, the lessor it to be recompensed by his receiving a certain part of the production as royalty. It cannot be said that the provision in the lease, which says that it shall remain in force as long after three years as oil and gas, or either, is produced by the lessee, can be so construed as to detract from it the essentials of a lease, and make it such a conveyance as to pass the whole estate to the lessor. This is an optional provision, and there is a clause in the lease reserving unto the lessees the right to surrender the lease for cancellation at any time. Therefore Thomas J. Headley, the father of Mansfield Headley, having in his lifetime conveyed to the South Penn Oil Company and to Loomis a one-half of the oil and gas underlying the 46 and 24 acres, respectively, and which should be construed to be one-half of the prevailing one-eighth royalty, and

Mansfield Headley having leased to Hoopen-garner, Wharton, and Karnes & Co., the remote assignors of the defendants, his interest in the seven-eighths of the oil and gas underlying the 70 acres, reserving one-fifth of the one-eighth royalty, would be liable on his warranty to Hoopen-garner, Wharton, and Karnes & Co., or those claiming under them, but just to what extent it is not necessary to determine, for reasons hereinafter appearing; nor is it absolutely necessary for the decision of the case to construe the conveyance from the Headley heirs, and to determine whether or not it contains implied covenants of title and quiet enjoyment, but this question is presented by the record, and it is proper and just that it should be considered and determined; and to decide it is only to give two reasons, instead of one, why Mansfield Headley is not entitled to the relief he asks.

The doctrine of estoppel is invoked, and this is the additional reason for denying the plaintiff relief. All the parties who at that time were interested in the oil and gas underlying these two tracts of land signed division orders, of date April 17, 1900, and August 9, 1900, respectively, agreeing to a division of the oil and gas, and directing how it should be distributed, and by doing so have contracted in regard thereto, and thereby adjusted and settled the amount to be received by them, respectively, prior to the signing of these agreements and stipulations, and as to how it should be divided in the future. This amounts to a construction of the contract by the parties thereto and those interested therein. These division orders were signed by all the interested parties, including the assignors of the defendants Goodkind & Kleeberg and the Colonial Oil Company. Goodkind & Kleeberg purchased the working interest in this lease, and received a conveyance therefor on the 21st day of December, 1900, and the Colonial Oil Company purchased from Goodkind & Kleeberg the working interest on the 7th day of January, 1902. Both interests were acquired subsequent to the time of the execution of the division orders. These purchases by Goodkind & Kleeberg and the Colonial Oil Company were made with the full knowledge of the existence of these division orders. They knew that the parties had agreed among themselves as to their respective interests, and, acting upon this, they became the purchasers of the property, and, having so acquired these interests, they cannot now be prejudiced by Mansfield Headley asserting a greater interest than that which he stipulated for in these contracts, and which they believed he had at the time they acquired the property. It would be a fraud upon their rights to permit him to do so. Having made the agreement to accept one-fifth of one-sixteenth of the royalty oil, he will not be permitted, after the defendants have acted upon the agreement, to assert that he is now entitled to one-fifth of one-eighth thereof. Plaintiff says that the defendants Goodkind

& Kleeberg and the Colonial Oil Company knew that by the requirements of the decree they were required to pay the one-eighth of all the oil as royalty; that the title papers in plain language told them so; that when they took an assignment of the deed from the purchasers they were bound to know the contents of their title papers, and that those papers told them that the Headleys must be paid one-eighth of the royalty: that when the first division order was signed Snyder had actual notice that there was an outstanding royalty in South Penn Oil Company and Loomis, and their title papers told them that one-eighth should be paid to the Headleys; and if Goodkind & Kleeberg and the Colonial Oil Company had looked to their title papers, which they were bound to do, they would have known the facts regarding the title. It may be true that they could have ascertained, by an examination of the lease and the title papers, that the Headleys were to receive a one-eighth of the oil as royalty; but they are not called upon nor required to go further than the contract made by all the parties interested in the division of the oil. Equity did not require them to search the records, nor even look to the lease, to see what interest Headleys had, when the contract itself expressly represented and told them what that interest was. No one will doubt the right of Headley to have contracted with reference to his interest. He did contract with reference to it, and by his contract he must now stand. He cannot be heard to say: "Yes, I did contract to receive a one-fifth of one-sixteenth, but I now repudiate that contract, and I assert that I am entitled to one-fifth of one-eighth, and that the Colonial Oil Company must pay that amount to me, notwithstanding the fact that in making the purchase of the seven-eighths working interest they knew of the existence of my contract, knew what I had agreed to accept, and knew all the conditions in reference to the division of the oil." The case of *Brant v. Va. Coal & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927, is cited and relied upon; but it is not an analogous case. The defendant company was not destitute of knowledge of the true state of Mansfield Headley's title; but it may, and could, have known of the condition of the title, and that the lease to Hoopengartner, Wharton, and Karnes & Co. reserved a one-eighth royalty, yet it cannot be said that Mansfield Headley could not contract with reference to that royalty interest, by compromise, by sale, or in any other way, and when the defendants find in existence a contract by which the plaintiff has dealt with his interest, and in which it is definitely stated, then, notwithstanding the lease and title papers may represent his interest to be one-fifth of one-eighth, they may presume that this interest has in some way been changed by this contract or division order, and may act upon this presumption without making further inquiry as to the interest of the parties signing the contract, and

the plaintiff will be estopped from asserting, to their detriment, an interest greater than that for which his contract provides. 2 Pomeroy's Equity Jurisprudence, § 810, says: "It has been said that, in alleged cases of estoppel by conduct affecting the title to land, the record of the real title would furnish a means by which the other party might ascertain the truth, so that he could not claim to be misled, and could not insist upon the estoppel." "This conclusion," says Mr. Pomeroy, "if correct at all, is correct only within very narrow limits, and must be applied with the greatest caution. It must be strictly confined to cases where the conduct creating the estoppel is mere silence. If the real owner resorts to any affirmative acts or words or makes any representations, it would be in the highest degree inequitable to permit him to say that the other party who had relied upon his conduct and been misled thereby might have ascertained the falsity of his representations." Therefore when the Colonial Oil Company saw the division order, setting forth what had been agreed upon between the plaintiff and the other interested parties, they were not required to probe into the matter and find out just how, and upon what consideration, and for what reason, the contract was entered into. If the lease did provide for one-fifth of one-eighth royalty, and the contract between the parties provided for one-fifth of one-sixteenth, they had the right to presume that there had been some negotiations or dealings between the parties, by which his interest had been reduced from one-fifth of one-eighth to one-fifth of one-sixteenth.

There are two kinds of estoppel by contract—one where the party is estopped to deny the truth of the facts agreed upon and settled by the terms of the contract, and the other is an estoppel arising from the acts done under or in performance of the contract. "If in making a contract the parties agree upon or assume the existence of a particular fact as the basis of the negotiations, they are estopped to deny the fact so long as the contract stands." 16 Cyc. 719; *Grand Rapids Fourth Nat. Bank v. Onley*, 63 Mich. 58, 29 N. W. 513. The plaintiff worked on the lease, and after oil was found he was the first one to inform the lessees of the interest of the South Penn Oil Company and Loomis, and when this information was received the said division orders were signed, directed to the Pipe Line Company, to divide and distribute the oil in certain proportions to the interested parties, and under and in compliance therewith the company distributed the oil for several years without complaint upon the part of any one; yet Mansfield Headley knew all that was going on, and exactly in what proportions the oil was being distributed, because his contract plainly told him so, and he must know its contents, and will not be heard to say, as he does, that at the time he signed the orders he did not know his rights in the premises, but thought he was

getting all that he was entitled to under the lease. This is hardly tenable, even if he could now make such claim. When he says his contract was that the heirs were to have one-eighth of the production, we cannot conclude, from all the facts and circumstances, that this is so, especially in view of the division orders, and he having acquiesced in the distribution of the oil thereunder for about three years, and most especially when the rights of third parties would be affected thereby. While the division orders were directed to the Pipe Line Company for the purpose of having the oil distributed to the parties in proportion to their relative interests represented therein, yet they should be treated, certainly for the purposes of this case, as fixing and representing the true interests of the parties thereto. If not a contract binding the parties, then what was the purpose of its execution? It was intended by the parties to serve some lawful purpose. Of course, they would be a protection to the Pipe Line Company, and, if so, we should carry it further, and hold it to be a binding stipulation, shaping the interests of the parties, especially third persons contracting with reference to these interests therein defined and fixed. "Estoppel by contract" is a term which is intended to embrace all cases in which there is an actual or virtual undertaking to treat a fact as settled, as, for example, a contract based upon one's having a certain title to property will estop the parties in the performance of the contract from claiming a different title. "The estoppel in this class of cases is fixed by the execution of the contract. Nothing further need be shown, where the fact in question is clearly agreed or assumed." Bigelow, Estoppel (5th Ed.) 460.

This brings us to the consideration of the interests of the infants. The lease which was made by Mansfield Headley and the widow and Le Masters, as guardian of the infant heirs, on the 17th day of March, 1899, having been made by the guardian leasing the infants' interests, without authority of the court having been first obtained by proper judicial proceedings, is admitted by all to be inoperative and void as to the infants, and only served to pass the interest of Mansfield Headley and the widow. This being so, summary proceedings were instituted by Le Masters, the guardian, for the purpose of disposing of the oil and gas of the infants in the two said tracts of land. Such proceedings were had therein as resulted in a sale to Hoopengartner, Wharton, and Karnes & Co., the same persons to whom the former lease, of date March 17, 1899, had been given, and upon the same terms. No question is made as to the regularity of the proceedings under which this sale was made. But it is claimed that, as Thomas J. Headley in his lifetime had disposed of one-sixteenth of the oil production, the four infants are only entitled to four-fifths of one-sixteenth thereof, and that the lessees should be protected under the

covenants of general warranty of title in the deeds from the ancestor, Headley, to the South Penn Oil Company and Loomis, and only required to pay the one-half of the royalty to the South Penn Oil Company produced from the 46-acre tract, and to Loomis one-half of the production from the 24 acres, and to Mansfield Headley one-fifth of one-sixteenth, and to the infants four-fifths of one-sixteenth of the royalty, and to require them to pay one-eighth royalty to the heirs will be to demand of them three-sixteenths royalty, when, under their contract, they should pay only one-eighth royalty. The decree authorizing the guardian to sell the undivided interest of the infants to the oil and gas provided that, in addition to a certain bonus, they should receive four-fifths of one-eighth of all the oil produced, and under the decree the lessees purchased, agreeing to pay them the four-fifths of one-eighth, and a deed was made to them in conformity therewith. There is no warranty in this conveyance, except a special warranty, as provided by section 17, c. 83, of the Code of 1899 [Code 1906, § 8244] and by the terms of this decree, and deed made in pursuance thereto, there was passed to the vendees the seven-eighths working interest in the oil and gas, reserving to the infants four-fifths of one-eighth of the entire production. It was sold upon these terms, and this is the plain construction of the deed. This sale being a judicial sale, the rule "caveat emptor" applies, and although the title fails, or the lessees may not get as much oil as they thought they were purchasing, they will not be relieved from the payment of the consideration. The court sold just such title as was vested in the infants, could have sold nothing else, and the purchasers were bound to know this. They purchased at their own risk, and are held to know the source and condition of the title. In this character of sales there is no warranty, except special warranty, before referred to. In *Williamson v. Jones*, 43 W. Va. 563, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891, it is said: "A purchaser at a judicial sale is conclusively held as having notice of all facts, touching the rights of others in the property sold, disclosed by the record of the case." And Judge Brannon, speaking for the court, says: "Prudence would make a man inquire where the real estate in the land was. A purchaser at a court sale purchases under the rule 'caveat emptor' (look out, buyer). The court or commissioner warrants nothing."

Apply this doctrine, and the lessees are conclusively held to know that the South Penn Oil Company and Loomis held title to one-sixteenth of all the oil produced on this land. But even ignorance will not give relief or excuse from payment of the purchase money. "The purchaser's ignorance that a particular instrument forming a link in his chain of title was in existence, and his consequent failure to examine it, would not in the

slightest affect the operation of the rule. An imperative duty is laid upon him to ascertain all the instruments which constitute essential parts of his title, and to inform himself of all that they contain." Pom. Eq. Jur. (3d Ed.) § 626, and many cases cited. Objection after confirmation of sale comes too late. "In Virginia the maxim 'caveat emptor' strictly applies to all judicial sales. Objection for defect of title must be made before confirmation of report of sale." *Hickson v. Rucker et al.*, 77 Va. 135. And to the same effect is *Long v. Weller's Ex'r*, 29 Grat. (Va.) 347. And in *Cooper v. Hepburn*, 15 Grat. (Va.) 551, it is held that where a court directs a sale of infant's real estate, and the sale is made and confirmed, the purchaser stands upon the same footing as any other purchaser at a judicial sale, and is not entitled to any other or further relief. "The purchaser at a court sale buys at his own risk—under the rule of 'caveat emptor' (let the purchaser take care). The court ordering the sale, or the commissioner making it, warrants nothing. A person buying at such sale is conclusively held to have notice of all the facts which an examination of the record would have disclosed to him. * * * And it is the duty of the purchaser to ascertain for himself the title to the land as well as the extent thereof, and if he have just ground of objection, for want or defect of title, he should present his objections to the court before confirmation of the report of sale. A person having purchased property at a judicial sale, and permitted the sale to be confirmed, without objection, is not entitled to be relieved from the purchase, or from paying the purchase money, though he has acquired no valid title to the land purchased by him." *Hogg's Eq. Pro.* § 687. But the same author says this doctrine is subject to the qualification that the purchaser is entitled to relief where mistake of material facts is afterwards discovered, or fraud; but such mistake must be mutual, and if fraud or mistake be relied on by the purchaser, after the sale has been confirmed, it must be clearly and distinctly charged and proved. Neither fraud nor mistake is shown here on the part of the infants.

The appellants contend that the infants are estopped to claim more than four-fifths of one-sixteenth of all the oil produced, because two of them, who were plaintiffs in the ejectment suit, received royalties after attaining their majority, and at least three of them were past years of discretion, and also that the guardian and heirs, having accepted for three years before suit brought the amount agreed upon under the division orders, are estopped to deny the terms under which the operations were directed. "An infant of years of discretion by intentional fraudulent conduct will be barred under the doctrine of estoppel in pais from asserting her title to either real or personal property against one misled thereby." *Williamson v. Jones*, supra. The record fails to disclose

fraudulent conduct upon the part of the infants. We see nothing that calls for the application of the doctrine of estoppel as to them. The fact that some of them received their share of the royalties after they had attained their majority does not do so. An infant may or may not, at his election, affirm or repudiate, after he attains his majority, a contract made by him during minority, and it may be, if the infants were seeking to avoid the sale, that they would not be permitted to do so if they had received the royalties after becoming 21. That would be a ratification and affirmance of the contract; but very different is this case. They do not seek to avoid the sale, but are asking strict compliance therewith, according to the plain construction of the deed. The fact that they accepted a part of the consideration without any objection, or claim that more was due them, will not militate against them. The lessees knew what they were entitled to receive, and the fact that they did not pay it, and that the infants did not demand it, but accepted one-half of the amount thereof for three years, will not relieve the lessees from the payment of the remainder of the consideration. Nor will the fact that the guardian signed the division orders, agreeing to take one-half of what the deed called for, estop them from now claiming their full share. Even if they had known of his having signed such orders, they could have treated them with impunity. He was not empowered to make such a contract for them, and the lessees were bound to know this, and, knowing that he was acting without authority and in excess of his powers, they cannot claim the advantage of such conduct to the detriment of the infants.

Having held that there is an implied covenant for title and quiet enjoyment in the lease made by the Headley heirs, in which Mansfield Headley passed his interest, and having determined that the infants are entitled to four-fifths of the one-eighth royalty, it may be asked, what is the extent of the liability of Mansfield Headley on his implied warranty; that is, should it be treated as several, or joint and several? But, as before stated, it is not material, because, in signing the division orders, the lessees are bound thereby, as well as the plaintiffs. They recognize, in these orders, his interest to be one-fifth of the one-sixteenth royalty, have acted upon them for years, and are now claiming under them; and, if binding upon Headley, they must also bind the lessees, and they are concluded from saying otherwise.

The appellants further claim that under the authority of *Ammons v. Ammons*, 50 W. Va. 405, 40 S. E. 490, all parties should have been convened, and all questions affecting the royalty settled, and that they should have a decree for the seven-eighths they purchased. In that, as in this, case, there was a sum-

mary proceeding to sell infants' lands; but there the court decreed that the purchaser should pay one-half of the royalty to the life tenant and one-half to the infants. Afterwards, this court, in *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L. R. A. 292, having decided that the life tenant is only entitled to the interest on the royalty during the continuance of the life estate, and that the residue or corpus of the royalty will be paid to the remaindermen, the South Penn Oil Company, the purchaser, declined to make further deliveries of the royalty oil, and filed its petition for the purpose of having the purchase money distributed, and to that end asked that the decree should be corrected, on the ground that the summary proceedings were not in conformity with the statute and so erroneous as to becloud and endanger its title. And it was held by this court that the purchaser could file his petition in said proceedings, for the purpose of having such error corrected, and its title cleared, and have relief given so far as within the power of the court. This proceeding was based entirely upon the irregularity of the summary proceeding and the irregular manner in which the proceeds arising from the sale were being distributed. There was no controversy as to the interest held by Armina Ammons and Milton A. Ammons, guardian for the infants, Armina Ammons owning the life estate, with the remainder to the infant children; and, this being so, the court decreed the royalty oil to be divided equally, one-half to the life tenant and one-half to the infant remaindermen, and therefore, under the doctrine of *Wilson v. Youst*, supra, the South Penn Oil Company asked to have the proceedings corrected so as to have a proper distribution of the royalty. This was perfectly proper, because, the respective interests in the property being undisputed, it was then a matter of law as to whom the royalty should be paid, and if, in the summary proceedings, to which they were all parties, an improper order as to its distribution was made, it was right and proper to correct it. But very different is this case. The regularity of the summary proceedings and decrees, under which the sale was made, is not questioned. The guardian was directed by the decree to make sale upon certain terms, and by the provisions of this decree he should have been and was guided, and when the sale was made the purchasers agreed to pay four-fifths of one-eighth of all the oil produced. This sale was confirmed by the court, and a deed made in accordance with the provisions thereof, and, now that this has been done, the purchasers cannot have these proceedings and decrees opened, because they are final and conclusive upon them.

The plaintiff assigns as cross-error that the court erred in perpetuating the injunction enjoining the prosecution of the ejectment suit of *Elisha Le Masters*, guardian,

and others, against the Colonial Oil Company. This is based upon the fact that the lessees failed to pay the full share of the royalty to the infants to which they were entitled. While there is a provision in the deed made by the guardian in the summary proceeding to the effect that a failure to comply in all respects with the terms and stipulations of the deed would work a forfeiture, and that the property would revert to the heirs, there is no claim that the lessees have failed in any respect to comply with the contract, except as to the payment of four-fifths of one-sixteenth of the oil production, and this was because of the complications which gave rise to this litigation. They placed a different construction upon the contract from that given it by the heirs, and have so confided in their construction as to litigate it through this court for decision. This is not such a voluntary and willful failure and refusal to comply with its provisions as should work a forfeiture of the estate acquired under the deed. It appears from the record that their failure to pay must have been in good faith, relying upon their construction of the deed. To impose a forfeiture is a harsh penalty, and courts are slow to do so, except where it is plainly demanded. While the common-law courts recognize and will enforce forfeitures in proper cases, yet courts of equity will never do so, but, on the contrary, will relieve against them. It is said in *Craig v. Hukill*, 37 W. Va. 523, 16 S. E. 364: "Affirmative relief against penalties and forfeitures was one of the springs or fountains of equity jurisdiction, and the jurisdiction was very early exercised; and it would be going in the very opposite direction, and acting contrary to its essential principles, to affirmatively enforce a forfeiture. The elementary books on equity jurisprudence state the rule, as almost an axiom, that equity never enforces a penalty or forfeiture." 2 Story, Eq. Jur. § 1319; 1 Pom. Eq. Jur. § 459; Bisp. Eq. § 181; Beach, Mod. Eq. Jur. § 1013. And also it is said in *Hukill v. Myers*, 36 W. Va. 645, 15 S. E. 151: "Courts of equity were originally founded, among other purposes, to relieve against the hardness of courts of common law, and notably to relieve against forfeiture, even where it clearly exists; and very safely it can be said that equity looks with disfavor upon forfeitures, and will not be quick, active, or alert to see or declare or enforce them." The infants have at all times had their remedy for pecuniary reimbursement. And not only that, but they are now in this suit asking that the lessees be compelled to pay the back royalties and have their future interests determined. They certainly cannot claim under the deed future royalties, and at the same time claim the benefit of a forfeiture. This would be extremely inconsistent, and not to be countenanced. Therefore, even if a violation of the provisions of the deed would forfeit the estate, yet, under the facts of the

case, there is no forfeiture, and the prosecution of the ejectment suit was properly enjoined.

The South Penn Oil Company cross-assigns error. There is no question but what it is entitled to one-sixteenth of all the oil produced on the 46-acre tract, and that Loomis is entitled to one-sixteenth of all the oil produced from the 24-acre tract. There is no controversy as to this; but the lower court failed to so provide, which it should have done.

The infants are entitled to have an accounting for their full share of four-fifths of one-sixteenth of the royalty oil since the first production, in addition to the four-fifths of one-sixteenth which they have already received, this interest, of course, being subject to the widow's dower; and, inasmuch as there have been various assignees of the lease since the first production of oil, the decree of the circuit court is reversed, and this cause is remanded, to be proceeded in and determined according to the principles herein announced, and according to the rules and principles governing courts of equity.

McDOWELL COUNTY BANK et al. v. WOOD et al.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1900.)

1. JUSTICES OF THE PEACE — ACTIONS ON NOTES.

The holder of several promissory negotiable notes, constituting separate demands, may maintain separate actions before a justice of the peace upon such notes where the amount of each does not exceed the jurisdiction of a justice, and where, if consolidated, the aggregate amount thereof would exceed such jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 169.]

3. SAME—CONSOLIDATION OF CLAIMS.

Section 48, c. 50, Code 1899, § 1899, Ann. Code 1906, providing that where a plaintiff has several demands against the same defendant arising out of contract, express or implied, he must bring his action for the whole amount due and payable, does not apply where the aggregate amount thereof would exceed the jurisdiction of a justice. It only applies where, after the consolidation of all such demands, the whole amount is cognizable by a justice.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 169.]

3. SAME—ENTRY OF JUDGMENT.

Where an action is commenced in a justice's court by summons, and one of the defendants appears before the return day thereof and waives service and confesses judgment, and the justice does not enter judgment until the return day of the summons, this does not render the judgment void.

4. SAME.

Quære: Where a defendant appears and confesses judgment before the return day of the summons, can the justice enter judgment immediately, or should he wait until the return day of the summons?

5. JUDGMENT—CONFESSION—ENTRY.

That part of section 114, c. 50, Code 1899 (section 2065, Ann. Code 1906), which provides that when a judgment is confessed it shall

be entered without delay is directory and not mandatory.

(Syllabus by the Court.)

Appeal from Circuit Court, McDowell County.

Action by the McDowell County Bank against J. A. Wood and others. Decree for defendants. Plaintiff appeals. Reversed and remanded.

Rucker, Anderson & Hughes, for appellants.
D. J. F. Strother, for appellees.

SANDERS, J. This is a suit in equity brought in the circuit court of McDowell county by the McDowell County Bank, a corporation, I. T. Mann, and I. J. Rhodes against J. A. Wood, George French Strother, Zelma E. Moses, C. L. Moses, Jeannette H. Hammer, and W. L. Hammer, for the purpose of enforcing three judgment liens of \$253.75 each, in favor of the plaintiffs, respectively, against certain real estate at one time owned by the defendant J. A. Wood, and by him aliened to the defendants, Moses and Hammer; the deed therefor not having been recorded until after the rendition and docketing of said judgments. All of the defendants except J. A. Wood demurred to and answered the bill.

In order to properly dispose of the questions arising upon the record, it will be necessary to give a statement of the facts out of which this controversy grows. On the 16th day of May, 1901, the Dry Fork Lumber Company executed three promissory negotiable notes for \$250 each, payable to G. F. Strother and G. D. Heasley in 60, 90, and 120 days after date, respectively. These notes were indorsed by the payees and by J. A. Wood, and discounted before maturity by the plaintiff McDowell County Bank. On the 17th day of September, 1901, the bank assigned one of the notes to I. T. Mann, another to I. J. Rhodes, and retained one itself, and on the same day the assignments were made, the bank, I. T. Mann, and I. J. Rhodes brought actions on their respective notes before a justice of the peace. The summons in each case was returnable on the 23d day of September, 1901, but on the 20th day of September the defendant Strother appeared and waived service of process and confessed judgment in each of the three cases for the amount claimed, and on the return day of the summons the defendant Wood likewise appeared and confessed judgment in each of the cases, at which time judgment was entered against the defendants Strother and Wood, in each of said cases, for the sum of \$253.75.

The defendants claim that the assignment of the two notes to Mann and Rhodes was for the purpose of reducing the amount so as to bring it within the jurisdiction of a justice, and for that reason the judgments of the justice are void; that jurisdiction cannot be conferred by any manipulation of a debt which exceeds the amount of a justice's jurisdiction for the purpose of reducing it so as to

bring it within the jurisdictional limits. The aggregate amount of the notes is \$750, exclusive of interest, and, of course, if consolidated, would exceed the jurisdiction of a justice. They, however, constituted three separate and distinct demands of \$250 each. The justice had jurisdiction to render judgment upon either of these demands, but when aggregated the amount exceeded his jurisdiction. At common law separate suits could be maintained upon separate and distinct demands, but not where the claim was entire and inseparable, and, where such entire claim was split up and suit brought for a part thereof, the creditor would be precluded from recovering the residue. Freeman on Judgments, § 238; Phillips v. Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Snow Steam Pump Co. v. Dunn, 119 N. C. 77, 25 S. E. 741; Gottlieb v. Fred W. Wolf Co., 75 Md. 126, 23 Atl. 198; Staples v. Goodrich, 21 Barb. (N. Y.) 317; Smith v. Jones, 15 Johns. (N. Y.) 229. This being the common-law rule, separate suits could have been maintained by the bank upon each of these notes before a justice of the peace, unless by our statute, section 48, c. 50, Code 1899 (section 1999, Ann. Code 1906), this rule has been changed. This statute provides that, when a plaintiff has several demands against the same defendant, founded on contract express or implied, he must bring his action for the whole amount due and payable at the time such action is brought, whether the demands be such as might have heretofore been joined in the same action or not, and provided, further, if he bring his action for a part only, the judgment in the suit, whether for or against him, shall bar him from recovering the remainder. We must inquire as to the meaning of this section, and whether or not it applies to all claims, or to claims and demands, the aggregate amount of which does not exceed the jurisdiction of a justice. If we hold that it applies to all claims, whether in the aggregate they exceed such jurisdiction or not, this would mean that a party must consolidate his claims, even though, when consolidated, a justice has no jurisdiction. This statute, according to the rule announced in the case of Flat Top Grocery Co. v. McClaugherty, 46 W. Va. 419, 33 S. E. 252, applies only to separate demands where the aggregate does not exceed the jurisdiction of a justice, and is held not to apply where the aggregate amount does exceed such jurisdictional limit. It is contended, however, that the case of Grocery Co. v. McClaugherty, supra, is not parallel to the case in hand; that in that case there were two notes due and payable exceeding the amount of the jurisdiction of a justice, and suit was brought on one before the justice and judgment rendered thereon, and then suit was brought on the other—not before the justice, but in the circuit court. The fact that suit was brought upon one of these notes before

a justice and the other in the circuit court was not the reason for the court's decision, but it was based upon the fact that the two notes were separate and distinct demands, the aggregate amount of which exceeded the jurisdiction of a justice. Because the second suit was brought in the circuit court is no reason for claiming that there is a dissimilarity in the two cases, for, if the justice had jurisdiction to render judgment on the first note, he certainly would have had jurisdiction to render judgment on the second note, because it was within his jurisdictional amount. The conclusion reached in that case was that, the demands being separate, and in the aggregate exceeding the jurisdiction of a justice, separate suits could be maintained in any court having jurisdiction. And as to whether or not a justice would have jurisdiction would depend upon the amount involved in the particular action, and not whether he had previously rendered judgment upon one of the demands set up in a previous action. It would hardly do to hold that the circuit court had jurisdiction to entertain the action and the justice did not, when the amount was less than three hundred dollars. The case of Bodley v. Archibald, 33 W. Va. 229, 10 S. E. 392, is relied upon to support the contention of the defendants. While it is true a writ of prohibition was awarded in that case to prevent the justice and creditor from enforcing the judgment, yet upon examination it will be found that the claim there was not separable, but an entire, indivisible one.

The foregoing are the reasons for the decision in this case, recognizing Grocery Co. v. McClaugherty, supra, as law. But, while individually I regard that case as controlling and binding upon this court, yet I do not regard it as sound. The construction given to the statute in that case is strained, and renders it practically nugatory. The act was designed to prevent separate suits before a justice upon separate and distinct demands, and to thereby rid the defendant of being mulcted in costs and vexed with a multiplicity of suits when the whole amount could be consolidated and included in one action. But it is said in Grocery Co. v. McClaugherty, supra, that this applies only to demands where, in the aggregate, they do not exceed the jurisdiction of the justice, and that, where the claims do in the aggregate exceed such jurisdiction, then separate suits can be maintained upon each separate demand. As in that case, the demands were separate, and an action was brought upon one of them before a justice, and the other in the circuit court. The aggregate of the claims exceeded the jurisdiction of the justice. And the court held that the judgment before the justice could not be pleaded in bar to the action brought in the circuit court. If the second action was maintainable in the circuit court, and if the judgment before the justice could not be pleaded in bar, then there is no reason why the second suit could not have been maintained be-

fore a justice, the sum being less than \$300, and the justice having concurrent jurisdiction with the circuit court. Therefore the construction given to the statute in that case is that, if the demands in the aggregate exceed the jurisdiction of a justice, the plaintiff may bring as many suits before a justice as he has separate and distinct demands, and one judgment cannot be pleaded in bar to subsequent actions. This is certainly not within the letter or the spirit of the statute, because, by its positive language, it says that all separate demands shall be united, and imposes as a penalty for not uniting them that the plaintiff shall be precluded from recovering the remainder. Therefore, if the plaintiff chooses to resort to the justice's court for the collection of his debt, and sues upon one of his demands, he thereby loses the right to recover the remainder, under a proper and reasonable construction of this statute, if the first judgment is pleaded in bar of the second suit. The result of the construction given to this statute is that, if one has six notes of \$50 each, he is required, before a justice of the peace, to consolidate them and bring one action, whereas, if he has 20 notes for \$50 each, he is permitted to bring 20 separate actions. It cannot be said that the courts are closed against a litigant because the Legislature has seen proper to limit the jurisdiction of a justice to a certain sum, and require the consolidation of all separate demands in one action, under penalty of losing that part not included, simply because, to consolidate, the aggregate amount would exceed the jurisdiction of a justice and drive the plaintiff into the circuit court. If that be so as to separate claims, why cannot the same reason be assigned as to an entire and indivisible one? For there it would not be contended that the party could split his claim and bring two actions before a justice. With just as much plausibility it might be argued that the courts would be closed against such party. If the claim exceeds the justice's jurisdiction, the plaintiff has an open, plain, and adequate remedy by bringing his action in the circuit court.

While I believe that the statute has been misconstrued, yet, in my view, a proper construction of it, and the construction I feel should be given to it, would operate to reverse the decree, and in this case the result would be the same. I hold that the judgments are not void; that a jurisdictional question does not arise. This statute does not take away from a justice jurisdiction to render judgment upon a separate demand where it does not exceed the jurisdictional limit, but it imposes as a penalty upon the plaintiff that if he fails to unite all of his separate demands he shall be barred from recovering the remainder. This being the penalty imposed upon the plaintiff for not uniting his several demands, it is a matter of defense, and such as can be waived. Therefore, when an action is brought against

one upon a separate demand, and judgment rendered, and an action is then brought against the same party upon another demand, which was due at the time of the bringing of the first action, it is then the right of the defendant to plead the former judgment in bar of the second action, but, if he stands by and fails to make this defense, falls to plead this former judgment in bar, it cannot be said that the court has not jurisdiction. At the common law, as we have noted, separate actions could be maintained upon each separate and distinct demand, and, if the amount of such demand did not exceed the jurisdiction of a justice, separate suits could be maintained thereon before the justice. It would not fall within that class of cases which holds that claims cannot be split up for the purpose of giving a court jurisdiction. If the demands are separate and suits can be maintained for each, then the question as to whether or not the amount exceeds the jurisdiction of a justice is controlled by the amount of each separate and distinct demand for which suit is brought, the aggregate amount having nothing to do with it. This section of the statute recognizes the right of the party to sue for less than his whole claim, if the demand is separate. It provides: "If he bring his action for part only, the judgment in the suit, whether for or against him, shall bar him from recovering the remainder." Can it be said that this provision of the statute is meaningless? And, if it is not meaningless, then it seems to me that there can be no other conclusion reached than that it recognizes the right of the plaintiff to sue for a part of his claim where it is separable, and, if it recognizes his right so to do, unquestionably the justice would have jurisdiction and the judgment would be valid. The judgment being valid, and the plaintiff not having sued for the whole of his claim. If he proceeds to sue for the remainder, is it to be said that the justice has not jurisdiction if the sum is within his jurisdictional limit? Can it be said that, where the plaintiff fails to plead the former judgment in bar, the court has no jurisdiction to render judgment? The court had jurisdiction of the subject-matter and the person, but the plaintiff had previously brought suit and recovered judgment upon one of his several demands when, at the same time, the demand upon which the second suit was brought was due. This he did at his peril. The defendant, as we have seen, could have pleaded it in bar, but, because he has the right to do so, and because the statute bars the plaintiff from recovering the remainder, it cannot, for that reason, be construed to mean that the justice was without jurisdiction and that the judgment is void. The justice, in my view, had jurisdiction, and the judgments are valid and enforceable. It was held in *Gresham v. Landens et al.*, 1 Ga. Super. Ct. Rep. 149, that, "when several suits are brought between the same parties in a justice's court,

the defendant can take advantage of their amounting to more than \$30 only by a plea to the jurisdiction." And the court, in the opinion in that case, says: "It does not appear that any exception was taken to the jurisdiction in the court below, and, as the question was not raised then, the court committed no error in entertaining jurisdiction, the cases being, *prima facie*, within their jurisdiction."

The defendants assign another reason why the decree of the circuit court should be sustained; that is, that the actions before the justice were brought on the 17th day of September, 1901, returnable on the 23d day of September, and that on the 20th day of September, Strother, one of the defendants, appeared, waived service of process, and confessed judgment, and that judgment was not entered until the return day of the summons, at which time judgment was also rendered against Wood. The question arises, could the justice properly enter the judgment until the return day of the summons? The defendants are cited to appear on a certain day, known to the plaintiff, at which time the plaintiff can be present to take care of his interests. There are two ways of commencing actions before a justice—one by appearance and agreement of parties, the other by summons. This action was commenced by the latter mode. Then what right has the justice, in the absence of the plaintiff, and when he is not expected to be present, to make disposition of the case? This question we do not decide, because not necessary.

That part of section 114, c. 50, Code 1899 (section 2035, Ann. Code 1906), which provides that judgments shall be entered without delay when confessed is directory, and not mandatory. This statute fixes no time for the entry of the judgment; it only says it shall be entered without delay. Suppose it is not entered immediately, and not until the return day of the summons. Is it to be said that, because the justice failed to enter the judgment at once upon confession, the plaintiff cannot have judgment on the return day of his summons, upon a plain note, not in any way contested? We cannot hold that the plaintiff can thus be deprived of his debt. The case of *McClain v. Davis*, 37 W. Va. 330, 16 S. E. 629, 18 L. R. A. 634, is relied upon as supporting the defendant's contention. That is a case tried before two justices with a jury. A verdict was rendered and no judgment entered thereon, and, nearly two years afterwards, the same justices, without notice, met and undertook to enter judgment upon the verdict *nunc pro tunc*. It was held that the *nunc pro tunc* order was unauthorized and illegal. We do not think that case is controlling here. We have here a confessed judgment, which only required actual entry, and no definite time within which it should be done, the statute only saying it shall be done without delay.

The actual entry upon a justice's docket of a judgment after its rendition or confession is a ministerial act. "After a justice has rendered and publicly announced his judgment in an action at the close of the trial, the entry thereof upon the justice's docket is purely ministerial, and not judicial." *Packet Co. v. Bellville*, 55 W. Va. 560, 47 S. E. 301. And it is also held in that case that, although the statute requires a judgment of a justice to be entered within 24 hours after trial (Sundays excepted), still, when a judgment is rendered within such time, but entered after the time thus directed, it is not void. And it is also said in that case: "Where a judgment in an action tried before a justice is rendered and publicly announced by the justice on the day and at the close of the trial, although the clerical work of entering the judgment upon his docket is not performed until a few days thereafter, the statute is substantially complied with." But, if *McClain v. Davis*, *supra*, does apply to the case in hand, it is effectually overruled by *Packet Co. v. Bellville*, *supra*.

The bank being entitled to bring separate actions upon the three notes, it certainly is no ground of complaint that two of these were assigned for the purpose of giving the justice jurisdiction, because the justice had jurisdiction before such assignment.

It is said that the cashier had no authority to make the assignments. Whether so or not, we will not say. It suffices to say that this question cannot be raised here. If it could have been raised at all, it should have been done before the justice.

The decree of the circuit court is reversed, and the cause remanded.

HARDMAN v. CABOT.

(Supreme Court of Appeals of West Virginia.
Nov. 27, 1906.)

1. HIGHWAYS — PUBLIC USE — PIPE LINES — ADDITIONAL BURDEN.

A pipe line, laid in a public rural highway, under proper authority, and used for supplying the public with natural gas for heating and illuminating purposes, though imposing an additional public service upon the road, is not a use in excess of the right of the public in such road, and does not impose an additional burden upon the estate in fee in the land.

2. SAME.

In respect to the rights of the public in highways, held under valid dedications and acceptances, and the power of the Legislature over the same, there is no distinction in this state between the streets of incorporated cities and towns and country roads.

3. SAME — CONSENT OF AUTHORITIES.

Certain rights of use in public highways, owing to their peculiar nature, are dependent upon the will of the authorities having control of the streets and roads, and can be exercised only with their consent and under such restrictions as they, in the exercise of their discretion, may see fit to impose. Among these the right to convey natural gas, for public use, along a highway by means of pipes, laid under the surface, is included.

4. SAME—USE BY NATURAL PERSON.

Permission to so use a public road may be granted, by a county court, to a natural person.

5. GAS—RIGHTS OF GAS COMPANY IN HIGHWAY — PIPE LINES — ENJOINING USE — EVIDENCE.

In a suit to enjoin the use of a public road, under permission therefor, granted by a county court, for the purpose of conveying natural gas along the same by means of pipes laid under the surface thereof, for public consumption, as a means of producing heat and light, on the ground that the pipes are not maintained, and the gas conveyed by means of them, for such purpose, the plaintiff must allege and prove the fact; wherefore the defendant may introduce evidence to prove that the pipes are so maintained and the gas so conveyed, in resistance of the effect of the plaintiff's evidence, under his denial of the allegation of the bill.

6. EQUITY—EVIDENCE—BURDEN OF PROOF.

In assailing a prima facie right or title, by a bill in equity, the plaintiff must aver and prove facts sufficient to overcome it. Ordinarily, he cannot otherwise put the defendant to the proof of a perfect, indefeasible title or right.

(Syllabus by the Court)

Appeal from Circuit Court, Calhoun County.

Bill by Marcellus Hardman against Godfrey L. Cabot. Decree for defendant, and plaintiff appeals. Affirmed.

Mathews & Bell and Walter Pendleton, for appellant. Van Winkle & Ambler, for appellee.

POFFENBARGER, J. Marcellus Hardman feels aggrieved by the action of the judge of the circuit court of Calhoun county, in dissolving, in vacation, an injunction, which he had obtained, inhibiting and restraining Godfrey L. Cabot from locating, maintaining, and operating a gas pipe line in a public road, running through the lands of said Hardman, under permission for occupation thereof, granted by the county court of said county, which pipe line was required, by said order of permission, to be placed under the surface of the road at least two feet.

Certain conclusions to which we have come, and which seem to be accordant with those of the trial court, render it unnecessary to discuss a number of questions, concerning which elaborate arguments are found in the briefs. This will be apparent to counsel from the following statement of principles and conclusions: Assuming for the present that the use to which the road is subjected, in the exercise of the privilege so granted, is within the purpose for which the road was dedicated to the public, and accepted by its authorities, and does not constitute an additional servitude upon the land, the title to which is in the plaintiff, subject to a right of use in the public for highway purposes, the important question arises whether such permission can be granted by a county court to a private individual, for the purpose of enabling him, by means thereof, to subserve the public interest, by supplying the inhabitants of the community with natural gas for the

purposes of heat and illumination. Express authority for granting such permits to incorporated companies, organized for the purpose of transporting petroleum oil and natural gas, is conferred upon county courts by section 24 of chapter 52 of the Code 1899 [Code 1906, § 2229]. It is earnestly insisted by counsel for the appellee that the authority conferred by that section is broad enough to enable such tribunal to grant like permits or privileges to private individuals, and *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410, is cited as authority for the proposition. But it was carefully noted in that case that the act of the Legislature authorizing the occupation of public roads by telephone companies, with the consent of county courts, was not amendatory of any chapter of the Code relating to corporations, wherefore this court was able to place a liberal construction upon the word "companies," used in the act. It may well be doubted whether chapter 113, p. 337, of the acts of 1891, adding a new section to chapter 52 of the Code of 1899 [Code 1906, §§ 2207-2229], relating to corporations generally, falls within the line of that process of reasoning. But this is not conclusive. While we may not be able to say the word "companies," as used in section 24, c. 52, Code 1899 [Code 1906, § 936], includes copartnerships or individuals, the spirit of that and other statutes may sustain the action of the county court.

It is far less important for us to know, and for the Legislature to declare, what persons may make a certain use of a highway, than what may be lawfully done in it. All persons, both natural and artificial, are entitled to use public highways, and have equal rights in respect to them; but there is a limitation upon all as to the manner in which they may use them. Some of the uses, that courts have deemed to be within the grant of the land for highway purposes, are such in character as cannot be exercised, with safety to the public, or without working prejudice to persons using the way in the ordinary modes, in the absence of regulation. To the end that proper rules and regulations may be established in every such case, persons desiring to exercise such powers must obtain permission to do so, and the permission is granted upon terms and conditions intended to prevent the use permitted from rendering the highway unsafe to other persons or producing an unreasonable restraint upon their privileges. To this class belong railways, telegraph and telephone lines, sewers, and water and gas pipes. The Legislature, in expressly authorizing the use of highways, under permission of the county courts, by corporations engaged in the service of the public, for the location and operation of their gas pipes, has declared that such use is proper. Who may have it is a matter of no consequence, in so far as it affects the road, but of immense importance as regards the public. We are not to impute to the Legislature an intention to allow cor-

porations greater rights in public highways than natural persons. That private persons may engage in public service, such as is usually carried on by corporations, has been declared by this court. *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410; *Gas Co. v. Lowe & Butler*, 52 W. Va. 662, 44 S. E. 410; *Watson v. Railway Co.*, 49 W. Va. 528, 39 S. E. 193. The Legislature has expressly so declared also in section 1, c. 44, p. 100, of the Acts of 1891, as to the transportation of petroleum oil.

That railroads, whether operated by steam or other motive power, and telegraph and telephone lines, do not impose additional servitudes, when located in highways, be they city streets or country roads, is abundantly settled by the decisions of this court. *Watson v. Railway Co.*, 49 W. Va. 528, 39 S. E. 193; *Lowther v. Bridgeman*, 57 W. Va. 306, 50 S. E. 410; *Arbenz v. Railroad Co.*, 63 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Spencer v. Railroad Co.*, 28 W. Va. 406; *McEldowney v. Lowther*, 49 W. Va. 348, 39 S. E. 644. To hold the contrary, as regards pipe lines for conveying gas, water and other supplies, would be most disastrous to cities, towns, and counties of this state, in which hundreds, possibly thousands, of miles of such pipes have been laid in the highways, without any thought on the part of the fee owner of any right in him to prevent it, until payment of compensation should be made. In the states of Indiana, Pennsylvania, and some others, such use of a highway is regarded and treated as subjecting the land to an additional servitude, but there is a great deal of high authority to the contrary, besides a lack of forcefulness in the reasoning upon which the decisions, declaring the doctrine, are based. In *Bishop v. North Adams Fire District*, 167 Mass. 364, 45 N. E. 925, the court held that the public authorities might lay water pipes in a public highway without the payment of any compensation to an abutting landowner, although the highway, of which he owned the fee, was thereby subjected to an additional public use. This decision was based upon the doctrine announced in *Attorney General v. Metropolitan Railroad*, 125 Mass. 515, 28 Am. Rep. 264, and *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7. In the latter of these two cases, which involved the right to compensation for a supposed additional servitude, resulting from the location of a telegraph line in a public highway, the court said, at page 81 of 136 Mass. (49 Am. Rep. 7): "When the land was taken for a highway, that which was taken was not merely the privilege of traveling over it in the then-known vehicles, or of using it in the then-known method, for either the conveyance of property or transmission of intelligence. Although the horse railroad was deemed a new invention, it was held that a portion of the road might be set aside for it, and the rights of other travelers, to some extent, limited by those conditions necessary for its use. * * * The discovery

of the telegraph developed a new and valuable mode of communicating intelligence." In another part of the opinion it said: "It has never been doubted that, by authority of the Legislature, highways might be used for gas or water pipes, intended for the convenience of the citizens, although the gas or water was conducted thereunder by companies formed for the purpose; or for sewers, whose object was not merely the incidental one of cleaning the streets, but also the drainage of private estates, the rights of which to enter therein were subject to public regulation. * * * Nor can we perceive that these are to be treated as incidental uses, as suggested by the plaintiff, because the pipes are conducted under the surface of the traveled way, rather than above it. The right of the owner of the fee must be the same in either case, and the use of the land under the way for gas pipes or sewers would effectually prevent his own use of it for cellarage or sewer purposes." The theory of incidental use, thus repudiated, was that pipes could be used only for the purposes of the highway, such as supplying it with light and water and draining it. The court held the additional public use was not an additional burden upon the land. See *Watson v. Railway Co.*, 49 W. Va. 528, 39 S. E. 193, for approval of some of the principles declared in said case. The Indiana, Pennsylvania, and other decisions, denying the power of the Legislature to authorize such use of rural highways, make a distinction between such highways and streets of cities and towns. This court recognizes no such distinction. *Lowther v. Bridgeman*, cited. Some of them assign as a reason for the additional servitude doctrine that such an occupation of the land would ripen into title by lapse of time. As it is under permission, not title or claim of title, it is difficult to see how it could be adverse. In the case of streets, the exercise of such right is universally recognized, and held not to impose any additional burden. *Elliott, Roads & Streets*, § 406.

That the surface, the use of which is granted for highway purposes, includes more than the visible part of the land has been often declared by the courts, and is affirmed by constant experience. Excavations, fills, and the laying of deep foundations for bridges are necessary. *Danforth, J.*, said, in *Story v. Railway Co.*, 80 N. Y. 122, 161, 43 Am. Rep. 146, "The public purposes of a street requires of the soil the surface only. Very ancient usage permits the introduction under it of sewers and water pipes, and upon it of posts for lamps." In *Cloverdale v. Charrington*, L. R. 4 Q. B. Div. 104, Lord Justice Bramwell said: "'Street' comprehends what we may call the surface; that is to say, not a surface bit of no reasonable thickness, but a surface of such thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things

which are commonly done in or under the streets." What has just been said, it must be observed, assumes that the grantee of this permission will use the pipe line in the service of the public. Upon the evidence adduced, the circuit court has necessarily found that such is the intention, and the evidence seems to amply justify the finding. The defendant testifies that he has 30 miles or more of gas mains, of which this pipe will form a part, used in distributing natural gas, and that he is supplying a number of private customers. It seems not to be contested that he is supplying the people of the town of Brooksville and vicinity, and he says, if he is unable to lay the large line, in controversy, he will be obliged to obtain gas from some place other than his Leaf Bank field, in order to give his customers down the river an adequate supply, and further that some of his customers in that section are complaining of the lack of an adequate supply. Lack of capacity to give his customers an adequate supply of gas by means of the 6¼ inch pipe, which is already laid over the plaintiff's land at some distance from the public road, seems clearly to be the cause of his effort to put in the 10-inch pipe on the road. His testimony is not as full and definite as it might be, but we think it sufficiently discloses the public nature of the business in which he is engaged and the necessity of the use of the road, to enable him to successfully prosecute it.

His right of occupation of the road for the purpose and in the manner aforesaid is denied in the argument, on the ground that no notice of his application to the county court, for the privilege or franchise, was given in the manner prescribed by the statute, but the bill does not charge failure to give such notice. As will be shown herein, the plaintiff is bound to show that the defendant's occupation of the road is wrongful, in order to sustain the injunction, and, under well-settled principles and rules of equity practice, he must allege whatever it is necessary to prove. But, aside from this, such notice would only have given him an opportunity to be heard before the granting of the privilege, and he has had the equivalent of that in the hearing given him upon his motion, after the permit had been given, to revoke the same, upon which hearing the court modified its order and curtailed the privilege to such an extent as it thought anybody was entitled to have it restricted, by requiring the defendant to put his pipe 2 feet under the ground, instead of 18 inches, as prescribed in the first order. The statute, requiring notice of such applications, does not confer any judicial powers upon the tribunals to which they apply, nor vest in any citizen the right to prevent or control action, otherwise than to the extent of being heard in opposition, by remonstrance or otherwise. *City of Benwood v. Railway Co.*,

53 W. Va. 465, 44 S. E. 271. However, we do not decide that he is precluded, by the hearing on his motion to revoke, from having such relief, if any, as he is entitled to by reason of the granting of the permit, without notice having been given, if it was so granted. This matter is not in the case. Since, in using the road as aforesaid, by permission of the county court, the defendant has not taken, and is not attempting to take, any of the land of the plaintiff, it is quite clear that some of the principles enunciated in *Lowe & Butler v. Gas Co.* and other condemnation suits are not applicable, and much of the argument in the briefs of counsel for the appellant need not, therefore, be responded to. Whether his property has been or will be, injured by a rightful occupation of the road is an entirely different matter. For that he is not entitled to an injunction, as has been emphatically asserted by a number of decisions of this court, unless the injury is so great as to amount to a virtual taking of the property. *Watson v. Railroad Co.*, 49 W. Va. 528, 39 S. E. 193; *McEldowney v. Lowther*, 49 W. Va. 348, 38 S. E. 644; *Taylor v. Railroad Co.*, 33 W. Va. 39, 10 S. E. 29; *Arbenz v. Railroad Co.*, 33 W. Va. 1, 10 S. E. 14, 5 L. R. A. 371; *Spencer v. Railroad Co.*, 23 W. Va. 406; *Mason v. Bridge Co.*, 17 W. Va. 396. By these decisions he is limited to his action at law for compensation in damages.

In his answer Cabot did not aver that his use of the road was permitted for a public purpose. On the motion to dissolve, he tendered, and was permitted to file, over the objection of the plaintiff, an amended answer, setting up this fact. Before doing so, he had taken depositions to prove it. On objection to the reading of the depositions for that reason, the court gave leave to retake them. Thereupon the parties filed a stipulation by which the plaintiff waived the right to require the depositions to be retaken and consented to the reading thereof. It is here assigned as error, that the court considered this evidence and founded its decree thereon, because the objection to the filing of the amended answer has not been waived, and is insisted upon, and, without said amended answer, there is no allegation of the fact which the testimony proves. Well-settled principles deny the right to file the amended answer, upon the facts disclosed by the affidavits, tendered with it. But the evidence is admissible without any affirmative allegation of the fact. The defendant's occupation and use of the road, is not the occupation and the use of the plaintiff's land, for it is covered by the grant out of said land to the public of the right of use, and the permission given to the defendant, confers upon him no right in excess of that which the public has in respect to the land. Hence, in order to sustain his injunction it is incumbent upon the plaintiff to show

that in granting to the defendant the privilege which he had, the county court, in some way, exceeded its authority. This might have been done by alleging and proving that the purpose for which the privilege was granted, and the use to which the road was thereby subjected, were not public in their nature, or possibly, but we do not so decide, by failure to give the notice of the application. In this ruling we apply nothing more than elementary rules of pleading and practice. The defendant has the prima facie right. Any one who seeks to deprive him of that must overcome it with proof, and must lay a basis for his proof in his pleadings. The occupant of land is not compelled to make a disclosure of his title merely because somebody challenges his right to it. He who seeks to set aside a deed, on the ground of fraud or a defect of any kind, be it apparent upon the face of or found in some matter dehors the instrument, and to be established by proof aliunde, must allege that defect, as well as prove it, in order to invalidate, or obtain relief against, the deed. That the defendant has the prima facie right is apparent, and not disputed. The road is a public one, having been under the control of public authorities and used by the public for half a century or more, and the county court granted a privilege in it which it had a right to grant, for aught that has been shown by the plaintiff. "Every averment necessary to entitle a plaintiff to be entertained in a court of equity must be contained in the bill." *Vanbibber v. Belrne*, 6 W. Va. 168; *Elb v. Martin*, 5 Leigh (Va.) 141; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513. And the plaintiff must assert his claim with reasonable certainty. *Zell Guano Co. v. Heatherly*, 38 W. Va. 409, 18 S. E. 611.

Seeing no error in the order complained of, we affirm it.

HARBY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Oct. 25, 1906.)

1. CARRIERS—CONTRACT OF SHIPMENT—LIMITING LIABILITY.

Where a shipper enters into a special contract with the initial carrier for transportation of live stock, the connecting carrier is entitled to the benefit of the limiting value clause, where it is provided in the contract that it shall have the benefit of such valuation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 951.]

2. SAME—TRANSPORTATION OF FREIGHT.

Freight must be transported with all reasonable diligence where no time for delivery is expressly agreed upon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 396, 397.]

Appeal from Common Pleas Circuit Court of Sumter County; Watts, Judge.

Action by A. D. Harby against the South-

ern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. M. Thomson, for appellant. Lee & Moise, for respondent.

JONES, J. The complaint herein alleged three causes of action. The first for \$750, damages to a car load of horses and mules, 28 in number, alleged to have been received by defendant as a common carrier and insurer at Birmingham, Ala., October 8, 1904, and delivered in Sumter, S. C., October 11, 1904, in bad condition, scarred, bruised, and some lamed; one mule having died from injuries received. The second cause of action was for the same amount of damages for injuries to said stock as the result of defendant's alleged negligence in handling and transporting said animals. And the third cause of action was for the statutory penalty of \$50, for failure to adjust and pay the claim filed within 90 days. The defendant company received the shipment October 8, 1904, from Kansas City & Memphis Railroad Company at Birmingham, Ala., in apparently good condition, but delivered the same to plaintiff at Sumter, S. C., in bad condition. One mule died, from injuries received, some time after delivery to plaintiff, which was valued in the testimony at from \$165 to \$175. In giving estimates as to the damages, witness W. B. Boyle, for defendant, stated the damages to be from \$250 to \$300, exclusive of the value of the mule which died, while the witnesses for plaintiff made estimates as follows: W. S. Graham, \$485; J. P. Booth, \$600; C. W. Stansall, \$750; exclusive of the dead mule; W. B. Blanding, \$600; and the plaintiff \$1,000, including the animal which died. The jury rendered a verdict for plaintiff for \$600, and defendant appeals from the judgment thereon upon three exceptions to the charge to the jury.

1. The first and second exceptions to the charge raise the question whether in this case the defendant as connecting carrier is entitled to the benefits of the limited valuation clause in the special contract made by the shipper with the initial carrier. The testimony was to the effect that Charles W. Stansall, as agent for plaintiff, bought stock from the Erwin Piper Horse & Mule Company at Ft. Scott, Kan., and was present when they were put in car there for shipment by the St. Louis & San Francisco Railroad Company. The original bill of lading was produced by plaintiff and introduced in evidence by defendant without objection. It was signed by St. Louis & San Francisco Railroad Company, and by Erwin Piper Horse & Mule Company, as shipper. The shipment was therein referred to as "consigned to A. D. Harby from Ft. Scott, Kansas, Station, to Memphis, Tenn., Station, on the line of the company, and at said last-named station to deliver the same to a carrier whose line may form a part of the route to Sumter, S. C., hereinafter called the 'place of desti-

nation.'" In consideration of a special reduced rate, the shipper agreed upon a valuation of each head of horses and mules at \$100 from Ft. Scott, Kan., to Memphis, Tenn., and \$75 per head from Memphis, Tenn., to Sumter, S. C., the agreement declaring that this "valuation is named by me for the purpose of securing a reduced rate of freight on this shipment, and I agree that, in case of loss or damage to the same, said reduction so named shall be conclusive should I make any claim for such loss or damage against any carrier over whose line the same may pass."

The stipulation to which special attention is directed is as follows:

"(8) It is mutually agreed that if the destination of the aforesaid cars be on the line of the St. Louis & San Francisco Railroad Company, then the St. Louis & San Francisco Railroad Company agrees to deliver same to consignee after payment of charges and surrender of contract; but if the destination of such cars be beyond the lines of the St. Louis & San Francisco Railroad Company, then the St. Louis & San Francisco Railroad Company agrees, and each connecting carrier in turn is hereby authorized to deliver said cars to connecting carrier for transportation under the terms, stipulations, limitations and agreements in respect of such further transportation as may be agreed upon between the shipper and such connecting carrier or carriers: Provided, that if no other such contract be required or executed to cover the movement of the shipment over the line of any carrier in the route, then such carrier shall have the benefit of all the stipulations and conditions of this contract, it being understood that this contract is thereby adopted by the shipper and such carrier as the contract providing for their mutual rights and obligations, but, nevertheless, each carrier in the route shall be liable only for loss or damage occurring on its own road."

"(10) It is further agreed that neither the company nor any carrier over whose line this stock may be transported shall be liable for any injury to said stock in any amount above the actual damage thereto, nor in any amount in excess of the value thereof as stated in the application of the shipper, which is hereto attached and made a part thereof, and in case of total loss of said stock or any portion thereof, and claim therefor is made by the shipper against the company, or any connecting carrier, wherein the value of said stock may be material, the valuation named in said application shall be conclusive upon all parties hereto."

There was no evidence of any other contract of shipment between the shipper and connecting carriers.

The charge to which exception is taken is as follows: "I charge you further, as matter of law, that, if this stock was shipped by some one else to Mr. Harby from Ft. Scott, Kan., and if he made a contract whereby they

were relieved, or liability was limited, that contract was only good over that road, over the initial road, and not good over this road here. They have not sued the initial road, but they have sued the road here. The defendant road here cannot avail itself of any contract that was made at Kansas with a road there which was a separate and distinct road other than this one here." We think this charge was erroneous, as the effect was to deprive the defendant of the limited valuation clause in the special contract. That such a contract may be lawfully made is settled by our case of *Johnstone v. Railroad Co.*, 39 S. C. 56, 17 S. E. 512, approving the doctrine of *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 23 L. Ed. 717.

A delivery of goods to the carrier by the shipper or consignor ordinarily vests title in the consignee. The consignor is presumed to have authority to enter into a contract of shipment with the carrier, and the real owner will be bound by any just and reasonable stipulation limiting the carrier's liability on the contract made by such agent. 4 Elliott on Railroads, § 1507. This is especially so if the owner and consignee accept the benefits of the special contract. The agreement in question puts the plaintiff, as consignee, in contract relation with the initial carrier, and imposed upon such carrier duties with respect to the shipment which the plaintiff could enforce under the contract, but subject to the reasonable limitations upon such liability therein stipulated, as well as the stipulation with reference to connecting carriers. With respect to the effect of the initial carrier's contract on connecting carriers, in 4 Elliott on Railroads, § 1446, the rule is thus stated: "If a connecting railroad company is designated in the initial carrier's bill of lading, or if the bill provides that all stipulations shall inure to the benefit of all the carriers, then, having accepted the goods thereunder without any separate agreement, it becomes virtually a party to the contract, bound by the undertakings therein, and benefited by the limitations." This statement of the law is supported by the authorities cited, some of which are: *Maghee v. Camden & Amboy R. R. Co.*, 45 N. Y. 514, 6 Am. Rep. 124; *Halliday v. St. Louis, etc., Ry. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *St. Louis, Iron Mountain & Southern Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104; *Adams Express Co. v. Harris* (Ind. Sup.) 21 N. E. 341, 7 L. R. A. 214, 16 Am. St. Rep. 315; *Central Railroad & Banking Co. v. Bridger* (Ga.) 20 S. E. 349. The error in the charge was prejudicial because it cannot be said with certainty that the verdict for \$600 does not include \$165 or \$175 for the value of the animal which died.

2. The third exception alleges error in instructing the jury that, if defendant received the stock at Birmingham, Ala., it was its duty to transport them "as speedily and carefully as possible." It is contended that this im-

posed upon defendant a higher duty than the law requires, and that it was prejudicial because the complaint charged negligence in handling and transporting said animals from Birmingham, and there was conflict in the testimony as to the time usually required for such shipments. The contract of shipment provided that the stock was "not to be transported within any specified time, nor delivered at any particular hour, nor in season for any particular market." The correct rule in such cases is that, when no time is expressly agreed upon, the goods must be transported with all reasonable diligence. *Nettles v. Railroad Co.*, 7 Rich. Law, 190, 62 Am. Dec. 409; 6 Cyc. 412. However, considering the charge of the court in connection with the qualifying words immediately following, imposing the duty of "ordinary, reasonable care," we do not consider that the court materially departed from the correct rule as stated.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

FLUDD v. EQUITABLE LIFE ASSUR. SOCIETY OF THE UNITED STATES.

(Supreme Court of South Carolina. Oct. 25, 1906.)

1. JURY—RIGHT TO JURY TRIAL—LEGAL AND EQUITABLE ISSUES.

Civ. Code 1902, § 1826, provides that life insurance companies may institute proceedings to vacate policies procured by fraud in the application. Held that, in an action on a policy where the right to cancel for fraudulent misrepresentations is set up in the answer, defendant is not entitled, because of such statute, to have the issue tried in equity.

2. APPEAL—REFUSAL OF REFERENCE.

Refusal of court in an equity suit to grant reference to take evidence is not appealable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 711-716, 735.]

3. INSURANCE—INTEMPERATE HABITS.

A man is not of intemperate habits within the meaning of an insurance policy because he occasionally uses intoxicating liquors and sometimes to excess.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 676.]

4. APPEAL—REVIEW—EXCEPTIONS TO CHARGE.

Exceptions containing only extracts from a charge will not be reviewed unless they contain only a single proposition, the mere reading of which would indicate the point on which the opinion of the court is sought.

5. INSURANCE—FORFEITURE OF POLICY—ESTOPPEL.

Where a company delivers a policy as valid and the agent at the time had knowledge of facts rendering it void at its option, the company is estopped to assert such ground of forfeiture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, § 1028.]

Appeal from Common Pleas Circuit Court of Orangeburg County; Aldrich, Judge.

Action by Minnie M. Fludd against the Equitable Life Assurance Society of the United States. Judgment for plaintiff. Defendant appeals. Affirmed.

J. K. P. Bryan, for appellant. Glaze & Herbert and Raysor & Summers, for respondent.

JONES, J. The plaintiff, as a beneficiary of a policy of insurance issued by defendant company, December 12, 1901, for \$2,000, on the life of her husband, John A. Fludd, who died April 11, 1902, brought this action on April 10, 1903, and recovered judgment for the amount of the policy and interest, from which defendant appeals.

1. Appellant's first exception alleges error in the refusal of Judge Aldrich to grant an order referring the equitable defense contained in paragraphs 6, 7, 8, and 9 of the answer to the master to take testimony thereon and report to the court, and the second exception assigns error in refusing to allow the defendant to deposit with the clerk of the court the sum of \$108.55 as a continuing tender in this cause subject to the final decree of the court of said equitable issues. The paragraphs of the answer referred to are as follows:

"(5) Further answering, and for a further defense this defendant alleges that, in the written application for the said policy, as set forth in the said complaint, in reply to the question, 'Has applicant ever been intemperate,' the said J. A. Fludd answered, 'No.' and warranted the said answer to be true, and that such material fact so thereby agreed to be the basis of the said insurance was untrue.

"(6) The defendant, further answering the said complaint, for a further defense, alleges that the said J. A. Fludd induced the said defendants as insurers to make and subscribe the policy attached to the complaint and become insurers as alleged by falsely and fraudulently representing to them that he had not been intemperate; whereas, he had theretofore been repeatedly intemperate.

"(7) The defendant, further answering the said complaint, and for a further defense, alleges that the said J. A. Fludd induced the said defendant, as insurers, to make and subscribe the policy attached to the complaint and become insurers as alleged, by falsely and fraudulently representing to them, in a fact material to the risk, that his practice as regards the use of spirits, wines, malt liquors, or other alcoholic liquors, was 'very moderate'; whereas, his practice in regard to such use was very immoderate, and causing said J. A. Fludd to be turbulent and violent in life, spirit, and manner, and that the said J. A. Fludd was shot, wounded, and killed in a turbulent, violent resistance to the officers of the law, caused in part by the immoderate use of intoxicating liquors.

"(8) Further answering the said complaint, this defendant further alleges that the said J. A. Fludd induced this defendant to subscribe the said policy of insurance by falsely and fraudulently concealing from this defendant material facts concerning his man-

ner of life and extrahazardous risk of the same for insurance. In that, in reply to the question, 'Do you know of any circumstances connected with your manner of life which would render your life extrahazardous for insurance?' said J. A. Fludd answered, 'No,' and concealed thereby from this defendant that he had been living a violent, intemperate, turbulent life, and had frequently committed assault and battery, and also assault and battery with intent to kill, and had been convicted therefor, said facts being material to the risks, the said J. A. Fludd being killed in a violent, turbulent resistance to the officers of the law.

"(9) This defendant, further answering the complaint herein, alleges that upon ascertaining the facts set forth in the several defenses aforesaid, and by reason thereof, this defendant elected to rescind said contract of insurance, and on the 26th day of July, 1903, duly tendered to said Minnie M. Fludd the sum of \$103.90, together with \$4.75 legal interest thereon from the 2d day of December, 1901, being the total amount of the said sum and interest received by this defendant on account of said policy.

"Wherefore, defendant prays judgment: (1) That the said complaint be dismissed with costs. (2) That the said policy be delivered up by plaintiff and decreed to be canceled by the court."

Section 1828, Civ. Code 1902, provides: "Life insurance companies are hereby authorized to institute proceedings to vacate policies on the ground of the falsity of the representations contained in the application for said policy: Provided, the same be commenced within two years from the date of said policy." It is true, the insurance company has set up the matter of cancellation within two years from the date of the policy, but it is by answer to an action on the policy after the death of the insured. If the statute has any application when the right of action on the policy has accrued, a matter of very great doubt, it was certainly not intended to interfere with the usual procedure governing after action is begun against the company on the policy. The action being for the recovery of money only, it is a strictly legal action, and plaintiff is entitled to a trial by jury unless waived in the manner provided by law, or a reference by consent, or by compulsion in the discretion of the court upon grounds stated in section 393 of the Code of Civil Procedure of 1902.

2. The fact that fraud is alleged in procuring the instrument sued on does not make an issue cognizable only in equity, as such issue may be tried in the legal action. *Price v. R. R. Co.*, 38 S. C. 201, 17 S. E. 732; *Griffin v. R. R. Co.*, 66 S. C. 77, 44 S. E. 562. All the rights which the insurance company could maintain in an action for cancellation on the ground of false representation are available as a defense alleging forfeiture in a suit on the instrument. It was, therefore,

perfectly proper to deny the equitable relief sought, inasmuch as defendant had a complete and adequate remedy at law. *Alexander v. Muirhead*, 2 Desaus. 162; *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616, 20 L. Ed. 501; 24 Ency. Law, 632; 6 Cyc. 291. Furthermore, it has been repeatedly decided that a refusal to grant a reference to take testimony in a strictly equitable action is within the discretion of the court and not appealable. *Association v. Berry*, 53 S. C. 131, 31 S. E. 53; *Gregory v. Perry*, 66 S. C. 458, 45 S. E. 4. These exceptions must, therefore, be overruled.

3. Appellant's third and fourth exceptions assign error in charging the jury "that occasional use of intoxicating liquors does not render a man intemperate, nor will an exceptional case of excess justify this application to him; as to the habits of John A. Fludd, the insured, the occasional use of intoxicating liquors does not render the insured a man of intemperate habits, nor would an occasional case of excess so render him." The exception merely quotes the language of the court, and states that it was error, without specifying wherein it was erroneous. As a general proposition, the charge was correct and in accordance with the rule stated in *Drakeford v. Knights of Damon*, 61 S. C. 344, 39 S. E. 523, and it is not claimed in the exceptions that the charge was inapplicable to this case.

4. Exceptions 5 to 12, inclusive, quote extracts from the charge and assign general error without any specifications whatever. This court, as a rule, declines to consider such exceptions, unless the quoted charge contains a single proposition, a mere reading of which would definitely indicate the point upon which the opinion of the court is sought. *Norris v. Clinkscales*, 59 S. C. 245, 37 S. E. 821. The character of these exceptions will be sufficiently shown by the following. Fifth exception: "The presiding judge erred in charging the plaintiff's fifth request: 'The jury is instructed that an insurance company will not be permitted to defeat a recovery upon a policy issued by it by proving the existence of facts which, by the terms of the policy, would render it void, where, at the time of the issuance of the policy, the company, or its agents had knowledge of such facts or information which, if pursued, would have led to actual knowledge.'" Sixth exception: "The presiding judge erred in charging the jury as follows, in commenting upon the plaintiff's fifth request: 'That means this, Mr. Foreman and gentlemen: If you find that the agent of the company knew the habits and character of the insured, and knew that the alleged false warranties and representations were false when made, and nevertheless took his application, as alleged, then the company would not be able to put up a successful defense, and I so charge you.'"

5. It is manifest that such exceptions do

not call upon the court to review the whole record to see whether there was testimony in the case to render such charge applicable. We see no error of law in the general proposition contained in quoted charge. The knowledge of an agent acquired within the scope of his agency is imputable to his principal, and, if an insurance company, at the inception of the contract of insurance, has knowledge of facts which render the policy void at its option, and the company delivers the policy as a valid policy, it is estopped to assert such grounds of forfeiture. *Gandy v. Insurance Co.*, 52 S. C. 228, 2 S. E. 655.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

MILHOUS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina. Oct. 24, 1906.)

DAMAGES—NOTICE OF SPECIAL CIRCUMSTANCES —CARRIERS—DELAY OF BAGGAGE.

In an action by a passenger for delay in the delivery of baggage containing dental tools, the passenger cannot recover damages for what he would have made by working at his profession, the patients being present during the time of delay, without allegation and proof of notice to the carrier of the special circumstances under which such special damages are claimed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 38.]

Appeal from Common Pleas Circuit Court of Barnwell County; Purdy, Judge.

Action by J. H. E. Milhous against the Atlantic Coast Line Railroad Company. Judgment for plaintiff before a magistrate was affirmed in the circuit court, and defendant appeals. Reversed and remanded.

Robert Aldrich, for appellant. G. M. Green, for respondent.

JONES, J. The plaintiff sued the defendant company before O. W. Moody, a magistrate for Barnwell county, to recover damages for delay in delivering certain baggage, consisting of four grips, which defendant had engaged to transport for him, as passenger, from Barnwell, S. C., to Dunbarton, S. C., on the 13th day of September, 1905. The baggage went on the same train as plaintiff and by mistake was carried beyond the proper station, but was returned on the next train and delivered to plaintiff at Dunbarton, after a delay of 3 hours and 20 minutes. Plaintiff is a dentist, and the baggage contained a part of his dentist machine, called an "engine," but it was not claimed nor does it appear that the defendant company had any knowledge or notice of this. Plaintiff, as appears by his letter to defendant, dated September 15, 1905, and introduced in evidence by defendant, made demand on defendant for damages to the amount of \$20, claiming that his time on that trip was worth \$6 per hour, and that on account of delay

and lost time he did not finish the work of some school children who were going away to college, which work he consequently lost. In his complaint before the magistrate, plaintiff demanded \$100 damages, alleging the loss of time before mentioned as the result of the gross carelessness, willfulness and wantonness of the defendant company in failing to deliver the baggage promptly. The defendant company made a general denial, but in court, before entering upon the trial, offered to allow judgment to be taken against defendant for \$1 and costs, which offer was refused. On the trial, over defendant's objection to its relevancy, plaintiff was allowed to testify that the time he lost by the delay was worth \$6 per hour, basing the value of his time by the work he did while at Dunbarton on that trip, and the loss of work by the delay. Defendant moved for a nonsuit on the ground that loss of profits in business, or special damages, could not be considered in this case. The magistrate gave judgment for \$20, and defendant appealed to the circuit court, alleging error (1) in basing judgment upon what plaintiff could have earned had his baggage been put off with him; (2) that there was no evidence of willfulness; (3) that there was no evidence of such injury or loss as the law takes into consideration.

Judge Purdy made the following decree: "There is no basis for punitive damages in this case. Failure to put off the implements of the plaintiff was wholly an inadvertence, cured immediately on discovery, but occasioned a delay of 3 hours and 20 minutes. The plaintiff claims damages for loss of time at \$6 per hour, and states that his time was worth that much on that occasion, and that the subjects or clients were present, and had to leave to go off to school, thereby depriving him of the opportunity to do the work. In his complaint he bases his damages on 'lost time,' and there was no motion to make definite and certain the statements or elements of damages beyond this. There was no objection to the testimony upon the ground that no special damages were alleged, but on other grounds. "There was no cross-examination to probe the witness and get names of patients deprived of his services, names of parties for whom he performed services, and amounts deprived of, and earned, respectively, but the statement stands unchallenged that he lost 3 hours and 20 minutes, and that on that occasion he was earning \$6 per hour. If the magistrate gave judgment for anything, \$20 under this showing was the amount that the plaintiff was entitled to be paid. If it be said that this is excessive, there is no proof upon which to base a reduction, nor is interference with the judgment sought on this ground, but primarily on the right of the plaintiff to recover at all. The case of *Mood v. Telegraph Company* recognizes the right to re-

cover special damages. See that case 40 S. C. 524, 19 S. E. 67. I express no opinion as to the earning capacity of the plaintiff other than that appearing in the record, and from that testimony, not contradicted or impeached, the judgment of the magistrate is sustained and the exceptions are overruled, and it is so ordered."

Defendant now excepts to this decree, alleging error. (1) In holding that plaintiff was entitled to recover for lost time, or what he could have earned in the time he was out of the use of his baggage. (2) In holding that special damages could be recovered, when none was alleged. (3) In holding that special damages could be recovered, when no notice that such loss would be sustained was given, alleged, or proved. (4) In that dental instruments are not baggage, and the profits to be derived from their use are speculative and remote. (5) In not sustaining defendant's ground of appeal from the magistrate's court as stated.

After consideration, we are of the opinion that the circuit court was in error. For the purpose of this appeal we will assume, without deciding, that a reasonable amount of dental tools may be regarded as baggage of a passenger, who is a dentist, and carrying them for personal use. Such is probably the law, as indicated in *Davis v. Railroad Co.*, 10 How. Prac. (N. Y.) 830; *Porter v. Hildebrand*, 14 Pa. 129; *Kansas City, etc., Co. v. Morrison*, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252. It is not claimed that any direct injury resulted to the baggage by reason of the delay, nor that plaintiff was otherwise damaged or inconvenienced than by the loss of what he would have earned during the delay if the dental instruments had been delivered in due time. There is nothing reported in the evidence which tends to show that this particular portion of his baggage was so essential to his usual occupation that his time was absolutely lost, or to show what was the ordinary and usual value of 8 hours and 20 minutes of his time. The claim for damages rests upon the special circumstances which rendered the use of the tools valuable to plaintiff, and falls within the class of special damages. This court has, in several cases recently, considered the subject of special damages, and the rule is settled that, in order to recover such damages, the plaintiff must allege and prove notice to the carrier of the special circumstances. *Traywick v. Southern Ry.*, 71 S. C. 85, 50 S. E. 549; *Wesner & White v. Atlantic Coast Line Ry.*, 71 S. C. 211, 50 S. E. 789; *Guess & Glover v. Southern Ry.*, 73 S. C. 264; 53 S. E. 423; *Wehman v. Southern Ry.*, 74 S. C. 286, 54 S. E. 360. As there was no allegation or proof of such notice to the carrier, it is clear that the plaintiff was not entitled to recover such special damages.

The judgment of the circuit court and of the magistrate's court is reversed, and the

case remanded to the magistrate court for a new trial.

GARY, A. J. As the law does not provide for an appeal from a magistrate to the Supreme Court, this court should not undertake to act directly upon a judgment rendered by a magistrate, but should remand the case with proper instructions to the circuit court.

YOUNG v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO.

(Supreme Court of South Carolina. Oct. 27, 1906.)

REMOVAL OF CAUSES—DISMISSAL—RIGHT TO SUO AGAIN.

Plaintiff brought suit in a state court and the action was removed into the federal court because of diverse citizenship and of amount, and, on motion of plaintiff, the action was discontinued and the costs paid. *Held*, that he could bring an action thereafter in the state court on the same cause of action for such an amount as would give the state court exclusive jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 217.]

Appeal from Common Pleas Circuit Court of Charleston County, Memminger, Judge.

Action by Martin Young against the Southern Bell Telephone & Telegraph Company. From an order dismissing the action, plaintiff appeals. Reversed.

Bryan & Bryan, for appellant. Smythe, Lee & Frost, and Hunt Chipley, for respondent.

JONES, J. The plaintiff commenced action in the court of common pleas for Charleston county on September 6, 1902, to recover \$10,000 damages for personal injury alleged to have been suffered by him through defendant's negligence. On September 19, 1902, a petition and bond for removal on the ground of diverse citizenship was duly filed and accepted, and subsequently the cause was actually transferred to the United States Circuit Court for South Carolina. On April 21, 1903, the United States Court, on motion of plaintiff's attorney, passed an order discontinuing the cause on payment of costs. After payment of the costs, plaintiff, on April 24, 1903, upon new summons and complaint brought this suit in the court of common pleas for Charleston county upon the same cause of action except that the damages were laid in the sum of \$2,000. The defendant answered and the case was submitted to a jury at November term, 1904, and resulted in a mistrial.

Thereafter, in March, 1905, defendant on notice moved, before Judge Memminger, to dismiss all the proceedings in the cause on the ground that the court had no jurisdiction thereof, and that the jurisdiction of said cause is vested exclusively in the United

States Court. Judge Memminger granted the motion, and dismissed the case for want of jurisdiction upon the rule and reasoning stated in *Baltimore and Ohio R. R. Co. v. Fulton*, 59 Ohio St. 575, 53 N. E. 265, 44 L. R. A. 520. That case held that, where a case has been properly removed from a state to a federal court, the jurisdiction of the state court ends forever, unless perhaps the case is remanded with the consent of defendant; that the jurisdiction of the federal court over the cause of action remains exclusive even though the suit is disposed of in the federal court otherwise than upon its merits. The reasoning by which this result is reached is based upon the court's view of the spirit and policy of the statute authorizing removal on the ground of a diversity of citizenship as resting upon the fact that litigation between citizens of different states must be more or less affected by local influences, and that such a policy applies as well to any renewal of the action after it has been disposed of in the federal court as to the period of its pendency; and the further reason is given that a contrary rule would be productive of a very inconvenient practice and much abuse, in enabling a party to permit his case to be dismissed by failure to prosecute in the federal court with the purpose of recommencing it in the state court, and thus entailing expense and trouble on the defendant in causing it to be removed or submit to the jurisdiction of the state court. The only case cited in that opinion as directly supporting the same was *Cox v. East Tenn., etc., R. R. Co.*, 68 Ga. 446.

The Supreme Court of Georgia, however, in the case of *McIver v. Florida, etc., R. R. Co.*, 110 Ga. 223, 36 S. E. 775, 65 L. R. A. 437, holds the contrary view, and declares that the *Cox* Case merely decided that after nonsuit in a federal court, a renewal of the action in the state court was not a part of the original case or on the same footing with it with respect to the statute of limitations. The Georgia Supreme Court quoted with approval the following forceful language of a writer in *Case and Comment*, of July, 1890, at page 228 of 110 Ga., at page 777 of 36 S. E. (65 L. R. A. 437): "The possibility that a plaintiff might improperly permit the dismissal of a case after removal for the purpose of beginning again in the state court, and thus compel the defendant to remove the cause again or else submit to the state court, is one ground of the Ohio decision. But the unnecessary trouble caused to a defendant by dismissing an action and suing anew is not confined to cases that have been removed from a state court. It does not, in other cases, prevent the plaintiff from commencing a new action after dismissing the former one, and the difference in respect to actions removed into the federal court is only in degree. The distinction between reinstatement of an action and the bringing of a new action does not seem to have been much con-

sidered in this case. Because a case can be reinstated only by the court that dismissed it, it is said that 'by parity of reasoning,' a state court cannot pass on the right of the plaintiff to recommence an action after it has been dismissed by a federal court. But commencement of a new action, although for the same cause, is not a reinstatement, but a distinct and independent case. Exclusive jurisdiction of an action is a very different thing from exclusive jurisdiction of all possible actions for the same cause. An election to bring an action in one of two courts of concurrent jurisdiction is not usually irrevocable. After dismissal of the first one, the plaintiff has the same choice between the courts that he had originally. There seems to be no reason why this should not apply where the concurrent jurisdiction is in state and federal courts. If bringing an action originally in the federal court does not give it such exclusive jurisdiction of the entire cause of action as to prevent bringing any action therefor in a state court after the federal suit is dismissed, why should this be the result of removing a suit from a state court into a federal court? In either case, it is difficult to see why, after an action has been dismissed without prejudice to the right to bring a new action, the plaintiff has not the same election that he had in the beginning with respect to jurisdiction."

The Supreme Court of Georgia further declares: "The act of Congress provides that certain cases may be removed from the state court to the federal court, but this does not mean that the cause of action is removed. The act refers in terms to suit and not cause of action. Until the state court is absolutely deprived of jurisdiction of a particular cause of action it may take jurisdiction of, and pass upon, the same, with the exceptions above noted—that, when the federal court has taken jurisdiction, the state court cannot take any action in connection with the same so long as the cause is pending in the federal court. But when that court denies to the plaintiff a hearing, or fails for any reason to pass upon the sufficiency of his cause of action, he may bring the same again in the state court and invoke an adjudication of that court. And the fact that the new suit is for an amount which will prevent another removal to the federal court will not invalidate the suit. If the plaintiff in the new suit voluntarily abandon a portion of his claim for damages, it does not seem that the defendant should complain. The policy of the laws of the United States is to compel persons having claims of small amounts to litigate in the state courts, and voluntarily giving up a portion of his claim for damages and being content to accept a sum less than the federal court would entertain jurisdiction of would not seem to be contrary to the laws of the United States and its established public policy in reference to the jurisdiction of its courts."

The rule declared in the Georgia case and

the reasoning by which it is supported appear to us to be correct. The Ohio case, so far as our investigation develops, is the only precedent in support of the view of the circuit court, while, on the other hand, several authorities besides the Georgia court support the contrary view. *Hooper v. Atlanta*, etc., R. R. Co., 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931; *Rodman v. Missouri*, etc., R. R. (Kan.), 70 Pac. 642, 59 L. R. A. 704. See also, the following cases, which we have not examined, but which, from the syllabi in the *Century Digest*, seem to hold in opposition to the Ohio case: *De Witt v. Chesapeake & Ohio R. R. Co.* (Ky.) 79 S. W. 275; *Nipps Adm'x v. Chesapeake & Ohio R. R. Co.* (Ky.) 80 S. W. 796; *Krueger v. Chicago & A. R. R. Co.*, 84 Mo. App. 358; *Gassman v. Jarvis* (C. C.) 100 Fed. 146; *Texas Cotton Products Co. v. Starnes* (C. C.) 128 Fed. 183, affirmed by the Circuit Court of Appeals, 133 Fed. 1022, 66 C. C. A. 673. Our attention has not been called to any decision of the United States Supreme Court which is decisive as to this question and we have discovered no such case. In the case of *Bush v. Kentucky*, 1 Sup. Ct. 625, 27 L. Ed. 354, the removal of a criminal case from the state to the federal court did not operate to divest the state court of all jurisdiction thereafter to try the accused, although the indictment removed to the federal court was in that court quashed, but, inasmuch as the crime was against the state and not the United States, and prosecution could only have been begun in the state court, not being originally cognizable in the federal court, the case is perhaps not conclusive, although there is similarity in view of the fact that the present suit for the sum of \$2,000, treated as a new and independent action, is only cognizable in the state court. But the case cited certainly shows an exception to the broad contention that a cause or controversy removed from the state court to the federal court is forever thereafter, until finally determined upon its merits, within the jurisdiction of the federal court to the exclusion of the state court.

In reaching our conclusion we are mindful of the rule established in the United States Supreme Court that the jurisdiction of a federal court acquired on removal from a state court cannot be ousted or divested by any change of conditions; that is, conditions in the pending suit, as, for example, when the parties become residents of the same state after removal to the federal court on the ground of diverse citizenship (*Morgan v. Morgan*, 2 Wheat. [U. S.] 290, 4 L. Ed. 242; *Clarke v. Mathewson*, 12 Pet. 165, 9 L. Ed. 1041), or, after the right of removal attached, an amendment in the state court allowing plaintiff to reduce the matter in dispute to less than the jurisdictional amount (*Kanouse v. Martin*, 15 How. [U. S.] 198, 14 L. Ed. 660), or when there is a change in the value of the subject of controversy after jurisdiction acquired (*Cooke v. United States*, 2 Wall. [U. S.] 218, 17 L. Ed. 755), or

by dismissal of the original bill involving the jurisdictional amount after the filing of a cross-bill which did not involve the jurisdictional amount (*Kirby v. American Soda Fountain Co.*, 24 Sup. Ct. 619, 48 L. Ed. 911). The present contention does not relate to a mere change of the conditions in a suit pending in a federal court or within its control, but to a new action in the state court, having concurrent jurisdiction in the first instance subject to the right of removal, restored after the federal court has discontinued the removed suit. It is not contended by respondent in this case that the order of discontinuance, not having therein the words "without prejudice," must be treated as a final adjudication so as to prevent a new suit in any court, as the case of *Dunham v. Carson*, 37 S. C. 269, 15 S. E. 960, shows that the failure to insert such words in the order of discontinuance did not make the order a decree on the merits, but the contention is that the removal gave the federal court exclusive jurisdiction over the cause of action until adjudication on the merits. It is argued that the phraseology of the removal statute supports this contention. Section 629 of the Revised Statutes of the United States, after prescribing the proceedings necessary to removal, declares: "It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit, and the said copy being entered as aforesaid in the said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court." Act March 3, 1875, c. 137, § 3, 18 Stat. 470, superseded by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 433 [U. S. Comp. St. 1901, p. 510].

It is contended that the word "cause" means more than "suit," that it means "cause of action," and that the cause of action is taken entirely out of the jurisdiction of the state court and that the federal court alone had jurisdiction thereof. We cannot accept this construction. The words "suit" and "cause" mean the same thing in the statute. In common usage and very often in statutes and decrees, the words "suit," "action," "case," and "cause" are used interchangeably to indicate the same thing. *Bouvier* defines "cause" to be "a contested question before a court of justice; it is a suit or action." The suit, action, case, or cause in which the state court cannot proceed further is the matter removed to the federal court. This is manifest from the context which requires that the cause shall proceed in the federal court in the same manner as if it had been originally commenced there, language appropriate in reference to a "suit," but wholly inappropriate in reference to the "cause of action," which is the legal right of the plaintiff invaded by the defendant's breach of corresponding duty, upon which the right of action arose when the invasion took place. The respondent's contention, therefore, receives no aid from the

phraseology of the statute. On the contrary, the plain meaning is that the suit or cause after removal shall proceed in the federal court, subject to the same rules which would govern if the suit or cause had been originally commenced there. If plaintiff had originally commenced the suit in the federal court for \$10,000, and the same had been discontinued on payment of costs, we know of no rule which would prevent plaintiff's election to sue again in the state court for any sum, subject to the defendant's election to remove again, or to sue for such sum as gave the state court exclusive jurisdiction. This suit is for such a sum as in the policy of the removal statutes is such a case as should be tried exclusively by the state court.

This conclusion renders it unnecessary to consider the other question raised as to whether the defendant, by answering and going to trial and delaying this motion for about two years, has waived any right it may have had to make such motion.

The judgment of the circuit court is reversed.

LEESVILLE MFG. CO. v. MORGAN WOOD & IRON WORKS.

(Supreme Court of South Carolina. Oct. 23, 1906.)

1. TRIAL—RIGHT TO OPEN AND CLOSE.

Unless defendant by his pleadings admits plaintiff's cause of action, and relies on affirmative defense, he is not entitled to open and reply.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 47, 50.]

2. EVIDENCE—DOCUMENTARY PRESUMPTIONS.

Where a letter is received in due course of mail in response to a letter sent, and is written on a corporation's letterhead, and purports to be signed by its bookkeeper, it is presumed to be the letter of the corporation whose name is signed to it, in the absence of any evidence to the contrary.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1651.]

3. SAME—SELF-SERVING DECLARATIONS.

A letter from defendant to plaintiff's attorney, stating that defendant did not owe the sum claimed, and inviting the attorney to go over the matter with the defendant, was properly excluded as a self-serving declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1068, 1072.]

4. APPEAL—MISCONDUCT OF COUNSEL.

Where an attorney in his argument referred to a letter which was offered in evidence and ruled out, and on objection the judge instructed the jury not to consider the letter, it was no ground for reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4135; vol. 46, Trial, § 316.]

5. EVIDENCE—BEST AND SECONDARY.

Where no special search has been made for letters called for, it is improper to admit secondary evidence of their contents.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 605, 608, 634.]

6. SAME—QUESTION FOR COURT.

The loss of a paper, so as to admit secondary evidence thereof, is a question addressed to the discretion of the trial judge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 675.]

7. SALES—FAILURE TO DELIVER—DAMAGES.

In an action for failure to carry out a contract to deliver goods sold, the seller is liable for the difference between the contract price and the market price at the time and place of delivery, whether the goods were bought for a specific purpose or for the general purposes of the buyer's business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1174-1201.]

8. PLEADING—DEMURRER—AMENDMENT.

After sustaining a demurrer to a counterclaim, the allowance of an amendment designed to perfect the same is within the discretion of the trial court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 575-582.]

9. APPEAL—REVIEW—DECISION.

Where, in an action on a contract, judgment is rendered for plaintiff and defendant appeals, and plaintiff seeks to sustain the judgment on the ground that its motion for nonsuit, because there was no evidence to sustain a counterclaim set up by defendant, should have been granted, the Supreme Court cannot dismiss the counterclaim, but only grant a new trial.

Appeal from Common Pleas Circuit Court of Spartanburg County; Kluh, Judge.

Action by the Leesville Manufacturing Company against the Morgan Wood & Iron Works. Judgment for plaintiff. Defendant appeals. Reversed.

Nicholls & Jones, for appellant. E. L. Asbill and T. S. Sease, for respondent.

JONES, J. The plaintiff sued defendant to recover \$135.75 for lumber sold and delivered, and recovered judgment for \$99.49, from which defendant appeals upon exceptions raising the questions which we now consider.

1. Whether the court erred in refusing defendant the right to open and reply. The right of the defendant to open and reply depends upon whether the answer admits the plaintiff's cause of action, and relies upon an affirmative defense, so that if defendant offered no evidence the plaintiff would be entitled to judgment on the pleadings. *Thompson v. Insurance Co.*, 63 S. C. 292, 41 S. E. 464. By reference to the answer in this case, it appears that defendant admits only that defendant is a corporation, but denies all the other allegations of the complaint. The ruling was therefore correct.

2. The plaintiff made draft on defendant for \$145.75, and in reply received a letter through the course of mail signed "Morgan Wood & Iron Works, per Gilmore"; Gilmore being the bookkeeper of the company, and the letterhead purporting to be that of defendant corporation. The letter, in substance, admitting notice of the draft, claimed that it was "more than the amount you agreed to take," returning the draft, stating that

the president was out of town, and that the matter would be turned over to him for adjustment on his return. This letter was introduced in evidence by plaintiff over defendant's objection that it was not signed by the president or some one proved to have authority. We think the ruling was correct. A letter received in due course of mail, in response to a letter sent by the receiver, is presumed, in the absence of any showing to the contrary, to be the letter of the person or corporation whose name is signed to it. *Scofield v. Parlin & Orendorff Co.*, 61 Fed. 804, 10 C. C. A. 83; *Ragan v. Smith* (Ga.) 29 S. E. 759; 1 *Elliott on Evidence*, § 107.

3. The defendant sought to introduce in evidence a letter addressed to Sease & Hoke, attorneys for plaintiff, stating that the claim would have been paid long since but that defendant did not owe the amount claimed, and inviting Sease & Hoke to call and inspect the books and papers and go over the matter with the president. The court declined to allow the evidence, on the ground that it was self-serving. We approve the ruling. In so far as the statement of the defendant's officer could be construed as an implied admission against interest, i. e., that something was due on plaintiff's claim, its exclusion was not harmful to defendant; and in so far as the statement was a denial of the correctness of the claim sued on, and a readiness to show defendant's books and papers, it was an unsworn self-serving declaration of defendant or its officer, and therefore inadmissible. *Ring v. Huntington*, 1 Mill, Const. 162; 16 Cyc., 1202-1206.

4. During the argument of the case to the jury, counsel for defendant commented upon a letter which was offered in evidence, but which was ruled out, and, upon objection being made, the judge ruled that he could not refer to the letter, and instructed the jury not to consider it. This ruling is the basis of an exception, but it is quite clear the court acted properly in the exercise of its power to make its ruling effective by enforcing obedience thereto. The propriety of the court's ruling is not affected by the fact that the comment on the letter related only to the fact that it was written, and not to its contents. The exclusion of the letter from evidence removed it altogether from the consideration of the jury.

5. With a view to prove the third counterclaim set up in answer, alleging \$51.25 damages to defendant by plaintiff's failure to fill defendant's order for lumber alleged to have been accepted by plaintiff, the defendant sought to introduce in evidence copies of letters written by defendant to plaintiff, one containing said order and the other making reference thereto. It appears that a subpoena duces tecum was served on Barr, of plaintiff's firm, who lived at Leesville, a short while before going into the trial at Spartanburg, to produce the original, but the circuit court ruled that the notice was in-

sufficient to enable witness to make search and produce the papers, or to let in the copies on nonproduction of the originals. Thereupon defendant sought to have the copies let in on the ground that the evidence showed loss of the originals; Mr. Barr having testified that he turned over all papers in the case that he found to Mr. Asbill, his attorney, although he had no recollection of having found or turned over to Mr. Asbill the particular papers in question, Mr. Asbill having testified that he had turned over all the papers received by him to Mr. Sease; and Mr. Sease having testified that he did not receive or have the papers in question. The court ruled the copies inadmissible because there was no testimony that search had been made for the originals, so as to establish their loss, and this ruling is the basis of the fifth, sixth, seventh, and eighth exceptions. We sustain the ruling. The loss of a paper is always a preliminary question addressed to the discretion of the presiding judge, and his ruling is not ordinarily the subject of review by this court (*Hobbs v. Beard*, 43 S. C. 378, 21 S. E. 805), and there is nothing in the record to show any abuse of discretion in this case. The evidence tended to show that an order for a second lot of lumber had been received by plaintiff, but no search had been made for same, and it could not be produced in court. The general rule is that parol evidence of the contents of a paper in the possession of the adverse party, which constitutes the evidence of the rights pleaded, cannot be given except after reasonable notice to produce. *Worth v. Norton*, 60 S. C. 300, 38 S. E. 605.

6. The ninth and tenth exceptions are to the charge given the jury. The defendant requested the court to charge with reference to the third counterclaim, as follows: "Fifth, If you find that the plaintiff sold the defendant a second car of lumber, and if the plaintiff declined and failed to fulfill the contract, they would be liable in damages to the defendant for any loss it might have shown it sustained thereby, and the measure of the defendant's damages would be the difference in the price of the lumber according to the contract and what the defendant was compelled to pay for such lumber to supply what the plaintiff failed to furnish; in other words, the market price of the lumber at the time when it should have been delivered." To which the court responded: "I have already given you specific instructions in reference to the third alleged counterclaim. If you find that there was a contract, and if the plaintiff broke it, then the plaintiff would be liable only for the loss ensuing, but not for any special loss or damages, and, subject to what I have charged you in that matter, I charge you this proposition."

In order that it may fully appear what instructions had previously been given on the subject, we quote at length as follows: "Now, in reference to the third counterclaim,

where the defendant alleges that plaintiff agreed to ship a car load of lumber for a certain purpose, and for a certain price, and failed to keep the agreement, if any damages naturally resulted, as a natural consequence of that failure, then defendant would be entitled to have compensation for the damages. If the contract is not established, as a matter of course, the defendant would have nothing on the alleged counterclaim. The burden is on the defendant to prove that there was such a contract, and prove the terms of the contract by the preponderance of the evidence; and if you find that the contract was proved, and the defendant suffered any damages as a natural consequence of the failure of the plaintiff to keep the contract, why it is entitled to have compensation to that extent for damages; but unless defendant suffered damages as a natural and proximate result of that failure, it would not be entitled to recover any such damages, unless plaintiff had notice that special damages would ensue if it failed to keep its contract; and so, if you find that the contract was made between the parties to furnish a car of lumber at a specified price, without any notice to plaintiff that it would be used for any special purpose, or that the defendant would be compelled to take any other steps to procure lumber in the place of that which plaintiff was to furnish, in case of failure of plaintiff to furnish it, I say, unless you find that defendant was compelled to resort to other means to get lumber for the specified purpose, and that the plaintiff knew that defendant would be put to such expense then there could be no damages of a special character for which plaintiff would be liable. For instance, if you should find that the defendant and the plaintiff entered into a contract to furnish that last mentioned car of lumber at a specified price, and if there was no special purpose mentioned, but merely to be used in the defendant's business—general business—then there can be no special damages ensuing to the defendant, even though the defendant afterwards went into the market, and bought other lumber in the place of that, at a different and greater price, because that would not be incumbent on the defendant to do that, if he could do it or not, just as he pleased. There was no necessity for the defendant, other than the purpose of its own business, to do it. So, if you find that to be the case, then the defendant would not be entitled to any damages for the difference between the price of lumber agreed to be furnished and this last mentioned car, which defendant purchased elsewhere for the general purpose of his business. It is only the direct and proximate consequences of a man's act that he can be held responsible for, and if a man agrees to furnish goods for another, and fails to do it, and the other party is not compelled to buy goods in the place of these for some specific purpose, but goes on in the general course of his business and buys other goods, the party who had failed to furnish

goods under such contract as that would not be liable for any special damages, enhancement in price, or anything else that the other party might pay in the general course of business for goods to take the place of those that the party had agreed to furnish; that is, in reference to the third counterclaim. So, if you find, first, that there was such a contract between the parties to furnish that car load of lumber, and you should find further that the defendant suffered damages as a natural consequence of the breach of the contract, it is entitled to compensation for such damages as that; but if it merely suffered damages arising from the fact that it went into the market in the general course of its business, and bought other lumber at a different price, the plaintiff would not be liable for damages on that score, because it would be held that it was not within the contemplation of the parties at the time the contract was made. You will observe in one of these counterclaims it is alleged that the parties merely agreed, without any reference to special purpose, but merely for the purpose of defendant's general business, and unless there are damages naturally resulting from the failure to perform the contract by the plaintiff in this case, then he cannot be held responsible for any special damages, unless it is notified that special damages would ensue in case this plaintiff failed to keep its contract."

The appellant complains of this charge on the ground that a seller who fails to carry out his contract is equally liable for the difference between the contract price and the market price whether the goods were bought for a special purpose or for the general purposes of the buyer's business, and that the effect of the charge was to deny recovery by defendant on the counterclaim, as no special damages were claimed or proven, but only general damages, to be measured by the difference between the contract price and the market price of the goods at the time and place of delivery. The general rule undoubtedly is that when the vendor fails to deliver goods sold, the vendee is entitled to recover the difference between the contract price and the market value of the goods at the time and place appointed for delivery, and possibly interest. *Davis v. Richardson*, 1 Bay, 106; *Ellison & Co. v. Johnson & Co.*, 74 S. C. 202, 54 S. E. 202; 2 *Sutherland on Damages*, 365. The defendant was entitled to have the jury so instructed, if there was evidence of such a contract and its breach. We cannot say that the charge as a whole substantially gave the defendant the benefit of the rule stated, as the court charged defendant's request subject to his general charge, and in that charge it is positively stated that, "if defendant suffered damages arising from the fact that it went into the market in the general course of its business, and bought other lumber at a different price, the plaintiff would not be liable for damages on that score, because it would be held that it was

not within the contemplation of the parties at the time the contract was made." The difference between the contract price and the market price of goods at the time and place of delivery is something which must follow necessarily and in the usual course of things, and must therefore be held to be within the reasonable contemplation of the contracting parties, and to fall within the class of general damages as distinguished from special damages, which do not arise, necessarily and in the usual course of things, from a breach of contract, but which do arise from circumstances peculiar to the special case. Such is the distinction between general and special damages, as stated in the famous case of *Hadley v. Baxendale*, 9 Exch. 341, approved and applied in this state in very many cases. There was error, therefore, in the charge.

The respondent seeks to sustain the judgment on the grounds stated in the "case" for appeal: (1) That the court erred in allowing the answer setting up the third counterclaim to be amended after sustaining plaintiff's demurrer thereto for insufficiency. (2) In refusing plaintiff's motion for nonsuit as to the third counterclaim, when there was no evidence of any contract or damages in connection therewith.

Even if we should consider whether there was error in allowing the amendment, we would have to sustain the ruling of the court, as the amendment did not insert a new or different cause of action, but was designed to complete a defectively stated cause of action, and it was within the discretion of the court to grant it. *Ruberg v. Brown*, 50 S. C. 398, 27 S. E. 873; *Brown v. Railway Co.*, 58 S. C. 466, 36 S. E. 852.

If it should be conceded that the second ground urged does show that error prejudicial to respondent was committed, it cannot be relied on to sustain the judgment of the circuit court, for if we should conclude that there was no evidence of the third counterclaim, we could not dismiss the counterclaim, but could only grant a new trial. *Chemical Co. v. Kirven*, 65 S. C. 207, 43 S. E. 658; *Lewis v. Hinson*, 64 S. C. 571, 43 S. E. 15.

The judgment of the circuit court is reversed, and the case is remanded for a new trial.

CARTER v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. March 31, 1906.)

CARRIERS — ERROR IN TICKET — MINIMIZING DAMAGES.

Where a passenger has been inadvertently informed by the ticket agent that a through train stopped at a small station to which he sold her a ticket, she must use all reasonable means suggested by the conductor, on discovering the mistake, to minimize her damages, and should get off at a station preceding her destination and take the next local train following, and cannot recover for injury caused by going

to the station next beyond her destination and walking back nine miles through the heat and rain.

Appeal from Common Pleas Circuit Court of Union County; Klugh, Judge.

Action by Mamie Isabel Carter against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Sanders & De Pass, for appellant. V. E. De Pass for respondent.

WOODS, J. The plaintiff, Mrs. Carter, recovered a judgment of \$800 against the defendant, Southern Railway Company, for injuries which she alleges resulted from defendant refusing to stop its train and put her off at Zirconia, N. C., to which point she held a ticket, purchased at Union, S. C., where she had taken the train. The defendant's appeal raises interesting questions as to the right of a passenger holding a ticket to a station at which the train he is on does not stop.

The defendant had two daily trains passing Union, S. C., and Zirconia, N. C., known as "No. 9" and "No. 14"; the first leaving Union at 9 o'clock a. m., and the second about 2 o'clock p. m. No. 14 was a local train scheduled to stop at Zirconia. No. 9 was scheduled to stop at the more important stations, not including Zirconia. These trains it will be convenient to designate the "local train" and the "through train." Accompanied by her husband, the plaintiff, on July 31, 1904, boarded No. 9, the through train, with a ticket to Zirconia. As she and her husband testify, he bought her ticket and his own 10 or 15 minutes before the arrival of the train, the ticket agent telling them they would reach Zirconia about 12 o'clock. This statement, if made by the agent, could only refer to the through train, as the local train did not leave Union until about 2 o'clock. The conductor told the plaintiff he could not stop his train at Zirconia, and suggested to her and her husband that they should get off at Saluda, the next stop before reaching Zirconia, and wait there for the local train or go on to Flat Rock, the next stop beyond. The plaintiff refused to get off at Saluda, and insisted on being put off at Zirconia, because she had written to her friends to meet her there and take her a short distance in the country to her father's home, which was her ultimate destination. The train did not stop at Zirconia, and the plaintiff, in company with her husband, got off at Flat Rock, from which point she walked two miles to the residence of her sister, intending to spend the night there and walk to her destination the next day, a distance of about nine miles. Not finding her sister at home, she and her husband continued their journey on foot the entire distance over a rough mountain road or trail. The plaintiff and her husband testify that from this journey on a hot day, in the rain, she suffered much hardship, resulting in sickness from which

at the time of the trial she had not recovered; and it was for this suffering and sickness that the plaintiff demanded and recovered against the defendant damages as the proximate result of its refusal to stop its train at Zirconia. In demanding to be put off at Zirconia and refusing to get off at Saluda and wait for the next train which arrived at Zirconia late the same afternoon, the plaintiff, as she testified, had in view the fact that in going on to Flat Rock she would have to walk back nine miles; and so she informed the conductor.

The testimony of the conductor differed little from that of the plaintiff, except that he testified that before reaching Spartanburg he suggested to her that city as a convenient place to wait for the next train, while this was denied by the plaintiff. The plaintiff testified that she absolutely refused to consider the conductor's suggestion to get off at Saluda, and that he did not offer her transportation from Saluda to Zirconia on the next train, while on this point the conductor said that the plaintiff and her husband first agreed to stop at Saluda, and he actually indorsed the tickets so as to give them passage on the next train, and they then changed their minds and concluded to go on to Flat Rock.

From the foregoing statement it will be seen that there is little dispute as to the material facts; and the question in the case was whether the plaintiff, having refused to get off at Saluda and take the local train, had a right to go on to Flat Rock and recover of the defendant damages for the suffering and sickness due to her long walk. In other words, was the hardship of the journey and the sickness resulting from it the natural and proximate outcome of the defendant's failure to stop its train and let the plaintiff off at Zirconia? This question is presented with great elaboration in the exceptions to the charge, covering 11 printed pages, but we think the vital point is sufficiently indicated by the tenth request to charge and the court's modification of it. The request was: "If it appears that, through a mistake or oversight, the agent sold a ticket for a train not scheduled to stop at the station she wanted to get off at, and the plaintiff got on board of such train, and while on the train was informed by the conductor before reaching such station that it did not stop there, but that there was another train following on that day on which she could go to her station, and advised her to get off the train she was on and get on the other train, and she refused to do so, and remained on and was carried by to another station, and then got off and walked through the country and was made sick, when, if she had gotten off and taken the other train, this would not have happened—then she cannot recover any damages." The modification was: "That is subject to the

same modification. In fact, it involves the same question as to the law and facts both, but it involves the same consideration that applies to the preceding request. I charge you that you must consider the circumstances in which the plaintiff was placed on this particular occasion, not only the circumstances that confronted her on the train, but the circumstances that would have confronted her if she had gotten off the train and waited for another train when it reached the station that she was going to; that is, if you find that there was an engagement by some party to meet her at that station at that particular train, and that such engagement would be broken if she got off the train and waited and got on another train that arrived at a later hour, then it is a matter for the passenger to consider which course she would adopt, and if she arrives at the conclusion which a person of ordinary prudence and reason under similar circumstances would arrive at, then she performs her duty with reference to the defendant. And any act or conduct on her part by allowing herself to be carried by the station would not, under these circumstances, defeat her right to compensation for whatever injuries she suffered because of the failure of the railroad company to perform its duty. With that modification, I charge you that." The request and modification are to be considered not as applied to a claim for damages for delay in carrying the plaintiff to her destination according to her ticket; for the suit is not on that ground, but for the hardship of the long walk and the sickness resulting from it.

There can be no doubt of the right of railroad companies to run passenger trains stopping only at important stations, provided reasonably adequate provision is made by other trains for the accommodation of local travel. Incident to this right of a railroad company is the duty of a passenger before boarding a train to use due diligence to ascertain if it stops at his destination, and, if the passenger fails to use the means of information at his command, he cannot complain of the resulting inconvenience or damage, even if on his refusal to pay the additional fare to the next regular stopping place he is ejected from the train. *Railroad Co. v. Randolph* (Ill.) 5 Am. Rep. 60; *Atchison, etc., R. R. Co. v. Gants* (Kan.) 17 Pac. 54, 5 Am. St. Rep. 780; *Dietrich v. R. R. Co.* (Pa.) 10 Am. Rep. 715. On the other hand, it is the duty of the railroad company to provide reasonable means by which the passenger may be informed as to the proper train for him to take; and the request to charge above quoted goes on the supposition that the defendant had failed to perform its duty in this respect, that the ticket agent had made a mistake, and either by words or by his action in selling the plaintiff a ticket for the train she took represented to her that that

train would stop at Zirconia. Assuming, then, that the plaintiff's being on the wrong train was due to the mistake of the railroad company, and not to any fault of her own, what were the relative duties in these circumstances of the railroad company and the passenger? Ordinarily the duty of a railroad company is to stop its train to let off passengers at stations to which it has undertaken to carry them. But where, as in this case, a passenger is on a train, by the mistake of a ticket agent, which under the rules of the company does not stop at the station called for by his ticket, the prompt and safe transportation of other passengers is also to be considered by the conductor in deciding whether he will adhere to his schedule or stop for the particular passenger, and, if in good faith he decides it to be his duty not to stop, then it is the duty of the railroad company to correct the mistake of the ticket agent as far as practicable with the least possible damage and inconvenience to the passenger, and to compensate the passenger for such damage as resulted from the mistake as a proximate cause.

The duty of a passenger in the situation of the plaintiff is to use all reasonable means known to herself or suggested by the conductor to minimize her damage, especially when it is conceded, as in this case, that the fault alleged against the ticket agent in misleading the passenger was due to inadvertence; and the passenger cannot recover for loss or injury which could have been avoided by the use of such means. *Willis v. Tel. Co.*, 69 S. C. 539 48 S. E. 538; 2 *Sherman & Redfield* on Neg. par. 741. In the application of this principle of the right and duty of the carrier to correct its mistake and of the duty of the passenger to minimize the damage, as a general rule where a passenger on account of the mistake of the carrier's agent boards a train not scheduled to stop at his station, the carrier has a right to correct the mistake by letting the passenger off at a stopping place of that train before passing the passenger's destination, so that he may take the next train scheduled to stop at his destination; and it is the duty of the passenger to stop off and wait for such train. *International Railway Co. v. Hassell* (Tex. Sup.) 50 Am. Rep. 526. In such case, however, the common carrier is, of course, liable for any damage or loss of time resulting from the passenger's stopping off which would not have been incident to waiting for the local train at the point where the passenger had to commence his journey. It is true, this general rule as to the duty of the passenger to stop and wait for the next train is subject to exceptions, and there may be circumstances requiring the conductor of a fast train to stop and let one passenger off at an unscheduled station even at the cost of disarranging the running of his own and other trains and inconveniencing other passengers. For example, the

passenger could refuse to allow the railroad company to correct its mistake by requiring him to leave the through train and wait for the local, at the cost of danger of life or limb or of physical suffering or other hardship. Therefore, as an abstract proposition of law, it is true, as the circuit judge said, that the duty of a passenger to get off and wait for the next train scheduled to stop at his destination is not so absolute but that it may depend on circumstances. But in this case there were no circumstances which in any view could justify the plaintiff in refusing to wait for the local train at Saluda, and in putting upon the defendant responsibility for the injuries which came to her from her determination to go on to Flat Rock and walk nine miles over a rough trail; for there was not a scintilla of evidence that any damage or injury or hardship would have resulted to the plaintiff if she had gotten off at Saluda and waited for the next train, or that she had any reason to apprehend any injury or hardship from so doing. It was undisputed that the local train would be along the same afternoon and take her to her destination. There was no evidence that Saluda was not a convenient and respectable stopping place, where the plaintiff might stay in safety and comfort. The local train which she would have taken from Saluda was the very train she should have been directed to take at Union, and the only train on which it was defendant's duty to carry her to Zirconia, and there is no evidence that she would have suffered any inconvenience or loss from waiting at Saluda rather than Union beyond the actual loss of time from her work as an operative in the factory. The circumstance alleged in the complaint and mentioned by the circuit judge as one which she had a right to consider as a reason for refusing to wait at Saluda, that she had written to friends to meet her on arrival of the through train at Zirconia, cannot have any force or even application, for the reason that the plaintiff wrote and made this appointment, as she alleged, on some day before the day of her departure from Union, and before she was misled by the agent as to the train she could take for Zirconia. There is no evidence that she had then made any effort to ascertain what train stopped at Zirconia, and, as she had no right to be carried there on the through train, she could not hold the railroad company responsible for the consequences of having written to her friends to meet her at that train.

As already remarked, the plaintiff is not suing for delay or loss of time, but specifically for the hardship of the long journey on foot from Flat Rock to her father's home near Zirconia, and the illness alleged to have resulted from the fatigue and exposure. It is to be further observed that the complaint alleges the conductor told plaintiff he would force her to go on to Flat Rock beyond her destination before he would allow her to get

off. If this allegation had been made good, a very different case would have been presented, but the plaintiff's own proof was that the conductor gave her the opportunity to get off at Saluda, which was on the Union side of Zirconia, and there wait for the local train.

To sum up, in the whole case, there is nothing whatever disclosed by the evidence which could make the defendant responsible for anything more than the delay of the plaintiff in reaching her destination which would have been consequent on waiting at Saluda for the local train. It was her own choice to go on to Flat Rock and take the long walk over the mountain trail, and the resulting hardship and sickness cannot in any possible view of the evidence be regarded a natural or proximate result of the defendant's selling her a ticket on the wrong train or refusing to put her off at Zirconia. On this point the facts are not susceptible of any other inference.

The vital difference between this case and the case of *Pickens v. Railroad Co.*, 54 S. C. 511, 32 S. E. 567, is that in that case there was evidence that, the railroad company having failed to furnish any car at Alken so that Mrs. Pickens could continue her journey from Augusta to Edgefield, she had no alternative but to leave the station and encounter the hardship of the storm from which she suffered. Here the plaintiff without necessity chose to make the long journey over the mountain trail. In *Richardson v. Railroad Co.*, 71 S. C. 445, 51 S. E. 261, there was evidence to the effect that the passenger having a ticket from Columbia to Latta took a train not scheduled to stop at Latta in consequence of the mistake of the ticket agent. It differed from this case in that the conductor not only refused to stop at Latta, but demanded of the passenger additional fare to Dillon, which was the only stop anywhere in the vicinity of Latta, and upon the passenger's refusal to pay stopped the train and put him off against his will as a trespasser. The question of proximate and remote causes and effects did not arise in that case nor in the case of *Samuels v. Railroad Co.*, 35 S. C. 493, 14 S. E. 943, 28 Am. St. Rep. 883.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

DANTZLER v. COX & DANTZLER.

(Supreme Court of South Carolina. Oct. 30, 1906.)

1. EVIDENCE—RELEVANCY—FRAUD.

In an action grounded on fraud, evidence is admissible, though only remotely connected with the transaction out of which the controversy had arisen.

2. APPEAL—REVIEW—DISCRETION OF COURT.

Rulings of the court as to the admission of irrelevant evidence are not reviewable unless there has been an abuse of discretion.

3. SAME—WEIGHT OF EVIDENCE.

A verdict for defendants based on alleged fraud on the part of plaintiff will not be set aside because there is no direct evidence sustaining the defense, where there were facts and circumstances from which the jury might properly have drawn the inference in favor of such allegations, and plaintiff did not go on the stand to deny the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3928-3934.]

4. SAME—OBJECTIONS WAIVED.

Where the jury found for all of the partnership defendants, though one of them had not answered, his liability being admitted, and this ground was not urged on motion for a new trial, nor mentioned when the verdict was announced, the judgment will not be set aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1700.]

Woods, J., dissenting.

Appeal from Common Pleas Circuit Court of Darlington County; Aldrich, Judge.

Action by D. K. Dantzler against R. R. Cox and another. Judgment for defendant, and plaintiff appeals. Affirmed.

The following are the exceptions of plaintiff: "(1) Because the circuit judge erred in admitting the testimony of the defendant A. L. Dantzler in regard to the amount of money that he invested in the business of the firm of the defendants Cox & Dantzler, said testimony being entirely irrelevant to any issue raised by the pleadings, because it is expressly admitted by the defendants, both in their pleadings and their testimony, that the defendant A. L. Dantzler was a member of said firm, and the nature or extent of his interest in said firm is not in issue, nor is it relevant to any fact in issue; it being manifest that said testimony was calculated to mislead and confuse the jury, and to create prejudice against the plaintiff. (2) Because the circuit court erred in allowing the defendant A. L. Dantzler to testify as to how much money he drew for personal use from the firm of Cox & Dantzler from time to time (1) because said testimony was entirely irrelevant to any issue raised by the pleadings, and (2) because there was no evidence even tending to show that the plaintiff, D. K. Dantzler, had any notice or knowledge of the transactions in question, or was in any wise connected therewith; it being the manifest effect of said testimony to confuse and mislead the jury, and to prejudicially affect the plaintiff's case. (3) Because the circuit judge erred in permitting the defendant A. L. Dantzler to testify as to how much board he paid, and when he paid it; how much life insurance he carried, and the amount of his premiums; how much money he spent on a visit to Washington, D. C., and where he got it from, etc. (1) because said testimony is manifestly irrelevant

to any issue in this case, and (2) because there is no evidence tending to prove that the plaintiff, D. K. Dantzler, had any notice or knowledge of the transactions in question, or was in any wise connected therewith; it being the manifest effect of said testimony to confuse and mislead the jury, and to prejudicially affect the plaintiff's case. (4) Because the circuit judge erred in permitting the defendant A. L. Dantzler to testify in regard to various and sundry entries in the books of Cox & Dantzler, because there was absolutely no evidence tending to prove that the plaintiff, D. K. Dantzler, had any notice or knowledge of such entries, or of any transaction affected thereby, or that he was in any wise connected therewith; it being manifestly the effect of said testimony to confuse and mislead the jury, and to prejudicially affect the plaintiff's case. (5) Because his honor erred in permitting the defendant E. R. Cox and defendants' witnesses, T. H. Coker, K. W. Sloan, and J. O. Muldrow, to testify in regard to entries on the books of Cox & Dantzler by the defendant A. L. Dantzler, and in regard to transactions of defendant A. L. Dantzler with his codefendants, without proving that the plaintiff, D. K. Dantzler, had some notice or knowledge of said entries or of the transactions affected thereby, or that he was in some way connected therewith; said testimony being entirely irrelevant, and manifestly calculated to confuse and mislead the jury and to create prejudice against the plaintiff. (6) Because the circuit judge erred in admitting the books of Cox & Dantzler as evidence, without any proof that the plaintiff, D. K. Dantzler, had any notice or knowledge whatever of the entries therein, or of the transactions thereby affected; said books being, under the circumstances, entirely irrelevant to any issue in this case, and being manifestly misleading and confusing to the jury, and calculated to create prejudice against the plaintiff. (7) Because the circuit judge erred in admitting testimony of K. W. Sloan in regard to entries on the books of the defendants Cox & Dantzler, pertaining to a transaction of said firm with Mrs. J. J. Willis; said testimony being manifestly irrelevant, and calculated to mislead and confuse the jury and to prejudicially affect the plaintiff's case. (8) Because the circuit judge erred in overruling plaintiff's motion, at the close of the defendants' testimony, to strike out the testimony of E. R. Cox, A. L. Dantzler, T. H. Coker, K. W. Sloan, and J. O. Muldrow, in so far as the same related to the accounts of the firm of the defendants Cox & Dantzler and to the individual account of A. L. Dantzler, and in regard to all transactions between members of the firm of the defendants Cox & Dantzler, and also all testimony in regard to the power and authority of the defendant A. L. Dantzler to make the notes in suit, because said testi-

mony was entirely irrelevant, being unsupported by any evidence that the plaintiff, D. K. Dantzler, had any notice or knowledge of the matters in question; said testimony being manifestly calculated to mislead and confuse the jury, and to create prejudice against the plaintiff. (9) Because the circuit judge erred in overruling plaintiff's motion for a new trial, there being absolutely no testimony to support the verdict of the jury, or tending in the slightest degree to prove fraud or collusion on the part of the plaintiff, as alleged in the answer. (10) Because the circuit judge erred in refusing to set aside the verdict of the jury and grant a new trial, although the jury, in utter disregard of the evidence, found for the defendants generally, including the defendant A. L. Dantzler, who did not answer the complaint, and whose liability is admitted."

Dargan & Coggeshall and Stevenson & Matheson, for appellant. Spears & Dennis, for respondents.

GARY, A. J. This is an action upon two promissory notes, alleged to have been executed by the defendants under their firm name, in favor of the plaintiff. The defendants denied the allegations of the complaint, except the fact of partnership, and set up as a defense "that at the time of the alleged execution of the notes in suit, the defendant A. L. Dantzler, was without authority to borrow money in the firm name, and if he did borrow money from the plaintiff, and execute to him the notes in suit, it was for his own private benefit and use, and that the plaintiff had knowledge of these facts." Also, "that the defendant A. L. Dantzler and his brother, the plaintiff, fraudulently and collusively made and accepted the notes in suit in fraud of the rights of these defendants, and without their knowledge or consent, and, so far as the partnership is concerned, these notes are without consideration." Also, "that the plaintiff, in collusion with his brother, the defendant A. L. Dantzler, fraudulently waited until after said business had been wound up, and the defendant A. L. Dantzler, had drawn from the firm whatever amounts were due him for salary, before any demand was made, in order that these defendants might be compelled to pay the whole amount of the notes, although no consideration passed from said plaintiff to defendants." The jury rendered a verdict in favor of the defendants, and the plaintiff appealed upon exceptions, that will be set out in the report of the case.

1. When fraud is alleged, considerable latitude is permissible in the introduction of testimony, even when it is only remotely connected with the transaction out of which the controversy has arisen. One reason is, that in cases of fraud it frequently happens that it is impossible to produce direct and positive evidence of such fact, and the party

alleging it is necessarily forced to rely upon the inference to be drawn from the surrounding circumstances. There might not be a single fact in itself sufficient to establish the fraud, yet, when they are considered together, their combined effect may produce conviction upon the minds of the jurors. Applying this rule to the case under consideration, we are satisfied that the testimony, to the introduction of which the plaintiff objected, was admissible.

2. Furthermore, the introduction of irrelevant testimony must necessarily be left in large measure to the discretion of the presiding judge, and his rulings are not appealable unless there was an abuse of discretion, which has not been made to appear in this case.

These views dispose of all the exceptions, except the ninth and tenth.

3. The ninth exception assigns error in overruling the motion for a new trial, on the ground that there was no testimony to support the verdict. While there was no direct and positive testimony sustaining the defenses set up in the answer, still there were facts and circumstances from which the jury might properly have drawn the inference in favor of said allegations. The rule is thus stated in *Railroad v. Partlow*, 14 Rich. Law, 287: "It may be that no one of the facts would, of itself, warrant the inference and yet, when taken together, they may produce belief, which is the object of all evidence." In 1 Greenl. Ev. § 51a, it is said: "It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it. All the circumstances mentioned in this ground may be regarded as links in the chain of proof, from which the jury might deduce the inference of the defendants' privity and direction in the acts of trespass. This is usually the case where an issue depends on circumstantial evidence. Among the circumstances was the fact that, having the opportunity to take the stand and exculpate himself, the defendant declined to do so." The plaintiff in the case under consideration failed to become a witness.

4. The tenth exception assigns error in refusing to set aside the verdict, on the ground that the jury found for the defendants generally, including the defendant A. L. Dantzler, who did not answer the complaint, and whose liability is admitted. The record does not disclose the fact that this ground was urged upon the motion for a new trial, but the record does show that A. L. Dantzler has not entered up judgment on said verdict. Furthermore, this objection should have been interposed when the verdict was announced.

It is the judgment of this court that the judgment of the circuit court be affirmed.

WOODS, J. I dissent. The evidence shows conclusively that A. L. Dantzler was not only a member of the defendant copartnership, but the manager of the business, and his authority to give the notes sued on is beyond controversy. Any private understanding among the members of the firm that he should not give notes or borrow money was not binding on third persons without notice, and there was no evidence that the plaintiff had notice of such understanding. There was evidence of great confusion in the partnership books kept by A. L. Dantzler, and of irregularities in the conduct of the business, which might justify the inference that he had misappropriated some of the funds of the partnership, including, perhaps, the money received for the notes on which the plaintiff seeks to recover. But so far from the evidence offered by the defendants showing that the notes were taken by the plaintiff in collusion with A. L. Dantzler for the purpose of defrauding the partnership, it tended to show affirmatively the actual payment by the plaintiff to A. L. Dantzler, the managing partner, of the money for which the notes were given; for on June 1, 1901, the date of the first note for \$216, given by Cox & Dantzler, due 12 months after date, the check of the plaintiff to Cox & Dantzler was paid by the Bank of Darlington, and on September 13, 1901, the date of the second note for \$79.50, plaintiff drew from the Bank of Darlington \$75, and this gives color to the claim that he paid that sum to A. L. Dantzler when he took the note on the same day. The difference between the amount paid by the plaintiff and the face of the note manifestly represents the interest. A. L. Dantzler testified he received these sums from his brother for the notes, and there was no evidence to the contrary. Any fraudulent appropriation of this money to his own use by the partner whom the defendants had intrusted with the management of the business could not affect the plaintiff, unless he had notice of an intention to misappropriate. So far as I can discover, there was no evidence of such notice. A. L. Dantzler and D. K. Dantzler are brothers, and the defendants proved intimate relations between them, but knowledge by the plaintiff of his brother's improper conduct of the business of Cox & Dantzler was not proved. Business transactions between members of the same family, in which the outside world is concerned, as has been often held, should be subjected to more than ordinary scrutiny, but a business transaction is not presumed to be fraudulent merely on the relationship or intimacy of the parties.

In argument much stress was laid on the failure of the plaintiff to testify in exoneration of himself from the charge of fraudulent collusion, and this is the only point upon which it seems to me there is any room for doubt. The rule of law, as well as of common sense, is that, if there is any evidence

of fraud against a party, his failure to take the stand and give his version imparts additional strength and significance to such evidence. But where there is simply a charge of fraud, unsupported by any evidence, no inference is to be drawn against the party charged from his failure to testify. The defendant in all cases may sit in silence until the plaintiff has offered some proof against him, and cases in which fraud is charged are not exceptions to the rule.

As a result of these views, I think the circuit judge was right in admitting, in the first instance, all the testimony as to any irregularity or fraud of A. L. Dantzler in the conduct of the firm's business, for all this was a necessary preliminary to connecting the plaintiff with such irregularities or fraud; but when the defendant failed to connect the plaintiff with any of the alleged wrongdoing on the part of A. L. Dantzler, the testimony became incompetent, and should have been stricken out. For the same reason I think there should have been a new trial, because the verdict for the defendants was without evidence to support it.

CHEROKEE TANNING EXTRACT CO. v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Dec. 18, 1906.)

TELEGRAPHS AND TELEPHONES—OPERATION—DELIVERY OF MESSAGES—ACTIONS FOR DAMAGES.

A company wrote to plaintiff saying: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and January 1st at 95 cents each delivered in car load lots." On Monday morning plaintiff filed with defendant telegraph company a reply: "We accept your offer 1,500 barrels as per yours of the 7th." The message was not delivered until after another company had purchased the barrels. Held that, as the company's letter was a mere inquiry and plaintiff's acceptance was not in the terms of the inquiry or offer, no final contract was completed, and the telegraph company was liable only for nominal damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 72, 73.]

Appeal from Superior Court, Cherokee County; McNeill, Judge.

Action by the Cherokee Tanning Extract Company against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed, and partial new trial ordered.

This is an appeal from a judgment in favor of the plaintiff, for damages alleged to have been sustained through the negligence of the defendant in failing to transmit and deliver promptly a certain telegram.

Merrick & Barnard and F. H. Busbee & Son, for appellant. Dillard & Bell, for appellee.

BROWN, J. There is no dispute as to the material facts. The evidence shows: That

on the 7th day of November, 1903, an agent of the Standard Oil Company at Wilmington, N. C., wrote to the plaintiff at Andrews, N. C., a letter containing among other things, this request: "Kindly advise us by wire Monday if you can use about 1,500 creosote barrels between now and January 1st at 95 cents each delivered in car load lots." That the plaintiff received this letter on Monday, November 9th, and at 7:30 p. m. of that day and filed with the defendant, at its Andrews office, a message addressed to the Standard Oil Company, Wilmington, N. C., and reading as follows: "We accept your offer 1,500 barrels as per yours of the 7th." This message was delivered to the sendee at 10:36 a. m., November 10th. At the same time it wrote to plaintiff, the oil company addressed a similar letter to the Brevard Tanning Company and others. The latter company purchased the barrels by telegram received by the oil company shortly before plaintiff's message. The plaintiff claims substantial damage. Defendant requested the court to charge that plaintiff was entitled to recover nominal damages only, to wit, the price paid for the telegram. We think this instruction should have been given.

Damages are measured in matters of contract not only by the well-known rule laid down in *Hadley v. Baxendale*, 9 *Ench.* 341, but they must not be the remote, but the proximate, consequence of a breach of contract, and must not be speculative or contingent. Unless the reply of plaintiff by wire to the letter of the oil company created a contract between the two for the sale and delivery of 1,500 barrels at 95 cents each, then plaintiff can recover only nominal damages for any other damages would necessarily be purely speculative or contingent. The language of Brannon, J., in a similar case in West Virginia is appropriate to this: "But the trouble facing the plaintiff in this case is that there was no final contract between the parties, but only a proposal for a contract, and there can be no contract without both a proposal and its acceptance. The failure of the telegram company did not cause the breach of a consummate contract; it only prevented one that might or might not have been made." *Beatty v. Tel. Co.* (W. Va.) 44 S. E. 309. See, also, *Hosiery Co. v. Tel. Co.* (Ga.) 51 S. E. 290 and *Wilson v. Tel. Co.* (N. C.) 52 S. E. 153. The offer must be distinct as such, and not merely an invitation to enter into negotiations upon a certain basis. *Wire Works v. Sorrell*, 142 *Mass.* 442, 8 N. E. 332; *Beaupre v. Tel. Co.*, 21 *Minn.* 155; 24 *Am. & Eng. Enc.* 1029, and cases cited.

Again, the offer must specify the specific quantity to be furnished, as a mere acceptance of an indefinite offer will not create a binding contract. *McCaw Mfg. Co. v. Felder*, 115 *Ga.* 408, 41 S. E. 664; 24 *Am. & Eng. Enc.* 1030, note 1, and cases cited. "The offer must be one which is intended of itself to

create legal relations or acceptance. It must not be an offer merely to open negotiations which will ultimately result in a contract." 1 Paige on Cont. § 26, and cases cited; Clark on Contracts, § 29. In *Moulton v. Kershaw*, 59 Wis. 316, 18 N. W. 172, 48 Am. Rep. 516, the defendants wrote to the plaintiff as follows: "In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt in full car load lots of 80 to 75 barrels, delivered at your city at 85 cents per barrel to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain as the price in general remains unchanged. Shall be pleased to receive your order." The plaintiff at once telegraphed the defendant: "Your letter of yesterday received and noted. You may ship me two thousand barrels Michigan fine salt as offered in your letter." The defendant declined to deliver the sale and plaintiff sued for damages. The Supreme Court of Wisconsin, sustaining a demurrer to the complaint, held that the communications between the parties did not show a contract; that the letter of the defendants was not such an offer as plaintiff could by an acceptance change into a binding agreement. See, also, *Smith v. Gowdy*, 90 Mass. 566. The letter from the oil company to the plaintiff was a mere inquiry. *Walser v. Tel. Co.*, 114 N. C. 440, 19 S. E. 366. It was evidently a "trade inquiry" sent out by the oil company to customers, and did not purport and was not intended to be a legal offer binding on acceptance. "Care should be taken always not to construe as an agreement letters which the parties intended only as preliminary negotiations." *Lyman v. Robinson*, 14 Allen (Mass.) 254.

Again, the acceptance by the plaintiff was not in the terms of the offer. The acceptance was for 1,500 barrels. The oil company could not have compelled the plaintiff to take a less number. If the plaintiff regarded the oil company's letter as a valid offer, it should have replied that it would take what barrels the oil company had, not exceeding 1,500, as that company had offered no exact specific number. "An acceptance to bind the other party must be unconditional and unqualified and must correspond exactly to the terms of the offer." 24 Am. & Eng. Enc. 1031, 1032, and cases cited; 1 Parsons, Cont. 476, 477. As the plaintiff's message to the oil company seasonably delivered would not, of itself, have effected a legal contract between the plaintiff and the oil company for the delivery of 1,500 barrels at 95 cents each, it follows that any other than nominal damage would be purely speculative. The oil company might have delivered the barrels, and then, again, it might not have done so. It might have delivered 1,500, and again it might have delivered a much less number. Its letter specified no exact number and it was under no legal compulsion to deliver any.

As the defendant manifests its willingness to pay nominal damages, it is unnecessary

to consider the exceptions to his honor's rulings on the issue of negligence.

We award a new trial upon the second issue relating to the damages.

Partial new trial.

CAROLINA & T. S. R. CO. v. BAILEY et al.
(Supreme Court of North Carolina. Dec. 18, 1906.)

APPEAL—DECISIONS REVIEWABLE—FINALITY
—EMINENT DOMAIN.

An order of the superior court in condemnation proceedings remanding the cause to the clerk that he may hear the same is interlocutory, and no appeal lies therefrom to the Supreme Court, and this though a plea in bar was filed by defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 473.]

Appeal from Superior Court, Swain County; W. R. Allen, Judge.

Condemnation proceedings by the Carolina & Tennessee Southern Railroad Company against J. S. Bailey and others. Appeal by defendants from an order of the judge of the superior court dismissing an appeal by defendants from an order of the clerk appointing commissioners. Appeal dismissed.

J. S. Adams, for appellants. Chas. M. Busbee, for appellee.

BROWN, J. We think his honor ruled correctly in dismissing the appeal as premature, and properly remanded the cause to the clerk to be proceeded with under the order appointing commissioners, which had been made by the clerk in pursuance of the statute. Revisal 1905, § 2580. In the case of *Railroad v. Newton*, 183 N. C. 182, 45 S. E. 549, it is decided that an order of the superior court in condemnation proceedings, remanding the cause to the clerk that he may hear the same, is interlocutory, and no appeal lies therefrom to the Supreme Court, though a plea in bar was filed by the defendant. That no appeal can be taken at such stage in condemnation proceedings, viz., when the judge below remands the cause to the clerk, has been repeatedly adjudged before the case of *Railroad v. Newton*. *Telegraph Co. v. Railroad*, 83 N. C. 420; *Railroad v. Railroad*, 83 N. C. 499; *Railroad v. Warren*, 92 N. C. 622.

Appeal dismissed.

KIMBERLY et ux. v. HOWLAND.
(Supreme Court of North Carolina. Dec. 18, 1906.)

1. NEGLIGENCE—SUBMISSION OF ISSUES.

In an action for injury from negligence, the case is properly submitted by the issues: Was defendant negligent as alleged? was plaintiff injured thereby? and what, if any, damages is plaintiff entitled to recover?

2. EXPLOSIVES — INJURIES FROM BLASTING — EVIDENCE.

Evidence that defendant was blasting with dynamite 175 yards from plaintiff's house and close to other houses; that defendant's foreman was not an expert blaster, and was absent part of the time when the blasting was going on, that his assistants had but little experience, that the blasts were fired off without being properly smothered, that smothering was a safe method usually employed in such operations, and that, had it been properly done, a rock would not have been thrown through plaintiffs' house by one of the blasts, is sufficient evidence of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Explosives, § 9.]

3. SAME — FORESEEING PROBABLE CONSEQUENCES.

One who is blasting with dynamite in the immediate neighborhood of dwellings should foresee the danger to persons in a house 175 yards distant from blasting without properly smothering the blast, so as to be liable for injury to them therefor, though he cannot foresee the exact form of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Explosives, § 9.]

4. DAMAGES—LIABILITY FOR WRECKED NERVOUS SYSTEM.

Where fright from the negligent throwing of a rock by a blast through a house nearly causes the miscarriage of a woman and wrecks her nervous system, recovery may be had therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 100.]

5. HUSBAND AND WIFE—INJURY TO WIFE—RIGHT OF HUSBAND TO RECOVER.

Where a wife is injured, the husband may recover for loss of her services, society, aid, and comfort, including a fair compensation for her future diminished capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Husband and Wife, § 768.]

Appeal from Superior Court, Buncombe County; W. R. Allen, Judge.

Action by T. M. Kimberly and wife against R. L. Howland. Judgment for plaintiffs. Defendant appeals. Affirmed.

The plaintiffs brought two distinct actions for an injury to the feme plaintiff by reason of the negligence of the defendant in conducting certain blasting operations. The husband sued for the loss of his wife's services. The two actions were consolidated and tried together upon the following issues: (1) Was the defendant negligent as alleged? Ans. Yes. (2) If so, was the plaintiff Janie Kimberly injured thereby? Ans. Yes. (3) What damage, if any, is plaintiff Janie Kimberly entitled to recover? Ans. \$3,500. (4) What damage, if any, is plaintiff T. M. Kimberly entitled to recover? Ans. \$700. From the judgment rendered, defendant appealed.

Merrimon & Merrimon, for appellant. Thomas A. Jones, for appellees.

BROWN, J. The defendant excepted to the issues submitted by the court, and tendered the following: (1) Were the injuries alleged in the complaint the immediate, natural, and necessary consequences of the alleged blasting? (2) Were the alleged injuries to the plaintiff such as might naturally

and probably occur from the alleged negligence, and were they such as should have been in contemplation of the defendant with reasonable certainty? (3) Was the alleged physical injury the natural and proximate result of the alleged fright? The issues submitted by the court presented every phase of the case and are such as arise upon the pleadings, and are approved by precedent as appropriate in such cases. The defendant was given the opportunity to present every defense he had and every proposition of law and fact embraced in the issues tendered by him. Not only was he given a fair opportunity to present his view of the law and facts, but the record shows that he did so present them. The issues submitted are also a sufficient basis for the judgment rendered. *Wright v. Cotten*, 140 N. C. 1, 52 S. E. 141; *Wilson v. Cotton Mills*, 140 N. C. 52, 52 S. E. 250.

The chief contention made by the learned counsel for the defendant in his argument is that in no view of the evidence can either plaintiff recover, and therefore the motion to nonsuit should have been sustained. As the right to recover anything on the part of the husband is dependent upon the liability of the defendant to the wife, we will consider her case first.

It is contended: (1) That the evidence discloses no negligent act. (2) That the defendant's agents could not have reasonably foreseen the consequences of their acts. (3) That the injury complained of by the wife was the result of fright only, for which no recovery can be had. The plaintiff offered evidence tending to prove that defendant was blasting rock with dynamite on the outskirts of the city of Asheville about 100 yards from Charlotte street and 175 yards from plaintiffs' residence, and in close proximity to other houses. A rock from one of the blasts, weighing about 20 pounds, crashed through a portion of plaintiffs' residence. It was further in evidence that defendant's foreman was not an expert blaster and that a part of the time when the blasting was going on he was absent, and that his assistants had but little experience. It was in evidence that the blasts were fired off without being properly "smothered," and that "smothering" is a safe method usually employed in such operations, and that, had it been properly done on this occasion, the injury to plaintiffs' residence could not well have resulted. We think the evidence of negligence amply sufficient to have been submitted to the jury. *Blackwell v. Railroad*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 736. We think, furthermore, that a man of ordinary prudence should have foreseen the probable consequences of blasting with dynamite in such a neighborhood without properly smothering the blast. Persons using such an inflammable and powerful instrumentality as dynamite are charged with knowledge of its probable consequences which

they could by reasonable diligence have acquired. The defendant knew he was blasting in a populous neighborhood, and that plaintiffs' dwelling was near by. If the evidence offered by plaintiffs is to be believed, the workmen were unskillful and the blasts deficiently smothered so as to fail to properly confine their effect. It is true, defendant did not know, at the time he fired the blast, that the feme plaintiff was lying in bed in her home in a pregnant condition, but he or his agents knew it was a dwelling house and that in well regulated families such conditions occasionally exist. While the defendant could not foresee the exact consequences of his act, he ought, in the exercise of ordinary care, to have known that he was subjecting plaintiff and his family to danger and to have taken proper precautions to guard against it. *Gates v. Latta*, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584; *Watson on Damages*, § 4; 19 Cyc. 7, and cases cited; *Blackwell v. Railroad*, supra. The authorities seem to agree that, if the tort is willful and not merely negligent, the wrongdoer is liable for such physical injuries as may proximately result whether he could have foreseen them or not. We do not base our decision upon any evidence of a willful wrong, for there is none. The defendant was engaged in a lawful act, and, if prosecuted with due care, he would not be liable, and due care means, in a case of this sort, a high degree of care. We bear in mind the distinction between willful wrongdoing and those consequences flowing from simple negligence, so clearly stated by Mr. Justice Walker in *Drum v. Miller*, 185 N. C. 208, 47 S. E. 424, 65 L. R. A. 890, 102 Am. St. Rep. 528: "In the one case he is presumed to intend the consequences of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner, otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen." We, therefore, conclude that, while there is no evidence of a willful wrong, the defendant should have reasonably foreseen the result of his negligence. No human being could foresee the exact form of the injury inflicted, but ordinary prudence could foresee that there was danger to plaintiffs and their household unless the blast was securely confined.

It has been argued in this case by defendant's counsel with much earnestness and ability, backed by most respectable authority, that the feme plaintiff's injuries, if she sustained any, were the result of fright without any contemporaneous physical injury, and that she cannot recover for them. This brings us to the consideration of a question concerning which there is much conflict among the authorities. We will not undertake to either reconcile or review them. All

the courts agree that mere fright, unaccompanied or followed by physical injury, cannot be considered as an element of damage. In a very exhaustive note by Judge Freeman to *Gulf Ry. Co. v. Hayter*, 77 Am. St. Rep. 860, all the authorities are collected. But, where the fright occasions physical injury, not contemporaneous with it, but directly traceable to it, the courts are hopelessly divided. The testimony offered in behalf of the plaintiffs tends to prove that the wife was lying on her back heavy with child at the moment the rock crashed through the roof; that, although it did not strike her, it greatly shocked her nervous system and nearly caused a miscarriage, and that she has never recovered from the effects of it. If this testimony is believed, the injury to the wife was a physical injury resulting from shock and fright and directly traceable to it. There is much conflict of evidence, but plaintiffs' testimony tends to prove that, had not the rock crashed through the roof, she would not have endured the nervous physical pain and suffering which has followed. The nerves are as much a part of the physical system as the limbs, and in some persons are very delicately adjusted, and, when "out of tune," cause excruciating agony. We think the general principles of the law of torts support a right of action for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because the physical injury consists of a wrecked nervous system instead of lacerated limbs. Injuries of the former class are frequently more painful and enduring than those of the latter. A recent writer on the subject trenchantly says: "To deny recovery against one whose willful or negligent tort has so terribly frightened a person as to cause his death, or leave him through life a suffering and helpless wreck, and permit a recovery for exactly the same wrong which results, instead, in a broken finger, is a travesty upon justice. The reasoning which can lead to such a result must be cogent indeed if it shall be entitled to respect." *Case & Comment*, August, 1906. A text-writer of repute says: "The preferable rule on this subject is, in our opinion, that, if a nervous shock is a natural and proximate consequence of a negligent act, and physical injuries resulting directly from mental disturbance, there should be a recovery for the anguish of mind and its consequent physical loss, irrespective of contemporaneous bodily hurt." *Watson on Damages for Personal Injuries*, § 405. We think the able judge who tried this case in the court below clearly stated the law, as we administer it, when he said: "While fright and nervousness alone do not constitute an injury within the meaning of this issue, if this fright and nervousness is the natural and direct result of the negligent act of the defendant, and if this fright and nervousness naturally and directly causes an

impairment of health or loss of bodily power, then this would constitute an injury within the meaning of this issue. There must be an injury, as explained to you, and this injury must have been the natural and direct result of the negligent act of the defendant and one which should have been foreseen by the defendant by the exercise of ordinary care." *Watkins v. Manufacturing Co.*, 131 N. C. 537, 42 S. E. 983, 60 L. R. A. 617, and cases cited; *Bell v. Great Northern Ry.*, L. R. 26 Ir.; *Purcell v. Railway*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203.

It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that, where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name. 15 A. & E. Encyc. Law (2d Ed.) 861, and cases cited. In this case there is no evidence of an outlay of money in medical bills and other actual expenses, and the court so charged the jury, and directed them to allow nothing on that account. His honor also correctly instructed the jury to allow nothing because of any mental suffering upon the part of the husband. There was, however, evidence as to the loss of the services of the wife and that the injury inflicted was of such a character as to deprive the husband of her society, services, aid, and comfort. The court further charged that, if the injuries are permanent, the husband could also recover such sum as will be a fair compensation for the future diminished capacity to labor on the part of the wife. This instruction we think is correct and supported by authority. 8 Thompson's Negligence, §§ 7341, 7342. It is impossible to lay down a rule by which the value of her services and the loss of the wife's society can be exactly measured in dollars and cents. All the judge can do is to direct the jury to allow such reasonable sum as will fairly compensate the husband therefor under all the circumstances of the case.

We have carefully examined all the exceptions in the record, although we comment only on such as we think proper. The case appears to us to have been well and fairly tried, and we find no reversible error in any of the rulings or instructions of the court.

No error.

NORTH FORK LUMBER CO. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. Dec. 11, 1906.)

1. RAILROADS — OPERATION — FIRES — DEFECTIVE LOCOMOTIVES.

Where a fire is set out by a spark from a defective locomotive, or one not having a proper

spark arrester, or because the locomotive is operated in a careless manner, the company is liable whether the fire originates on or off the right of way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1690-1693.]

2. SAME—FOUL RIGHT OF WAY.

Though an engine may be properly operated, and not be defective and have proper spark arrester, yet if a fire originates on the right of way because it is in a foul or negligent condition the company will be liable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1668-1671.]

3. APPEAL—REVIEW—HARMLESS ERROR.

The jury found that a fire along a right of way was caused either by sparks from a defective engine, or because the engine was operated in a careless manner. Held, that the railroad company could not complain that the issue as to the condition of its right of way was not also submitted.

4. RAILROADS — OPERATION — FIRES — BURDEN OF PROOF.

Where a fire along a right of way is set out by a locomotive, the burden is on the company to show that such locomotive was equipped with a proper spark arrester.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1711, 1714.]

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Action by the North Fork Lumber Company against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Moore & Rollins and C. A. Webb, for appellant. Chas. E. Jones and Zebulon Weaver, for appellee.

CLARK, C. J. A pile of lumber belonging to the plaintiff was burned while under a shed on the defendant's right of way. The side of the shed next to the railroad track was open, and the eaves were about the height of the smoke stack of a locomotive. The public and the defendant used the shed for loading and unloading, and, not long before this fire others than the plaintiff had used it for a workshop, and some shavings had accumulated there. It was in evidence that the defendant's locomotive passed, throwing a great many sparks and of unusual size, much larger than would be thrown by an engine with a proper spark arrester. Within 15 or 20 minutes after this locomotive passed, fire was first seen, and it was burning among the shavings. It is not shown that either the plaintiff or the defendant had actual knowledge that the shavings were under the shed, but, "any one passing along the road could have seen them."

The liability of railroads for setting out fire is summed up under three heads in *Williams v. Railroad*, 140 N. C. 624, 53 S. E. 448, but indeed it may be stated under two, to wit: (1) When the fire is set out by sparks from a defective engine, or one not having a proper spark arrester, or because operated in a careless manner, the company is liable for the negligence whether the fire originates on

or off the right of way. (2) When the engine is properly operated, is not defective, and has a proper spark arrester, but fire originates on the right of way, because it is in a foul or negligent condition, the company is liable. In the present case the judge charged that if the state of facts, stated under the first head, occurred, to wit, that the sparks were emitted by a defective spark arrester, the jury should find the first issue "yes." The jury so found. We do not see that the defendant has any cause to complain that the second head, the alleged negligence from allowing the accumulation of shavings on the right of way, was not also presented. The plaintiff alone could complain of that. If the fire was set by reason of a defective spark arrester, it was immaterial whether or not the defendant allowed an accumulation of inflammable material on the right of way. Under the charge of the court on the second issue, the jury found that the plaintiff was not responsible for the accumulation of shavings, or, if it was, that the proximate cause was the defective spark arrester. The court properly charged that if the fire was set out by the locomotive, the burden was on the defendant to show that it was equipped with a proper spark arrester—a matter peculiarly within its knowledge. 13 A. & E. (2d Ed.) 498, which cites the English, federal, and state cases.

No error.

J. S. MARTIN & SON v. BRISCOE.

(Supreme Court of North Carolina. Dec. 11, 1906.)

1. JUDGMENT—CONFESSION—REQUISITES OF AFFIDAVIT.

Under Revisal 1905, § 581, providing that a judgment by confession may be supported by a verified writing by the debtor authorizing such entry and stating the facts on which the debt arose and that it is justly due, no statement need be made that the controversy is real and the proceedings in good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 74, 92.]

2. SAME—REVIVAL—ESTOPPEL OF DEBTOR.

An affidavit in support of a judgment by confession recited the sum due, that it was "partly due" for certain bills of goods, and that the amount was "part of bill for goods." Six years after entry of judgment thereon, and when the claim was barred except for the judgment, the debtor, on the creditor's motion to revive the judgment, attacked it on the ground of the insufficiency of the affidavit under Revisal 1905, § 581, requiring a concise statement of the facts and a showing that the sum confessed was justly due. No allegations were made of fraud, nor any claim of payment. *Held*, that the debtor was estopped to set up such defense, if any existed.

3. SAME—REVIVAL—PROCEEDINGS—APPEAL FROM CLERK.

Where a motion upon affidavit and notice to revive a dormant judgment is before the judge on appeal from an improper refusal of the clerk to revive the judgment, it is optional with the judge to reverse and remand the case with directions, or to himself grant the motion and order execution to issue.

Connor, dissenting.

Appeal from Superior Court, Rutherford County; Justice, Judge.

Motion upon affidavit and notice by J. S. Martin & Son to revive a dormant judgment against W. L. Briscoe. From a judgment reversing the refusal of the clerk of the superior court to revive the judgment, defendant appeals. Affirmed.

This was a motion upon affidavit and notice to revive a dormant judgment. The defendant had confessed judgment in favor of the plaintiff as follows:

"North Carolina, Rutherford County. In the Superior Court. November Term, 1896. J. S. Martin & Son v. W. L. Briscoe. That there is due from him to the plaintiffs above named the sum of eight hundred and twenty-three dollars and fifteen cents (\$823.15). That the amount is partly due from defendant to plaintiffs for bills of goods bought from plaintiffs by the defendant and received by him during the time elapsing between January 1, 1896, and October, 1896, and that the amount of eight hundred and twenty-three dollars and fifteen cents is part for bills of groceries bought in the time named. And the defendant, W. L. Briscoe, hereby confesses judgment in favor of plaintiff for the sum of eight hundred and twenty-three dollars and fifteen cents, and hereby authorizes the court to enter judgment against him and in plaintiff's favor for the amount. W. L. Briscoe, the defendant above named, being sworn, makes oath that the facts set forth in the foregoing confession of judgment is made in good faith. W. L. Briscoe.

"Sworn to and subscribed before me, this the 14th day of November, 1896. T. C. Smith, C. S. C."

On the back of same the following entry of judgment: "Whereas the defendant, W. L. Briscoe, has filed the foregoing statement and affidavit, it is adjudged by the court that the plaintiff recover of the defendant the sum of (\$823.15) eight hundred and twenty-three and 15/100 dollars, together with three (\$3.00) dollars costs of this confession of judgment. This 14th day of November, 1896. T. C. Smith, Clerk Superior Court for Rutherford County."

The defendant contends that the original affidavit of W. L. Briscoe, the defendant, was not sufficient to authorize the entry of judgment by confession, and that such judgment was void for the want of jurisdiction. Upon hearing the cause the clerk of the superior court held the judgment invalid, and refused to revive it. On appeal, this was reversed, and the defendant appealed.

B. A. Justice, for appellant. McBrayer & McBrayer, for defendant.

CLARK, C. J. This is a "judgment confessed" under Code 570 (now Revisal 1905) § 580, and not a "controversy submitted without action" under Code 567 (now Revisal 1905) § 803. Hence the authorities cited

upon the construction of the latter section have no application. "Confession of judgment" does not require, like the "submission of a controversy without action," that the affidavit shall set out that the controversy is real and the proceedings are in good faith, though the latter statement is in fact made in the affidavit in this case. It is sufficient (Revisal 1906, § 581) that there should be a statement in writing signed by the defendant and verified by his oath and stating: (1) The amount for which judgment may be entered and authorizing its entry. (2) If for money due, a concise statement of the facts out of which the debt arose and it must show that the sum confessed is justly due.

There can be no controversy raised except as to whether there is "a concise statement of the facts out of which the debt arose" and which "shows that the sum confessed is justly due." The confession is not very skillfully drawn, but it does set out that the amount of \$823.15 is due plaintiff by him for part of "bills of goods bought from plaintiffs by defendant and received by him between Jan. 1, 1896, and Oct., 1896," and said amount is "part of bills of groceries bought in the time named." It would seem that this was a sufficient statement of "the facts out of which the debt arose" and "shows that the sum confessed is justly due"—especially in view of the fact that there is no objection here to the validity of this judgment by any creditor—but it is the debtor, the defendant, who is urging a defect in his own confession of judgment, and is seeking thereby to impeach his own affidavit that the debt was due, and his authorization that judgment be entered against himself, and this after acquiescence in said judgment for nearly six years. There is no suggestion of fraud or imposition in securing the confessing of judgment or any denial that the debt was not then due, nor any denial of the plaintiff's affidavit that it has not been paid since. Should the defendant set aside this confession of judgment the statute would now be a bar to the debt. In *Smith v. Smith*, 117 N. C. 848, 23 S. E. 270, which was a proceeding by an administrator of the confessing debtor, representing creditors, to set aside a judgment confessed, there was no statement in the confession that the debt was due, nor of any "facts showing that the debt was still due." Here it is explicitly stated in the defendant's affidavit that the amount confessed "is due." In *Bank v. Cotton Mills*, 115 N. C. 508, 20 S. E. 765, it was held that, when the confession of judgment is for "goods sold and delivered," that is sufficient to show the debt was justly due without stating "time of sale (though this was given here) quantity, price, and value of the goods." In that case it was also held that filing such confession of judgment is equivalent to authority to enter judgment. In the present case there is express authority to enter judg-

ment, and his honor properly allowed the motion to revive the judgment and to issue execution.

We would not be understood as passing upon the question of the validity of such judgment confessed if it were attacked by a creditor, or even if the defendant had assailed it on the ground of fraud or imposition or denied the debt. We place this decision upon the ground of estoppel—the original affidavit by defendant that the debt was due the plaintiff, his acquiescence in the judgment for six years, his failure in this proceeding to deny the plaintiff's allegation (made under oath) that the debt is still due, the absence of any averment by defendant of fraud, mistake, or imposition, and the fact that, if the judgment should be now held invalid, at defendant's instance, for informality, after having been entered at defendant's request, he would be protected by the statute of limitation.

The case being before the judge by appeal, it was optional with him to reverse the clerk, and remand the case to him with directions how to proceed, or himself to grant the motion to revive judgment and to order execution to issue. *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188; *Roseman v. Roseman*, 127 N. C. 497, 37 S. E. 518; *Ewbank v. Turner*, 134 N. C. 80, 46 S. E. 508.

Affirmed.

HOKE, J., concurs in result.

CONNOR, J. (dissenting). I regret that I cannot concur in the opinion of the majority of the court in this case. This court has uniformly held, beginning with the case of *Davidson v. Alexander*, 84 N. C. 621, that a judgment confessed pursuant to the provisions of section 803 of the Revisal 1906, is invalid unless the requirements of the statute be strictly complied with. I do not think that, tested by what is said in that case and every other decision of the court which follows and approves it, the record before us is in accordance with the statutory requirement that it must state concisely the facts out of which the indebtedness arose. We have in this case a statement "that the amount is partly due from defendant to plaintiffs for bills of goods bought from plaintiffs by the defendant and received by him during the time elapsing between January 1, 1896, and October, 1896, and that the amount of \$833.15 is part for bills of groceries bought in the time named." There is a painful uncertainty in respect to the facts out of which the alleged indebtedness arose. It is said that it is "partly due" and that the amount is "part for bills of groceries." The very pertinent inquiry arose: what part of it is due for goods bought, and what part is for bills of groceries? There is nothing in the statement which gives the slightest response to this inquiry. As was said by Ruffin, J., in *Davidson v. Alexander*,

supra: "The object of the statute in this is to protect the other creditors of the debtor; to enable them, not only to see the extent of his liabilities, but to test the bona fides of this particular debt to which he is given a preference, and, that they may have full opportunity to do this, the parties are commanded to spread upon the record specifically the circumstances and business transactions out of which it originated. A mere statement that the defendant is indebted to the plaintiff in a sum certain 'arising from the acceptance of a draft, of which the following is a copy,' etc., falls far short of the demands of the statute." The language of the learned justice is applicable to the record in this case. "Compared with these requirements, how meager is the information, as to the consideration of the debt and the transaction out of which it grew, is the statement of the debtor when confessing the judgment under consideration?" What is there in this statement of facts which would enable a creditor to institute an investigation to ascertain the bona fides of the debt? He is told that the amount for which judgment is confessed is "partly due" and is "part for" bills of groceries, etc. He would seek in vain for any information given him by the record, by which he would be enabled to test the validity of the judgment. This court has, with absolute uniformity, applied the principle announced in *Davidson v. Alexander*, supra. In *Davenport v. Leary*, 95 N. C. 203, the judgment was declared void because the confession of judgment did not embrace the account upon which it was based. In *Smith v. Smith*, 117 N. C. 348, 23 S. E. 270, in which all the cases are reviewed, it is said, referring to the section of the Code in question: "The proceeding is in derogation of common right, and, to prevent the perpetration of fraud in such cases, that section requires that the consideration be stated and that it appear that the amount for which the judgment is confessed is justly due. If the statutory requirements are not complied with, the judgment is irregular and void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. * * * In the absence of such statement, or the statement at least of facts showing that the debt was still due, the judgment was properly held void, for, without compliance with the statute on the face of the proceeding, the court had no jurisdiction to enter up the judgment."

I cannot concur in the suggestion that any estoppel can arise against the parties to the judgment, because it is absolutely void as the court is without jurisdiction; hence, whenever it is called to the attention of the court and any relief asked upon it, the application should be declined. While it may be conceded that leave to issue execution would not affect the rights of creditors to attack the judgment, it is at least a recognition of

its validity which should not be had. In my opinion, there is no judgment upon which the court can direct execution to issue.

WALKER, J., concurs in the dissenting opinion.

STEADMAN et al. v. STEADMAN et al.
(Supreme Court of North Carolina. Dec. 11, 1908.)

1. EJECTMENT—DEFENSES—ESTOPPEL.

Where, in an action to recover land, both parties claim under a common grantor, defendant is estopped from questioning the title of the common grantor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 59, 103.]

2. WILLS—PROBATE—PROOF.

Under Rev. Code, c. 119, § 15, requiring that a written will with witnesses shall be proved by the oath of two of the subscribing witnesses, if living, etc., a probate of a will signed by testator, and witnessed by two witnesses, based on the proof of one of the two subscribing witnesses, without more, is invalid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 715-720.]

3. SAME—TIME FOR PROBATE—LIMITATIONS.

In the absence of a statute to the contrary, there is no limitation within which a will may be proved, and a will may be proved 50 years after testator's death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 601.]

4. SAME—PROBATE—PROOF—SUFFICIENCY.

The attempt to prove a will in 1857, in accordance with Rev. St. c. 122, § 6, in effect January 1, 1856, does not affect a probate in 1906, which complies with the requirements of Revisal 1905, § 3127, cl. 3.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 506.]

5. EJECTMENT—DEFENSES—ESTOPPEL.

A party in an action to recover land who claims under a deed from a devisee in a will cannot question the validity of the probate of the will.

6. EVIDENCE—DECLARATION OF GRANTOR—ADMISSIBILITY.

The declaration of a person made while in the possession of real estate that she claimed under her father's will is competent as against one claiming under a deed from her.

7. WILLS—CONSTRUCTION—ESTATES DEVISED.

A testator devised to a son and daughter a tract of land to be equally divided in value between them, and also devised to them another tract, and declared that it was his will that another son and two other daughters should be "equal sharers in said tract * * * during their natural life." Held that, in view of Revisal 1905, § 3138, providing that a devise of real estate shall be construed to be a devise in fee simple, and in view of other provisions of the will showing that equality among the children was intended to arise from other portions of the estate devised, the son and daughter acquired the two tracts in fee, and the other son and the two daughters were only life tenants in the second tract.

Appeal from Superior Court, Rutherford County; Justice, Judge.

Action by Sarah Steadman and others against J. B. Steadman and others. From a judgment granting insufficient relief to the plaintiffs, both parties appeal. Affirmed on

the appeal of defendants, and reversed in part on the appeal of plaintiffs.

Action to recover land tried before justice, judge, and a jury, at April term, 1906, superior court, Rutherford county. There was evidence offered showing: That Joseph Steadman died in Rutherford county in 1857, leaving a last will and testament, signed

his
Joseph (X) Steadman, and witnessed by two
mark
subscribing witnesses. That Joseph Steadman left six surviving children and heirs at law: Susannah, and James A. Steadman, John, Sarah, Margaret, and Mary Steadman. That all the devisees mentioned in the will were dead at the time of the action brought; John, Sarah, Mary, and Margaret having died without issue. At the death of Margaret, she left a last will and testament devising her property to her sister Mary, who died not long before the institution of this suit. The tract of land, the subject of this controversy, is the second, or 150-acre tract mentioned in the will of Joseph Steadman, and the language of the will pertinent to the questions involved is as follows: "It is my will that my eldest daughter Susannah, and my son James A. shall have a certain tract of land, containing one hundred acres lying on the waters of Dill's creek; to be equally divided in value between them, and then also one other tract containing one hundred and fifty acres, lying on the waters of Jarrett's creek. It is my will that my son John and daughters Mary and Margaret be equal sharers in said tract of land during their natural life. It is my will that my daughter Sarah shall have equal in value with my son John and daughters Mary and Margaret to be paid out of the other portion of my estate, due allowances to be made by my daughter Susannah and son James A. and daughter Sarah for property already received. And all other property [except the mare which I now own] to be equally divided between my son John and daughters Mary and Margaret." The plaintiffs claim the land under this will and are the children and heirs at law of Susannah and James A., two of the devisees named in the will. The defendants claim under a deed from Mary, one of the devisees named in the will. Issues were submitted that were responded to by the jury as follows: (1) "Did John Steadman, Margaret Steadman and Mary Steadman claim title to the land described in the complaint under Joseph Steadman? Answer. Yes. (2) Are the plaintiffs the owners in fee and entitled to the possession of the land described in the complaint? Answer. Yes; eleven-fifteenths. (3) Is the defendant in the unlawful and wrongful possession thereof? Answer. Yes. (4) What damages, if any, have plaintiffs sustained by reason of defendant's wrongful and unlawful possession? Answer. Fifteen dollars

for each year, total \$30.00." On the verdict the court gave judgment in favor of plaintiffs for eleven-fifteenths of the land in controversy. Both plaintiffs and defendants excepted, and appealed.

S. Gallert, for plaintiffs. McBrayer & McBrayer and B. A. Justice, for defendants.

Defendants' Appeal.

HOKE, J. (after stating the case). The jury by their verdict, having established that both plaintiffs and defendants claim the land in controversy under Joseph Steadman, the alleged testator, the defendants are, for the purposes of this action, estopped from questioning the title of the common grantor; and can in any event only claim the estate that may have come to them by reason of the deed from Mary Steadman, the devisee, or one of the heirs at law of her father, the said Joseph.

Defendants object to the validity of this trial, and assign for error: (1) That the court admitted in evidence the paper writing purporting to be the last will and testament of Joseph Steadman. This paper writing, bearing date November 28, 1857, signed

his
by Joseph (X) Steadman, and attested by
mark

two witnesses, Joseph Owens and Drewry McDaniel, when offered as evidence, had thereon two probates: One bearing date December 1857, in which it is shown that "Drewry McDaniel, one of the subscribing witnesses, upon being duly qualified, proved the due and solemn execution of the will; and the second, bearing date April 12, 1906, set out in extenso in the record, and in all things complying with the requirements of Revisal 1905, § 3127, cl. 3. which provides as follows: "In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead, or reside out of the state, or are insane, or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead, absent, insane, or incompetent shall be sufficient." The first probate was invalid, because, at the time it was taken, proof by one of the subscribing witnesses without more was not sufficient proof of a will. This was all that had been required under the Revised Statutes, for proof of a will in common form in the first instance (Rev. St. c. 122, § 6); but the Revised Code, which went into effect on January 1, 1856, required that a written will with witnesses should be proved by the oath of two of the subscribing witnesses, if living, etc. Rev. Code, c. 119, § 15. At the time the will was proven, the Code had probably not been universally distributed; or, what is more likely, the courts of pleas and quarter sessions had not become familiar

with the changed method. Whatever may have been the reason, the first probate did not comply with the law as it then existed; and, standing alone, would not justify the admission of the will in evidence. The plaintiff, recognizing that this probate was not in compliance with the statute, then offered proof establishing the second probate, which in all things complied with the requirements of the law, showing that one of the subscribing witnesses was dead, and the other had for many years been a nonresident.

It is objected to this proof that the same is too late, and cannot now be received; but the authorities do not support this position. In the absence of some statute to the contrary, there is no limit upon the time after a testator's death within which a will may be proven. *Gardner on Wills*, p. 814. In *Haddock v. Railway*, 146 Mass. 155, 15 N. E. 495, 4 Am. St. Rep. 295, a will was admitted to probate 63 years after the death of the testator. And, while the will does not operate to pass property till proven, as required by law; when it is so proven, it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it. 1 *Underhill on Wills*, p. 21, note 3; citing *Graves v. Mitchell*, 90 Wis. 306, 63 N. W. 271; *Coggeshall v. Home*, 18 R. I. 696, 31 Atl. 694. See, also, *Scott v. West*, 63 Wis. 529, 24 N. W. 161, 25 N. W. 18. Nor does the attempt to prove the will in accordance with the law as it formerly existed, effect the present probate, which, in all things, complies with the present law. *Morgan v. Bass*, 25 N. C. 243. Nor, in any event, could the probate be questioned by one who claims under the will by this indirect method. *London v. Railroad*, 88 N. C. 585; *Hampton v. Hardin*, 88 N. C. 592. The probate of this will being valid, and the same having been duly recorded, the will was properly admitted as evidence. Defendant further objects that the court admitted in evidence the declarations of Mary Steadman while in possession of the property, to the effect that she held under the will of her father, Joseph. These declarations are competent as characterizing and accompanying the possession of the declarant and were also properly received. *Nelson v. Whitfield*, 82 N. C. 46; *Brown v. Gosnell*, 141 N. C. —, 56 S. E. —.

There is no reversible error to defendant's prejudice shown in the record, and, on their appeal, the judgment is affirmed.

No error.

Plaintiffs' Appeal.

As heretofore stated, the verdict having established that both parties claim under Joseph Steadman, and the will of Joseph Steadman, making some disposition of the property, having been properly proven and admitted in evidence, the rights of the par-

ties on this appeal will depend on the correct construction of this will. The language of the will pertinent to the questions involved here, is as follows: "It is my will that my eldest daughter, Susannah, and my son James, shall have a certain tract of land containing one hundred acres, lying in the waters of Dills' creek, to be equally divided in value between them; and then also one other tract containing one hundred and fifty acres, lying on the waters of Jarrett's creek. It is my will that my son John and daughters Mary and Margaret be equal sharers in said tract of land during their natural life." The land in controversy is the second, or Jarrett tract, and the judge below, in construing the will, in effect decides that the testator died intestate as to the remainder of this tract after a life estate therein to his children; but we do not think that this is the correct interpretation of the will. It is an accepted principle that the presumption is against intestacy. 1 *Underhill on Wills*, p. 617; *Blue v. Ritter*, 118 N. C. 580, 24 S. E. 356. And another principle has long been incorporated into our statute law, that a devise to a person shall be construed to be in fee simple, unless it shall plainly appear that the testator intended an estate of less dignity. *Revisal 1905*, § 8138.

This will, in express terms, devises the Jarrett tract of land to Susannah and James A. Steadman; which, under this statute, would give them the land in fee. And while the clause which immediately follows, imposes a life estate in favor of John, Mary, and Margaret, whether such estate is to these three, or to them as tenants in common with James and Susannah, the result is the same. The subsequent clause only creates a life estate; and all the devisees of such estate being dead, the children and heirs at law of James and Susannah, to whom the fee simple was given by the prior clause, at the death of the life tenants, became, and are now, the owners of the land. Mary, being only a life tenant her deed would only convey to the grantees such estate as she had; and on her death, which occurred about six months before suit commenced, the rights of the children and heirs at law of James and Susannah, who held in remainder, would become absolute, giving them the title and right to the immediate possession of the property. *Smithwick v. Briggs*, 23 N. C. 281; *Brothers v. Brothers*, 44 N. C. 265. Nor do we think the idea advanced, that the testator evidently wished his children to share equally in his estate, changes the result. Such a general intent is sometimes helpful where the language of a will is of doubtful import; but an indefinite, general intent cannot avail, and is never allowed, to change or control a devise express in its terms and without doubt as to its meaning. *Crissman v. Crissman*, 27 N. C. 498; *Long v. Waldraven*, 113 N. C. 337, 18 S. E. 251. It will be noted,

too, that the clauses of the will from which this general intent is inferred, rather tend to show that such equality as was contemplated was intended to arise from other portions of the estate, and was not designed, and should not be permitted to affect the construction of the devise involved in this litigation. The court is of opinion, and so holds that, on the facts presented, a proper construction of the will of Joseph Steadman places the entire interest in the land in dispute in the plaintiffs, who are children and heirs at law of James A. and Susannah Steadman, and the judge below should have so instructed the jury.

For the error pointed out, there will be a new trial on the second issue, and it is so ordered.

Partial new trial.

MATTHEWS v. FRY et al.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. APPEAL — REVERSAL — DISPOSITION OF CAUSE.

A jury being waived, the judge found the facts and entered judgment for defendant. On appeal, the Supreme Court was of the opinion that, on the facts found, judgment should have been entered for plaintiff, and entered its order "Reversed." Held that, on remand, plaintiff was entitled to the entry of judgment in his favor without submitting to a new trial.

2. SAME—FINDINGS—CONCLUSIVENESS.

The findings of fact by a trial judge, when authorized by law or consent of parties, are as conclusive on appeal as when found by a jury, if there is any evidence to support them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

3. TRIAL—EXCEPTIONS—FINDINGS.

Where the court made findings of fact in favor of defendant, if defendant was dissatisfied therewith, he should have excepted at the time, and, having acquiesced in the findings without exception until after reversal on plaintiff's appeal, it was then too late for defendant to except to the findings.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 964.]

Appeal from Superior Court, Swain County; W. R. Allen, Judge.

Action by John G. Matthews against A. M. Fry and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Shepherd & Shepherd and C. W. Rowe, for appellants. Dillard & Bell and Bryson & Black, for appellee.

CLARK, O. J. "The parties waived a jury trial and agreed in writing that the judge should find the facts and enter judgment thereon, as, upon the facts so found, he might decide the law to be." The judge found the facts and entered judgment thereon in favor of the defendant. Upon appeal (Matthews v. Fry, 141 N. C. 582, 54 S. E. 379), this court was of opinion that, upon the facts found, judgment should have been entered in favor

of the plaintiff, and entered its order "Reversed." When the certificate of opinion was presented in the court below the plaintiff moved for judgment in accordance therewith. The defendant resisted this judgment and asked for trial de novo, and insisted that some of the findings of fact had been made by the judge without any evidence to support them.

The judgment was properly entered for plaintiff in accordance with the mandate of this court to reverse the judgment. *Summerlin v. Cowles*, 107 N. C. 462, 12 S. E. 234; *Bernhardt v. Brown*, 118 N. C. 711, 24 S. E. 527, 715, 36 L. R. A. 402. The findings of fact by the judge, when authorized by law or consent of parties, are as conclusive as when found by a jury, if there is any evidence. *Branton v. O'Briant*, 93 N. C. 103; *Roberts v. Insurance Co.*, 118 N. C. 435, 24 S. E. 780; *Walnut v. Wade*, 103 U. S. 688, 26 L. Ed. 526. If there was any ground to except to such findings because without evidence to support the finding, upon any point, or for any other cause, the defendant should have done so and have brought up his side of the case, also, when the plaintiff appealed, or at least he should have entered an exception so as to preserve his rights. It is not unusual for both parties to appeal. Having acquiesced in the findings of fact without exception, it is too late to except now.

If the defendant was dissatisfied with the ruling of this court upon the law, his remedy was by a petition to rehear (which he did, and the petition was disallowed), and not by a motion for a new trial, in disregard of the mandate of this court.

Affirmed.

STATE v. CONNOR.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. INDICTMENT—DESCRIPTION OF STATUTORY OFFENSE—NEGATING EXCEPTIONS.

Where a statute creates a substantive criminal offense, the description being complete and definite, and a subsequent clause excepts certain cases from its provisions, the excepted cases need not be negated in the indictment unless such exceptions form but a part of the description of the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 295-298.]

2. CRIMINAL LAW—STATUTORY OFFENSE—EXCEPTIONS IN STATUTE—BURDEN OF PROOF.

Where a statute creates a substantive criminal offense, the description being complete and definite, and a subsequent clause excepts certain cases from its provisions, the burden is on the accused to prove that his offense falls within the exceptions, unless such exceptions form but a part of the description of the offense.

3. INDICTMENT — DESCRIPTION OF STATUTORY OFFENSE—ELOPEMENT—NEGATING EXCEPTIONS.

Revisal 1905, § 3360, provides that: "If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony,

and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage has been an innocent and virtuous woman: Provided, that no conviction shall be had upon the unsupported testimony of any such married woman." *Held*, that an indictment for the offense must negative the exception in the first proviso.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indictment and Information, §§ 296-298.]

4. CRIMINAL LAW — STATUTORY OFFENSE — ELOPEMENT—EXCEPTION IN STATUTE—BURDEN OF PROOF.

Revisal 1905, § 3360, provides that: "If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year or more than ten years: Provided that the woman since her marriage, has been an innocent and virtuous woman: Provided, that no conviction shall be had upon the unsupported testimony of any such married woman." *Held*, that the burden is on the state in a prosecution for such offense to prove beyond a reasonable doubt that the case does not fall within the first proviso.

5. ADULTERY—ELOPEMENT—EVIDENCE AS TO CHARACTER OF WOMAN.

In a prosecution for criminal elopement under Revisal 1905, § 3360, making it a crime to elope with the wife of another man if she has, since marriage, been innocent and virtuous, evidence on the part of the state as to the general character of the woman for virtue is admissible.

Clark, C. J., and Brown, J., dissenting.

Appeal from Superior Court, Buncombe County; Moore, Judge.

Prosecution of Connor for criminal elopement. Defendant was found guilty, and appeals. Reversed.

Frank Carter and H. O. Chedester, for appellant. Robert D. Gilmer, Atty. Gen., for the State.

HOKE, J. The statute under which the conviction was had, Revisal 1905, § 3360, is as follows: "If any male person shall abduct or elope with the wife of another, he shall be guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided, that no conviction shall be had upon the unsupported testimony of any such married woman." Defendant, by exceptions properly noted, assigns for error: (1) That the judge erred in charging the jury that the burden was on the defendant to prove that the "woman in the case" was neither innocent nor virtuous. It is well established that, when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by subsequent clause, either in the same, or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negated in the indictment, nor is proof required to be made in the first instance on the part of the prosecution.

In such circumstance, a defendant charged with the crime, who seeks protection by reason of the exception, has the burden of proving that he comes within the same. *State v. Heaton*, 81 N. C. 543; *State v. Goulden*, 184 N. C. 743, 47 S. E. 450. These limitations on the clause creating the offense being usually expressed under a proviso, we find the rule frequently stated "that, when a proviso in a statute withdraws a case from the operations of the body of the section, it need not be negated in the indictment." This statement is entirely correct so far as noted in cases where the same has been applied, and will be found generally sufficient for the determination of questions arising under statutes of this character. The test here suggested, however, is not universally sufficient, and a careful examination of the principle will disclose that the rule and its application depends, not so much on the placing of the qualifying words, or whether they are preceded by the terms "provided" or "except," but rather on the nature, meaning, and purpose of the words themselves. And, if these words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they must be negated in the bill of indictment. In such case, this is necessary in order to make a complete statement of the crime for which defendant is prosecuted. In *State v. Abbey*, 29 Vt. 60, 67 Am. Dec. 754, it is said: "Whether an exception in a statute is to be negated in a pleading, or whether they are mere matters of defense, depends upon their nature, and not upon their placing or upon their being preceded by the words 'except, or provided.'" And again: "The exceptions in a penal statute required to be negated are such as are incorporated with, and a part of the enactment, as to constitute a part of the definition or description of the offense." Our own decisions are in support of this proposition. *State v. Norman*, 13 N. C. 223; *State v. Liles*, 78 N. C. 496; *State v. Burton*, 188 N. C. 576, 50 S. E. 214. See, also, Clark's Criminal Procedure, pp. 272, 273, which gives a very full and satisfactory statement of the doctrine. This being the correct test, we think it clear that the words in the statute here considered and contained in the first proviso are, and were intended to be, a part of the description of the offense.

It does not withdraw a case from the operation of the body of the section in which a definite substantive offense is created, but it adds a qualification to the offense itself. As said by Henderson, Judge, in *State v. Norman*, supra: "We find in the acts of our Legislature two kinds of provisos: The one in the nature of an exception, which withdraws the case provided for from the operation of the act; the other adding a qualification, whereby a case is brought within that operation. Where the proviso is of the first

kind, it is not necessary in an indictment, or other charge founded upon the act, to negative the proviso, but, if the case is within the proviso, it is left to the defendant to show that fact by way of defense. But, in a proviso of the latter description, the indictment must bring the case within the proviso. For, in reality, that which is provided for, in what is called a proviso to the act, is part of the enactment itself." This interpretation is confirmed by the highly penal nature of the statute, making the offense a felony, and imposing a punishment of not less than one or more than 10 years. Such a penalty was never intended to be imposed on one who should elope with a wife separated from her husband, and who was an abandoned prostitute, and such a statute was in all probability only passed to protect women who had been innocent and virtuous, and to punish the criminal who had wronged and debauched them. This view finds further support in the second exception, which provides that the unsupported testimony of the woman herself should not warrant a conviction; evidently contemplating that the burden of the first proviso was on the state, for it is only as to facts included in the first that the testimony of the woman was likely to be important. The words contained in the first proviso being descriptive of the offense and a part of its definition, it is necessary, in stating the crime charged, that they should be negated in the bill of indictment. And wherever this is required and the statute does not otherwise provide, and the qualifying facts do not relate to defendant personally and are not peculiarly within his knowledge, the allegation must be made good by proof, and, being part of the crime, must be proved by the state and beyond a reasonable doubt. *State v. Crowder*, 97 N. C. 432, 1 S. E. 690; *State v. Wilbourne*, 87 N. C. 529. The correct doctrine as to the rule and the exceptions to it is well stated in Archbold's Criminal Pleading as follows: "In indictments upon statutes, we have seen (ante p. 53) that, where an exception or proviso is mixed up with the description of the offense, in the same clause of the statute, the indictment must show, negatively, that the party, or the matter pleaded, does not come within the meaning of such exception or proviso. These negative averments seem formerly to have been proved in all cases by the prosecutor, but the correct rule upon the subject seems to be that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defense; but, on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate personally to the prosecutor, or be peculiarly within his knowledge, or at least be

as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative." The general rule is that what is necessary to be charged as a descriptive part of the offense is required to be proved, and all of the decisions in this state which we have noted, or which have been called to our attention, where the rule has been changed and the burden put on defendant, have been cases where the burden was changed by the statute, or the facts referred to in the exception or proviso related to the defendant personally, or were peculiarly within his knowledge. This was true in *State v. Goulden*, supra, as to the proviso in indictments for bigamy, also in indictments for selling liquor without license, in criminal trespass on land, etc. The principle, we think, should not be extended or applied except in cases of like kind and based on reasons of like necessity. As said by Ruffin, Judge, in *State v. Wilbourne*, supra: "The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offense charged, must be established by the prosecutor. The rule itself is but another form of stating the proposition that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice, and so forcibly has it commended itself by its wisdom and humanity to the consideration of this court, that it has never felt willing, whatever circumstances of difficulty might attend any given case, to disregard it." We hold, therefore, that the judge erred in putting the burden of proving the facts of the first proviso on the defendant.

Defendant further excepted because the judge below admitted evidence as to the general character of the woman for virtue. In criminal prosecutions, it is always open to defendant to offer evidence as to his character at the time of the alleged offense and have the same considered as substantial testimony in his favor. *State v. Johnston*, 60 N. C. 151. And, under certain circumstances, the character of other persons is relevant in like manner. This is generally true in prosecutions for criminal offenses against females, where, from the nature of the prosecution, the character of the woman is necessarily and directly involved in the issue. It is so in seduction and in indictments for rape or for assault with intent to commit rape. *State v. Daniel*, 87 N. C. 507. And it is so in abduction, when, as here, the character of the woman is, by express terms of the statute, directly in question. *Amer. & Eng. Ency.* vol. 1, p. 181 and note. It will be observed that in states which hold the contrary on indictment for abduction, the decisions are put on the ground that the crime, by their statutes, in no way depends

on the character of the person abducted. *People v. Demousset*, 71 Cal. 611, 12 Pac. 788. His honor was correct, therefore, in admitting the testimony as relevant to the inquiry.

For the error in the charge as to the burden of proof, the defendant is entitled to a new trial, and it is so ordered.

New trial.

CLARK, C. J. (dissenting). Revisal 1905, § 3360, makes it a felony "if any male person shall abduct or elope with the wife of another." That is a complete offense. No other description is added. The proviso withdraws from the punishment, denounced upon a man who abducts or elopes with the wife of another, the case where such wife has not been "since her marriage an innocent and virtuous woman." When, therefore, the state has shown that the prisoner has "abducted or eloped with the wife of another," the prisoner may withdraw himself from criminal liability therefor by showing, if he can, that she has not been a virtuous and innocent woman since her marriage. This is a matter of defense, not a part of the offense, and the burden of proving it, in order to withdraw himself from criminal liability for abducting or eloping with the wife of another, is upon the prisoner. The judge merely stated what is the language of the statute. The second proviso, that "no conviction shall be had upon the unsupported testimony of such married woman," necessarily referred to the offense, the "abduction or elopement." It could not possibly refer to the second proviso, for it needed no statutory provision to inform us that a man cannot be convicted of abduction or elopement upon the unsupported testimony of the woman that she was innocent and virtuous—the only purport of the first proviso—whereas, but for this second proviso, her testimony of the abduction or elopement would be sufficient to convict, if believed by the jury.

The statute, Revisal 1905, § 3361, defines bigamy: "If any person being married shall marry any other person, during the life of the former husband or wife," and adds a proviso that the statute shall not apply (1) where the husband or wife of the prisoner shall have been absent seven years and not known to prisoner to have been living within that time; (2) or if the prisoner had been lawfully divorced; (3) or the former marriage had been declared void. It was held, in *State v. Goulden*, 134 N. C. 743, 47 S. E. 450, that, the state having shown the second marriage of the husband during the lifetime of his wife, the burden was upon him to prove any of the above matters in defense. This is exactly in point. Just as here, the abduction of, or elopement with, the wife of another being shown, the burden was upon the prisoner, in order to deprive that act of liability to punishment, to show

in exculpation and defense that this particular wife was such an one as eloping with or abducting her was not punishable. By proving that she came within the proviso, he can exempt himself—withdraw himself—from coming within the statute. This has been the uniform ruling of this court as to provisos which withdraw the defendant, upon a certain state of facts, from liability under the broad general terms of the statute creating the offense. *State v. Norman*, 13 N. C. 222; *State v. Call*, 121 N. C. 649, 28 S. E. 517; *State v. Welch*, 129 N. C. 580, 40 S. E. 120. A very similar case to this was *State v. George*, 93 N. C. 570, upon the sections next preceding that on which this trial was had for "abduction of a child," in which the court held that the words of the proviso "without the consent and against the will of the father" was not a part of the description of the offense. There are a number of instances where there is no proviso, but where a circumstance, which is a descriptive part of the offense and must be so charged, is nevertheless to be proved not by the state but by the defendant. This is on the ground that, such circumstance being a matter peculiarly within the knowledge of the defendant, the burden is on him to prove it as a defense. As in an indictment for embezzlement, Revisal 1905, § 3406, "not being an apprentice or other person under 16 years of age," must be charged, but the defendant must show that he was under 16. *State v. Blackley*, 133 N. C. 622, 50 S. E. 310, and cases there cited. In prosecutions for retailing spirituous liquor, Revisal 1905, § 3529, the bill must charge that it was done "without license," but the burden is upon the defendant to show that he had license. *State v. Emery*, 98 N. C. 668, 3 S. E. 636; *State v. Smith*, 117 N. C. 809, 23 S. E. 449; *State v. Holmes*, 120 N. C. 576, 26 S. E. 692, and a long line of authorities. In an indictment for fornication and adultery, Revisal 1905, § 3350, the bill must allege "not being married to each other," but the burden is on the defendant to show that they are married, as a matter in defense. *State v. McDuffie*, 107 N. C. 888, 12 S. E. 83; *State v. Peeples*, 108 N. C. 769, 13 S. E. 8; *State v. Cutshall*, 109 N. C. 769, 14 S. E. 107, 26 Am. St. Rep. 599. In an indictment for entering upon land without license, Revisal 1905, § 3688, the bill must allege that the entry was "without license," but the burden is on the defendant to prove license. *State v. Glenn*, 118 N. C. 1194, 23 S. E. 1004. In these and other similar instances the burden of proving the opposite of the matter charged is on the defendant, because it is a matter peculiarly within his knowledge, though it is a part of the description of the offense, and, if proved, will relieve the defendant of the presumption raised by proof of selling liquor, appropriation of money, cohabitation, entry on land after being forbidden, etc. But when, as here, the offense is completely defined and a proviso sets out

circumstances which, if shown, withdraws the defendant from liability, the burden is on him for that reason, and not because the matter is one peculiarly within his knowledge. *State v. Norman*, supra, and other cases cited above. Even where the statute, unlike ours, does not make the unchastity of the woman a proviso withdrawing the abductor from liability, but makes the chastity of the woman a part of the description of the offense, the courts hold that there is a presumption in favor of female virtue; and hence, when the state has shown that the defendant has abducted or eloped with the wife of another man, the burden is on him to show that she was unchaste, as a matter of defense. In the absence of proof, the courts elsewhere will not presume that a woman, who is shown to have been abducted, was unchaste. *Bradshaw v. People*, 153 Ill. 159, 38 N. E. 652; *Slocum v. People*, 90 Ill. 281; *Griffin v. State*, 109 Tenn. 32, 70 S. W. 61; *People v. Brewer*, 27 Mich. 138; *Andre v. State*, 5 Iowa, 389, 68 Am. Dec. 708; *State v. Higdon*, 32 Iowa, 264.

BROWN, J., concurs in the dissenting opinion.

STATE v. HODGE.

(Supreme Court of North Carolina. Dec. 18, 1906.)

CRIMINAL LAW—APPEAL—HARMLESS ERROR—REJECTION OF WITNESS—CONDUCT OF COUNSEL.

Where, in a prosecution for murder, the witnesses, on motion of the defense, were excluded from the courtroom, the action of the trial court in not permitting a witness for the defense to testify because defendant's counsel, who had talked with him on the first day of the trial and learned of his testimony, did not put him under subpoena until the second day of the trial, and permitted him to stay in the courtroom without having him sworn, or calling the court's attention to the matter until he was called to the stand, was not reversible error, where it did not appear that defendant was prejudiced by the court's refusal to receive the evidence of the witness, though counsel for accused stated that his testimony was material, but did not state in what particular it was material, or what was expected to be proved by such witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3145.]

Connor and Walker, JJ., dissenting.

Appeal from Superior Court, Dunham County; Ferguson, Judge.

John H. Hodge was convicted of murder, and appeals. Affirmed.

Guthrie & Guthrie and Braham & Brawley, for appellant. The Attorney General, for the State.

CLARK, C. J. The prisoner was convicted in June last of the murder of his wife on February 24, 1906. The evidence was plenary. He came to the house of his wife between 11 and 12 o'clock at night, when she was in

bed, as were her 6 children, the youngest 5 years old, 4 of them girls, and the oldest a girl about 17, and all sleeping in the same room. The oldest boy testified that he was waked up between 11 and 12 o'clock by his father's voice, who upbraided his mother about a deed he had made her for the property. When she refused to discuss the matter, he ran to the bedside, and attacked her in the presence of her children, who tried to shield her and to hold him back but in vain. He threatened to shoot them, and when the terrified children relaxed their hold, and were run out of the house by him, he dragged his wife out of bed and shot her. This boy was just 15 years old. The prisoner had beaten his wife before, and had been put under a peace bond. A neighbor, who heard the screams and pistol shot, hurried over to the house, when the prisoner, who was standing in the room where his wife lay shot and dying, met him in the hallway, and, pointing his pistol at witness' head, told him not to come in. The children were all out in the yard in their night clothes screaming. The witness went to get an officer, and when he got back the prisoner had fled. The dead body of prisoner's wife, with the bedclothes wrapped around her waist, was then lying with her head on the hearth and feet on the floor. She had been shot in the side. The prisoner rode in a street car to the vicinity of his wife's house, got off, and went in that direction, and soon the pistol shot was heard. Several testified that if the prisoner was then under the influence of liquor it was not perceptible; he seemed sober. After the homicide his employer (Mr. Houston) went to see him, told him he was sorry he had gotten into this trouble, and asked him "why he had done as he did. He said he had been treated wrong. I asked him if he was drinking. He said, 'No;' he had drunk nothing before he went there, but something after he left. I then asked if he was not sorry for what he had done. He said, 'No;' that he was glad of it, and that he had been treated wrong; his property had been taken from him, and he had been kicked out of doors; that he had studied over the matter, and planned it for some time." The same witness saw him again, and asked, in the presence of the jailer, "if he regretted what he had done. He said, 'No;' that he was glad of it; that he had been treated wrong; his property had been taken from him; that he had been kicked out of his own house; and that he could not stand it any longer." When asked if he was not afraid he might be hung, he said "he didn't care, and was ready to pay the penalty; that he hoped they would hang him, that he was ready to hang then." When the coroner went to see the prisoner, he looked up and asked, "Is she dead?" When told she was, he said, "Then I am satisfied." W. T. Riggsbee, who was with the coroner, cautioned him to keep silent, that he would regret it, but he replied that "he would not, and that he had thought

over the matter for five weeks." When asked when he got the pistol, he said a few days ago, and when asked if it was not since Thursday (the homicide was on Saturday night) he said "Yes"; said he got the pistol from a friend, but when asked the name of his friend said he had forgotten. Mr. Hamlet testified that about 10 o'clock the night of the homicide he saw the prisoner buy a pistol, who asked if the pistol would "shoot strong." When told that it would, he said he "would try it next day, and if it did not shoot strong he would rue back." The oldest daughter, aged 17 years, testified substantially to the same state of facts as her brother; that they were all asleep in the same room, she and one of her sisters in bed with her mother, when she was awakened by the prisoner's voice. He was standing on the floor, and told his wife to get up; that he "wanted to talk with her." He again told her to get up, and said, "I am going to live in this house in spite of you and Lawyer Manning." He again told her to get up. She told him she was sick, and to get away; she could not stand to talk to him. He was then sitting upon the side of the bed. He immediately pulled his pistol out, and said, "You can't stand it; see if you can stand this." The witness tried to get between the pistol and her mother's head, when the prisoner told her to "get up, or I will shoot you," whereupon the prisoner took hold of his wife's feet, jerked her out of bed, and dragged her to the hearth. When this daughter started to them, prisoner pushed her to the door, and then, with his wife in one of his arms, shot her in the side. She said her younger sister offered to fix her father a place to lie down when they first woke up, but he declined, and said, "I would'n't lay down in this house five minutes for \$1,000." She says that before she went to bed she fastened all the doors except the back door, which her mother said that she had fastened. The prisoner and his wife had separated and were not living together. The sole evidence introduced for prisoner was that of some witnesses who testified that he was drinking on his way to his wife's house that night. The only exception to be considered (for though there were others they were merely formal, and are without merit, and, though not expressly abandoned, are not in the brief) is the following, as stated by the judge: "The prisoner, when the jury were impaneled, through his counsel, moved that witnesses be sent out and separated. The motion was granted. The state's witnesses were sworn and sent out of the courtroom, and a number of the witnesses sworn for the prisoner and sent out of the courtroom. On the first day of the trial prisoner's counsel talked with the witness W. T. Riggsbee, and learned of his testimony, but did not put him under subpoena until to-day, second day of the trial. Both before and after the witness was subpoenaed, counsel for prisoner permitted the witness to stay in the

courtroom without having him sworn, or calling the court's attention to the matter until they called him to the stand. The state objected to the witness. Objection sustained, and prisoner excepted." The court adds: "The foregoing facts were found at the time the witness [Riggsbee] was offered, upon statement of counsel then made, who stated that he had examined said Riggsbee on the first day, and knew what his testimony would be, but did not put him under subpoena till the morning of the second day, and both before and after he was put under subpoena he permitted Riggsbee to remain in the courtroom without calling the attention of the court to the fact. Counsel for the prisoner stated that the witness' testimony was material, but did not state to the court in what particular it was material, or what he expected to prove by said witness, and the objection was to the ruling of the court in declining to allow the prisoner's counsel to examine the witness Riggsbee." This was a mere abstract proposition, and could not be held error unless the prisoner had made known what the evidence would be. Had that been stated, and had it been in any wise material, there can be no doubt the learned and just judge who tried this case would have admitted it, notwithstanding the conduct of counsel, and the undue advantage which might have been given the defense by permitting this witness to remain in the courtroom during the whole trial, in contempt of the order of the court, made at the instance of the defense, by which all witnesses were sent out of the courtroom. At any rate, if counsel had stated what he expected to prove, the question would be presented whether the defense had suffered any prejudice. It is elementary learning that the appellant must show error that prejudiced him. For all we know, the witness Riggsbee would not have given any evidence the exclusion of which could be of any effect. Neither below nor in this court, even, did the defense give the slightest inkling by affidavit or even a statement what it would be. He did not present it in either court. The mere assertion that excluded evidence is material is not sufficient. The prisoner may be mistaken about it, and, if so, its exclusion, even though erroneous, is not reversible error. For that reason courts have always held that the excluded evidence must be material, and whether it is material or not is a question of law which must be decided by the court, and not by the bare suggestion of the prisoner or his counsel. In all the evidence Riggsbee appears only once, and then not at the scene of the homicide, but at one of three confessions, and if we should surmise (for we do not know) that he would materially contradict the coroner's account of the confession made to him, there are the other two fuller confessions, not offered to be contradicted, at which Riggsbee was not present. This doubtless accounts for the court not being told what his evidence was.

The crime of which the prisoner has been convicted, and of which the above is a condensed synopsis, was proven in all its fullness of detail. The prisoner, living separated from his wife, had a grievance about property. He buys a pistol, inquiring if it will "shoot strong"; goes down to her house near midnight, effects a burglarious entrance, rouses her with her children, attacks her, and when her little children try to shelter her, drive them out of the house by flourishing his pistol, drags his wife out of bed by the heels, holds her in his left arm, and shoots her, drives a neighbor off at the muzzle of his pistol, and escapes. When taken he asks, "Is she dead?" and when told that she is replies, "Then I am satisfied." On at least three different occasions he confesses the crime, and declares that he does not regret it, and that he had contemplated it for five weeks. The only evidence offered in defense is to contradict the witnesses for the state, who testified that the prisoner seemed entirely sober when on his fatal errand. There is not even the usual attempt to prove insanity, nor anything tending to suggest it. We are asked to give a new trial, not for any material evidence excluded, but because the defense states that there was material evidence excluded, and that by a witness who was kept in the courtroom contrary to the order of the court and without the knowledge of the court. To grant such motion would seem trifling with justice. The evidence must be set forth before we can hold that it was material, and therefore that its exclusion was prejudicial. In an indictment for homicide in Massachusetts it was held upon similar facts that the exclusion of the witness was in the discretion of the court, though there the evidence was disclosed. *Commonwealth v. Crowley*, 168 Mass. 121, 46 N. E. 415, and same was held in *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101; *Whart. Cr. Ev.* (9th Ed.) 446, *Weenl. Ev.* (16th Ed.) 432c; *Holder v. U. S.*, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010; *O'Bryan v. Allen*, 95 Mo. 75, 8 S. W. 225; *Jackson v. State*, 14 Ind. 327; *Bell v. State*, 44 Ala. 393; *Bird v. State*, 50 Ga. 589.

The conviction of the guilty and their punishment is commanded by the law. The Constitution guarantees security of life and person. This guaranty is a mockery if crime is not punished, for unless the punishment of crime deters from its commission, criminal courts, with their heavy expense and consumption of time, should be abolished. The sole object of a trial for murder is not the acquittal of the prisoner. It is to determine whether he is guilty or not, after giving him the advantage of requiring the unanimous verdict of a jury of 12 men, each of whom must be satisfied beyond a reasonable doubt of his guilt. There is no doubt here of the commission of the crime, of its revolting details, of the base motive, of the preparation

for it, of the thinking over it, of the confessions of the prisoner. The mere assertion that a witness could have given material evidence, the purport of which was undisclosed below, and on the hearing here, cannot justify a new trial.

The prisoner has been fairly tried and convicted. He gave his wife no postponement and no opportunity of defense, omitting no circumstance of horror. The law has given him nearly a year's delay, opportunity of defense, the aid of counsel, and his conviction after a full hearing has been declared by the verdict of 12 men beyond a reasonable doubt of his guilt, and indeed the evidence permits of none. The evidence of the crime and the attendant horrors are beyond denial; none was attempted. There was the fullest evidence of premeditation; his going with a pistol to the house where slept his defenseless wife and children, the burglarious entrance, the threat, and then the assault with a pistol, the breaking down the feeble but zealous protection of the children, who sought to protect their mother with their own bodies, the terrifying the children and driving them out, dragging his wife by the heels out of the bed, holding her up on one arm while he shot her with the other, the shooting without provocation or excuse—all this shows a deliberate purpose to kill. Besides, there was the previous declaration when buying the pistol, and three voluntary confessions of having determined on the matter long before, and his gratification at accomplishing his purpose.

Riggsbee was not present at the scene of the murder nor at the buying of the pistol, and only at one of the confessions, the least important one—that made to the coroner. The defense has not vouchsafed to lay before the courts what Riggsbee would have said, but it is clear that it could not have called in question the circumstances of the homicide and the premeditation of the prisoner. He can still lay it before the executive. He has been "informed of the accusation against him, has confronted his accusers and witnesses with other testimony, and has had counsel for his defense." Const. art. 1, § 11. It is not a restriction of the above rights to make orderly requirements in the discretion of the court and in the interest of justice, among such, to regulate the order in which witnesses shall be examined, that they shall be sworn, or that they shall be sworn and sent out of the courtroom before being examined. It has been a long observed practice in the administration of justice, and on this occasion the motion was made by the prisoner. His failure to observe the order called for such steps as were necessary to enforce it. He has not, however, shown that any testimony excluded would have been useful to him. With every latitude possible for the prisoner, there is a point beyond which reverence for the administration of

justice forbids us to go, lest justice be wounded in the house of her friends.

No error.

HOKE, J. (concurring). I do not think that the judge below had the right, in his discretion, to deny the examination of the witness. There are decisions which uphold this ruling. There is also strong authority to the contrary, and I would never agree to the proposition that in a prosecution of this character a prisoner could be deprived of testimony material to his defense because a witness, during the progress of the trial, had entered the courtroom in violation of the judge's order. Holding this view, however, I think the judgment should be affirmed, for the reason that it nowhere appears, nor can it be discovered, that any harm has come to the prisoner by this action of the trial judge. This is not a case where a prisoner was without counsel, and may have erred in ignorance of his rights; nor where the witness had refused to disclose the purport of his testimony. On the contrary, the case shows that the prisoner was represented by counsel, faithful, learned, and capable, who had examined the witness, and claimed to know what his testimony would disclose. Neither at the trial, nor at any other time, nor in any way, has this testimony been stated, in substance or tenor, so that the court can see its materiality. On the contrary, as pointed out in the principal opinion, it appears, and almost conclusively, that if the witness was aware of any relevant fact or circumstance, the evidence was hardly of importance, and could not possibly have affected the result.

A perusal of the case leads to the conclusion that the counsel, in the presence of desperate circumstances, was not aggrieved by the denial of a substantial right or the rejection of evidence which he regards as of consequence, but was seeking for an exception upon which he could successfully maintain an appeal. Such an exception, so presented, is, to my mind, entirely too indefinite and speculative for serious regard in the administration of the practical affairs of life, and to hold it for reversible error would render the enforcement of the criminal law well nigh impossible. As said in *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 138, quoting from *Pleading & Practice*, vol. 2, p. 500: "This system of appeals is founded on public policy, and appellate courts will not encourage litigation by reversing judgments for technical, formal, or other objections, which the record shows could not have prejudiced the appellant's rights." And from *Ashe, J.*, in *Butts v. Screws*, 95 N. C. 215: "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." This sound and salutary principle obtains in criminal as well as in civil causes, and, applied to this case, shows that the trial is free from reversible error.

I am of opinion that the judgment below should be affirmed.

CONNOR, J. (dissenting). The testimony, as arrayed in the opinion of the Chief Justice, presents a case in which the enormity of the crime and the manifest guilt of the prisoner are well calculated to cause a judge to hesitate to dissent from the judgment which brings merited punishment to the criminal. It is due to the learned and impartial judge who tried the case, and I do not hesitate to say, that he wisely exercised his discretion in declining to permit the witness Riggsbee to be sworn, provided it was a matter of discretion and not of absolute right. I am impressed with the conviction that the conclusion to which the court has arrived establishes a precedent in our criminal jurisprudence violative of an essential and a most valuable constitutional right secured to every person charged with crime. I am not inadvertent to the fact that, notwithstanding the truth that a frequent recurrence to fundamental principles is essential to the preservation of liberty, we weary and become impatient of constitutional restraints upon government, when invoked to secure to guilty persons trial according to "the law of the land." Notwithstanding all of this, I am compelled to dissent from several propositions announced in the opinion of the court. The bill of rights clearly and unmistakably declares that "in all criminal prosecutions, every man has the right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony," etc. Without this guaranty to the citizen, when charged with crime, the right of trial by jury would be of no value, but rather a cunningly devised scheme for keeping the promise to the ear and breaking it to the sense. I cannot think that this right to confront his accusers with testimony is ever dependent upon the discretion of a judge. The court should seek to remove the decision of all questions involving the right of the citizen from the realm of discretion, and place it upon the foundation of law—fixed, certain, and of universal application. One of the purposes which the people had in making written constitutions was that there should be a government of laws and not of men. In regard to the question presented by the exception of the prisoner, we have a direct, and, I think, controlling, authority in this court. In *State v. Sparrow*, 7 N. C. 487, the prisoner was upon trial for murder. After the jury was charged, the witnesses for the state and the prisoner "were sworn and sent out." After the evidence had been closed on the part of the state, and the defendant, the Solicitor General, moved for leave to swear another witness, who had been present in court during the whole trial, to prove that the prisoner had fled from persons who went to arrest him after the deceased died, this motion was objected to

on the part of the state; but the objection was overruled by the court, and the witness was sworn and examined. Prisoner excepted, and, upon conviction, appealed. Taylor, C. J., was of the opinion that the exception was good, and that there was error in the action of the court, entitling the prisoner to a new trial. Judges Hall and Henderson thought otherwise. The former said: "The Constitution of the state declares that every man has a right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony; and if the prisoner, when the proper time comes, has a right to introduce his witnesses, as the Constitution authorized him to do, he would not forfeit that right if, either through inadvertence or design, he or the state omitted to call their witnesses when directed to do so, in order that they might be separated." Henderson J., said: "Whatever may be the consequences of an omission or refusal to obey the order of the court to name or send out the witnesses, I think the court is not authorized to reject a witness offered at the proper time because he was not sent out. This would add another objection on the score of incompetency, unknown in our law, as far as I can discover; for I have never yet heard of a witness being rejected on that account, and it must be admitted that this motion is predicated on the supposed existence of such a rule. Were a prisoner to refuse to name his witnesses in order that they might be sent out, a judge would hesitate much before he would direct a jury to retire without hearing such witnesses, if offered by the prisoner when called upon to make his defense and offer his proofs. The law and the Constitution, which gives him a right to confront his accusers with witnesses and other testimony, would be a dead letter." This case has been cited but once by this court. Then a witness who was not sent out was examined, and the court held that it was not error. *Worth v. Cox*, 89 N. C. 44. Judge Elliott, in his work on Evidence (section 802) says that while there is some conflict among the authorities whether a witness remaining in the courtroom should be permitted to give testimony, it is held in some jurisdictions that "where a party is without fault, and a witness disobeys an order for exclusion, the party ought not to be deprived of the testimony of his witness. This latter view would seem to be the better; that is, if the party calling the witness has been guilty of no misconduct, a judge ought not to reject him. So, then, in case of refusal by, or failure of, a witness to leave the room, the proper remedy would seem to be for the court to admit his testimony, and punish the witness for contempt of court." Among many other authorities cited to sustain this proposition is *State v. Sparrow*, supra. In this connection it may be well to note that the case cited in the opinion of Jackson v.

State, 14 Ind. 327, came under review by the same court in *State v. Thomas*, 111 Ind. 575, 13 N. E. 85, 60 Am. Rep. 720, Judge Elliott saying: "Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility"—citing Taylor on Evidence. "But it seems to be now settled that the judge has no right to reject the witness on this ground, however much his willful disobedience of the order may lessen the value of his evidence"—also citing 2 Phil. Ev. 744, saying: "But it may now be considered as settled that the circumstance of a witness having remained in court in disobedience to an order of withdrawal is not a ground for rejecting his evidence, and that it merely affords matter of observation." *Thomas' Case* was reaffirmed in *Taylor v. State*, 130 Ind. 63, 29 N. E. 415. I do not think that the cases cited in the opinion sustain the conclusion reached by the court. In *Holder v. U. S.*, 150 U. S. 91, 14 Sup. Ct. 10, 37 L. Ed. 1010, the court directed the witnesses, except the one under examination, to be excluded from the courtroom. Bickford, who had remained in the courtroom, was examined without objection. Other evidence intervened, and he was recalled; objection then being made for that he had not left the room. The objection was overruled, and defendant excepted. Fuller, C. J., said: "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the court. Certainly the action of the court in admitting the testimony will not, ordinarily, be open to revision." This falls far short of sustaining the right of the court to exclude a defendant's witness. In *State v. Gesell*, 124 Mo. 531, 27 S. W. 1101, an order for separation and withdrawal was made when the jury was impaneled. The record states: "Furber, who had been a codefendant, and had been severed from him, remained seated by the defendant, Gesell, in the courtroom during the whole trial." The court says that the authorities are in hopeless conflict as to whether the court can reject the testimony of a contumacious witness. "The point has been decided both ways in this state," citing cases. The conclusion is reached, on the authority of *O'Bryan v. Allen*, 95 Mo. 68, 8 S. W. 225, that "if the party who desired the testimony of the disobedient witness has participated in his disobedience, or has been guilty of connivance at the fault of the witness, he should not be allowed to testify." When we turn to

O'Bryan's Case, we find that it was held to be reversible error to exclude a witness who was not sent out "unless the party or his attorney calling the witness has been party or privy to the violation of the order"; because, says the court, "any other rule would put it in the power of a hostile witness to deprive a party of his evidence." I respectfully submit that the authorities cited in the opinion in that case should have led the court to hold that "a witness who disobeys such order is guilty of contempt; but the judge cannot refuse to hear his evidence, although the circumstance is a matter of remark to the jury. 2 Best, Ev. 636. The learned justice says that this "may now be regarded as settled." In *Com. v. Crowley*, 168 Mass. 121, 46 N. E. 415, the circumstances under which the witness was excluded were peculiar. I concede that the ruling in that case sustains the opinion in this. It is worthy of note, however, that the question was not discussed by the court, and *Holder's Case*, *supra*, was relied upon. The value of that case as an authority for the purpose of sustaining the right to exclude the witness has been pointed out. *Wharton*, Cr. Ev. § 446 (9th Ed.) is relied upon. The original text so states the law, but the notes, after citing many cases, concludes: "But it may now be considered as settled that the circumstance of a witness remaining in court, in disobedience of an order of withdrawal, is not ground for rejecting his evidence." The old rule was always to exclude the testimony.

I have thus reviewed the authorities relied upon to sustain the ruling in this case. It is impracticable for me to comment upon the large number of cases cited in the excellent brief of prisoner's counsel, showing that by the overwhelming weight of authority the court has no right to exclude the witness. The latest work on criminal procedure so states the law. *Clark*, Crim. Proc. 548. The last deliverance of this court is to the same effect. In *State v. Hare*, 74 N. C. 591, it is held error to refuse "to allow the defendant to examine a witness who was not present when the other witnesses were sworn and sent out, and who came in during the trial, but had not heard the examination of the other witnesses." No authorities are cited; the question is treated as settled. *Grimes v. Martin*, 10 Iowa, 347; *Dickson v. State*, 39 Ohio St. 73.

I cannot better close the discussion of this question than by quoting the wise and noble words of one who drew inspiration and acquired knowledge, by heredity, example, and education, of the principles of constitutional liberty from an ancestry illustrating the highest virtues of citizenship and judicial service in our own state. In *Parker v. State*, 67 Md. 329, 10 Atl. 219, 1 Am. St. Rep. 387, Mr. Justice William Sheppard Bryan, lately departed, after a long and honorable service on the bench in his adopted state, said: "It

was in the discretion of the court to order the witnesses to leave the courtroom; but it is not reasonable to take away from a prisoner on trial the benefit of testimony on which his life may depend because of the misconduct of another person. The humanity of the law is shocked at the punishment of the innocent. It provides with the greatest solicitude that persons accused of crimes shall have fair and impartial trials. The object is considered of sufficient importance to be guaranteed by the solemn and impressive declarations of our organic law. The scheme and theory of our legal system seek to provide that no man shall be adjudged guilty unless the truth of the matter charged upon him has been established after a fair and full investigation. The ascertainment of the truth is the great end and object of all the proceedings in a judicial trial. But this object is pursued by general rules, which experience has shown to be useful in guarding against erroneous conclusions. By the operation of these general rules, certain well-defined classes of persons are forbidden to testify. Subject to these well-known and distinctly marked exceptions, a person on trial has the right to prove the truth relating to the accusation against him by the evidence of all witnesses who have any knowledge of it, and they are compelled to attend and deliver their testimony in his behalf. Since such great care has been taken to secure the right of an accused person to prove the truth relating to the accusation against him, it would be very strange if he should forfeit this most precious privilege by the misbehavior of a witness. Authorities were cited at the bar for the purpose of showing that in some jurisdictions it was within the discretion of the judge to refuse to permit a witness to testify under the circumstances stated in the second exception. If the evidence of such witness would show the innocence of a prisoner on trial for his life, then the discretion of the judge to admit or reject the testimony amounts to a discretion to take the prisoner's life or to spare it. The wise, just, and merciful provisions of our criminal law do not place human life on such an uncertain tenure. A man's life and liberty are protected by fixed rules prescribed by the law of the land, and are not enjoyed at the discretionary forbearance of any tribunal. All suggestions of this kind are alien to the spirit and genius of our jurisprudence." This language was used with the approval of Justices Alvey, Stone, and Miller, and leaves nothing more to be said. When the constitutional right to confront his accusers is placed upon positive law, there is certainty and safety to the citizen. When made to depend upon variable and varying circumstances and conditions, ultimately vesting in the unreviewable discretion of a judge, there is confusion, uncertainty, resulting in conflicting decisions, dependent upon the pe-

cular views of the court respecting the guilt or innocence of the defendant, which it is the province of the jury alone to decide. We are not called upon to decide in this case whether, if the prisoner were in fault in not swearing and sending his witness out of the courtroom, he would forfeit his constitutional right. There is nothing in the record indicating that he knew that Riggsbee was under subpoena or would be called. The prisoner had been in jail, and was, of course, in custody during the trial. Whatever may be said of the effect of his personal conduct upon his right, I find no authority holding that by the failure of his counsel to comply with the order of the court his rights are forfeited. There are rights secured to a person on trial for a felony which he cannot waive, while there are others which may be waived by him, but not by his counsel. I do not find any decision holding that the right to examine his witness is lost by any act of omission or commission of counsel. I am sure that, upon principle, no such decision could be sustained. Here there is no suggestion that the learned and honorable counsel connived at, or, for any improper reason, permitted, the witness to remain in the court after he ascertained that his testimony would be of value to his client and had him subpoenaed. It is entirely consistent with our observation and experience that he overlooked the fact that the witness should retire. His uniform, honorable, and frank conduct in his relations to the courts exclude any other explanation.

But it is said that the prisoner has suffered no harm by the refusal of the court to permit his witness to testify. If I were permitted to express my personal opinion in this respect, I should not dissent from the proposition. When, as a judge, I am called upon to deal with a constitutional right of a citizen, I am not permitted to make the Constitution of "none effect" because of such reasons. I do not find that the judges have heretofore done so. I find no case, and none is cited, to show that a court may for such reason deal with their rights. Our own reports, and many others, contain numerous cases in which new trials have been given because of the failure to accord constitutional rights to defendants, and in none of them is it suggested that unless prejudice was shown it was not reversible error.

It is further said that the exception cannot be sustained because it does not appear what prisoner proposed to show by the witness. I concede that where the exception is based upon the exclusion of evidence such is the rule. The distinction is well stated in *Thomas' Case*, *supra*, where it is said: "The relatrix was not bound to state what she expected to prove by Johnson, because the question is not as to the competency of his testimony, but as to his right to testify at all. Where the matter complained of is the action of the court in refusing to per-

mit a witness to testify at all, the grounds of the objection to the witness must be shown by a bill of exceptions, and this is all that need be shown in order to present the matter for our consideration. We cannot say that the relatrix was not prejudiced by the refusal of the court to permit Johnson to testify, and the judgment cannot be sustained." This opinion is sustained by authority. I do not find in any of the cases which I have examined that the right of defendant to have his exception considered is dependent upon showing what he expected to prove.

I have with some labor and care considered and investigated the question presented, because, with all possible deference to the opinion of the court, both in respect to the law and the desire to see that guilty men are punished, I cannot resist the conclusion that a dangerous innovation, of course unintentional, is being made upon a fundamental right of the citizen. If, perchance, the right is invoked by a guilty man, it is no reason that it should be denied, or its value and certainty weakened. We cannot tell how soon it will become a shield for the protection of an innocent man charged with crime. I concede—what I do not find anywhere doubted—"that the sole object of a trial for murder is not the acquittal of the prisoner. It is to determine whether he be guilty or not, after giving him the advantage of requiring the unanimous verdict of a jury of 12 men, each of whom must be satisfied beyond a reasonable doubt of his guilt." I only insist that, unless he be permitted to confront his accusers with his witnesses, the right of trial by jury is of little value, and to refuse it to him is, as said by Chief Justice HENDERSON, to make this provision of the Constitution "a dead letter."

WALKER, J., concurs in the dissenting opinion.

STATE v. BOHANON.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. CRIMINAL LAW—APPEAL—QUESTION OF FACT—INDIFFERENCE OF JUROR.

The findings of fact of a trial court as to whether a juror is indifferent are not reviewable on appeal.

2. SAME—REVIEW—HARMLESS ERROR—JURY—CHALLENGE FOR CAUSE.

Where a party has not exhausted his peremptory challenges when the panel is completed, an objection that a juror should have been rejected for cause is not available.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3117.]

3. HOMICIDE—EVIDENCE—DYING DECLARATION.

In a prosecution for murder, testimony of a witness who was with deceased after he was shot and two hours before he died, and who was told by deceased that he was dying, that he said, "I do not know what my wife and

children will do; I begged Frank [defendant] to go along and let me alone," is competent as a dying declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Homicide, § 439.]

4. CRIMINAL LAW—EVIDENCE—VOLUNTARY CONFESSIONS.

In a prosecution for murder, evidence of voluntary confessions by defendant that he killed deceased, giving his reasons for so doing and detailing the circumstances connected with the killing, is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1146.]

5. SAME—REVIEW—INSTRUCTIONS—FAILURE TO REQUEST.

A defendant in a criminal prosecution who does not ask for additional instructions cannot complain that the court did not present his contentions to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2846.]

Appeal from Superior Court, Guilford County; Long, Judge.

Prosecution of Frank Bohanon for murder. From a conviction of murder in the first degree, defendant appeals. Affirmed.

The defendant, with Kiser Crutchfield and Oscar Crutchfield, was indicted for the murder of R. E. Beacham, on July 31, 1906. He and Kiser Crutchfield were convicted of murder in the first degree, and Oscar Crutchfield was acquitted. The defendant alone appealed.

George S. Bradshaw, for appellant. The Attorney General, for the State.

WALKER, J. (after stating the case). We have carefully examined the testimony in this case, and find it sufficient to sustain the conviction of the defendant, though no objection was distinctly made that there was no evidence to warrant the verdict. There are seven errors assigned as having been committed in the rulings of the court at the trial, and they will be considered in their order.

The defendant objected to C. C. Townsend as a juror upon the ground that he had formed and expressed the opinion that the defendant is guilty. The court, after hearing the evidence bearing upon this objection, found that the juror was indifferent, and overruled it. The juror was sworn and served. We do not see how this ruling can now be made the subject of an exception. The juror stated that, notwithstanding he had formed and expressed an opinion that the defendant is guilty, he was yet satisfied that he could decide fairly and impartially as between the state and the defendant, and the court found upon the evidence that he was indifferent. The findings of fact as to indifference have been held not to be reviewable in this court. *State v. Ellington*, 29 N. C. 61; *State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771; *State v. Kilgore*, 93 N. C. 533; *State v. Potts*, 100 N. C. 457, 6 S. E. 657; *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *State v. Fuller*, 114 N. C. 885, 19 S.

E. 797; *State v. Kinsauls*, 126 N. C. 1096, 36 S. E. 31; *State v. Register*, 133 N. C. 747, 46 S. E. 21. The case of *State v. Potts*, 100 N. C. 457, 6 S. E. 657, seems to be directly in point. But there is another familiar principle of the law which fully meets and answers this objection. The defendant did not exhaust his peremptory challenges, but there were many left to him when the panel was completed. When such is the case, the objection to a juror, who could have been rejected peremptorily, is not available. *State v. Hensley*, 94 N. C. 1021; *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357; *State v. Teachey*, 138 N. C. 587, 50 S. E. 232. The same rule has been affirmed three times at this term of the court. *Ives v. Railroad Co.*, 142 N. C. —, 55 S. E. 74; *Hodgin v. Railway Co.*, 142 N. C. —, 55 S. E. 413; and *State v. Sultan*, 142 N. C. —, 54 S. E. 841.

The defendant next objected to the testimony of the witness W. T. Ansley, who stated that he was with Beacham after he was shot by the defendant, and that he told the witness that he was dying. There was other sufficient evidence tending to show that Bohanon knew that he was in extremis. He died within two hours after the witness had the conversation with him to which the defendant objected. The court permitted Ansley to testify that Beacham said to him: "I do not know what my wife and children will do. I begged Frank [Bohanon] to go along and let me alone." This was competent as a dying declaration. It is evident that the deceased was referring to what had occurred at the time he was shot, so that what he told Beacham he had said to the defendant constituted a part of the res gestæ and was not the narration of a past event. It identified the defendant as the one who had committed the homicide. *State v. Dixon*, 131 N. C. 808, 42 S. E. 944; *State v. Boggan*, 133 N. C. 761, 46 S. E. 111; *State v. Teachey*, 138 N. C. 587, 50 S. E. 232. The reference he made to his family merely confirmed the finding that he was, at that time, aware of his critical condition, and well knew that he was fast approaching the supreme moment of his dissolution, when his words had more sanction and solemnity than is ever imparted by the ordinary tests the law applies to insure the accuracy and credibility of human testimony.

The third, fourth, and fifth assignments of error are based on the admission of the testimony of the state's witnesses, W. J. Weatherly, D. H. Collins, and C. F. Neely. Weatherly testified that the defendant was arrested in Danville, Va., and that on his way to Greensboro he asked him why he had killed Beacham. He replied that he was working under Beacham, who discharged him and mistreated him by tearing down his tent. The witness chided him for having resorted to violent and serious measures in resentment of such a grievance, whereupon

the defendant said that he would not have killed him, if the Crutchfields had not made him drunk and provoked him to it, by telling him that he ought not to submit to such a wrong. Collins testified that the defendant told him he had gone to Greensboro and bought a gun and then went to the railroad camp to look for Beacham; that when he found Beacham, the latter cursed him and told him to go away or he would kill him, or something like that, and the defendant replied that he had come there for trouble, and he then shot Beacham. After the shooting occurred he went to Kiser Crutchfield's, and then he lay in the pines all day, where he saw the officers searching for him. Neely testified that the defendant admitted to him he had killed Beacham, and added that he would not have done it if the Crutchfields had not persuaded and helped him to do it. He said, in a second statement, that Beacham had a pistol and "that he had to shoot him to keep from being shot." There was evidence on the part of the state that Beacham did not have his pistol in his hands at the time he was shot, and that the act of the defendant was willful and deliberate, and not done in self-defense. The testimony of the three witnesses, Weatherly, Collins, and Neely, was competent and relevant. We have examined the preliminary proof taken by the court to ascertain if the defendant's confessions were voluntary. There is nothing to be found there to indicate that they were not. No promise was made to induce him to make the confessions, nor was any threat used to extort them. So far as we are able to see, they were entirely voluntary. His honor having so found, the testimony was admissible. *State v. Bishop*, 98 N. C. 773, 4 S. E. 357; *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *State v. Daniels*, 134 N. C. 641, 46 S. E. 743; *State v. Exum*, 138 N. C. 599, 50 S. E. 283; *State v. Smith*, 138 N. C. 700, 50 S. E. 859.

The sixth exception is without any merit, and, if it were not for the gravity of the charge, we would pass it by without comment. The defendant in that exception complains that his honor did not present to the jury the contentions of his counsel. The charge of the court in this respect was very full and explicit, and so clear in statement that the jury could not have failed to understand the defendant's theory in all its phases. Besides, the defendant did not ask for any additional instructions, if those already given were, in his opinion, not sufficient to cover the case. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 223; *State v. Martin*, 141 N. C. 832, 53 S. E. 874.

The seventh and last exception is also untenable. It appears that the court not only instructed the jury clearly and fully as to the doctrine of reasonable doubt, but repeated its instructions as to that matter more than once, and cautioned the jury that

the burden was on the state at all stages of the prosecution, and that they should not convict of any degree of homicide without being fully satisfied of the defendant's guilt to the exclusion of every reasonable doubt.

Upon a review of the whole record, we conclude that no error was committed by the court in the trial of the case.

No error.

BOURNE v. SHERRILL.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. CONTRACTS—CONSIDERATION.

Where, at the time of the sale of a certain lot and as an inducement thereto, the vendee agreed that, if he resold the lot, plaintiff should have the profits realized on such resale, the consideration supporting the sale was sufficient to sustain the collateral agreement.

[Ed Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 267.]

2. EVIDENCE—WRITTEN INSTRUMENT—CONTRADICTION—COLLATERAL AGREEMENT.

Parol evidence of a collateral agreement by a vendee to pay to the vendor any profits realized from a resale of the property was not objectionable as contradicting the conveyance.

[Ed Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2048-2051.]

3. FRAUDS, STATUTE OF—CONTRACT CONCERNING LAND.

At the time plaintiff conveyed certain property to defendant it was agreed that, if defendant resold the property and did not build thereon, plaintiff should have the profits realized on such resale. *Held*, that such agreement attached to the proceeds from and after a resale, and was not, therefore, an agreement concerning land, within the statute of frauds.

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Action by one Bourne against one Sherrill. From a judgment for plaintiff, defendant appeals. Affirmed.

Issues were submitted and responded to by the jury as follows: "(1) Did the defendant agree with the plaintiff that if he would sell him the lot, that in the event he did not build on it, but sold it, the plaintiff was to have the profits?" Answer: "Yes." "(2) If so, what profit did the defendant derive from the sale of the lot?" Answer: "\$263.04, with interest." There was judgment on the verdict for plaintiff, and defendant excepted and appealed.

Julius C. Martin, for appellant. Locke Craig, for appellee.

HOKE, J. There was evidence of plaintiff tending to show that plaintiff sold and conveyed to defendant a lot in Asheville, for which he had been offered a larger price by another, under assurance that defendant desired to build on the lot as a home for himself and wife; that at the time the lot was conveyed to defendant, as an inducement thereto, and in part consideration for the

sale and delivery of the deed, defendant then agreed that if defendant did not build, but resold the lot, plaintiff was to have the profits realized on such resale; that shortly after obtaining the title the defendant resold the lot at a profit, and plaintiff instituted the present suit to recover the profits pursuant to the agreement.

Defendant objected to the introduction of any and all of this testimony and to any recovery predicated thereon, on the grounds (1) that the agreement was without consideration; (2) that the same contradicted the deed; (3) that the contract was invalid under the statute of frauds, the same being a contract concerning realty, and required to be in writing. The decisions of this state are against the defendant on each of the propositions advanced by him. *Michael v. Foll*, 100 N. C. 178, 6 S. E. 264, 6 Am. St. Rep. 577; *Sprague v. Bond*, 108 N. C. 382, 13 S. E. 143. The consideration arose at the time of the sale, and as part inducement thereto. The conveyance, the purpose of which was to pass the title, is allowed its full operation, and is therefore in no wise contradicted. And the agreement enforced by this recovery attached to the proceeds from and after the sale, and was not therefore concerning land, or any interest therein, within the meaning of the statute of frauds.

In *Michael v. Foll*, supra, it was held: "At the time of the delivery of a deed for land, and as a part of the inducement for its execution, it was orally agreed between the vendor and vendee that, if the vendee should sell the mineral interest in the land during vendor's life, he would pay the vendor one-half of the amount received therefor. Held, that such agreement could be shown by oral evidence, and did not come within the statute of frauds." In *Sprague v. Bond*, supra, it was held as follows: S., being the owner of certain lands, conveyed them by deed absolute to B., upon the parol promise of the latter, from the proceeds of any sale the vendee might make, after paying expenses, etc., the vendor should be paid a part. Held not to be within the statute of frauds. And *Shepherd, J.*, delivering the opinion said: "The enforcement of the alleged agreement, after the sale of the land, does not in any respect impinge upon the terms of the conveyance, but relates entirely to the payment of the consideration. It is true that the plaintiff could not have compelled the defendant to execute her agreement to sell the land, as there was no enforceable trust, and the agreement was within the statute of frauds, but this part of the agreement has been voluntarily performed, and the other part, not being within the statute, may now be enforced." This last opinion refers with approval to the case of *Hess v. Fox*, 10 Wend. (N. Y.) 436, in which *Savage, C. J.*, delivering the opinion in a similar case, said: "No question can arise

on the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor." These authorities are decisive against defendant, and the judgment below is affirmed.
No error.

CITY OF ASHEVILLE v. WACHOVIA LOAN & TRUST CO. et al.

(Supreme Court of North Carolina. Dec. 18, 1900.)

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—AUTHORITY OF LEGISLATURE.

The Legislature in the exercise of the power to impose taxes may authorize the imposition of assessments on property measured by special benefits for the cost of public improvements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1001, 1002.]

2. SAME—AUTHORITY OF MUNICIPALITY TO IMPOSE SPECIAL TAXES.

A municipality possessing only the power to levy taxes for municipal purposes cannot impose taxes on property measured by special benefits for the cost of a public improvement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1001, 1002.]

3. SAME.

Asheville City Charter (Priv. Laws 1901, p. 255, c. 100) § 65, prescribing the preliminary steps for obtaining land for widening a street, authorizing the jury to assess the damages and special benefits, and the aldermen to discontinue the proposed improvement on determining that the damages as found are excessive, etc., confers on the city the power to levy assessments for benefits for the cost of a public improvement.

4. SAME—ASSESSMENT—TAXING DISTRICTS—CREATION.

In the exercise of the power conferred on a municipality to levy assessments for benefits for the cost of a public improvement, a taxing district must be established within which the improvement is to be made and the benefits assessed, and all the property in the district must be assessed for the cost, not to exceed the benefits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 1073, 1074.]

5. SAME—STATUTES—VALIDITY.

Asheville City Charter (Priv. Laws 1901, p. 255, c. 100) § 65, which authorizes the aldermen, on determining to widen a street, to direct the mayor to issue his writ to a policeman directing him to summon a jury and notify the persons "supposed to be affected" by the proposed improvement as designated in the writ, is objectionable as authorizing the mayor to arbitrarily impose on such persons as he supposes affected, the cost of the improvement, though the measure of liability of the entire property benefited is the cost of the improvement, so that each owner is interested in having each part of the whole assessed, to the end that, if the total benefit exceeds the cost, the burden may be properly apportioned.

6. SAME—AMOUNT OF ASSESSMENTS FOR PUBLIC IMPROVEMENTS.

The right of a municipality to levy assessments for benefits for the cost of a public improvement is not based on the idea that the municipality may collect from property the total amount of the benefits in case they exceed the cost of the improvement, but the assessment can only amount to the cost of the improvement, and hence the cost of the improve-

ment must be ascertained before the final apportionment of the assessment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, §§ 1100-1107.]

7. SAME.

In the exercise of the power conferred on the city of Asheville by section 65 of its charter (Priv. Laws 1901, p. 255, c. 100) to levy assessments for benefits for the cost of a public improvement, the board of aldermen must define the limits of the district within which the assessments are to be made, so that the property therein may bear its proportion of the cost on the basis of benefits.

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Proceedings by the city of Asheville for the widening of a street, in which the Wachovia Loan & Trust Company and another appeared and filed a demurrer to the pleadings. From a judgment overruling the demurrer, defendants appeal. Reversed.

This is a proceeding instituted by the plaintiff, city of Asheville, pursuant to the provisions of section 65 of its charter (Priv. Laws 1901, p. 255, c. 100) to widen West College street and have damages and benefits sustained by the property affected assessed. Defendant Wachovia Trust Company and Weaver, owners of lot upon which benefits were assessed, excepted to the report of the jury, and from a judgment confirming same appealed to the superior court of Buncombe county. The exceptions were overruled and defendants appealed to this court. The city of Asheville was incorporated by chapter 100, Priv. Laws 1901.

Section 65 of said chapter provides: "Whenever in the opinion of the board of aldermen of said city, it is advisable to obtain land or right of way therein for the purpose of opening a new street therein, or widening or straightening a street therein, or making culverts or waterways for carrying water out of any street therein, and said board of aldermen and the owner or owners of such land or right of way cannot agree as to the amount of damages consequent thereupon, as well as to the special advantage which may result to the owner or owners thereof, by reason of such opening, widening or straightening of street, or making such culvert or waterway, said board of aldermen may direct the mayor of said city to issue, and he shall thereupon issue his writ, under the seal of said city, commanding a policeman thereof to summon a jury of six freeholders of said city, unconnected by consanguinity or affinity with any of the persons supposed to be affected by said proposed improvement, in which writ the proposed improvement shall be fully described, and the persons who are supposed to be affected thereby shall be named. Such policeman shall, in obedience to said writ, summon a jury of six freeholders as aforesaid, and direct them to assemble at the mayor's office in said city at a time by such policeman appointed, not less than twenty nor more than thirty days after the date of such

writ. Such policeman shall also serve notice of the time of meeting of the jury upon all the persons who are named in such writ as supposed to be affected by such proposed improvement, at least fifteen days before the date appointed for the meeting of the jury. Such notice shall be in writing, and signed by said policeman, and addressed to the person or persons upon whom service thereof is made, and shall state the time appointed for such meeting of the jury, and designate briefly the proposed improvement, and may be issued as a single notice to all persons named in said writ, or as a separate notice to every one of them, or to any two or more of them. Such notice shall be served upon the person or persons therein named, or his, her or their agent, by reading the same to him, her or them. Such policeman shall duly return such writ and all such notices with his return thereon in writing endorsed, together with any such order of the mayor to said board of aldermen, at its next meeting after the time appointed for the meeting of the jury aforesaid. At the time appointed for the meeting of the jury such policeman shall cause the jury to assemble at the office of the mayor of said city, where every one of them shall be sworn by such mayor or other competent person to faithfully, truly and impartially assess the damages, if any, which, in his judgment, will be done to the property of every person named in the writ, and will also assess any special benefit, advantage or enhanced value which will be caused to the property of any person named in the writ. Immediately after the jury shall have been so sworn they shall proceed, accompanied by such policeman, to view the land of every person named in the writ, and shall assess the damages, if any, to every one of the premises which they have viewed, and the special benefit, advantage or enhanced value, if any, which will accrue by reason of said proposed improvement to every one of the premises which they have viewed. Said jury shall forthwith return to said board of aldermen, by filing it with the clerk thereof, a statement in writing, signed by every one of them, or a majority of them, in case they cannot agree, setting forth distinctly a full, itemized report of their proceedings, and stating separately the amounts of damages or special benefits, or both, as the case may be, which they have assessed to every one of the premises so viewed by them. At the first meeting of the said board of aldermen after a complete report or reports upon the matter in said writ ordered to be decided shall have been filed as aforesaid, said board of aldermen shall consider and pass upon such report or reports. If said board of aldermen shall determine that any item of damages so assessed is excessive, it may reject such report or reports, and discontinue the proposed improvement, and in case of such discontinuance no other proceeding shall within three months

thereafter be commenced for a similar purpose in relation to any of the premises affected thereby, or any part of the same, without the written consent of the owner thereof. It shall be competent for said board of aldermen, in passing upon any such report or reports to decrease or remit any item or items of special benefit, advantage or enhanced value therein contained, if it think proper to do so. If said board of aldermen shall think proper, it shall order such report or reports, or such report or reports so modified by it, as to special benefits or advantages or enhanced value, approved, and the lands condemned in said proceeding shall vest in said city so long as they may be used respectively for the purpose of said improvement, so soon as the amount of damages assessed to them respectively, decreased by the amount of special benefit, advantage and enhanced value, so assessed against them respectively, shall have been paid or tendered to the owner or owners of such premises respectively, or deposited as hereinafter provided."

Provision is made for an appeal by any person dissatisfied with the report of the jury, and the order confirming same, to the superior court of Buncombe county. Pursuant to the provisions of said charter, at a meeting of the board of aldermen of said city, a resolution was adopted declaring that, in the opinion of said board, it was advisable to obtain a strip of land, or right of way thereon, on the north side of West College street, between North Main and Haywood streets, for the purpose of widening West College street between the points named. The resolution sets out the width to which it was proposed to widen the street, referring to the survey made by the city engineer. It is also recited that it appears to the board that said board and the "owner or owners of such land or right of way cannot agree as to the amount of damages consequent thereon, as well as to the special advantage which may result to the owner or owners thereof by reason of such widening of West College street." It was thereupon ordered that the mayor issue his writ commanding a policeman to summon a jury of six freeholders, in accordance with the provisions of the charter, to assemble and view "the premises of all persons who are supposed to be affected thereby." Pursuant to said resolution the mayor issued his writ, in which the proposed improvement was fully described and the persons supposed to be affected thereby were named, commanding the policeman to summon a jury and to notify the persons named of the time and place of meeting, etc. The jury met in accordance with the writ and discharged the duty imposed upon them, making report to the mayor and aldermen. Among other things, they found that the lots of defendants were specially benefited in the amounts named. At a meeting of the board of aldermen held sub-

sequent to the date of filing said report a resolution was adopted confirming said report, from which order the defendants appealed. The record contains the following agreement in regard to the lot of defendants the Wachovia Trust Company: "That the lot of land referred to in the notice of appeal herein, or any part thereof, was not obtained, taken, condemned, appropriated or used by said city in and for the widening of said street; but the said lot of land above mentioned, and every part thereof, is situated and abutting on the south side of said street; that said street was not widened by the obtaining, taking, condemning, appropriating or using of any property on the south side of said street, but, on the contrary, said street was widened wholly by the obtaining, taking, condemning, appropriating and using of property on the north side of said street." And in regard to lots of appellant Weaver: "That the lots of land referred to in the notice of appeal herein, or any of them, or any part of them, was not obtained, taken, condemned, appropriated or used by said city in and for the widening of said West College street; that the said lots above mentioned and all of them, and every part of them, are situated on the north side of North Water street, in said city, and said lots or any of them, or any part of any of them, are not situated or abutting on said West College street, but, on the contrary, are more than one hundred and sixty feet from said street." The defendants filed the following demurrer to the pleadings: "Now comes the defendant in the above-entitled cause and demurs and says that upon the whole record herein, including chapter 100, section 55, of the Private Laws of North Carolina, Session 1901, and the agreed statement of facts, the plaintiff has no right, power, or authority to assess or cause to be assessed against the property of the defendant any sum whatsoever."

From a judgment overruling said demurrer, defendants appealed.

Davidson, Bourne & Parker, and J. S. Styles, for plaintiff. Frank Carter and H. C. Chedester, for defendants.

CONNOR, J. (after stating the case). The demurrer calls into question the right of the plaintiff under the powers granted in its charter to assess special benefits for the purpose of paying the cost of widening West College street. The learned counsel for defendants stated in his argument that he did not deny the right of the Legislature to confer upon the city of Asheville the power to assess against property within said city the cost of public improvements by which such property received peculiar and special benefits. He insists (1) that the power is not granted; (2) that, if granted, it is invalid because the method provided for its exercise is not in accordance with the right of the landowner, in that no taxing district is es-

tablished, either by the charter or by the resolution of the board of aldermen; that the attempt to confer upon the mayor the power to fix such district in his writ by naming such persons "as are supposed to be affected" is invalid. He also urges objections to the mode of procedure, which we will notice later. The power to impose upon property the cost of public improvements, measured by the peculiar and special benefit sustained, has been settled beyond controversy. It is uniformly held that this power is based upon the right to tax, and not that of eminent domain. In *Bauman v. Ross*, 107 U. S. 548 (589) 17 Sup. Ct. 966, 42 L. Ed. 270, it is said: "The Legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street, to be assessed upon the owners of land benefited thereby"; citing a large number of cases. *Cooley on Tax*, 1152. The subject was discussed, the authorities reviewed, and the power sustained in an able opinion by Mr. Justice Shepherd in *Raleigh v. Peace*, 110 N. C. 32, 14 S. E. 521, 17 L. R. A. 330. It is equally well settled that, "assessments being a peculiar species of taxation, there must be a special authority of law for imposing them. The ordinary grant to a municipal corporation of power to levy taxes for municipal purposes will not justify any other than ordinary taxes. This would follow from the general rule which requires a strict construction of all such grants; but the principle has peculiar force when applied to powers in themselves exceptional. And it is always held that such a power, when plainly granted, is to be construed with strictness, and as strictly pursued by the authorities who are to levy the tax." 2 *Cooley on Tax*, 1158. The same principle is announced by Judge Elliott in his work on *Roads*, § 544, cited with approval in *Greensboro v. McAdoo*, 112 N. C. 359, 17 S. E. 178. While this most salutary principle is to be kept in view, it is also true that, if the power is given, the statute will not be declared invalid because it does not specifically prescribe the details of the procedure to be pursued in its exercise. *Raleigh v. Peace*, *supra*. While the language employed in the charter is not so clear as might be desired, we are of the opinion that the intention of the Legislature to confer the power, both of eminent domain and to assess special benefits, is sufficiently shown. Some confusion arises from a failure to grant them separately. The first portion of the section prescribing the preliminary steps for obtaining land or a right of way therein, for the purpose of opening or widening a street, when an agreement as to the amount of damages, as well as special benefits, which may result to the owner, cannot be had if not explained by other parts of the section, would seem to sustain

defendant's contention. When the duty of the jury is prescribed, we find that they are to be sworn to assess "the damages, if any, which will be done to the property of every person named in the writ," also to assess "any special benefit, advantage or enhanced value which will be caused to the property of any person named in the writ." They are directed, after being sworn, "to view the land of every person named in the writ and assess damage, if any, to every one of the premises which they have viewed and the special benefit, advantage and enhanced value, if any, which will accrue by reason of said proposed improvement to every one of the premises which they have viewed." The "persons named in the writ" are those "who are supposed to be affected" by the proposed improvement. This is, of course, to include not only those whose lands are to be taken, but those whose lands are to be "specially benefited." Thus the language used in the first portion of the section is explained and its scope enlarged. When the report is filed, the board of aldermen are directed to consider and pass upon it. "If they shall consider that any item of damage is excessive, they may reject the report and discontinue the proposed improvement. If they consider that any item of benefits is excessive, they may decrease or remit the same." It thus clearly appears that the Legislature had in mind both the right of condemnation and of assessing benefits, and intended to confer both on the city of Asheville. Provision is further made in case of an appeal. (1) When one whose land has been taken appeals, the damages assessed, less the benefits, shall be deposited with the clerk of the superior court to await determination of the appeal. (2) When one against whom special benefits have been assessed appeals, the amount so assessed is declared to constitute a lien upon such land as of the time at which the board passed upon the report. Provision is made for enforcing the payment of the special benefit so assessed. It is an elementary rule of construction that the entire statute, or at least so much of it as relates to the matter in controversy, must be read, and the intention of the Legislature gathered therefrom and given effect. Unless the construction sustaining the power, as claimed by plaintiff, be given, much of the language found in section 65 becomes meaningless.

The defendant attacks the statute and the proceeding thereunder for that (1) no taxing district is established within which the improvement is to be made and the special benefits assessed; (2) that no provision is made for ascertaining the cost of the proposed improvement and apportioning among the lots or pieces of property benefited. For manifest reasons it is uniformly held that the Legislature must establish the district, or assign the duty to do so, either to the board of aldermen or commissioners to be appoint-

ed in some lawful way. It is impracticable to assess benefits upon property for local improvements, unless the territory within which such property is located is, in some way or by some means, ascertained. It is not necessary that the boundaries of the district should be coterminous with any of the political divisions of the state. In *People v. Mayor, etc.*, 4 N. Y. 419, 55 Am. Dec. 286, the district established for the assessment of special benefits was "the streets, avenues and squares within the first seven wards," etc. In *Busbee v. Commissioners*, 93 N. C. 143, the county of Wake is declared to be a taxing district for the purpose of levying an assessment to pay the cost of a common fence. In *Com'rs v. Com'rs*, 92 N. C. 180, the counties of Lenoir and Green were combined into a taxing district for the same purpose. The principle finds recognition in our drainage laws. Revisal 1905, § 3997. In *Baumann v. Ross*, 167 U. S. 589, 17 Sup. Ct. 982 (42 L. Ed. 270), Gray, J., says: "The class of lands to be assessed for the purpose may be determined either by the Legislature itself, by defining a territorial district, or by other designation; or it may be left by the Legislature to the determination of commissioners, and may be made to consist of such lands and such only as the commissioners shall decide to be benefited." *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 163. In the statute under consideration in *Irrigation Dist v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369, commissioners were appointed to lay off irrigation districts.

While expressions found in opinions and authors sometimes indicate that, without any territorially defined boundaries, assessments may be levied upon such parcels of land as the jury or commissioners think benefited, we find that usually, if not uniformly, some designation is made confining them to fixed limits. Such certainly is the result of our investigation in the statutes passed by the Legislature of this state. As we have seen, and as uniformly laid down by writers on the subject, the Legislature may, in the statute, fix the limits of the district, or, if it deem best, confer this power upon the local authorities, or upon the commissioners or jury appointed to make the assessment. It is held by all of the authorities that, when the district is created by either of the lawful agencies, all of the property within such district must bear its proportionate part of the cost of the improvement, measured by the special benefit accruing to it. It is generally held that fixing the limits of the district is a legislative function, and when exercised is not subject to review by the courts. "The whole subject of taxing districts belongs to the Legislature. So much is unquestionable. The authority may be exercised directly, or, in the case of local taxes, it may be left to local boards or bodies; but in the latter case the determination will be

by a body possessing, for the purpose, legislative power, and whose action must be as conclusive as if taken by the Legislature itself. It has been repeatedly decided that the legislative act of assigning districts for special taxation on the basis of benefits cannot be attacked on the ground of error in judgment regarding the special benefits and defeated by satisfying a court that no special and peculiar benefits are received. If the Legislature has fixed the district and laid the tax for the reason that, in the opinion of the legislative body, such district is peculiarly benefited, its action must in general be deemed conclusive." *Cooley on Taxation*, 1253. Judge Cooley says that there are exceptions to this general principle, some of which he names. Judge Elliott, conceding that the "numerical weight of authority overwhelmingly" sustains the general doctrine, says that he very much doubts "whether in any case the right of arbitrary decision by the Legislature can be defended on strict principle," and that he "cannot forbear suggesting that the judiciary ought not to, and, in truth, cannot, surrender its power to decide the questions affecting the right to impose special burdens on private property." An interesting discussion of the general principles underlying the subject may be found in the very able opinions of the court in the case of *Norwood v. Baker*, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, and the subsequent cases modifying, and, thought by some, overruling, it. Few subjects have given the courts more anxious consideration. On the one hand is an evident desire to sustain the action of the Legislature and of legislative agencies in dealing with the subject, and yet equally evident is the recognition of the danger of wrong and injustice to the citizen by giving to such agencies arbitrary power. It is difficult to reconcile the doctrine in a legal system which so jealously guards the property rights of the citizen, by which personal property of inconsiderable value may not be taken by another citizen except after a trial in open court with a jury to pass upon disputed facts and a judge learned in the law to declare his legal rights, with that which permits a board of aldermen, with no other guide than their judgment, to impose burdens for benefits, real or supposed, upon his home, with no right to be heard and no power to review their judgment or correct their mistake. Learned judges frequently admit that wrong and injustice may be done, but see no way by which the taxing power upon which, as we have seen, the right is based, may be controlled by the judiciary. We have no disposition to make any departure from the generally accepted doctrine, but we deem it appropriate to say that, in administering the law and exercising the powers conferred, it is the duty of those intrusted with it to proceed with cautious and careful watchfulness of the substantial right of the citizen.

We do not intend to suggest that the municipal officers in this case have not done so. It is held in *Bauman v. Ross*, *supra*, that the duty to fix the limits of the taxing district may be imposed upon the same commissioners who assess the benefits. While we see no objection to this course, the district should be defined before the assessment is made. It would seem just that the zone of benefits should control the boundaries of the district, and that all property in such district should be assessed to pay the cost not to exceed the benefits accruing to it.

We are confronted with the fact that in the charter of plaintiff no provision is made for laying off the taxing or assessment district, nor does it appear that it was done by the jury. The aldermen, deeming it conducive to the public welfare, decide to widen West College street. They thereupon, in accordance with the charter, direct the mayor to issue his writ to a policeman, directing him to summon a jury and notify all persons "supposed to be affected" by the proposed improvement; thus empowering the mayor, whose functions are not legislative, to select only such persons as, in his judgment, he supposes to be affected. None others are to be notified. There is no direction to summon all who have property in the zone of benefits, nor is any such zone designated otherwise than by the names of persons named in the writ. What is there under this proceeding to prevent the mayor selecting the lots of Mr. Weaver, lying on North Water street, some 200 feet from the street to be widened, and omitting the names of those who own lots between West College street and Mr. Weaver, in which event the jury would have no right or power to assess the benefits accruing to such lots. It is obvious that, under the charter, the mayor may arbitrarily impose upon such persons as he supposes affected the entire cost of the improvement. It does not appear by the record that the mayor has omitted any lots which should be assessed. That the power to do so is given renders the statute open to criticism. The measure of liability of the entire property benefited is the cost of the improvement. Therefore each property owner is interested in having each part of the whole assessed to the end that, if the total benefit exceeds the cost, the burden may be properly apportioned. When a taxing district or zone of benefit is fixed in advance of the assessment, this right is secured.

The defendants suggest that before any judgment can be entered against their property the cost of the improvement should be ascertained. This contention, we think, is sound. The right to levy assessments for special benefits is not based upon the idea that the corporation may collect from property the total amount of such benefits and turn into the treasury the profit made by the improvement. The right which the city has is to collect "the whole or a part of the

public improvement from the property benefited." *Spencer v. Merchant*, *supra*. This principle is clearly recognized in the charter of the plaintiff of 1891 (chapter 125, § 5), wherein the method of equalizing assessments for improving streets is prescribed. The cost is ascertained and then apportioned between the abutting real estate. The present Chief Justice, discussing this statute in *Hillard v. Asheville*, 118 N. C. 845, 24 S. E. 738, says: "It makes each street or portion of a street improved a taxing district by requiring the cost of the total improvement on each street to be ascertained." In that act, for the purpose of paying for the improvement, the "frontage" rule was adopted. This was sustained in *Raleigh v. Peace*, *supra*. The only difference between the two statutes in that respect is that in the charter of 1901 the benefit is to be ascertained by the jury, instead of the arbitrary "frontage" rule. In all other respects the principle involved is the same. While the question presented here is not raised in *Peace's Case*, *supra*, it is manifest that the learned judge did not overlook it. In speaking of the ordinance, he says: "It very clearly provides for a taxing district, to wit: * * * This provision as to the cost very plainly implies that the expense of the improvement in the entire district had been previously estimated, and thus we have an apportionment between the abutting owners and the city," etc. The principle is recognized in our legislation providing for building fences around a district by directing the cost of the fence to be ascertained and the cost apportioned among the several tracts of land in the territory within the common fence, also in the drainage laws (Revisal 1905, § 3997), wherein the cost of the work is first ascertained. It is not essential to the validity of a special assessment that the property about the street to be improved. If within the zone of benefit, as fixed by the statute or the commissioners, it may be assessed as if on the street. Nor do we hold that the cost must be ascertained before the assessment is made. This would often be difficult, but before the final apportionment is made and judgment rendered it is necessary that the cost be ascertained, for this is the limit of the power to impose assessments.

We are, upon careful consideration of the several questions presented by the demurrer and argued before us, of the opinion (1) that the power to levy assessments upon lots to which special and peculiar benefits accrue from a public improvement is conferred upon the plaintiff by chapter 100, § 65, p. 255, Laws 1901; (2) that in the exercise of the power of levying special assessments the board of aldermen lay off and define the limits of the district within which they are to be made, and that all property within said district should bear its proportion of the cost upon the basis of special and peculiar benefits, as distinguished from those general

benefits which accrue to it in common with all other property in the city; (3) that upon a final order or judgment, fixing the amount which is to be paid by the owner is made, the cost of the improvement be ascertained and apportioned between the several pieces of property.

The record comes to us upon an appeal from a judgment overruling a demurrer. Hence no final judgment appears in the record. The demurrer does not raise any question regarding the amount of benefit assessed, or the principle upon which it was assessed. We find no objection to the statute by reason of the notice required to be given. The demurrer, in so far as it attacks the power of the plaintiff to levy special assessments for special benefits accruing to property by reason of public improvements, was properly overruled. For the reasons herein stated, the judgment rendered by the board of aldermen cannot be sustained, and in that respect there was error in the judgment overruling the demurrer. The only portion of the order made by the board of aldermen which is certified to this court is that in which judgment is rendered against the defendant appellants. For the reasons given herein, the order, as to them, must be set aside and vacated. If so advised, we can see no good reason why the board may not allot and define a taxing district and proceed to have the benefits to the property, within the district, assessed in accordance with the provisions of the statute and the principles herein announced. The appellants will recover their costs in this court.

Error.

STATE v. HALL.

(Supreme Court of North Carolina. Dec. 18, 1906.)

CRIMINAL LAW—PLEA IN BAR—EXISTENCE OF COURT.

An alleged plea to the jurisdiction of the court in a criminal case alleging that the court was not lawfully constituted because the Governor was out of the state at the time he directed the holding of the term and signed the judges' commission was a nullity, since the court could not pass on its own existence as a court.

Appeal from Superior Court, Rowan County; Long, Judge.

George Hall was convicted of conspiring to break and enter the jail of Rowan county with intent to kill Nease Gillespie and others who were confined therein as prisoners, and he appeals. Affirmed.

Before pleading to the indictment and before announcing his readiness for trial, the defendant filed a plea to the jurisdiction of the court, and moved the court not to proceed with the trial, and for the discharge of the defendant. The motion was based upon the affidavit of the defendant which was then filed, and which is in the following words and figures, namely: "The defendant, George

Hall, being duly sworn, says: That he is advised and believes and so avers, that this court is without jurisdiction to try him for the offense charged in the bill of indictment. That he is informed and believes that this special term of court was ordered and the commission of Hon. B. F. Long, the judge presiding, issued by Robert B. Glenn, purporting to make said order and to issue said commission by virtue of his alleged office as Governor of North Carolina; whereas, affiant is informed and believes said Robert B. Glenn, at the time of making said order and the issuing of said commission, was wholly without authority or warrant of law for so doing, being, as affiant is informed and believes, at said time, to wit, on the 17th day of July, 1906, and for many days prior and subsequent thereto, absent from the state of North Carolina, and actually in the state of New Jersey, and defendant is advised and believes that his said action, while so absent from the state, was wholly without warrant of law, unlawful and void, and that all proceedings thereunder are and have been unlawful and void, and that this court is without lawful constitution or jurisdiction to try this case against affiant, or any other cause. Wherefore defendant demands that he go without day." In support of this motion, defendant introduced Hon. Robert B. Glenn, Governor of North Carolina, who testified as follows: "Q. You are the Governor of the state? A. Yes, sir. Q. I will ask you where you were on the 17th day of July, 1906? A. I was in Atlantic City, N. J. Q. You were absent from the state on the 17th day of July, 1906? A. I was in Atlantic City, N. J., on that day. Q. Governor, did you sign the commission of Judge Long to hold this court? A. I sent a telegram to my private secretary and he signed the commission. I seldom sign commissions. Q. By the State: Did you direct and authorize him to sign it? A. I did. He could not get the Lieutenant Governor, and he applied to me. I got this telegram at Atlantic City, and as it needed attention at once, I ordered the commissioners to hold this special term of court, because I wanted to stop this lynching in North Carolina. This signature [to the commission which was produced by the judge] is my signature, but it is stamped with a rubber stamp. I ordered it on a telegram, and directed my private secretary to give this order and stamp my name. I directed him to order a special term of court commencing August 6, 1906." The commission of Judge Long was then introduced. It is in the usual form and it is not necessary to set it out in full. The court, in passing on the defendant's plea to the jurisdiction, considered the minutes of the board of county commissioners relating to the special term and those minutes were made a part of the case. They show that a special meeting of the board was called on July 17, 1906, to take action in regard to

the Governor's notice to the chairman that the special term had been ordered for the trial of criminal cases, to begin on August 6, 1906, and continue for one week, and that a grand jury had also been ordered to be drawn and summoned for the term. The board directed that notice of the term be published, and that jurors drawn by them in that meeting be summoned by the sheriff of the county. The defendant objected to the introduction of the minutes. The objection was overruled, and he excepted. The court, upon consideration, overruled the plea to the jurisdiction, and the defendant excepted. There was a verdict of guilty. The defendant moved for a new trial and in arrest of judgment for the same reason which he assigned in support of his plea. The motions were overruled, and he again excepted. Judgment having been entered upon the verdict, the defendant appealed.

T. F. Klutz, for appellant. The Attorney General and Walter Clark, Jr., for the State.

WALKER, J. (after stating the case). As we view the case there is but one question presented for our decision. When he was called upon to answer the indictment, the defendant entered what is called a "plea to the jurisdiction of the court," but, in the formal statement of the grounds of his objection to the further prosecution of the case, he does not, either in fact or in a technical sense, attack the jurisdiction of the court, but he denies its right to proceed against him solely upon the ground that the court was unlawfully called and organized, or, in other words, that it was not a court, never having had any legal existence under the law. Jurisdiction, when applied to courts and speaking generally, consists in the power to hear and determine causes. 12 Pl. & Pr. 116. It presupposes always and of course that there is a court to exercise it, for it is not predicable of anything but a lawfully existing tribunal. It relates to the subject-matter of the controversy or to the person, and never is applied to any question touching the existence of the court itself. It is not conferred until the court designated to exercise it has been brought into being according to the mode prescribed by law. The defect here alleged is not that, if the court had been properly called and organized, it would still not have had the necessary jurisdiction of the subject-matter of the prosecution and of the person of the defendant, but that there was no such court as that which pretended to indict and try him. This presents a somewhat different case from an exception to the right of a court, admitted to exist, to try a particular cause. The distinction is clear. *Burt v. Railroad*, 31 Minn. 475, 18 N. W. 285, 289. We believe there is no such thing known to the science of pleading as a plea denying the very existence of the court before which the plea is filed, and, in

the nature of things, there cannot be, for no court can pass upon the validity of its own constitution and organization. It must always decide that it is a court, because the moment it is admitted that it does not exist, and has never existed, as a legal entity, so to speak, it is at once settled that it never had the power to decide anything, not even the plea denying that it ever was a court. How can a body having no legal existence, and consequently no judicial power or authority, decide anything? Therefore it is that jurisdiction, or the right to hear and determine, necessarily involves the idea that there is some tribunal having legal existence under the law to hear and decide. This is not by any means a new proposition. It certainly has the full sanction of reason and common sense, as it would be a legal solecism for a court to deny or disavow its own existence and it is also, we think, supported by high authority. In *Beard v. Cameron*, 7 N. C. 181, the very question was presented to this court. There a plea to the jurisdiction was filed, and Judge Henderson said: "It is to my mind a very strange and incongruous proposition that an answer is required to be given by A. B., whether he be a judge, which answer he cannot give unless he be a judge. I plead that you are not a judge. A judge alone can decide the plea; and I call on you to decide. This certainly cannot be the way of testing Judge Baker's appointment." And again: "It is said that the extent of the jurisdiction of all courts is settled by the courts themselves. This is true, but then it must be remembered that, in all such cases, there is a court competent to decide, and it is called upon, not to decide whether it is a court, but the extent of its jurisdiction. The plea must therefore be overruled." That was a case in which the defendant pleaded to the jurisdiction because the judge, as he alleged, had no authority whatever to preside over the court—not even color of authority—and that he was no more than a private person, and consequently there was, in fact, as well as in law, no court. With respect to this contention, Chief Justice Taylor, who delivered a separate opinion, thus met the objection put forth in the plea: "The defendant prays judgment if he ought to be compelled to answer to the plaintiff in his said plea here depending. Whom does he ask to pronounce this judgment? The person who is asserted by the plea to be constitutionally incompetent to render any judgment. If the person holding the court were not a judge duly authorized and rightfully commissioned, he could render a judgment in no case, none of his acts or proceedings could possess a judicial character, or be capable of affecting, in any shape, the rights or property of the citizens. It must be nugatory, then, to propound to the person assuming this authority, a question involving his competency to de-

cide, for that were to ascribe to his decision an authority which the very statement of the question denies it to possess. If he were to decide that he is a judge, and proceed to try the cause and give final judgment, no efficacy could be imparted to such judgment by his decision; it would be *ipso facto* a nullity, in the one case as well as in the other, and no act of his could give it the force of *res adjudicata*. The highest evidence of the opinion of a person acting in the character of a judge that he has a right to do so is exercising the functions of the office. This has already been given, and the strength of such evidence is not increased by his particular opinion to the same effect expressed on a plea to the jurisdiction." The Chief Justice did not mean here to deny the proposition that there might be a judge *de facto*. *State v. Lewis*, 107 N. C. 967, 12 S. E. 457, 13 S. E. 247, 11 L. R. A. 105; *State v. Speaks*, 95 N. C. 689; *Norfleet v. Staton*, 73 N. C. 546; *Burke v. Elliott*, 26 N. C. 360, 42 Am. Dec. 142; *Burton v. Patton*, 47 N. C. 124, 62 Am. Dec. 194. He was discussing the case upon the assumption of the defendant, as stated in his plea, that the irregularity in the judge's appointment not only disqualified him and rendered him incompetent to preside, but that it had the added effect of destroying the existence of the tribunal itself, so that there could be no court to hear and decide. It is difficult, and we think impossible, to distinguish that case from the one at bar. In principle they are the same, and the reason which prevailed with the court in the one should control the decision in the other. It all comes to this, that, by his plea, the defendant has called upon the court to deny its own existence, and to exercise a judicial function in doing so, whereas, by the very nature of the plea, and indeed by its very terms, he avers that it has no such function because it has no existence in law. If we treat the plea as technically one to the jurisdiction, we must, of course, first assume that the court had a legal existence, for, as we have seen, it could not possess or exercise jurisdiction of any kind, either of the person or the subject-matter, unless it was a court. If we eliminate the plea, as one denying the existence of the court, which we must do, and also exclude all evidence bearing upon it, as it must share the fate of the plea itself, we only have left the record proper in the case which shows, on its face, and without resorting to any extraneous

facts, that the court was regularly called, organized, and held, so that the plea, regarded merely as one to the jurisdiction, but not to the existence of the court, must be overruled, for the record proper shows that it had jurisdiction of the person and the subject-matter. We do not understand that the defendant intended to raise any objection to the "jurisdiction of the court," using that term in its only legitimate sense, but that he merely intended to challenge the right of the court to exercise judicial authority under any circumstances, because, in fact, it was not a court recognized by the law. In either view the plea was bad and was properly rejected. Again, if there was no court to hear and determine, how is it that anything has been heard and determined? If the proceedings were void *ab initio* there was no indictment, no arraignment, no trial, and no judgment, and it follows logically that there was nothing to appeal from to this court, and we have, therefore, no jurisdiction to review the proceedings. This court can acquire jurisdiction to correct errors only where they have been committed by a court, constituted and organized according to law, or recognized as having the essential attributes of a properly constituted tribunal, and competent to exercise jurisdiction of controversies between litigants. We cannot entertain an appeal from anything except a court, or a person, such as a judge, who is clothed with judicial power. The reasoning by which the conclusion of this court was reached in *Beard v. Cameron*, *supra*, is satisfactory to us, as it commends itself to our sense of the fitness of things and accords with our notion of the fundamental principles of the law relating to the formation and the peculiar functions of courts. The plea of the defendant that there was no court to indict and try him is subversive of itself, as it violates the maxim "*ex nihilo nihil fit*." You cannot deduce the right to hear the plea from the premise that there was no court, for that is to deny and affirm at the same time.

As the plea must be overruled, and as all the evidence introduced in its support must fall with it, there is nothing left for us to do but to inspect the record to see if there is any defect or error therein, and, finding none, and confining ourselves strictly to the question before us, we must declare that there was no error in overruling the plea of the defendant.

No error.

NATIONAL UNION BANK OF MARYLAND v. HOLLINGSWORTH et al.

(Supreme Court of North Carolina. Dec. 22, 1903.)

1. CORPORATIONS—INDORSEMENT OF ACCOMMODATION NOTE—ACT OF PRESIDENT.

Where the president of a corporation indorsed an accommodation note in the name of a firm, which had been succeeded by the corporation, but the note was never payable to the corporation, and was not executed to pay a debt due it, the corporation was not liable on the indorsement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1641.]

2. APPEAL — PLEADING — ISSUES—QUESTIONS RAISED.

Where the parties went to trial on the pleadings, it was too late on appeal to raise the question whether one of the issues litigated was presented by the pleadings.

3. CORPORATIONS — ASSETS — TRANSFER — PAYMENT OF DEBTS — PERSONS ENTITLED TO COMPLAIN.

One not a creditor of a corporation could not complain that a transferee of all of its stock and assets did not pay all of the corporation's debts as agreed.

4. SAME—BONA FIDE PURCHASER FOR VALUE — EVIDENCE.

Evidence held sufficient to sustain a finding that R. was a bona fide purchaser of a corporation's stock and assets, for value, without notice of the alleged fraud of its president in organizing such corporation to take over the business of a firm without satisfying firm debts.

5. ASSIGNMENTS FOR BENEFIT OF CREDITORS—TRANSFER OF CORPORATION ASSETS.

Where the president of a corporation, who owned or controlled all of its stock, transferred the same to R. in consideration of a present debt due the latter, R.'s collateral agreement with reference to the disposition of certain notes evidencing such indebtedness, and to pay the outstanding debts of the corporation, did not make the transfer an assignment for the benefit of creditors, within Acts 1893, p. 453, c. 453, entitled "An act to prevent fraudulent assignments."

Hoke, J., dissenting.

Appeal from Superior Court, Buncombe County; W. R. Allen, Judge.

Action by the National Union Bank of Maryland against J. B. Hollingsworth and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Julius C. Martin and Chas. A. Webb, for appellant. Locke Craig and Moore & Rollins, for appellees.

CONNOR, J. This cause was before us at the December term, 1903, and is reported in 135 N. C. 556, 47 S. E. 618. The facts are there fully set forth in the statement of the case, and we find no reason, in disposing of this appeal, for restating them, but refer to the case as reported. After discussing the several phases of the controversy, as presented and argued before us, we concluded by saying: "The cause should be remanded, and a new trial had upon the issues of fraud raised by the pleadings and the claim of the defendant Robertson that, in any event, he is a purchaser for value and without notice. The burden of proof upon the first

issue will be upon the plaintiff, and as to the second upon the defendant." His honor, in accordance with this decision, submitted the issues indicated, and, in addition thereto, submitted the third issue. "Did the defendant the J. E. Dickerson Company indorse the notes in controversy in the name of J. E. Dickerson & Co.? His honor instructed the jury, in deference to what he construed to be the opinion of this court, to answer the issue in the negative.

The plaintiff's fifteenth exception is directed to this ruling. It was alleged that the defendant corporation had, through J. E. Dickerson & Co., as agents, contracted the debts sued on, had received the benefit of the money advanced on the notes, and was therefore liable for them. We do not think the question raised by the third issue was left open, and his honor may have refused to submit the issue. It will be observed that neither J. E. Dickerson or J. E. Dickerson & Co. had any connection with these notes, save by way of indorsement. There is no evidence that the J. E. Dickerson Company had any connection whatever with them. We expressed our opinion in the first appeal upon this phase of the case as follows: "This note was never payable to the corporation, was not executed in consideration of any debt due the corporation, was never indorsed by any officer of the corporation in his official capacity, and it is difficult to perceive how it could have become liable upon the cause of action set forth in the complaint; that is, the promissory note of Hollingsworth." We adhere to that view. The learned counsel contends that there was abundant evidence to go to the jury to prove that J. E. Dickerson was acting as agent of the corporation when he indorsed Hollingsworth's note, given in renewal of notes payable to J. E. Dickerson & Co., in the name of J. E. Dickerson & Co. While it is true, as contended by counsel, that a corporation may contract under an assumed and fictitious name and be bound on the contract, we know of no authority by which the president or other managing officer of a corporation, without any authority whatever, can bind the corporation by indorsing, in his own name, or the name of some firm of which he may be a member, a note payable to himself, for which the corporation received no benefit or consideration. There is no suggestion that either J. E. Dickerson undertook, or any officer of the bank understood or supposed that he was undertaking, to bind the corporation by indorsing the words "J. E. Dickerson & Co." upon the back of a note payable to J. E. Dickerson & Co. We find no scintilla of evidence tending to establish any liability against the corporation upon the indorsement, which is the cause of action. If the corporation received property from J. E. Dickerson, or by J. E. Dickerson & Co., in fraud of his or their creditors, the right to follow the property in the possession of the corporation, or the hands of a purchaser with notice, is

conceded. The exception cannot be sustained.

The plaintiff's tenth exception is pointed to the submission of the fifth and ninth issues, directed to the question whether Robertson was a purchaser for value without notice of the fraud of Dickerson. The exception is based upon the contention that the issues are not raised by the answer. We construed the pleadings as raising the question, and directed the submission of the issues as stated. Possibly there is some confusion in respect to the real matters in controversy in this case, growing out of the fact that the complaint is drawn upon the theory that the defendant Robertson, as partner of Watkins, Cottrell & Co., was personally indebted to the plaintiff bank. The affidavit upon which the attachment was issued states that Robertson, being a nonresident, is indebted and has property in this state. The attachment is levied upon the property assigned to him by the J. E. Dickerson Company, in the hands of J. E. Rankin, receiver, and the shares of stock in said company "which belong to and are the property of the said W. S. Robertson." In the first trial the court directed the jury to answer the issue that Robertson was not indebted to the bank, and rendered judgment accordingly, and this was, upon plaintiff's appeal, affirmed by this court. 135 N. C. 582, 47 S. E. 618. Thereafter all parties, and the court, treated the action as a bill to follow the property, upon the theory that Dickerson had dealt with it in fraud of his creditors. The pleadings should, upon the decision of this court, have been amended so as to present the real controversy. The parties, however, went to trial upon the pleadings, and it is too late now to raise the question that they do not present the questions upon the decision of which their rights depend. If necessary to do so, we would not hesitate to direct appropriate amendments made in this court.

Exceptions 14 and 17 are directed to the instruction that, if the jury believed the evidence, they should find that all of the debts of the corporation had been paid. It is conceded that, if his honor's ruling upon the third issue was correct, these exceptions cannot be sustained. The defendant Robertson expressly undertook to say, and says, without contradiction, that he did pay all of the debts of the corporation; and no one, other than plaintiff, which, as we have endeavored to show, is not a creditor, is complaining. We do not perceive how the plaintiff is in a position to complain of the time the debts were paid.

Exceptions 16, 18, and 19 point to the charge of his honor on the fifth and ninth issues, directed to the inquiry whether Robertson was a purchaser for value without notion of Dickerson's fraudulent purpose in making the transfers. The plaintiff introduced Robertson's deposition. He testified that neither he nor the firm of Cottrell, Watkins & Co. had any connection with or knowl-

edge of the Hollingsworth or Jones notes until after the property was transferred to him. The evidence upon this question is clear and positive. In answer to direct questions he says: "I never dreamed of that; was as much surprised to hear of them as any one else. I didn't know anything in the world about them. Don't know how many there are, or the amount of them; never heard of them before suits were commenced." This testimony was uncontradicted. It is claimed, however, that Robertson had notice of facts sufficient to put him upon inquiry. We have carefully examined the testimony, and are unable to find that he had knowledge of any facts in the slightest degree indicating that Dickerson owed any debts, except to his firm. There is no controversy in respect to the validity or amount of this indebtedness. As will be seen by reference to the statement of facts in the former appeal (135 N. C. 556, 47 S. E. 618), two of the partners of Cottrell, Watkins & Co. died, and it became necessary to close up their business. Mr. Robertson, together with the executors, went to Asheville in May, and it was at that time that the first arrangement was made. The Bank of Asheville was then in business, and there is no suggestion that it was insolvent, or, at least, that it was supposed to be so. Hearing that the bank had failed in September, and that Dickerson was in trouble, Robertson again visited Asheville, and at that time the final assignment was made in payment of the debt. He swears that he did not at that time know that Dickerson was indebted to any one but himself. It was but natural that the failure of the bank, in which Dickerson was a director, should have made it prudent for Mr. Robertson to visit Asheville; but it was not, in our opinion, any evidence that he was indebted to the bank, and, as we have seen, he swears positively that he did not know, and had no intimation of, that fact. Without undertaking to discuss the evidence in full upon that point, we refer to the statement of facts heretofore made.

His honor clearly charged the jury in regard to the burden of proof and the manner in which they were to consider Robertson's testimony, introduced by the plaintiff. We find no error in the instruction given. To the suggestion that the transfer made to Robertson in September was an assignment for the benefit of creditors, coming within the provisions of Acts 1893, p. 433, c. 453, it is sufficient to say that the real consideration of the assignment was in payment of the debt due Robertson. The collateral agreement in regard to the disposition of the notes which they held and the agreement on the part of Robertson to pay the outstanding debts of the Dickerson Company does not, in our opinion, bring it within the operation of the statute. While there were other exceptions in the record, they are not noticed in the brief, and we take them to have been abandoned. Those which were in the brief

fully presented the real matters in controversy.

Upon a careful consideration of the entire record, we are of the opinion that his honor's instructions were correct, and that his judgment is in accordance with the former opinion of this court. There is no error.

HOKE, J. (dissenting). I think the record and case on appeal show that there was evidence for the consideration of the jury of facts and circumstances which should have put the defendant Robertson on inquiry, and which would have led to knowledge of the fraud established by the verdict against Dickerson and Dickerson & Co.; and the jury should have been allowed to determine the question of the bona fides of Robertson's purchase in that aspect of the testimony. In my opinion, therefore, there was error on the part of the trial judge in charging the jury that, if they believed the evidence, they would answer the issue addressed to that question in favor of the defendant. As there is no question of law or legal inference seriously involved, however, I do not consider it necessary or desirable to discuss the case more at length.

BANK OF MORGANTON et al. v. HAY.

(Supreme Court of North Carolina. Dec. 11, 1906.)

PRINCIPAL AND AGENT—RIGHTS AS TO THIRD PERSONS—AUTHORITY OF AGENT—DRAFTS ON PRINCIPAL.

Plaintiff, a bank, cashed a draft drawn on defendant by his agent, on the faith of the payment of similar drafts, and a letter written by defendant to the agent, in which he said, "I had entirely overlooked your check, and now beg to inclose same to you. I think it would be well for you to draw on us at stated times, or write a few days in advance, and remind us of it, in order that you may not be embarrassed." Two later letters of defendant, also examined by the bank before cashing the draft, showed that defendant complained of the agent's failure to secure business, while his expense account had grown until it had about reached the limit, justified by reasonable expectation of commissions. One of these letters, which stated that the agent's draft for \$20 was received, and would be paid, and which called upon the agent to account for his agency, furnished the only evidence of the usual amount of the agent's drafts. Just one week from the date of this letter, the agent drew the draft in suit for \$60 for expenses not already incurred, but likely to arise thereafter in another place. It did not appear that he had made any accounting of his agency, that he was instructed to go to the place where he said he was going, or that he had notified defendant of his intention to do so, or of his purpose to draw on him for \$60. Defendant was not informed by the face of the drafts, which he paid, that they were cashed by the plaintiff bank, their appearance being the same as if simply drawn and forwarded for collection. *Held*, that the correspondence contained enough to put the plaintiff on its guard, and did not confer authority on the agent to have the draft in suit cashed.

Appeal from Superior Court, Burke County; O. H. Allen, Judge.

Action by the Bank of Morganton and another against T. T. Hay. From a judgment of nonsuit plaintiffs excepted, and appealed. *Affirmed*.

The plaintiff brought this action to recover \$60, the amount of a draft which was drawn on March 16, 1905, by H. L. Hinson on the defendant, payable to its order five days after sight. The defendant refused to accept and pay the draft upon the ground that Hinson had no authority to draw it. The plaintiff alleged that he did have authority to draw the draft as agent of T. T. Hay & Bro. of Raleigh, N. C., of which firm the defendant is a member. To show that such authority existed, the plaintiff introduced in evidence three letters written by T. T. Hay & Bro. to Hinson, as follows:

"Raleigh, N. C., Jan. 24, 1905.

"H. L. Hinson, Morganton, N. C.—Dear Sir: I am just in receipt of your letter, and will say that we are not at all discouraged, for we know you are coming to the point with some good applications soon. I had entirely overlooked your check, and now beg to enclose same to you. I think it will be well for you to draw on us at stated times or write a few days in advance and remind us of it in order that you may not be embarrassed. I will send you supplies asked for in your letter by tomorrow's mail. Yours very truly, [Signed] T. T. Hay & Bro."

"Raleigh, N. C., Feb. 1, 1905.

"Mr. H. L. Hinson, Morganton, N. C.—Dear Sir: It appears to us that you have been in Morganton long enough to find out whether or not you can do any work there or not, and we therefore write to know what are, really, your prospects. It is no use, in my opinion, for an agent to stay in a town indefinitely unless there is something in sight, for you have been there about three weeks and we have not had the pleasure of seeing a single application. Write me fully by return mail on this point, and let me know what we may expect from Morganton, and if the chances appear to be against you we want you to try some other place, for we must count on results and not what prospects may be in sight. Yours very truly, T. T. Hay & Bro., General Agents."

"Raleigh, N. C., March 7, 1905.

"Mr. H. L. Hinson, Morganton, N. C.—Dear Sir: Your draft for \$20 was received this morning and will be paid, but I would like very much for you to write what the prospects are in Morganton, for unless you do something pretty soon the advance account will be so large that you will be unable to make it up in the way of commissions. We do not mind spending money for the business if we get anything in return, but it does not appear to me a good proposition for you to spend several months in one place with no prospect of sufficient business to cover the outlay; therefore I am writing you

again this morning to let me hear from you in regard to this matter, and to move to another point unless you have some good business absolutely in sight. Yours very truly,
[Signed] T. T. Hay & Bro., General Agents."

The three letters were the only ones selected by the plaintiff from all the letters in the correspondence between Hay & Bro. and Hinson which were produced by the defendant upon notice from the plaintiff, and were the only letters seen by the plaintiff or its cashier prior to the drawing of the draft. W. E. Walton, a witness for the plaintiff, testified: "I am cashier of the Bank of Morganton, and was on March 18, 1905. I knew H. L. Hinson, who was an insurance agent representing the Phoenix Life Insurance Company. He was here about three months. On the 16th of March, 1905, I cashed a draft for him, which was drawn on T. T. Hay & Bro. of Raleigh, of which firm the defendant was a member. The draft was for \$60. (The witness produced the draft in suit). I cashed this draft on the faith of a letter written by T. T. Hay & Bro. to H. L. Hinson, which Mr. Hinson showed me. This letter was dated January 24, 1905. On the faith of the statements contained in this letter I cashed this draft, and T. T. Hay & Bro. refused to pay same. Hinson, while in Morganton, showed me two other letters from T. T. Hay & Bro. (letters of February 1, 1905, and March 7, 1905). I saw these three letters from Messrs. T. T. Hay & Bro. to Mr. Hinson before I cashed his draft." Here plaintiff proposed to show that at the time said draft was drawn by Hinson and cashed by the bank, Hinson stated to witness that he needed the \$60 for his expenses as agent for the defendant.

Plaintiff also proposed to prove by the witness that, prior to this time, he had cashed several drafts drawn by said Hinson on T. T. Hay & Bro., and that said drafts had always been paid. Plaintiff also proposed to prove that the said Hinson stated to witness at the time the \$60 draft was cashed that he needed the money to pay his expenses to Asheville and while at that point as agent. Plaintiff also proposed to prove that, in general appearance and demeanor, Hinson appeared to be a gentleman. All this evidence was objected to and excluded by the court, and the plaintiff excepted. Continuing, the witness testified: "I had a conversation with T. T. Hay, one of the members of T. T. Hay & Bro., some time in the month of October, 1905, about this matter. Mr. Hay told me in the conversation that Hinson had been his agent, and had gotten the best of him. I cashed this draft on the faith of the defendant's letter to Hinson, dated January 24, 1905, and because similar prior drafts had been paid." At the close of the evidence, defendant moved for judgment as of nonsuit under the statute.

The motion was sustained, and judgment of nonsuit was entered. The plaintiff excepted, and appealed.

S. J. Ervin, for appellants. Avery & Avery, for appellee.

WALKER, J. (after stating the case). There is a general rule that when one deals with an agent it behooves him to ascertain correctly the scope and extent of his authority to contract for and in behalf of his alleged principal, for, under any other rule, it is said every principal would be at the mercy of his agent, however carefully he might limit his authority. The power of an agent is not unlimited unless in some way it either expressly or impliedly appears to be so, and the person who proposes to contract with him as agent for his principal should first inform himself where his authority stops, or how far his commission goes, before he closes the bargain with him. *Briggs v. Insurance Co.*, 88 N. C. 141; *Ferguson v. Manufacturing Co.*, 118 N. C. 946, 24 S. E. 710. The principal is held to be liable upon a contract duly made by his agent with a third person: (1) When the agent acts within the scope of his actual authority. (2) When the contract, although unauthorized, has been ratified. (3) When the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term "apparent authority" including the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred upon the agent and to transact the business, or to execute the commission which has been entrusted to him, and the principal cannot restrict his own liability for acts of his agent which are within the scope of his apparent authority by limitations thereon of which the person dealing with his agent has not notice. The principal may also, in certain cases, be estopped to deny that a person is his agent and clothed with competent authority, or that his agent has acted within the scope of this authority which the nature of the particular transaction makes it necessary for him to have. *Tiffany on Agency*, 180 et seq.; *Briggs v. Insurance Co.*, supra. The authority to draw, accept, or indorse bills, notes, and checks will not readily be implied as an incident to the express authority of an agent. It must ordinarily be conferred expressly, but it may be implied if the execution of the paper is a necessary incident to the business. It will not be deemed a necessary incident, though, unless the purpose of the agency cannot otherwise be accomplished. When the power is expressly conferred, it must be strictly pursued; and unless the apparent exceeds the actual authority of the agent, paper executed by him will not bind his principal if the agent materially departs from the terms of his authority in regard to

the amount or the time of the paper or its character in other respects. Where the power exists, it is, of course, confined to the business of the agency, and does not authorize the making of paper for the benefit of the agent or the making of accommodation paper, and any contract so made will not be binding upon the principal, unless it may be he has in some way precluded himself from pleading the want or excess of authority or from otherwise repudiating the act of his agent. *Tiffany on Agency*, p. 215, § 43.

When applying the general principles in the law of agency to the case of an agent who draws a check or draft on his principal in order to ascertain what is the liability of the principal, which is the question herein presented, we may derive some aid from what this court has said (with special reference to the promise and corresponding legal duty of the principal to accept and honor the paper) in adopting the general rule, as laid down by Chief Justice Marshall, for the court in *Coolidge v. Payson*, 2 Wheat. (U. S.) 66, 4 L. Ed. 185, in regard to liability on commercial paper. When speaking of the distinction attempted to be drawn by some of the courts between a promise to accept made before and one made after the bill is drawn, the court says: "The court can perceive no substantial reason for this distinction. The prevailing inducement for considering a promise to accept, as an acceptance, is that credit is thereby given to the bill. Now, this credit is given as entirely by a letter written before the date of the bill as by one written afterwards." The general rule is then declared in these words: "Upon a review of the cases which are reported, the court is of opinion, that a letter written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." *Nimocks v. Woody*, 97 N. C. 5, 2 S. E. 249, 2 Am. St. Rep. 268. Decisions of courts of high authority are cited in that case to sustain the rule. It had been formerly decided otherwise in England by the Court of Exchequer in the leading case of *Bank of Ireland v. Archer*, 11 M. & W. 883, and also by some of the courts of this country, and they held that a promise made in writing to accept and pay a draft, yet to be drawn, for a specified amount, and communicated to one who, upon the faith of the promise, becomes the payee of it, when drawn for value, is not an acceptance in law, so that an action upon the draft can be maintained by the holder for value. But the rule here, as we have shown, has been settled the other way, and the original English rule seems to have been the same way (*Pillars v. Van Microp*, 3 Burr. 1663; *Pierson v. Dunlop*, Cowp. 57L; *Mason v. Hunt*, Doug. 284, 287; *Byles on Bills* [16th

Ed.] 260), though it was somewhat modified later by confining the liability of the drawee, who had given the authority to draw, to the person who was intended to take the bill on the credit of the promise to accept (*Miln v. Prest*, 4 Campb. 398); resulting finally in the doctrine as stated in *Bank v. Archer*, supra, and *Johnson v. Collins*, 1 East, 98. See, also, *Eaton v. Gilbert on Com. Paper*, §§ 147 and 148.

In applying this principle, it has been said that, first, the promise to accept and pay should be made within a reasonable time before the bill is drawn, for otherwise the drawer will be presumed to have declined to act on the authority granted him to draw, and the drawee will not be construed to have intended an indefinite liability; and, second, the promise must so describe the bill that there can be no doubt of its application to it. 1 *Daniel, Neg. Instr.* (5th Ed.) § 560. Mr. Daniel says, also, that high authorities go further, and declare that the promise must put its finger, so to speak, upon the specific bill; and that otherwise, if the promise be broken, the promisor may be sued by the drawer for breach of the promise to accept; but he cannot be sued by any one as acceptor. It is further said that while it should clearly appear that the bill corresponds to the promise (and is therefore protected by the authority), it is not perceived that there should be required any nicety of description, or exact correspondence between the two, either as to number, amount, date, or otherwise. "The burden of proof is upon the holder to establish that by comparing the face of the bill with the promise, or the bill in connection with the transaction in which it is drawn with the promise, that it comes fairly and reasonably within its terms. This done, there can be no reason why the promisor may not be sued as an acceptor, as well as for breach of promise to accept. In either case the correspondence of the bill with the promise must be proved, and a cause of action existing there does not seem to be any sufficient reason for determining that the character of the proof must shape its form, and also determine whether it shall be brought by the holder of the bill, who has taken it on the faith of the promise, or by the drawer, whose just expectations have been disappointed. The doctrine that the drawer may sue for breach of promise to accept when the bill is not accurately described in the promise, but that such promise does not operate as an acceptance, has been well said to rest on a distinction without a difference." 1 *Daniel, Neg. Instr.* (5th Ed.) § 561. This is, he says, the doctrine as formulated in the decisions of several of the states, New York among them, when citing and commenting upon *Coolidge v. Payson*, 2 Wheat. (U. S.) 66, 4 L. Ed. 185; *Id.*, §§ 560, 561 and 562, where the cases are collected and examined. *Bank v. McFarlan*, 5 Hill (N. Y.) 432, and *Id.*, 3 Denio (N. Y.) 553; *Bank v. Burleigh*, 74 Hun,

400, 28 N. Y. Supp. 587; *Parker v. Greele*, 2 Wend. (N. Y.) 545; *Greele v. Parker*, 5 Wend. (N. Y.) 414; *Bank v. Ely*, 17 Wend. (N. Y.) 508. This view, he further says, is admirably stated in *Nelson v. Bank*, 48 Ill. 39, 95 Am. Dec. 510, in which is cited as an authority in point the case of *Bissell v. Lewis*, 4 Mich. 450. See, also, *Lonsdale v. Bank*, 18 Ohio, 126; *Russell v. Wiggins*, 2 Story, 213, Fed. Cas. No. 12,165; *Cassel v. Dows*, 1 Blatchf. 835, Fed. Cas. No. 2,502; *Storer v. Logan*, 9 Mass. 55; *Brinkman v. Hunter*, 73 Mo. 172, 39 Am. Rep. 492.

Let us now consider the proposition involved in this case in the light of the foregoing principles. We do not think it can make any material difference whether we test it by the law of agency, or by that of negotiable instruments—the result must be the same in either case. Nor is it necessary to adopt as law in this state the view expressed by Mr. Daniel in regard to *Coolidge v. Payson*, in so far as it may be at variance with the principle as stated in that case, or may seem to go beyond it. Even in that view we must reach the same conclusion.

The plaintiff's cashier testified that while he had seen the letters of February 1, 1905, and March 7, 1905, "he cashed the draft on the faith of the defendant's letter to Hinson, dated January 24, 1905, and because similar prior drafts had been paid." He was not therefore misled to the prejudice of the bank by anything that is said in the two letters of February and March. They may, though, be still considered on the question of the authority of Hinson to draw the draft. There is one thing that appears prominently in those two letters, namely, the fact that Hay & Co. were not pleased with the prospect of their agency at Morganton, and were complaining of the agent's failure to secure any business, while the expense account had grown until it had about reached the limit justified by any reasonable expectation of commissions to offset it, or to cover the outlay. They also furnish the only evidence we have of the usual amount of the agent's drafts on his principal, to wit, \$20. After all this, Hinson, just one week from the date of the last letter, draws the draft in suit for three times the amount of his last draft and for expenses, not already incurred, but those likely to arise thereafter in another place. The case shows that all of the letters in the correspondence were delivered to plaintiff in response to his notice to produce them, and he selected only the three which were put in evidence. The letter of March 7, 1905, calls upon Hinson to give an account of his agency, but it does not appear that he did so, nor is it shown that he ever was instructed to go to Asheville, or notified Hay & Bro. of his intention to do so, or of his purpose to draw on them for \$60. It is true the cashier testified that similar drafts had before been paid. When, to whom, and for what amount? If to this bank, and for as much as \$60, or

anything approximating that amount, why were they not produced? They may have been similar in other respects, without being at all identical in amount. Let it be assumed, for the sake of argument, that the payment of prior drafts was evidence of the agent's authority to draw this one, which may be questioned (*Marriner v. Lumber Co.*, 113 N. C. 52, 18 S. E. 94), unless the facts established such a course of dealing between the parties theretofore as would lead a reasonably prudent man to believe that the agent possessed the requisite authority or, in other words, as would give him the apparent authority, or estop the alleged principal from denying that he had full authority. *Hay v. Ben. Association* (at this term) 55 S. E. 623; *McCraw v. Insurance Co.*, 78 N. C. 149; *Story on Agency*, §§ 95 and 260. Hay & Bro. could not have known from the face of the drafts thus paid by them, that they had been cashed by the plaintiff bank, as that fact would not be indicated on the draft. If they had been forwarded through the bank at Morganton to a bank at Raleigh, merely for collection, they would present the same appearance when received by Hay & Bro. as if they had been cashed by the plaintiff bank. The principal might be willing to give his agent authority to draw for his expenses, provided he forwarded the drafts for collection, when he would not risk such an authority with the agent if his drafts were to be cashed by a bank. In the latter case, the principal might be cut off from defenses against his agent which in the former he would have. Without specifying the particular advantages the principal would have when the dealings are confined strictly between himself and his agent without the intervention of a third party, we may say generally that the doctrine of apparent authority or of estoppel would not enter into such a business relation to the prejudice of the principal where no actual authority existed. The principal could also take advantage of the state of his account between himself and his agent, or of the agent's misconduct, and there are other conceivable defenses he might have against the agent which would not avail him as against an innocent third party. We have referred to this view of the case for the purpose of remarking that the correspondence between Hay & Bro. and their agent, Hinson, seems to confer an authority, not to have drafts on them cashed at a bank, but to draw for his expenses and forward the drafts for collection. The letter of January 24th clearly shows this to have been what was meant. The only object in having him draw at stated intervals was to remind Hay & Bro. that the installment for expenses was due, for in that letter they tell him to draw or to write a few days in advance so that they would be reminded to send the check. The letters show that the alleged authority to draw was nothing more than private instructions by Hay

& Bro. to their agent as to how he should conduct this part of the business.

The power to bind the principal by the making or indorsing of negotiable paper is an important one, not lightly to be inferred. It should be conferred directly, unless by necessary implication the duties of the agent cannot be performed without the exercise of the power, or where, as otherwise expressed, the power is practically indispensable to accomplish the object of the agency, and the person dealing with the agent must, subject to the principles heretofore stated, see to it that his authority is adequate. *Mechem on Agency* (1889) §§ 389-393. We cannot read the correspondence to be found in this case without being convinced that there was enough upon its face to put the plaintiff bank upon its guard, and to cause an inquiry to be made into the agent's authority before cashing his draft. Further, we think that the instructions were intended to be private and confidential, and not as the basis of credit to be extended to the agent, nor as an authority to him to obtain cash from a bank upon drafts to be drawn by him, nor by fair and reasonable implication did they authorize *Hinson* to make the draft in question. By comparing the correspondence with the draft, the latter appears at least to be a little out of the ordinary and should have excited suspicion as to the agent's assumption of authority to draw.

It follows from all we have said that the plaintiff's right to recover can be maintained, neither upon any well-settled principle in the law of agency, nor yet upon any in the law of negotiable instruments, either before or since the adoption of our statute, *Revisal of 1905*, c. 54. There was certainly no harm done the plaintiff when the court excluded the proposed evidence as to what the agent stated at the time he drew the draft and received the money thereon, namely, that he needed the money to pay his expenses at *Asheville* while there as agent. His honor took the correct view of the case, and properly directed a nonsuit upon the evidence.

No error.

STANFORD v. A. F. MESSICK GROCERY CO.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. MALICIOUS PROSECUTION—ABUSE OF PROCESS—DIFFERENCE BETWEEN.

To maintain an action for malicious prosecution, plaintiff must show that a proceeding has been instituted against him without probable cause, and from malice, and that damages have been sustained, and that the proceeding has been terminated by his discharge or acquittal; while, to sustain an action for malicious abuse of process, there must be shown an ulterior purpose, and an act done in the use of a process not proper in the regular prosecution of the case.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 33, Malicious Prosecution*, §§ 21, 72, 80.]

2. MALICIOUS PROSECUTION—ACTION—PLEADING—PROOF—ISSUES.

In a suit for malicious prosecution and malicious abuse of process, the allegations and evidence showed that plaintiff's grievance arose from his criminal prosecution for embezzlement, in which he was arrested and bound over to the court, without showing that defendant attempted to do any act in the criminal prosecution contrary to the regular prosecution of the case. *Held*, that the submission to the jury of the issue whether defendant caused plaintiff to be arrested and prosecuted for the unlawful purpose of forcing him to pay a debt, and not for the purpose of vindicating the law, was improper.

3. SAME—EVIDENCE—ADMISSIBILITY.

Where, in an action for malicious prosecution based on the prosecution of plaintiff for embezzlement of goods sold and delivered to him, the issue was whether there had been an absolute sale or whether the goods had been placed with him on consignment, evidence of what the agent making the sale stated to the manager of defendant as to the nature of the trade, was admissible not only to corroborate the testimony of the agent, but as substantive testimony, the question being whether defendant, in commencing the criminal prosecution, had probable cause for so doing, and whether he acted in good faith.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 33, Malicious Prosecution*, §§ 125, 128.]

4. EVIDENCE—RES GESTÆ—DECLARATION OF AGENT—ADMISSIBILITY.

Declarations of the manager of defendant to a justice of the peace at the time of the issuance of a warrant for the arrest of plaintiff for a criminal offense, are admissible, in an action for malicious prosecution, as a part of the *res gestæ*.

5. MALICIOUS PROSECUTION — PROBABLE CAUSE.

In an action for malicious prosecution, based on the arrest of plaintiff for crime, proof that a committing magistrate bound plaintiff over and that the grand jury found a true bill against him, makes out a *prima facie* case of probable cause.

6. SAME—MALICE.

The malice essential to sustain an action for malicious prosecution, does not mean personal ill will, but a wrongful act, knowingly and intentionally done, without just cause, constitutes malice.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 33, Malicious Prosecution*, § 60.]

7. SAME — DAMAGES — ELEMENTS — ATTORNEY'S FEES.

In an action for malicious prosecution, the jury may allow for a reasonable attorney's fee paid by plaintiff in the case in which he was prosecuted.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 33, Malicious Prosecution*, § 156.]

8. SAME—PUNITIVE DAMAGES.

In an action for malicious prosecution, punitive damages are not recoverable in the absence of actual malice, and the jury should be charged that if they find the issue in favor of plaintiff, they should award him compensatory damages, unless they further find that the wrongful act was done from actual malice, in which case punitive damages may be awarded.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 33, Malicious Prosecution*, §§ 157.]

Appeal from Superior Court, Rockingham County; Peebles, Judge.

Action by W. A. Stanford against the A. F. Messick Grocery Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Civil action for malicious prosecution and also malicious abuse of process. There was evidence tending to show that in November, 1900, the plaintiff became indebted to the defendant in about \$97.29 for groceries sold and delivered to the plaintiff, and that such amount was still due and owing; that the transaction was conducted by R. E. Steele, who was at that time salesman for defendant company, and in the matter acted as its agent; that, plaintiff having failed to pay, the defendant caused the arrest and trial of the plaintiff on a charge of embezzlement; that on the preliminary trial before a justice of the peace, in February, 1901, the plaintiff was bound over to court, three magistrates sitting at the hearing; and at the following term of the superior court of Forsyth county a true bill was found by the grand jury against the plaintiff. At the May term, 1901, the plaintiff was acquitted in a trial of the cause before a petit jury, and the plaintiff then commenced the present action for malicious prosecution and malicious abuse of process. The plaintiff claimed, and offered evidence tending to show, that there was an absolute sale of the goods, and that the arrest was wrongful, malicious, without probable cause, etc., and because it appeared to be the only available method of forcing the collection of the claim from the plaintiff, whom the defendant knew to be insolvent and otherwise protected by the homestead exemption laws of the state. There was evidence of the defendant tending to show that the goods were placed with the plaintiff on consignment, and the plaintiff was guilty of embezzlement in willfully failing to settle the claim or account for the proceeds of the sale of goods. The following issues were submitted and responded to by the jury: "(1) Did the defendant cause the arrest and prosecution of the plaintiff, as alleged? Yes. (2) If so, was the arrest without probable cause? Yes. (3) If so, was the arrest malicious? Yes. (4) Did the defendant by its agent cause the plaintiff to be arrested and prosecuted for the unlawful purpose of forcing him to pay the debt due defendant by plaintiff, and not for the purpose of vindicating the law against embezzlement? Yes. (5) What amount, if any, is the plaintiff entitled to recover of the defendant? \$2,000." There was judgment for the plaintiff, and the defendant excepted and appealed.

Manly & Hendren and L. M. Swink, for appellant. Lindsay Patterson and C. O. McMichael, for appellee.

HOKE, J. (after stating the case). In this suit the plaintiff seeks to recover on two causes of action, to wit, malicious prosecution and malicious abuse of process. The former exists when legal process, civil or criminal, is used out of malice, and without probable cause, but only its regular execution is contemplated. There is malicious

abuse of process where a party, under process legally and properly issued, employs it wrongfully and unlawfully, and not for the purpose it is intended by law to effect. *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993, cited in 1 *Cooley on Torts* (3d Ed.) 356; *Emery v. Ginnan*, 24 Ill. App. 65; *Lauzon v. Charroux*, 18 R. I. 467, 28 Atl. 975. For recovery on malicious prosecution, as stated in *Railroad v. Hardware Co.* (at the present term) 55 S. E. 422, there must be shown that an action or proceeding has been instituted without probable cause, from malice, and that damage has been sustained, and that the proceeding has been terminated by the discharge or acquittal of the accused. *Cooley on Torts*, 320; *Jaggard on Torts*, 349. In actions for malicious abuse of process, there must be shown (1) an ulterior purpose, and (2) some act done in the use of the process not proper in the regular prosecution of the case. A willful perversion of the process of the court to effect some collateral end, and one not within the scope of the action when regularly and properly pursued. *Cooley on Torts*, 354, 355. In this last action it is not necessary to show a want of probable cause, nor that the proceeding has terminated.

On the trial below the defendant in apt time excepted to the submission of the fourth issue which was addressed to the second cause of action, as stated in the complaint—that for abuse of legal process. If it be conceded that this issue may arise on the pleadings, there is no testimony to support it as a separate and distinct cause of action. In any event, its submission is not required, for a full and complete determination of the rights of the parties litigant can be better had without it. Both the allegations and the evidence show that the plaintiff's entire grievance arises, if at all, from the criminal prosecution for embezzlement, in which the plaintiff was arrested and bound over to court. It is nowhere alleged, certainly, there is no evidence to show, that the defendant did or attempted to do any act in this criminal proceeding, which was contrary to the orderly and regular prosecution of the case. While the complaint endeavors to set up two causes of action, as a matter of fact the testimony only discloses one—that for malicious prosecution—and the allegations purporting to be a second cause of action amount to nothing more than the assertion of a bad motive prompting the first. If, under the principles governing such actions, the defendant was justified in instituting the criminal prosecution, the plaintiff has no cause of action, either first or second. If he was not, then the plaintiff can recover his entire damages on the first, second, third, and fifth issues, and the motive suggested in the fourth issue can be received when properly established, and relevant on the issue as to malice or on the question of damages. As said in *Plummer v. Gheen*, 10 N. C. 66, 14 Am. Dec. 572: "If a man prosecute another for real guilt, however

malicious his motives may be, he is not liable in an action for malicious prosecution, nor is he liable if he prosecutes him for apparent guilt arising from circumstances which he himself believes."

The defendant by exceptions duly notes further objections to the ruling of the court on the statements made by R. E. Steele, the agent who effected the sale, to A. F. Messick, manager of defendant company, as to the nature of the trade under which the goods were passed to the plaintiff. These statements by Steele to Messick, when he returned from the plaintiff's place of business, and just after effecting the deal, were admitted by the court as corroborative of Steele, but rejected as substantive testimony. We think the ruling was erroneous, and that the evidence was competent for both purposes. This is not a question simply of what were the terms of the trade, but whether the defendant, in taking out the prosecution, had probable cause for so doing, and whether he acted in good faith. What the salesman told Messick of the trade is pertinent to that inquiry, and should be heard by the jury, and given such weight as they may think it deserves. *Swain v. Stafford*, 26 N. C. 392. If it be suggested that Steele was the defendant's agent, and that knowledge of the agent will be imputed to the principal, the reply is that such knowledge will be so imputed when the question is as to the fixing responsibility for a transaction done in the scope and course of the agency. *Flashblade v. Fidelity Co.*, 140 N. C. 589, 53 S. E. 854. But the principle does not apply here, where the question is not as to the terms of the trade, but as to the responsibility for instituting a criminal prosecution, dependent in part on what the defendant understood the trade to be, from information reasonably relied on by him. Furthermore, there is an exception to this rule of imputed knowledge when it would be against the interest of the agent to make the disclosure. If Steele sold the groceries to the plaintiff outright, when his instructions were to sell only on consignment, he would not likely make known such a violation of instructions, and the case would seem to fall under this recognized exception to the principle of imputed knowledge. *Tiffany on Agency*, 262, 263; *Allen v. Railroad*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 716, 15 Am. St. Rep. 185.

Again, the statement of the manager, made to the justice of the peace at the time the warrant was procured, was excluded as substantive testimony, and this is contrary to our decisions. The actionable wrong charged against the defendant was in taking out the warrant and causing the plaintiff's arrest. This was the act complained of, and the declarations of the manager in taking out the warrant, explaining and characterizing the act, are admissible as part of the *res geste*. *Johnson v. Chambers*, 82 N. C. 287; *Merrell v. Dudley*, 139 N. C. 59, 51 S. E. 777, where

Mr. Justice Brown, delivering the opinion, said: "Declarations or acts accompanying any act or transaction in controversy and tending to explain or illustrate it are received in evidence as part of the *res geste*."

The defendant also objects to a portion of the judge's charge as follows: "The fact that a magistrate binds a man over to court, and a grand jury finds a true bill against him, is ordinarily evidence of probable cause for the jury to consider, but that rule does not apply to a case of this sort." It is certainly the general rule, applicable to cases of this character, that when a committing magistrate has bound the party over or a grand jury has found a true bill against him, such action *prima facie* makes out a case of probable cause, and the jury should be directed to consider the evidence as affected by this principle. *Johnston v. Martin*, 7 N. C. 248; *Bostick v. Rutherford*, 11 N. C. 83; *Bell v. Percy*, 33 N. C. 233; 19 Am. & Eng. Enc. 663, 664. We see no reason why the principle does not apply here. His honor, in response to a prayer by the defendant, himself instructed the jury further: "The fact that the justice bound Stanford over to court, and the grand jury found a true bill against him, establishes, for the purpose of this action, *prima facie* that there was probable cause for the action of the Messick Grocery Co. in swearing out the warrant, and before the jury can answer the second issue, 'Yes,' the plaintiff Stanford must overcome this *prima facie* case, and satisfy the jury by the greater weight of evidence that the defendant swore out the warrant without probable cause." This states the doctrine correctly, but is in direct conflict with the portion of the charge excepted to which is erroneous. The objection therefore must be sustained.

The defendant further excepts to the charge of the court on the third issue—that addressed to the question of malice—as follows: "If the evidence satisfies you by the greater weight thereof that they sold the goods straight out to Stanford, and that they went there, and had him arrested for the purpose of collecting that debt, then the court charges you that it is your duty to answer the third issue, 'Yes,' because that would be a wrongful act, done intentionally, and without just cause or excuse." Malice, within the meaning of this issue, does not necessarily mean personal ill will, and the court was therefore correct in its intimation that a wrongful act, knowingly and intentionally done without just cause or excuse, will constitute malice; but whether such an act was committed when the defendant caused the plaintiff's arrest, under the circumstances presented by this evidence, is for the jury to determine, and not for the court. *Johnson v. Chambers*, supra; *McGowan v. McGowan*, 122 N. C. 145, 29 S. E. 97.

On the question of damages the court properly told the jury they could allow for a reasonable attorney's fee, paid by the plain-

tiff in the case in which the prosecution was had. 1 Sedgwick, § 241. And it is also correct doctrine, as stated in the charge, that, on a verdict for the plaintiff in malicious prosecution, punitive or exemplary damages may be awarded by the jury. *Kelly v. Traction Co.*, 132 N. C. 868, 43 S. E. 923. This right to punitive damages does not attach, however, as a conclusion of law because the jury have found the issue of malice in such action against a defendant. The right under certain circumstances to recover damages of this character is well established with us; but, as said in *Holmes v. Railroad*, 94 N. C. 318, such damages are not to be allowed "unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury." And, again, in the concurring opinion in *Ammons v. Railroad*, 140 N. C. 200, 52 S. E. 731, it is said: "Such damages are not allowed, as a matter of course, but only when there are some features of aggravation, as when the wrong is done willfully, or under circumstances of oppression, or in a manner which evinces a reckless and wanton disregard of the plaintiff's rights." Attention is also called to this concurring opinion as to what may be properly included in compensatory damages.

The term "malice" here, in reference to the question of damages, unlike its meaning in the issue fixing responsibility, means actual malice in the sense of personal ill will, and the jury should be instructed that if they find the issue, fixing responsibility in favor of the plaintiff, they shall award him compensatory damages, and if they further find that the wrongful act was done from actual malice in the sense of personal ill will under circumstances of insult, rudeness, or oppression, or in a manner which showed a reckless and wanton disregard of the plaintiff's rights, they may, in addition to compensatory, award punitive damages. *Holmes v. Railroad*, supra; *Ammons v. Railroad*, supra, concurring opinion; *Bowden v. Bales*, 101 N. C. 612, 8 S. E. 342; *Kelly v. Traction Co.*, supra; 1 *Joyce on Damages*, § 442, citing numerous authorities; 19 *Am. & Eng. Enc.* 704. In some of the earlier cases there is decided intimation that in actions which more especially impute malice, in case of recovery by plaintiff, such as slander or malicious prosecution, the right to punitive damages arises necessarily from a verdict for plaintiff; but in those cases the circumstances, as a rule, did not call for any careful examination of the question, and the court was not therefore advertent to the difference in the significance of the term "malice" when used in respect to damages, and when it is used in respect to the issue fixing responsibility. In this last, it need not necessarily be personal ill will, but, as intimated by his honor in the charge, it may be said to exist where there has been a wrongful act, knowingly and intentionally done plaintiff without just cause or excuse, and it may be inferred

in actions of this character from the absence of probable cause.

For the errors pointed out the defendant is entitled to a new trial, and it is so ordered.
New trial.

GREEN v. GREEN.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. DIVORCE—ALIMONY—ORDER—COMPLIANCE.

Where, in divorce, the judgment of separation found that defendant was the owner of certain lands and ordered him to convey a one-fourth interest therein in trust for plaintiff or to pay a certain sum into the clerk's office for plaintiff, and defendant made such conveyance, but he had previously conveyed the land to his son, the conveyance did not amount to a compliance with the order; a contention that the court necessarily found that a deed to the son was fraudulent being untenable.

2. APPEAL—SUBSEQUENT APPEALS—LAW OF THE CASE.

Where an order holding defendant in divorce in contempt for failing to comply with an order concerning alimony was affirmed by the Supreme Court, defendant could not on a subsequent appeal again raise the question as to whether the evidence had justified a finding that he was in contempt.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 3, Appeal and Error, § 4358.]

Appeal from Superior Court, Jackson County; McNeill, Judge.

Suit by Maggie V. Green against John A. Green for divorce. Proceedings against defendant for contempt in failing to comply with the order for alimony. Appeal by defendant from an order affirming an order adjudging defendant in contempt. Affirmed.

This is an attachment for contempt for failing to comply with an order of the court for alimony. The feme plaintiff obtained a judgment of divorce from bed and board against the defendant at May term, 1904, of the superior court, when Judge Jones, in the judgment of separation, after finding the necessary facts, ordered that the defendant convey a one-fourth interest in a certain tract of land to V. F. Brown, in trust for the use and benefit of the plaintiff and her child, or pay into the clerk's office \$250 for the same purpose, the land to be leased by the trustee and the rents applied to the support and maintenance of the plaintiff and her child, or that it be sold and the proceeds applied in like manner. The defendant executed a quitclaim deed to the trustee for the land. It was afterwards discovered that he had conveyed the land to his son in October, 1900. The trustee demanded possession of the defendant and his son, who refused to let him into possession; the defendant at the time denying that he owned any interest in the land, and his son asserting sole ownership in himself. At March term, 1905, Judge Shaw issued a rule requiring the defendant to show cause why he should not be attached for contempt for failing to comply with the order of Judge Jones.

The hearing of this rule was continued for the defendant to answer, but he has never answered the rule. Judge Shaw found as a fact that the defendant had not in any way complied with the said order, although he was fully able to do so, and especially that he could pay the \$250, and that he had willfully and contemptuously failed to do so. He thereupon adjudged the defendant in contempt of the court for refusing to obey its order, and further adjudged that he be imprisoned in the county jail until he had complied with the same. The defendant appealed, and at spring term, 1906, of this court the order of Judge Shaw was affirmed per curiam. 140 N. C. 651, 52 S. E. 1089. At May term, 1906, the matter came on to be heard before Judge McNeill upon the certificate of this court and the motion of the defendants to have satisfaction of Judge Jones' order entered of record. Judge McNeill, upon a review of the orders and facts in the case, held that the defendant had not complied with the order of Judge Jones, and denied his motion. He thereupon affirmed the order of Judge Shaw and directed that it be executed. It appeared that the defendant had complied with the order of Judge Jones in all respects, except as to that part of it relating to the execution of the deed or the payment of the money in lieu thereof. The defendant excepted to Judge McNeill's order and appealed.

W. T. Crawford and F. M. Alley, for appellant. Walter E. Moore and Shepherd & Shepherd, for appellee.

WALKER, J. (after stating the case). The only contention made in this court by the defendant's counsel was that he fully complied with the order of Judge Jones when he executed the deed to the trustee therein appointed. In support of this position, it was argued that Judge Jones necessarily found as a fact that the deed from the defendant to his son was fraudulent and void, because he recited in his order that it appeared the defendant owned a one half interest in the land. We do not think that any such inference can reasonably be deduced from that recital, when it is considered with the context of the order, as it should be. It is clear that the recital was based upon the fact that on March 10, 1899, a deed for the one half interest had been made by John N. Hunter to the defendant (the other half having been conveyed to his son by the same deed), and the admission of the parties that the defendant was, at the time the order was made, the owner of the one half interest acquired by the deed. But, evidently, Judge Jones did not know of the subsequent deed of the father to the son, or he would not have made such a recital, as the defendant's representation that he owned an interest in the land was not true. It would appear that the defendant was concealing the existence of this deed from the court and from his

wife, and attempting to commit a fraud in doing so. He knew that he had made the deed to his son, and he must have known that the court and his wife were ignorant of the fact. The recitals in the order of Judge Jones all tend conclusively to show it. But, however this may be, whether he was guilty of an intentional or fraudulent concealment or not, we do not think he has complied with the order. He was required to convey a one-fourth interest to the trustee, whereas it turned out that, when he made the deed, he had no such interest to convey. He had, before that time, conveyed all of his interest to his son. Perhaps this was his reason for making the deed in the form of a quitclaim. The law and the court intended not merely a colorable, but a real and substantial compliance with the order. We would mock at this plaintiff's calamity and turn her away empty-handed, when she is entitled to relief, should we hold that there had been any genuine attempt by the defendant to comply with the order. We have found no evidence in this record of any fraud committed by the defendant when he conveyed to his son, and, besides, if his deed was fraudulent and void as to the plaintiff, the court did not intend that, under its order, she was not to receive the use and benefit of the land, but instead get a lawsuit. Besides, should the defendant be permitted to plead his own fraud, in order to delay and vex the plaintiff, whose claim for alimony is at least meritorious? The purpose was that a good title to the one-fourth interest should be conveyed to the trustee, for how could he well lease the land or sell it without such a title? The court assumed that the defendant had a valid title, for otherwise it would simply have ordered payment of the money. No other conclusion can be legitimately drawn from the facts.

But Judge Shaw had adjudged the defendant in contempt and ordered him to stand committed until he had complied with the order. His ruling was affirmed by this court on appeal. It has not been modified by Judge McNeill, but, on the contrary, affirmed in every particular, and the said order was directed by him to be executed. The defendant cannot, by a second appeal, review the former decree of this court. *Pretzfelder v. Insurance Co.*, 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424. Judge McNeill found as a fact that the defendant had denied that he had any title to the land or any interest therein, when the trustee demanded possession of him and his son. How, in the face of this finding, can he now ask to have it entered of record that he had complied with the order of the court? As he was not able to make the requisite title, he should have paid the money into court according to the terms of the orders of Judge Shaw and Judge McNeill. This is what they clearly meant should be done, unless he had otherwise complied with the order by securing a good title

to the one-fourth interest and conveying that interest to the trustee. Not having done so, and not proposing to do so, he was manifestly, if not flagrantly, disobeying the order, and was therefore acting in contempt of the authority of the court, for which conduct he was properly adjudged to be committed. *Pain v. Pain*, 80 N. C. 325. We find no error in the ruling of the court.

No error.

STATE v. CANTWELL.

(Supreme Court of North Carolina. Oct. 28, 1906.)

1. JURY—EXEMPTIONS—STATUTES—REPEAL.

Under Revisal 1905, § 5458, providing that no act of a private nature, "unless in conflict with provisions of this Revisal," shall be construed to be repealed by the Revisal, an exemption from jury duty claimed by defendant under Private Acts 1868-69, p. 72, c. 55, granting permanent exemptions to members of a fire engine company of Wilmington, was repealed as directly in conflict with Revisal 1905, § 1957, directing the county commissioners to place the names of all taxpayers of good character on the list for jury duty.

2. CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT.

Under Const. art. 8, § 1, providing that all general and special acts passed pursuant to such section which relates to creation of corporations "may be altered from time to time or repealed," Private Acts 1868-69, p. 72, c. 55, granting exemptions from jury duty to the members of the Wilmington Fire Engine Company, was not a contract between the fire company and the state which the Legislature could not revoke.

3. SAME—VESTED RIGHTS—EXEMPTIONS FROM JURY DUTY.

Exemption from jury duty is not a vested right, but a mere privilege or gratuity which may subsequently be revoked.

Walker, J., dissenting.

Appeal from Superior Court, New Hanover County; W. R. Allen, Judge.

Robert C. Cantwell was summoned as a juror, and, having appeared and refused to serve, was fined \$10, and appeals. Affirmed.

Davis & Davis and E. S. Martin, for appellant. The Attorney General and Walter Clark, Jr., for the State.

CLARK, C. J. The defendant, regularly drawn and summoned as a juror for that term of court, declined to serve, and was fined \$10, and appealed.

He claimed to be exempt under chapter 55, p. 72, Priv. Laws 1868-69, ratified March 8, 1869, which incorporated the Wilmington Steam Fire Engine Company, and contains the provision that its "members shall, during membership be exempt from all jury and militia duty, and in case of active service in said company for five successive years, said exemption shall continue during the life of the member rendering such active service." The defendant served actively five successive years. The exemptions under this and other

private acts (passed usually, as is common knowledge, upon the motion of the members from the county in which each locality lies, and without scrutiny or opposition) became so numerous as to impair often the supply of good jurors. The General Assembly thereupon passed Revisal 1905, § 1957, which directs the county commissioners to select the names of "all such persons as have paid all the taxes assessed against them for the preceding year, and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the clerk of the board of commissioners and shall constitute the jury list, and shall be preserved as such." To this sweeping clause Revisal 1905, § 1980, adds the exemptions to be allowed, which are much fewer than those formerly allowed even in the general law, and contains this item: "No active member of a fire company shall be required to serve as a juror." Wilmington in 1897 adopted a paid fire department, and the defendant's company ceased its active service. The county commissioners having found that the defendant was liable to jury duty under Revisal 1905, § 1957, and not exempt under Revisal 1905, § 1980, placed his name on the jury list. Revisal 1905, § 1957, is broad, and succinctly prescribes what citizens shall be liable to jury duty, subject only to the exemptions set out in Revisal 1905, § 1980. This is a matter solely within legislative control, subject to change in the judgment of any succeeding Legislature. If the provision in the aforesaid act of March 8, 1869, under which the defendant claims exemption from rendering jury service to his state, is public in its nature, it is clearly repealed by Revisal 1905, § 5458. "All public and general statutes not contained in this Revisal are hereby repealed, with the exemptions and limitations hereinafter mentioned." If, however, it is a private act, it is not less repealed by Revisal 1905, § 5458. "No act of a private nature, unless in conflict with the provisions of this Revisal * * * shall be construed to be repealed by any section of this Revisal." The exemption claimed by defendant under chapter 55, p. 72, Priv. Acts 1868-69, is directly in conflict with Revisal 1905, § 1957, which directs the county commissioners to place the names of all taxpayers of good moral character, etc., on the list for jury duty, the exemptions being stated in section 1980, which does not exempt the defendant. It will be noted that this repealing clause is radically different from section 3873 of the Code, which provides: "No act of a private or local nature * * * shall be construed to be repealed by any section of this Code." The General Assembly had seen the inconveniences of this section, and the radical change of language in Revisal 1905, § 5458, shows a clear intention to repeal all private acts inconsistent with the provisions of the Revisal. Language could not be clearer.

The defendant contends, however, that the act of 1869 was a contract between the fire company and the state, and is protected by the principles laid down in the Dartmouth College Case. Whatever may be said of the correctness or incorrectness of that decision (and very much has been said), the inconveniences proved so great that this state, like most, if not all, others, has since inserted in its Constitution the following provision (article 8, § 1): "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the Legislature, the object of the corporations can not be attained under general laws. All general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." The Constitution was adopted April 18, 1868, and, if the exemption in the charter of the Wilmington Fire Company, ratified March 8, 1869, was a contract, there was written into that contract, as a part of it, that the Legislature had a right to amend or repeal, from time to time, any and all rights thereby conferred. But in truth, independent of that constitutional provision, exemptions from military and jury and other public duties were never at any time contracts by which one Legislature could irrevocably sell, or give away, the right of the state to command the service of its citizens for public and governmental duties. Such exemptions were adjudged to be mere privileges, revocable by subsequent Legislatures, and were so held in all the states (except in one case) in which the contention was raised, even prior to the incorporation into their respective Constitutions of the provision above quoted from the North Carolina Constitution.

"It has been generally held that the right of exemption from jury service is not a vested right, but a mere gratuity which may be withdrawn at the pleasure of the Legislature." 17 A. & E. Encyc. (2d Ed.) 1177. Judge Cooley, Cons. Lim. (7th Ed.) 329, 546, says: "The citizen has no vested right in statutory privileges and exemptions. Among these may be mentioned exemptions from the performance of public duties upon juries, or in the militia and the like, exemptions of persons and property from assessment for the purpose of taxation, * * * exemptions from highway labor and the like. All these rest upon reasons of public policy, and the laws are changed as the varying circumstances seem to require * * * the privilege of exemption might be recalled, without violation of any constitutional principle. The fact that a party had passed the legal age under an existing law, and performed the service demanded by it, could not protect him against further calls, when public policy or public necessity was thought to require it." "Exemption from service on juries is always subject to legislative repeal, even as to persons who by the

performance of specified services have earned an exemption under its provisions." *Dunlap v. State*, 76 Ala. 460. That case was exactly "on all fours" with this; the exemption from jury duty being claimed by virtue of services in a fire company for five years as prescribed in its charter. Clopton, C. J., in a very able opinion, quotes with approval from *Bragg v. People*, 78 Ill. 328: "It is impossible for the state to protect life, liberty, and property without the aid of juries. The system is a vital part of the machinery of government. It is the undoubted duty of the legislative department to provide for the selection of jurors in such way as shall best subserve the public welfare. Of this, of course, it must necessarily be the judge, and may provide that, for the time being, certain classes, by reason of what shall be deemed sufficient public considerations, shall be exempt; but to say that such exemption shall be perpetual, whatever may be the public necessities, would be to authorize one Legislature, by unwise legislation, to tie the hands of its successors, even to the extent of destroying the government"—citing many authorities, a few only of which we will quote. In *Ex parte Rust*, 43 Ga. 209, Lochrane, C. J., holds that a general statute providing for jury service repeals all previous exemptions not found therein, and that an exemption previously conferred in the charter of a fire company upon its members is not a contract, but a privilege revocable by any subsequent Legislature. Though the fireman had served the five years provided in the charter, the exemption is "not a contract, but a mere privilege, and may be revoked by the Legislature at any time." *Beamish v. State*, 65 Tenn. 532. "The duty of serving on juries is one of the inseparable incidents of citizenship, and all exemptions from such service [in that case for service in a fire company] are mere gratuities revocable at the pleasure of any succeeding Legislature, and are revoked by a general law, prescribing those subject to jury duty, without excepting those claiming exemption under prior local or general acts." In *re Scranton*, 74 Ill. 161. But the subject is most fully and conclusively discussed, and the same conclusion reached, in *Bragg v. People*, 78 Ill. 328. In that case the plaintiff had served seven years in a fire company whose charter provided that such length of service should exempt from jury duty. The court held that no Legislature can sell, or give, or bargain away, irrevocably, the sovereign right of the state to command the service of its citizens for military, jury, road, or other public duty, and adds: "Services performed in the fire department can, by no fiction, be made to take the place of the man in the jury box." There are other cases to the same purport as above.

The sole case to be found to the contrary is in *re Goodin*, 67 Mo. 637, which is based upon the ground that an exemption from jury

duty is a contract and protected by the decision in the Dartmouth College Case. If that decision could overbalance the uniform precedents to the contrary, it could not be authority here in view of the provision in our Constitution, above quoted, making all charters subject to repeal or amendment at the will of the Legislature. Indeed, in *Railroad v. Alsbrook*, 110 N. C. 145, 14 S. E. 652, this court held that, independent of and prior to the adoption of that provision, the Legislature could not irrevocably grant or bargain away, even for a consideration, an exemption of property from taxation. For a stronger reason, the state could not permit one Legislature to confer a release of its right to call for the discharge of public duty by its citizens, in the public defense, in the jury box or elsewhere, irrevocable by a subsequent Legislature. In *State v. Womble*, 112 N. C. 863, 17 S. E. 491, 19 L. R. A. 827, the exemption was sustained solely upon the ground that the local act conferring it was saved from repeal by section 3873 of the Code. This, as we have already seen, is otherwise under the provisions of Revisal 1905, § 5458. Affirmed.

WALKER, J. (dissenting). It is impossible for me to assent either to the conclusion or to the reasoning of the court.

On both points involved in the case I entertain an opinion different from that which has been delivered by the Chief Justice for the court. In the first place, I do not think the statute under which the defendant claims exemption from jury service has been repealed by the Revisal. The rule is well settled that repeals by implication are not favored. *State v. Perkins*, 141 N. C. 797, 53 S. E. 735. The two statutes should be irreconcilable with each other before such an implication can arise, and when any fair construction will prevent a conflict between them it should be adopted. *State v. Massey*, 103 N. C. 348, 9 S. E. 632, 4 L. R. A. 308; *State v. Womble*, 112 N. C. 864, 17 S. E. 491, 19 L. R. A. 827. The Revisal 1905, § 1980, simply provides that no active member of a fire company shall be required to serve as a juror. There is no express repeal here of any clause of exemption inserted in the charter of a fire company by prior legislation, and there is no necessary repugnancy between the two provisions of the law. If there is, in what does it consist? The exemption of active members of fire companies does not by any means imply that those who have once been active members for a sufficient length of time to entitle them to a permanent exemption shall no longer be entitled to the immunity which they have thus earned. Merely adding to the list of exemptions does not produce a conflict with a statute under which an exemption had accrued by reason of former active service for a series of years. It would not have this effect, even if the Revisal had provided that none but active mem-

bers shall be exempt, as this would merely distinguish between active and honorary members of existing organizations. The use of the term "active members" implies, of course that there are members who are not active. Otherwise it would have been sufficient to declare that all members of fire companies shall be exempt, without special reference to whether or not they are in active service, as they would all be active members if there is no such classification in the membership. It appears in this case that the defendant is not now a member of the fire company at all, active or inactive, as it had been disbanded, and a paid department has been substituted in the place of the former voluntary system for fire protection. How the inclusion of active members in an exemption can have the effect to repeal a law under which an exemption has already been vested I am unable to see.

It will be observed that there are no negative words used in the Revisal so as to exclude the exemption contained in the clause of the charter just mentioned, but only the granting of an exemption to a specified class which they did not before possess under the general law, but which was conferred only, as to some of them, in certain private charters, and that was merely a revocable grant, and not an irrevocable grant of exemption as is the one claimed by the defendant. The exemption allowed under the Revisal of 1905, § 1980, was clearly intended to apply to a class of persons who never enjoyed such an immunity before its enactment, and not to one protected by prior legislation and in whose favor there was an existing right of exemption. This is apparent from the phraseology of that section. The provision of the Revisal is plainly cumulative, and not revocatory. Nor does section 1957 of the Revisal of 1905 give any color to the claim that the Legislature has taken away all existing exemptions. That section only requires the commissioners to prepare a list of all persons having certain prescribed qualifications, and to exclude therefrom persons who are disqualified, such as those who have removed from the county, or who are dead (section 1961), but not those who are exempt from jury service. They do not even strike off those who have suits pending and at issue, but return their names to box No. 1, when they are drawing jurors to serve at a court. Section 1960. There is a vast difference between a disqualified and an exempted juror. The exemption is but a privilege, personal to the juror, and he may serve, even if objected to on the ground of the exemption, unless he insists upon his privilege. He may waive it, and when he does he is as much qualified as if the exemption had never existed. His name properly goes upon the list, not only because he is a qualified juror, but because the commissioners are not presumed to know of his exemption, and, if they were informed of it, they are not presumed to

know that he will avail himself of it when called to sit in the box, for, as I have said, he may then forego the privilege and agree to serve. The argument drawn from section 1957, as to preparing the list of jurors, would just as well apply to the exemption of practicing physicians and others, under section 1980, as to those under existing charters.

There is therefore nothing in the Revisal which conflicts with the clause of exemption in the charter of the fire company, or which manifests any purpose to repeal it, and we should lean to this view, because, as said by a court of high authority in a like case, the opposite interpretation of the law would disclose bad faith, and, "if possible, we should give such a construction to the act of the Legislature as will relieve the state from such an imputation." *Red Rock v. Henry*, 106 U. S., at page 604, 1 Sup. Ct., at page 441, 27 L. Ed. 251. And in another case, also upon a question of like kind, it was said that we should presume an intention, on the part of the state, to keep and observe her promises consistently with good faith, for to presume otherwise would be to impute to her an insensibility to the claims of morality and justice, which nothing in her history warrants. *Broughton v. Pensacola*, 98 U. S. 266, 23 L. Ed. 896; 28 Am. & Eng. Enc. (2d Ed.) p. 646, 661; *Lewis' Suth. Stat. Constr.* (2d Ed.) §§ 267, 488. The mind of the Legislature is presumed to be consistent, and it must also be presumed that the Legislature never intends an injustice, or to disregard its own agreements or to work private hardship. If a statute, therefore, is ambiguous or doubtful, or fairly open to more than one construction, that one should be adopted which will avoid such results as those indicated, as the Legislature should not be presumed to intend a wrong in the absence of explicit language expressing that intention. These are elementary principles of construction it is said in *Black on Interpretation of Laws*, pp. 98-101, §§ 44, 46.

Before I can assent to the proposition that the state has repudiated a solemn promise of exemption after having received the full consideration thereof in public services, language will be required more explicit and convincing than any the Legislature has yet used, and reasons and arguments more persuasive than any which have yet been advanced in support of such a position. The state, in my opinion, has done no such thing, and the Legislature did not intend to commit her to any such policy, but, on the contrary, it was the purpose to recognize and confirm existing exemptions.

But there is another and more serious question involved in this case, which relates to the power of the Legislature thus to destroy a vested right or to impair the obligation of its contract. In my opinion it has no such power. It is argued that the state cannot bargain away its right to require the citizen to perform jury service; such

a service being essential to the very preservation of the state. The deduction from this premise is that a sovereign right of such vital importance is not the subject of contract. Let us see how this is. If I am able to demonstrate that a sovereign right much more essential to the existence of the government than that of requiring the citizen to serve as a juror has been parted with by exempting persons or corporations from its exercise, not for a limited term, but forever, and that such an exemption has been sustained as being within the legislative power and as irrevocably binding on the state, it must be admitted that the exemption now in question by the same token must be a lawful exercise of that power and equally obligatory. The Constitution forbids the granting of hereditary emoluments, privileges, or honors, and also perpetuities and monopolies, as being contrary to the genius of a free state, and such as should not be allowed. Article 1, §§ 30, 31. But by article 1, § 7, it is expressly provided that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services." It is clearly implied here that, for public services rendered the state, a privilege may be granted in return, and there is no restriction as to its nature or extent. A privilege is said to be a particular or peculiar benefit enjoyed by a person, company, or class beyond the common advantages of other citizens, an exceptional or extraordinary exemption, or an immunity held beyond the course of the law. And, again, it is defined to be an exemption from some burden or attendance, with which certain persons are indulged, from a supposition of the law that their public duties or services, or the offices in which they are engaged, are such as require all their time and care, and that therefore, without this indulgence, those duties could not be performed to that advantage which the public good demands. *Black's Dictionary*, p. 941; *Anderson v. Rountree*, 1 Pin. (Wis.) 118. These approved definitions show clearly that the exemption here claimed is within the meaning of the word "privilege," as used in the Constitution, which may be conferred in consideration of public services. Indeed, this court has expressly held in cases just like this one that the Legislature may grant such an exemption. *State v. Hogg*, 6 N. C. 319; *State v. Williams*, 18 N. C. 373; *State v. Whitford*, 34 N. C. 99; *State v. Womble*, 112 N. C. 862, 17 S. E. 491, 19 L. R. A. 827. And in *State v. Willard*, 79 N. C. 660, the very exemption granted by the charter in question was sustained as within the power of the Legislature to grant, and the only point made was as to its true construction and the extent of the exemption in its application to the different kinds or classes of jurors.

In *Railroad v. Alsbrook*, 110 N. C., at page

145, 14 S. E. 652, this court (by Clark, J.) says: "The right of taxation is the highest prerogative of sovereignty. Its exercise is necessary to the very life and existence of the state. Its possession marks, regardless of the nominal form of government, its real nature, whether republican, monarchical, or autocratic. It is the power of the purse to which the power of the sword is a mere sequence," and, I venture to add, to which all other governmental powers are practically subordinate because upon it they are dependent for their continuance. It is, if anything, the supreme prerogative power of sovereignty and absolutely essential to the existence of government in any form. And yet this the highest power of the sovereign state has been held to be the subject of contract, and any agreement based upon a sufficient consideration, such as public services rendered, by which the state exempts the citizen or a corporation from taxation, is valid and binding, and is within the protection of the contract clause of the federal Constitution. This principle was announced in a case decided otherwise by this court, but which was reversed in the Supreme Court of the United States upon a writ of error. *Railroad v. Reid*, 18 Wall. 264, 20 L. Ed. 568; *Id.*, 18 Wall. 269, 20 L. Ed. 570. In that case the court said: "If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests. It may be conceded that it were better for the interests of the state that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered. In the nature of things, the necessities of the government cannot always be foreseen, and in the changes of time the ability to raise revenue from every species of property may be of vital importance to the state, but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the Legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power." That case has been approved by innumerable decisions since made and is recognized as settling the doctrine therein stated. Indeed, the general principle had been thoroughly well established long before it was reiterated and applied in that case. *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164, 3 L. Ed. 303; *Jefferson Bank v. Skelly*, 1 Black (U. S.) 436, 17 L. Ed. 173; *Railroad v. Tenn.*, 153 U. S. 486, 14 Sup. Ct. 968, 38 L. Ed. 793; *Fletcher*

v. Peck, 6 Cranch (U. S.) 87, 3 L. Ed. 162; *Bank v. Knoop*, 16 How. (U. S.) 389, 14 L. Ed. 977; *Pawlett v. Clark*, 9 Cranch (U. S.) 292, 3 L. Ed. 735; *Terrett v. Taylor*, 9 Cranch (U. S.) 43, 3 L. Ed. 650; *Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939; *Mills v. Williams*, 33 N. C. 558; *Bank v. Bank*, 35 N. C. 75; *Attorney General v. Bank*, 57 N. C. 287; *State v. Petway*, 55 N. C. 396. See, also, the later case of *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454, 21 L. Ed. 204. Where there is such a stipulation, it is entitled to a sensible and reasonable construction, so as to effect its obvious purpose, and should be regarded as a contract if it appears to have been so intended by the parties. *Ins. Co. v. Debolt*, 16 How. (U. S.) 416, 427, 14 L. Ed. 997; *Bank v. Edwards*, 27 N. C. 516; *Gordon v. Appeal Tax Court*, 3 How. (U. S.) 148, 11 L. Ed. 529; *House of the Friendless v. Rouse*, 8 Wall. (U. S.) 430, 19 L. Ed. 495. Thus far I have referred to exemptions or other privileges conferred which are not revocable by the terms of the grant. For example, the provision in the Revisal exempting active members from jury duty is revocable, because it is not given for any definite time, and even in the case of the exemption now under consideration it may be that it was within the power of the Legislature to have revoked it at any time before the period of five years had expired. The continuance of such exemptions being subject to the will and pleasure of the Legislature, the laws conferring them do not fall within the class of legislation which gives to them the character of contracts or imparts to them the qualities and protection of vested rights. But all the best-considered authorities hold that where the exemption is granted perpetually for a consideration, such as public services to be rendered for a definite time, and the services have been performed and the requirement of the law fully complied with, so that the agreement has been actually consummated and fully executed on both sides, it becomes an inviolable right, within the meaning and protection of the contract clause of the Constitution. *S. M. Co. v. Saginaw*, 18 Wall. (U. S.) 373, 20 L. Ed. 611. Even where, as by our Constitution (article 8, § 1), the power is reserved to alter or repeal the charters of private corporations, the exercise of this power cannot interfere with rights already vested under the charter. It cannot undo what has already been done, nor can it unmake contracts already made, but its operation will be confined to the future. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684; *Railroad Co. v. U. S.*, 99 U. S. 700, 25 L. Ed. 496; *Red Rock v. Henry*, 106 U. S. 604, 1 Sup. Ct. 434, 27 L. Ed. 251; *S. M. Co. v. East Saginaw*, supra; *People v. Auditor*, 9 Mich. 134. This court so held in *Smathers v. Bank*, 135 N. C. 418, 47 S. E. 893.

As there is no subject over which it is of greater moment for the state to preserve its power than that of taxation, and as it has been settled that the state may irrevocably part with this power in favor of a particular person or corporation, with much greater reason (a fortiori) may it exempt a citizen perpetually from jury duty for a sufficient consideration moving to the public in the way of services. This follows logically and inevitably from the other proposition, and cannot be resisted as a conclusion to be legitimately drawn from it. If the highest power of sovereignty can be bargained away, that which is of a lower grade, and is dependent upon it for existence, must be equally subject to alienation, unless we deny the truth of the axiom that the greater includes the less. This view has been taken in regard to a mere bounty which had been earned according to the terms of the legislation conferring it. *People v. Auditor*, 9 Mich. 134; *Montgomery v. Kasson*, 18 Cal. 189; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82, s. c. 13 Wall. (U. S.) 373, 20 L. Ed. 611. The same principle was adopted and held to apply to a case precisely like this one in every respect, in *Ex parte Goodin*, 67 Mo. 637, by a unanimous court, in a well-considered opinion by Chief Justice Sherwood, and it was so held notwithstanding there was a reserved power of amendment or repeal residing in the Legislature. So that case has met and answered every point now urged by the state, except the one as to the actual repeal of the provision of the charter which confers the exemption. In the opinion of this court it is said that the Missouri decision cannot be accepted as authority by this court, because of the power reserved to the Legislature in the Constitution of our state to amend or repeal charters. This is an inadvertence, for even a cursory reading of that case will show that the same power existed in the Legislature of Missouri, as it is expressly mentioned and held not to change the result. The case of *Railroad v. Alsbrook*, 110 N. C. 145, 14 S. E. 652, which is cited by the court in this case, does not decide that an exemption from taxation cannot be irrevocably granted, but only that the right there claimed did not extend to a certain class of property, as it was not clearly expressed in the charter of the company that it should. *Railroad v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972. But that such a power does exist is decisively determined by a multitude of cases. *Salt Manufacturing Co. v. East Saginaw*, 80 U. S. (13 Wall.) 873, 20 L. Ed. 611, where the authorities are collected by Justice Bradley, including among them *Railroad v. Reid*, 80 U. S. (13 Wall.) 264, 20 L. Ed. 568; *Id.*, 80 U. S. (13 Wall.) 20 L. Ed. 570. The court in the latter case, as I have said, reversed the decision of this court, holding the contrary doctrine. Besides, it was said in *Railroad v. Alsbrook*, 146 U. S.

279, 13 Sup. Ct. 72, 36 L. Ed. 972, that, if this court had decided in the same case when before it that no such power of exemption could exist, it would have been erroneous, and the decision in that case was affirmed only because it was held therein that the exemption did not apply to the railroad's branches, but only to its main line; and that was the entire scope of the decision.

I have cited copiously the cases in the Supreme Court of the United States because such questions as the one we now have under consideration must ultimately be adjudicated there, and its decisions are therefore controlling. The authorities cited to sustain the decision of the court in this case are squarely opposed to the doctrine as laid down by that supreme tribunal, and therefore should not be entitled to any weight as precedents with us, while the case from Missouri is directly in line with that doctrine and in perfect harmony with the decisions of the highest court having jurisdiction to finally and authoritatively settle the law, so far as it relates to the question herein involved. If the superior and sovereign power of taxation can be permanently relinquished in favor of an individual or of a corporation, why not the inferior and less important one under which the citizen may be compelled to perform jury service? The former power should no more be impaired to the detriment of the public than the latter one by giving such exemptions, and the power of compelling persons to attend at the courts for jury duty would be little or nothing to the state if there is no money in the treasury to sustain the government. The possession of the power of taxation is therefore not only essential, but a condition precedent to the exercise of the other power. You cannot put jurors on the panel, or in the box, without the money to provide for the necessary governmental machinery of which the courts are a part. The government, it is true, was not organized merely for the purpose of exercising the power of taxation, yet it was one of the extraordinary powers contemplated, as much so as any other, because the government could not exist without it. The question is not for what purpose did we form our government, but what are its essential functions. I may admit that, if the state cannot perpetually exempt from taxation, she cannot give a permanent exemption from jury service; but it is inconsistent and illogical, it seems to me, to affirm the right in the one case and deny it in the other. If either of the powers is inalienable, then the other must needs be so. No ingenious or subtle argument can explain why the reasons which justify the right of alienation in the one case do not also justify it in the other.

While the impolicy of exempting jurors perpetually may be conceded, it is not for me to decide that it is unwise; that being a matter solely within the cognizance of

the Legislature. Although I may condemn the law as impolitic, my conviction is that it is perfectly valid, and binding on the state. A right to the exemption having become vested by the performance of the services for the stipulated period, it could not be divested by state action. There is no evidence before us, and no suggestion can well be supported by actual proof, that the supply of competent jurors is about to be exhausted by reason of statutory exemptions, such as this one. Indeed, the contrary appears in this case, for we are informed that the voluntary fire departments are gradually giving place to the paid departments, the members of which are compensated for their services by the municipalities of the state in money, and not by way of exemption from jury duty, as was the case with volunteer associations. It must not be supposed that I am attempting, by this opinion, to vindicate solely the right of the defendant in this case. The question involved is more far reaching than the mere acquittal of one individual, even upon the charge of unlawfully refusing to do service which by the law, as heretofore settled, he is not bound to render, though that is a sufficient reason for fully discussing the matter. The real significance of the case is revealed when we consider that the principle, as herein declared, will be recorded as a precedent and by so much impair, if it does not seriously jeopardize the constitutional rights of the citizen in other cases involving more serious consequences.

KEEL v. EAST CAROLINA STONE & CONST. CO. et al.

(Supreme Court of North Carolina. Dec. 22, 1906.)

1. CONTRACTS — PERFORMANCE ON BREACH — DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.

A contract for the construction of a building required that the owner pay the contractor \$950 when the walls should have been erected to the second story, and \$1,000 when the building should have been covered, and required the owner to execute four notes for \$1,000, secured by mortgage on the land and premises. After the building had been erected to the second story and the owner had paid \$950, it was destroyed by fire, except that the walls remained standing and it appeared that the walls were worth \$500. The contractor refused to proceed with the construction of the building. *Held*, that the contract was divisible and owner was entitled to have the four notes canceled but not entitled to recover the \$950, nor was anything due defendant by reason of the value of the standing walls.

2. BILLS AND NOTES — TRANSFER WITHOUT INDORSEMENT — DEFENSES AGAINST HOLDER.

Notes in the hands of a bank as collateral for money loaned the payee but held without indorsement were subject to all defenses and equities available against the payee.

Appeal from Superior Court, Wayne County; Webb, Judge.

Action by X. T. Keel against the East Carolina Stone & Construction Company and

others. From a judgment in favor of plaintiff, defendants appeal. Modified and affirmed.

There was evidence tending to show: That defendant contracted and agreed to furnish material and build and construct for plaintiff, on a lot owned by plaintiff, in Mt. Olive, N. C., a three-story building, at a contract price of \$5,950, according to dimensions and stipulations set forth in the contract; said building to be completed on or before August 1, 1905. That on the 22d of August, 1905, when the house was erected to a point where the roof was about half covered, this storehouse was accidentally, and without fault on the part of plaintiff or defendant, destroyed by fire. That plaintiff, described as party of the second part in the contract, agreed to pay for the building, as follows: "The said party of the second part agrees to pay the said sum of \$5,950.00 as follows: \$950.00 when the walls of said building shall have been erected to the second story; \$1,000.00 when said building shall have been covered; 1,000.00 on August 1, 1906; \$1,000.00 on August 1, 1907; \$1,000.00 on August 1, 1908; and \$1,000.00 on August 1, 1909; said last four payments of \$1,000.00 each to be evidenced by four notes, drawing interest from the 1st day of August, 1905, at the rate of 6 per cent. per annum, secured by first mortgage on said land and premises hereinbefore referred to. And the said party of the first part hereby stipulates and guarantees that it will complete the erection as per contract, of said building, on or before August 1, 1905." That plaintiff executed and delivered the four notes for \$1,000 each in March, 1905, in accordance with the terms of the contract, and, when the walls of the building had been erected to the second story, plaintiff paid the defendant the \$950 as per stipulation. That these notes had been deposited by defendant company with the National Bank of Goldsboro as collateral for money advanced by the bank to defendant company, and so held by said bank without indorsement. That the defendant company had failed and refused to go on and complete the building. That the value to plaintiff of the walls left standing on the lot after the fire was \$500. On these facts admitted and established by the verdict of the jury, the court entered judgment as follows: "It is thereupon, on motion of counsel for the plaintiff, considered and adjudged by the court, that the defendants East Carolina Stone & Construction Company, and the National Bank of Goldsboro, cancel and deliver up the four notes of one thousand dollars each, executed by the said X. T. Keel to the said East Carolina Stone & Construction Company, and the mortgage securing the payment of the same, and that the plaintiff, X. T. Keel, recover of the defendant East Carolina Stone & Construction Company, the sum of four hundred and fifty (\$450.00) dollars, and the costs of this action to be taxed by the clerk. It is further considered,



ordered, and adjudged by the court that the restraining order herein be made perpetual." Both plaintiff and defendant excepted, the defendant alone perfecting its appeal.

Aycock & Daniels and M. T. Dickinson, for appellants. Dortch & Barham and W. C. Munroe, for appellees.

HOKE, J. (after stating the case). When one contracts with the owner of a lot to furnish all the materials and build and construct a house thereon for a certain price, the contract being entire and indivisible, if the structure, before completion, is destroyed by fire, without fault on the part of the owner, and the contractor, being given the opportunity, refuses to proceed further, in such case, he is liable to refund any money which may have been paid him on the contract, and also for damages for its nonperformance. *Brewer v. Tyson*, 48 N. C. 181; *Lawing v. Rinties*, 97 N. C. 350, 2 S. E. 252; *Beach's Modern Law of Contracts*, § 232, citing *Thompkins v. Dudley*, 25 N. Y. 272, 82 Am. Dec. 349. And this principle will not be affected by the fact that the money is to be paid by installments if the price is entire for a completed building and these installments are arbitrary and fixed without any regard to the value or any distinctive portion of the work done. *School Trustees v. Bennett*, 27 N. J. Law, 513, 72 Am. Dec. 873. But if the contract is divisible and severable, if the price is not entire for a completed building, but is payable by installments, these installments being fixed with regard to the value of the work done, or as certain portions of same are finished, in that event, if the structure be destroyed by inevitable accident, "the builder is entitled to recover for the installments which have been fully earned," but it seems that he has no claim for a proportional part of the next installment, which has been only partially earned. *Brewer v. Tysor*, 50 N. C. 173; *Beach, Modern Law*, citing *Richardson v. Shaw*, 1 Mo. App. 234. In this well-considered case, *Laws, Judge*, delivering the opinion, says: "The true principle which controls such a case as this is clearly stated in *Addison on Contracts*, 452: 'If the contract price of the building is to be paid by installments on the completion of certain specified portions of the work, each installment becomes a debt due to the builder as the particular portion specified is completed, and, if the house is destroyed by accident, the employer would be bound to pay the installment then due, but would not be responsible for any intermediate work and labor and materials.'" It has been further held that, where the contract to build a completed house is not entire and indivisible, but only a contract to do a part of the work and furnish part of the material, the owner, or some independent contractor, having undertaken, or being bound, to do some substantial portion of the work, if the structure is destroyed by fire or other inevitable accident before completion,

in such case, the parties are relieved from further performance, and the contractor is ordinarily allowed to recover for what he has done, over and above the amount which may have been paid him. *Cook v. McCabe*, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765; *Butterfield v. Byron*, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654. In the cases just cited and others of like import, by the nature of the agreement, both parties contracted with reference only to the one particular building, and evidently contemplated its continued existence. On its destruction, therefore, both sides are absolved from further obligation concerning it. The methods of adjustment in such circumstance are not pursued, because the modification of the general rule suggested by these cases does not apply to the one we are considering, and the cases are only referred to because they are mentioned, and to some extent relied on, in the argument in chief of the defendant's counsel.

In the contract before us the stipulations for payment by installments are clearly made with reference to distinct portions of the work as it progressed, and the contract, therefore, is not entire, but divisible, and, applying the principles above stated and pertinent to this inquiry, we hold that, when the walls of the building had reached the second story, by the express terms of the instrument, the \$950 was due and owing. This much had been earned, and plaintiff had no right to recover it back, nor any part of it, and the judgment, therefore, of \$450 entered against defendant, being predicated upon a right to recover back the payment, is erroneous and must be set aside.

Nothing is due the defendant, however, by reason of the verdict of the jury to the effect that the walls, as they stood after the fire, were worth \$500 to plaintiff. This is what the \$950 was chiefly paid for, and being greater in value than the walls, nothing is due defendant on that account.

The \$1,000 to be due when the building should be covered has not been paid and was never earned, and no question about it is involved in this suit.

The four notes for \$1,000 each, executed and outstanding, and now in the hands of the National Bank, were to be paid only after the building was completed. They were in no sense a payment, but by the express terms of the contract, and by the presumption of the law, they were only given in evidence of the obligation, and the mortgage as security for these notes when they matured. The amount represented and evidenced by these notes has never been earned and was never due by the contract, and the plaintiff is entitled to have them, and the mortgage given to secure them, delivered up and canceled. True, they are in the hands of the bank as collateral for money advanced to defendant, but they are held without indorsement and are subject to defenses and equities available

against the payee. *Mayers v. McRimmon*, 140 N. C. 640, 53 S. E. 178.

The judgment, therefore, as to these notes and the mortgages is correct, and the same is affirmed.

Modified and affirmed.

McAFEE et al. v. GREEN et al.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. TRUSTS—CONVEYANCE FOR USE OF TRUSTEE—CONSTRUCTION—ESTATE CREATED.

An owner conveyed land to a grantee as trustee, to hold for his own use. The grantee conveyed the premises to a third person in fee simple, who reconveyed on specified trusts. *Held*, that the owner's deed conveyed to the grantee the legal and equitable estate in fee, and, when he conveyed to the third person, all of his estate passed.

2. SAME.

An owner conveyed land to a grantee as trustee, to hold for his own use. The grantee conveyed the premises to a third person in fee simple, who reconveyed to the grantee as trustee, to hold in trust for his wife for life, and on her death for his own use for life, and then to the daughters of the wife, with a contingent remainder to their children. *Held*, that on the death of the grantee the legal title descended to his heirs, subject to the trusts declared, and, but for the contingent remainders, the legal title would, by the provision of the statute of uses, vest in the wife for life, and in the daughters in fee.

3. TRUSTS—APPOINTMENT OF NEW TRUSTEE—AUTHORITY OF COURT.

Where land is conveyed in trust for persons named, for life with contingent remainders over, it was competent, on application of the parties in interest, to appoint a new trustee, on the death of the trustee named in the deed, to hold the legal title to preserve the contingent remainders.

4. REMAINDERS—SALE OF PROPERTY UNDER ORDER OF COURT—TRUST PROPERTY.

Where, on the application of the parties in interest, a new trustee was appointed to hold the legal title to preserve contingent remainders created by a deed conveying real estate to a trustee in trust for specified purposes, the court, on the application of the parties in interest, was authorized to order a sale of the premises either under Revisal 1905, § 1590, providing that, where there is a vested interest in real estate and a contingent remainder, the court may order a sale, or independently of the statute.

5. TRUSTS—SALE OF TRUST PROPERTY—PRIVATE SALE.

The court may direct a trustee to sell the trust estate at a private sale, where such a sale is promotive of the interests of the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trusts, § 250.]

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Submission of controversy by Cora McAfee and others against Matt Green and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

This was a controversy submitted without action upon the following agreed facts: On the 6th day of May, 1889, C. E. Graham, being the owner of the land in controversy, together with his wife, executed deeds of conveyance therefor to W. L. McAfee, as trustee.

The habendum of said deed in the following words: "To have and to hold the above-described land and premises, with all the appurtenances thereunto belonging or in any wise appertaining, unto the said party of the second part, his heirs and assigns, to the only use and behoof of him and his said heirs and assigns forever." No other or further trusts were declared in said deeds. On September 26, 1889, the said W. L. McAfee, trustee, and his wife, Cornelia McAfee, executed to Platoff Zane a deed conveying said real estate in fee simple, no trust being declared in said deed. That on the 6th day of December, 1889, the said Platoff Zane describing himself as trustee, executed a deed to the said W. L. McAfee, trustee, for the said real estate upon the following trust, to wit: "But this conveyance is made in trust for the sole and separate use of the said Cornelia McAfee during her natural life, free from the control and disposal of her husband, the said William L. McAfee, except as herein provided, and so that the said property shall not be subject to the debts and liabilities of her said husband, and if the said William L. McAfee shall be living at the time of the death of the said Cornelia, then after her death in trust for the said William L. McAfee during his natural life, and from and after the death of them, the said William and Cornelia, in trust for such of the daughters of the said Cornelia and William, namely, Blanche, the widow of Thomas C. Acheson, Mary, the widow of Sylvester M. Hamilton, and Cora McAfee, as shall then be living, and the children of such of them as might then be dead, that is to say, to each of them the said Blanche, Mary and Cora, who should be living at the time of the death of the survivor of them, the said William and Cornelia, an equal undivided share during her natural life, for her sole and separate use, free from the control and disposal of and not to be subject to the debts or liabilities of any future husband; but if at the time of the death of the survivor of them, the said William and Cornelia, or either of them, the said Blanche, Mary and Cora should be dead leaving a child or children then living, such child or children shall take and have absolutely in fee simple the same share which his, her or their mother would if then living have been entitled to as aforesaid for her natural life, and the share to which either of them, the said Blanche, Mary and Cora, may become entitled to as aforesaid, for her natural life, shall upon her death vest absolutely and in fee simple in her child or children living at the time of her death, or if there should be no such child then living, in her heirs at law." Power was conferred upon the said trustee to sell and convey the property and hold the proceeds thereof upon the same trusts therein set out. The said W. L. McAfee died during the year 1890. That thereafter the said Cornelia McAfee, Cora, Blanche Acheson, Cornelia Acheson, Maude

Hamilton, Blanche Hamilton, and Mrs. Mary Hamilton duly filed their petition before the clerk of the superior court of Buncombe county for the purpose of having a trustee appointed in lieu of the said W. L. McAfee. That, pursuant thereto, the said clerk made a decree appointing the said Cornelia McAfee trustee in lieu of the said William L. McAfee, deceased, vesting in her the title to said land, upon the same trust declared in said deed. The said Cornelia thereafter died, and the said Blanche Acheson died, leaving as her only children and heirs at law, Blanche Acheson and Cornelia Acheson. The said Mary Hamilton thereafter died, leaving Blanche Hamilton and Maude Hamilton as her only heirs at law, all of whom are more than 21 years of age. The plaintiff, Cora McAfee, has no children, and is the only living child of W. L. and Cornelia McAfee, and, in default of issue, her said nieces would be her heirs at law. The owners of said property have been offered by defendants Natt Green and wife, the sum of \$35,000 therefor, and have agreed to sell and convey the same to said parties for said sum, which they regard as a fair price for said property. It appears that the said parties own other real estate in the city of Asheville, subject to the same limitations, which is unimproved and yielding no income. That, if the same were improved by the erection of buildings thereon, it would yield to the said parties an income. In a proceeding instituted by the said Cora against the other parties, owners of said land, in the superior court of Buncombe county, an order was made at September term 1906, appointing H. T. Collins guardian ad litem to represent such children as might be born to the said Cora McAfee and after her death be entitled to said interest in the property in remainder. At the said term of said court, the said H. T. Collins was also appointed trustee, with power and direction to hold said title to said land upon the same trust set out in the said deed, bearing date December 6, 1889. He was further authorized and empowered to discharge the trust set forth in said deed, Cora McAfee being the owner of the one-third undivided interest in said property. H. T. Collins, guardian and trustee, duly filed answer in said proceeding, admitting the facts hereinbefore set out. At the said term of said court an order was made in which George H. Wright, Esq., was appointed referee, with direction to inquire into the facts concerning said offer to sell said land and take testimony thereupon and to report whether, upon such facts, the interests of the said parties, especially the said Cora McAfee, would be enhanced by the sale of the property, and whether or not the price offered therefor was just and fair, etc. Thereafter the said referee made his report to the court, from which it appeared that he had taken testimony in respect to the matters submitted to him, and that he found

the facts, as hereinbefore set forth, to be true, and further that the interest of the parties would be materially promoted by a sale of the property and the reinvestment of the proceeds derived therefrom. Thereupon the said court made a decree reciting the facts hereinbefore set forth, in which it was ordered and adjudged "that H. T. Collins, of Asheville, N. C., be, and he is, hereby appointed commissioner of this court, and is ordered and directed, as such commissioner, to sell and convey immediately at private sale to Natt Green and wife, Mary R. Green, of Asheville, N. C., said one undivided one-third interest in said property, at the price of eleven thousand, six hundred and sixty-six and two-third dollars (\$11,666.67); and he is further ordered and directed, as such commissioner, to execute and deliver, upon the payment of such purchase money, a deed of conveyance in due form, conveying to said Natt Green and wife, Mary R. Green, their heirs and assigns, said undivided one-third interest in said land and property." He was further ordered, after paying the costs of the proceedings, to hold the remainder of the proceeds of said sale, one undivided one-third interest of the said Cora McAfee, as said commissioner, until further order of the court in the premises, etc. It further appeared that all the other parties, owners of said land, to wit, Blanche Acheson, Cornelia Acheson, Blanche Hamilton, and Maude Hamilton, had executed a deed, conveying their two-thirds interest in said property to the defendants Natt Green and wife. It was thereupon adjudged and decreed by the court that, upon the payment of the said \$35,000, purchase money as aforesaid, to the said parties, deeds therefor, as set out in the record, be delivered to the defendants Green and wife. To this judgment, the defendants excepted and appealed.

Wells & Swain, for appellants. Julius C. Martin, for appellees.

CONNOR, J. (after stating the case). The defendant's counsel except to the judgment herein for that: (1) The deed from McAfee to Zane is not signed as trustee. The land is conveyed by Graham to McAfee "as trustee" with habendum to "his own use and behoof." No other use is declared than such as would attach by operation of law, the deed reciting the payment of the purchase money by the grantee. The word "trustee" is therefore surplusage, not affecting the legal title conveyed by the operative words of the deed. (2) That, upon his death, the heirs of the trustee hold the legal title. This is true when the legal and equitable estates are separated and the trustee does not convey the legal title. *Clayton v. Rose*, 87 N. C. 106, and many other cases in our Reports, the last of which is *Cameron v. Hicks*, 141 N. C. 21, 58 S. E. 728. Hence, the legal and equitable estates were in McAfee in fee. When he conveyed to Zane all of the

estate which he had, there was nothing left in him to vest in his heirs. (3) The trustee may be appointed by the court, upon death of original trustee; hence deed from substituted trustee is necessary to perfect the title. As we have seen, the legal title vested in Zane by deed from McAfee and by Zane's deed to McAfee of December 6, 1889, it revested in him upon the trusts therein declared. Upon the death of McAfee, the legal title descended to his heirs at law subject to the trusts declared, to wit, for Mrs. McAfee for life, remainder for themselves, subject to the limitations contained in the deed from Zane to McAfee. As Mrs. McAfee, upon the death of her husband, became discover, but for the contingent remainder, the legal title, by operation of the statute of uses, would have vested in her for life and in her daughters in fee, thus combining both estates and making a perfect legal title. The parties, we presume, being so advised, filed their petition in the superior court, pursuant to section 1037, Revisal 1905, to have a new trustee appointed. All of the parties in interest joined in the petition, and, upon the passing of the decree, Mrs. Cornelia McAfee became the trustee, holding the legal title upon the same trusts as the original trustee—so far as it was competent for the court to confer them. It is doubtful whether the power to sell and invest the proceeds conferred upon W. L. McAfee, being one of personal confidence, involving the exercise of discretion, vested in the substituted trustee. *Young v. Young*, 97 N. C. 132, 2 S. E. 78; *Baker v. McAden*, 118 N. C. 740, 24 S. E. 531. This is not material here, because all parties in interest joined in requesting the appointment of a new trustee and no attempt is being made by the trustee to execute the power of sale conferred upon the original trustee. It is not very material whether the decree of the clerk, substituting the new trustee, be erroneous or not, because no action was taken by Mrs. Cornelia McAfee, as trustee, affecting the title, and, upon her death, the legal title, if divested by the decree, immediately revested in the same persons as her heirs at law. Upon the death of Mrs. Acheson and Mrs. Hamilton, two-thirds undivided interest vested in fee in their daughters, merging the legal and equitable estates, thus putting an end to all limitations upon their two-thirds interest. Assuming, as the parties have done, that, upon the death of Mrs. Cornelia McAfee, the new trustee, the legal title to one-third undivided interest descended to her heirs at law, her grandchildren and Cora McAfee, in trust for said Cora in fee, subject to be divested by birth and survival of issue, it was clearly competent, upon the application of all parties in interest, to appoint a new trustee to hold the legal title to preserve contingent remainders. Having done so, we can see no reason

why, independently of the statute of 1903, Revisal 1905, § 1590, the court, upon the application of all the parties in interest, the trustee representing contingent remaindermen could not direct a sale of the land. This was held in *Overman v. Tata*, 114 N. C. 571, 19 S. E. 706, and the authorities reviewed in *Springs v. Scott*, 132 N. C. 543, 44 S. E. 116. To prevent any possible doubt of the existence of the power, and to provide for its exercise and protect the interest of all parties in remainder, whether in esse or not, the act of 1903, being section 1590, Revisal 1905, was passed. "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale of the property by a proceeding in the superior court at term time, which proceeding shall be conducted in the manner pointed out in this section." The manner of procedure is specifically pointed out.

The facts set out in the record bring this case clearly within the language and purpose of the statute as construed in *Hodges v. Lipscomb*, 133 N. C. 199, 45 S. E. 556. The purpose of the statute was clearly pointed out by the Chief Justice in his well-considered opinion in that case, and we can add nothing of value thereto. In *Smith v. Gudger*, 133 N. C. 627, 45 S. E. 955, we again construed the statute and disposed of the same exception made here, saying: "To the suggestion in the demurrer that all persons, who might, in any contingency, have an interest therein, are not made parties, it is sufficient to say that the act of 1903 was passed expressly to meet the difficulty therein suggested." *Anderson v. Wilkins*, 142 N. C. 154, 55 S. E. 272. The statute is so manifestly in accordance with a sound public policy, as well as the promotion of private right and interests, that we have not hesitated to give it such a construction as effectuates the intention of the Legislature. In a country such as ours the highest public and private interests are promoted by removing obstructions to alienation and giving security to titles. To the exception that the sale is directed to be made privately, it is sufficient to cite *Rowland v. Thompson*, 73 N. C. 504, and *Barcella v. Hapgood*, 118 N. C. 712, 24 S. E. 124. The power of the court to order the sale to be made privately, when it appears to be promotive of the interests of the parties, has been too frequently adjudged by this court to be considered an open question. The proceeding has been conducted with careful regard to the statute and the course and practice of the court.

Upon a careful consideration of the entire record and the exceptions of defendants, we find no error. The judgment must be affirmed.

HELMS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of North Carolina. Dec. 18, 1906.)

1. TELEGRAPHS—FAILURE TO DELIVER MESSAGE PROMPTLY—ACTIONS FOR DAMAGES—RIGHT OF ACTION—EVIDENCE.

In an action against a telegraph company to recover for mental anguish for failure to promptly deliver a message filed and signed by plaintiff's son, evidence held insufficient to charge defendant with knowledge that the son sent the message as his father's agent or that the father might suffer mental anguish if the telegram was unreasonably delayed.

2. SAME—DAMAGES.

A person who is not mentioned in a telegram or whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish caused by delay in delivery, but only the price paid for transmission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 45, Telegraphs and Telephones, §§ 64-74.]

Clark, C. J., dissenting.

Appeal from Superior Court, Mecklenburg County; Peebles, Judge.

Action by M. A. Helms against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed.

This action was instituted by the plaintiff to recover damages for mental anguish on account of the failure of the defendant to promptly deliver to his son-in-law, at Charlotte, N. C., a message which the plaintiff had sent through John Helms from Pineville, N. C., in the following words: "Will Helms, Charlotte, N. C. Mother very sick. Come at once. [Signed] John Helms."

Tillett & Guthrie, for appellant. Burwell & Canaler, for appellee.

BROWN, J. The exceptions of the defendant to the evidence and to the charge of the court raise two questions for our consideration. (1) Is there any evidence which charges the defendant with knowledge that John Helms filed the telegram as the agent of and for the benefit of his father M. A. Helms? (2) Can this plaintiff sustain an action for damages for mental anguish without proving such fact?

As to the first contention of the defendant we think the evidence tends to prove that John Helms, 26 years old and the son of M. A. Helms, filed the telegram with the operator at Pineville; that the operator asked for the number and street of the sendee; that John Helms said he did not know it; that the operator said he could not send the message until he got the address; that John Helms went back to his father and got the address; that he told the operator that his father knew the street number; that the operator knew John Helms, and also knew the plaintiff; that John Helms told the operator that the sendee, Will Helms, was his brother-in-law, and that the plaintiff sent John Helms to send the message and gave him the money to pay for it but John Helms failed to

so inform the operator. We think there is nothing in the evidence which could reasonably charge the defendant with knowledge that the plaintiff was the real beneficiary and that his son was acting as his agent in sending the message. There is nothing in the evidence or on the face of the message which charges the defendant with notice that M. A. Helms, the plaintiff may suffer mental anguish if the telegram is unreasonably delayed. *Telegraph Co. v. Kirkpatrick*, 76 Tex. 217, 13 S. W. 70, 18 Am. St. Rep. 37.

As to the second contention we are likewise of opinion with the defendant. The overwhelming weight of authority is to the effect that a party who is not mentioned in a message or whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish. *Squire v. Telegraph Co.*, 98 Mass. 237, 93 Am. Dec. 157; *Telegraph Co. v. Proctor* (Tex. Civ. App.) 25 S. W. 813; *Railway v. Seals* (Tex. Civ. App.) 41 S. W. 841; *Elliot v. Telegraph Co.*, 75 Tex. 18, 12 S. W. 954, 16 Am. St. Rep. 872; *Telegraph Co. v. Brown*, 71 Tex. 723, 10 S. W. 323, 2 L. R. A. 766. This doctrine is nowhere more emphatically declared than by the Supreme Court of Texas where the doctrine of mental anguish is supposed to have originated. In *Telegraph Co. v. Gotcher* (Tex. Sup.) 53 S. W. 635, that court affirmed its former ruling to the effect that a party whose interest in the telegram was not made known to the company could not recover. There appears in this opinion the significant statement by the court that the court had "already expressed its disinclination to extend the right of recovery in this class of cases beyond the limits already fixed by the decisions of this court." In *Davidson v. Telegraph Co.*, 54 S. W. 830, and *Morrow v. Telegraph Co.*, 54 S. W. 853, the Court of Appeals of Kentucky held that a party whose name was not mentioned in the message could not recover for mental anguish. In *Rogers v. Telegraph Co.* (S. C.) 51 S. E. 773, the Supreme Court of South Carolina, after referring to the rule of *Hadley v. Baxendale* as controlling these mental anguish cases, then proceeded to hold that the party whose interest was not disclosed could not recover. The headnote correctly digests the opinion in these words: "Where a husband sends a telegram to his wife's mother, and it does not show on its face that it is for the benefit of his wife, and it is not alleged in the complaint that the telegraph company had notice that the telegram was sent for the benefit of the wife, the complaint fails to show that she was entitled to damages for failure to deliver." In *Poteet v. Telegraph Co.* (S. C.) 55 S. E. 113, Mr. Justice Woods, speaking for that court, discusses the matter with much clearness of expression: "In cases of this character the suit is usually for the tort committed in breach of the public duty owed to the plaintiff, but the duty springs out of the contract and depends on it, for mani-

festly the defendant owes no public duty concerning a particular telegram except to those for whom, or in whose behalf, it has undertaken to transmit it. All others are of the outside public, and damages which they incidentally suffer cannot, by any stretch, be regarded the natural and proximate result of failure to transmit a particular telegraphic message. The contract fixes the relation, and he who sues for tort based on contract must show privity with the party to be charged by connecting himself with the contract as a party or a known beneficiary. In further support of this view, it may be remarked that, as to the subject-matter of a telegram, it is too well established for discussion that, before there can be a recovery, the telegraph company must have notice that the particular result alleged as the basis of the claim was to be apprehended from delay in transmission. The same principle makes it necessary to recover that there should be notice to the company of the beneficial interest of the particular person who claims compensation for suffering." In his opinion the learned justice cites a large number of authorities in support of his views. The right of the sendee to recover of a telegraph company for error, or negligence in the transmission or delivery of a telegram is altogether denied in Great Britain. *Playford v. Telegraph Co.*, L. R., 4 Q. B. 706. In this country the English doctrine does not generally prevail. Here the weight of authority holds that the sendee may recover in his own name such damage as he may have sustained by reason of negligence when the message was intended for his benefit and it was apparent on the face of the message or the company otherwise had knowledge of it. 2 S. & R. Neg. (5th Ed.) § 543; Joyce, Elec. Law, § 1008; *Frazier v. Telegraph Co.* (Or.) 78 Pac. 330, 67 L. R. A. 320. The same principle applies where the message is sent for the benefit, and at the instance, of any one whose name does not appear on its face. The well-known rule laid down in *Hadley v. Baxendale*, 9 Exch. 345, decided in 1854, has been applied by the Supreme Court of the United States to telegraph cases, and it is held that, where the telegraph company is not informed of the nature of the transaction to which the message relates, or of the position which the plaintiff in the action would probably occupy, the measure of damages for negligence is the sum paid for sending. *Primrose v. Telegraph Co.*, 154 U. S. 29, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Hall v. Telegraph Co.*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. Our own court has adopted the same principles of law as applicable to this class of cases. In a well-considered opinion in *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559, Mr. Justice Walker says: "The principle uniformly sustained by the cases upon the subject, some of which we have cited, is that, unless the meaning or import of a message is either shown by its own terms or is made known by information given

to the agent receiving it in behalf of the company for transmission, no damages can be recovered for failure to correctly transmit and deliver it beyond the price paid for the service." In *Cranford v. Telegraph Co.*, 138 N. C. 162, 50 S. E. 585, the plaintiff was not permitted to recover because her interest in the telegram was not shown upon the face of it and was not brought to the attention of the company, and it is specifically held that "there can be no recovery of damages for delay in the transmission and delivery of a telegram when it does not appear in any way that the plaintiff was the intended beneficiary of the message." See, also, *Kennon v. Telegraph Co.*, 126 N. C. 232, 35 S. E. 468. In conclusion we regard it as well settled in this court now, as well as in all other courts whose decisions we have examined, that, where there is a delay in the delivery of a telegram, the telegraph company is not liable for the mental anguish of every one suffering by the failure to deliver the message, but only to those for whom or in whose behalf it has undertaken to transmit it. We will not undertake to reconcile *Cashion's Case*, 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, with the principles herein laid down. Whatever there may be that is conflicting with them in that case we regard as having been heretofore disregarded and practically overruled. We are of opinion that the plaintiff is entitled to recover nominal damages only, viz., the price paid for the message.

New trial.

CLARK, C. J. (dissenting). On December 18, 1905, the plaintiff's wife became ill at their home in Pineville, N. C., and the plaintiff directed his son, John Helms, to go to the telegraph office and send a message to his son-in-law, W. A. Helms, who resided in Charlotte, and tell him that plaintiff's wife was very sick, and wanted him to come and come at once. Accordingly John Helms delivered for transmission the following telegram: "Will Helms, Charlotte, N. C. Mother very sick. Come at once. John Helms." The jury found that the defendant negligently delayed the transmission of this telegram and the defendant's brief states the facts as above and adds that there is no question raised on this appeal as to the negligence. The plaintiff brought this suit to recover damages for mental anguish caused by the failure of the said Will Helms and also the wife of Will Helms (she being the daughter of the plaintiff) to reach the bedside of the plaintiff's wife before her death, and be present with him after that time. It was in evidence that the plaintiff sent his son, John Helms, to the telegraph office for the purpose of sending said message and gave him the money to pay for it; that the operator knew John Helms and his father and their relationship; that the operator refused to send the message without infor-

mation as to the street number of sendee; and that thereupon John Helms said that he would go back to the house of his father and get the address, which he did and gave it to the operator.

The chief defense relied on is that it does not appear that the operator was told (except inferentially) that the message was sent by John Helms as agent for his father. When a telegraph company fails to deliver a message or to deliver it promptly this is more than a breach of private contract, for the company could not refuse to accept and send the message. It is a tort and a breach of a public duty. It is commonly described as a tort arising out of a breach of contract. In *Green v. Telegraph Co.*, 138 N. C. at p. 492, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, Douglas, J., said, speaking for a unanimous court: "In the words of a great English judge 'a breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.' This has been expressly held by this court in *Cashion v. Telegraph Co.*, 124 N. C. 450, 32 S. E. 746, 45 L. R. A. 160, *Landie v. Telegraph Co.*, 124 N. C. 523, 32 S. E. 886, and *Cogdell v. Telegraph Co.*, 135 N. C. 431, 47 S. E. 114." Whether the message, as to which there is such default, is one whose default causes pecuniary loss or mental anguish, the party entitled to sue must be the "real party in interest" and comes within one of two categories: Either (1) a party to the contract, or (2) a beneficiary named therein.

1. He may be a party to the contract by being either the sender whose name is signed to the message, or the principal (whether disclosed or not) who paid for the message or by whose order the message was sent. Whether the breach caused pecuniary loss or mental anguish, the telegraph company must have contemplated that damages would accrue to the real sender of the message. "Qui facit per alium facit per se." Whether his name was signed to the message or not, it is the damage that would accrue to him, if any, which the company contemplated that it would incur by its negligence. It is not to be thought that a public corporation would be more faithful in sending a message for one party than another. *Telegraph Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843. Very frequently the signer of the message (as in this case) is a mere agent, a messenger, and in such cases he receives no damages and can recover none. The company is not thereby shielded, but is responsible to the "real party in interest," the principal by whose order the message was sent, for the damage he sustained, whether pecuniary loss or mental anguish, when the face of the message disclosed that failure to deliver would be likely to cause the loss of money (*Cannon v. Telegraph Co.*, 100 N. C. 300, 6 S. E. 731, 6 Am. St. Rep. 590) or mental suffering (*Young v.*

Telegraph Co., 107 N. C. 372, 11 S. E. 1044, 9 L. R. A. 689, 22 Am. St. Rep. 833). That is the gist of it. The real sender of the message is entitled to recover whether his name is signed thereto or an agent signs his own name. Whether the real or the nominal sender is the plaintiff is a mere matter of proof, as is the plaintiff's relationship to the sick or dying person named in the message. When that is shown, it is his loss, of course, which is the measure of damages. He is the real contracting party.

2. Sometimes the sender of the message, whether he sends it in his own name or sends it in the name of his agent, is not the real party in interest. In such case the sender cannot sue (*Pegram v. Telegraph Co.*, 100 N. C. 36, 6 S. E. 770, 6 Am. St. Rep. 557), but the beneficiary of the message may, if the fact that he is the beneficiary appear upon the face of the message. This may be either the sendee or one named in the message. This is upon the principle laid down in *Gorrell v. Water Co.*, 124 N. C. 323, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598, and cases following it, that "one for whose benefit a contract is made may sue for its breach or its enforcement." Thus, either (1) the maker of the contract, whether he contracts in his own name or in the name of an agent, can sue for whatever damage he sustains, or (2) the beneficiary of the contract who is contemplated as such on the face of the message can sue. Of course a person who is not a party, as principal or agent, to the contract nor a beneficiary named therein, cannot recover. *Cranford v. Telegraph Co.*, 138 N. C. 164, 50 S. E. 585. Accordingly, our reports show that, in the great majority of the cases, the action has been brought by the beneficiary named in the message, usually the sender, but sometimes one referred to in the message. In the other cases, the action has always been brought by the contracting party—this being sometimes the signer of the message and sometimes the undisclosed principal—with whose money or by whose order the telegram was delivered to the telegraph company for transmission. The action was brought by: Sender: *Kennon v. Telegraph Co.*, 126 N. C. 232, 35 S. E. 468; *Bennett v. Telegraph Co.*, 128 N. C. 103, 38 S. E. 294; *Bright v. Telegraph Co.*, 132 N. C. 318, 43 S. E. 841; *Williams v. Telegraph Co.*, 136 N. C. 82, 48 S. E. 559; *Green v. Telegraph Co.*, 136 N. C. 506, 49 S. E. 171; *Hancock v. Telegraph Co.*, 137 N. C. 499, 49 S. E. 952; *Hall v. Telegraph Co.*, 139 N. C. 370, 52 S. E. 50; *Gerock v. Telegraph Co.*, 142 N. C. 22, 54 S. E. 782; *Hancock v. Telegraph Co.*, 142 N. C. 163, 55 S. E. 82. Sender and sendee: *Andrews v. Telegraph Co.*, 119 N. C. 404, 25 S. E. 955; *Dowdy v. Telegraph Co.*, 124 N. C. 523, 32 S. E. 802. But it has been since strongly intimated that it is a misjoinder for two persons, suing each for his own mental suffering, to unite in the same action. *Morton*

v. Telegraph Co., 130 N. C. 803, 41 S. E. 481. Undisclosed principal of sender, seven cases: Thompson v. Tel. Co., 107 N. C. 450, 12 S. E. 427; Cashion v. Telegraph Co., 123 N. C. 269, 31 S. E. 498; Id., 124 N. C. 464, 32 N. E. 746, 45 L. R. A. 160 (fully discussed); Landle v. Telegraph Co., 124 N. C. 532, 32 S. E. 886; Id., 128 N. C. 434, 35 S. E. 810, 78 Am. St. Rep. 668; Hood v. Telegraph Co., 135 N. C. 622, 47 S. E. 607; Hamrick v. Telegraph Co., 140 N. C. 151, 52 S. E. 232 (in this last a new trial was given on another point, but there was no objection on this point suggested by the court). Sendee: Young v. Telegraph Co., 107 N. C. 371, 11 S. E. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 883; Thompson v. Telegraph Co., 107 N. C. 456, 12 S. E. 427; Brown v. Telegraph Co., 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793 (pecuniary loss); Lewis v. Telegraph Co., 117 N. C. 436, 23 S. E. 819; Havener v. Telegraph Co., 117 N. C. 541, 23 S. E. 457; Lyne v. Telegraph Co., 123 N. C. 130, 31 S. E. 350; Hendricks v. Telegraph Co., 123 N. C. 306, 35 S. E. 543, 78 Am. St. Rep. 658; Rosser v. Telegraph Co., 130 N. C. 251, 41 S. E. 378; Hunter v. Telegraph Co., 130 N. C. 607, 41 S. E. 796; Meadows v. Telegraph Co., 131 N. C. 74, 42 S. E. 534; Id., 132 N. C. 41, 43 S. E. 512; Elnrd v. Telegraph Co., 132 N. C. 268, 43 S. E. 825; Hinson v. Telegraph Co., 132 N. C. 460, 43 S. E. 945; Higdon v. Telegraph Co., 132 N. C. 728, 44 S. E. 558; Bryan v. Telegraph Co., 133 N. C. 604, 45 S. E. 938; Cogdell v. Telegraph Co., 135 N. C. 431, 47 S. E. 490; Hunter v. Telegraph Co., 135 N. C. 459, 47 S. E. 745; Dayvis v. Telegraph Co., 139 N. C. 82, 51 S. E. 898; Alexander v. Telegraph Co., 141 N. C. 76, 53 S. E. 657; Whitten v. Telegraph Co., 141 N. C. 362, 54 S. E. 289; Mott v. Telegraph Co., 142 N. C. 532, 55 S. E. 863; Harrison v. Telegraph Co. (N. C.) 55 S. E. 435; Shepard v. Tel. Co. (N. C.) 55 S. E. 704. Beneficiary named in message (these are really cases of disclosed principals, but who neither paid for nor ordered the sending of the messages): Sherrill v. Telegraph Co., 109 N. C. 527, 14 S. E. 94; Id., 110 N. C. 656, 21 S. E. 429; Id., 117 N. C. 354, 23 S. E. 277; Green v. Telegraph Co., 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 965, 108 Am. St. Rep. 955; Carter v. Telegraph Co., 141 N. C. 375, 54 S. E. 274; Kernodle v. Telegraph Co., 141 N. C. 437, 54 S. E. 423.

In Cranford v. Telegraph Co., 138 N. C. 165, 50 S. E. 585, it is clearly shown that one who suffers loss (it must be immaterial whether it is a money loss or mental suffering) by the failure to deliver a telegram cannot recover damages on that account unless he also shows that he is a party to the contract, either as sender or as principal or beneficiary (by being named therein) or the sendee. The language of the court is, after quoting Cashion v. Telegraph Co., 123 N. C. 267, 31 S. E. 493, and 124 N. C. 459, 32 S. E. 740, 45 L. R. A. 160, and Landle v. Telegraph Co., 124 N. C. 528, 32 S. E. 886:

"In each of those cases we need only say, without discussing the principle upon which they rest, there was abundant evidence to show that the message was sent for the benefit of the plaintiff [the undisclosed principal], the sender merely acting as her agent, while in this case there is no such evidence." That language exactly applies here. The principle stated in those cases cited in Cranford's Case has been recognized by this court six times, as above stated. It is reasonable, logical, and just, and there is no reason why we should overrule them. Besides the six decisions above referred to, it was said, in Sherrill v. Telegraph Co., 109 N. C. 533, 14 S. E. 94: "The plaintiff can therefore maintain this action both because his sister was his agent for the purpose of sending the telegram and because he was the beneficial party." Yet in that case the plaintiff had not directed the sending, and paid for the message, as in this case, but had merely left authority to telegraph in case of sickness, and had no knowledge of the message being sent until long afterwards. "The message may be written out, signed, and delivered by an agent." Scott & Jarnagan on Telegraphs, 161. "The contract is not necessarily with the party whose name is signed to the message." Id. 177.

Here, the evidence discloses that, in truth, the plaintiff sent the message through the agency of his son and paid for it. The relationship of the principal and his agent was known to the operator. The message concerned the critical illness of the plaintiff's wife, and was sent to the husband of his daughter, and John Helms told the operator that he "would go back" to his father and get the sendee's street number, and did so. All these were pregnant circumstances to give the defendant notice that the message was sent by the plaintiff's order. But, if that were not so, the above authorities, several in number, hold, unless all are overruled, that the plaintiff, if an undisclosed principal, can recover for the default in the delivery of a message. The defendant relies upon Cranford's Case, 138 N. C. 165, 50 S. E. 585. But that case, instead of overruling Cashion's and Landle's Cases, cites them as not being in conflict with itself. Cranford's Case rested on three propositions: (1) That the message, so far as the evidence disclosed, was sent solely for the benefit of the husband of the plaintiff; (2) that there was no evidence that the defendant knew that such a person as the feme plaintiff existed; (3) that there was no evidence that the message was sent for her benefit. The lack of evidence in the foregoing particulars was the controlling factor in the decision of that case. In the case at bar it affirmatively appears by the uncontradicted evidence (1) that the message was sent and paid for by the plaintiff; (2) that the operator knew the relationship between John Helms and the plaintiff, and his attention was called to it before the

message was sent by the son, saying he "would go back" to his father and get the sendee's street number; and (3) that the message was sent for the plaintiff's benefit. In *Cranford's Case* it is said: "Nor is there any evidence that the message was in fact intended for the benefit of the feme plaintiff. The defect in the proof last mentioned is sufficient of itself to defeat the plaintiff's recovery."

To sum up, it is not necessary that the company should have notice, at the time, who is the real sender. Its duty is the same, whether the sender, sendee, or principal of the sender is the "real party in interest." It is sufficient if the telegram on its face gives notice that failure to deliver will cause mental suffering or pecuniary loss, and that at the trial the evidence shall show that such damage accrued to the plaintiff, who shall further show that he was the real, not the mere nominal, sender of the dispatch, or that it was sent for his benefit as sendee or beneficiary named in the message. No case has been cited, and it is believed that none can be found, which denies the right of the real sender, he who orders the message sent and pays for it, to recover damages for failure to deliver, whether he was known to the company or not, and whether the damages are for money lost or mental suffering caused by the defendant's negligence. At least six times this court has ruled that such principal, being the real party to the contract, can recover. The cases cited in the opinion of Brown, J., of *Morrow v. Telegraph Co.*, and the others, which hold that a plaintiff whose name is not mentioned in the message cannot recover, refer to beneficiaries of the message, and are in exact accord with what is said in this dissent. Those decisions do not disqualify the real party to the contract, the principal who paid for and sent the message, and whose agent signed it. This view is sustained by the text and cases cited in *Jones, Telegraphs*, § 469. *Telegraph Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, holds that it is immaterial that the telegraph company is not informed by the signer of the message that it is sent in behalf of and paid for by an undisclosed principal. The company is liable to the latter for any mental anguish caused by its negligence.

HOLLAND v. SEABOARD AIR LINE RY. CO.

(Supreme Court of North Carolina. Dec. 22, 1906.)

1. APPEAL—REVIEW—SUBSEQUENT APPEALS.

A party who loses on appeal to the Supreme Court cannot review its decision by second appeal, but the only way is by petition to rehear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 48.]

2. MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

A brakeman whose duty it was under the rules of the company and the instructions of its conductor, when his train went onto a

siding, to lock a switch and remain within 10 feet of it, having violated such duty by retiring into the caboose without locking the switch so that another train ran onto the siding and into the caboose, killing the brakeman, he was guilty of contributory negligence, and no recovery could be had for his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 751-756.]

3. SAME—PROXIMATE CAUSE.

Such negligence was the proximate cause of the accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 795-800.]

Appeal from Superior Court, Moore County; Moore, Judge.

Action by M. H. Holland, administratrix of the estate of H. L. Holland, deceased, against the Seaboard Air Line Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. J. Adams and Seawell & McIver, for appellant. U. L. Spence, J. D. Shaw, and Murray Allen, for appellee.

WALKER, J. The plaintiff brought this action to recover damages for the alleged negligent killing of his intestate. The evidence introduced by him tended to show that in October, 1902, a freight train known as "Extra 578," which was proceeding southward from Hamlet, took the siding at Rockingham, and, a short time thereafter, a passenger train, which was also proceeding southward at a fast rate of speed, ran upon the siding, collided with the caboose, or shanty car, at the end of the freight train, and killed the intestate, H. L. Holland. The defendant's evidence tended to show that the intestate was employed by the defendant on Extra 578 as flagman, and it was his duty, as such, not only to set the switch to the main track and lock it, so that trains going south could pass on the main line by the switch in safety, but to stand near the switch and protect it from outside interference, and give the necessary signals, until the expected trains had passed that point. That the said duty he wholly failed to perform, and his negligence in this respect was the immediate and sole cause of the accident.

The usual issues as to negligence, contributory negligence, the last clear chance, and damages were submitted to the jury. At the close of the evidence the court intimated that it would charge the jury "that if they believed the evidence as to the manner in which the intestate came to his death, the presumption of negligence which the law raises from the fact that one is killed by the collision of trains is rebutted, and they should answer the first issue (as to negligence), 'No,'" and "if they believed the evidence relating to the alleged negligence of the plaintiff's intestate, they should answer the second issue (as to contributory negligence), 'Yes.'" The court also instructed the jury to answer the third issue (as to the last clear chance), "No." There is no material difference between the case as now presented and the same case as

It was when before us at a former term. *Holland v. Railway Co.*, 137 N. C. 368, 49 S. E. 359. But if there is any difference at all, it consists only in this, that at the former trial the plaintiff introduced the rules of the defendant company, showing what was the duty of the intestate with reference to the switch, and this further difference that there is in this record clear and undisputed proof that the intestate had full knowledge of rule J, which required him, after his train had taken the siding and cleared the main track, to stand near the switch, and give the signals to approaching trains. It appears, therefore, from all of the testimony that his duty was to lock the switch to the main track, and then to stand by and see that the proper signals were given to trains moving on that track, so as to safeguard his own train. The evidence, if believed, shows that he did not perform this duty, and that in consequence of his failure to obey the rules, of which he had full knowledge, and the instructions of his superior, the conductor, to him when leaving Raleigh, the terrible disaster resulted by which he lost his life.

The very facts we have here, or rather those which the evidence, if believed, tends to establish, are the same upon which this court adjudged, in the former appeal, that the plaintiff could not recover, because his own negligence was the proximate cause of his death, and not the negligence of the defendant. We do not perceive any reason for reversing or modifying that conclusion, and especially should we not do so when the case for defendant is, if anything, stronger than it then appeared. A party who loses in this court cannot review its decision by a second appeal, as the proper and only way is by a petition to rehear. *Kramer v. Railway Co.*, 128 N. C. 269, 38 S. E. 872; *Pretzfelder v. Insurance Co.*, 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; *Wright v. Railway Co.*, 132 N. C. 334, 43 S. E. 845; *Setzer v. Setzer*, 129 N. C. 297, 40 S. E. 62; *Jones v. Railroad Co.*, 131 N. C. 135, 42 S. E. 559; *Green v. Green* (at this term) 55 S. E. 818. There may, perhaps, be an exception to this well-settled rule, but, if so, this case is certainly not within it. In the former appeal we said: "All things considered, the question at last is: Was the situation a safe one, if the intestate had kept the position assigned to him by the defendant at or near the switch, so that he could prevent any interference with it, and guard against any resulting danger? If so, his failure so to act was the proximate cause of his death, as it was the sole efficient cause. The company had provided a perfectly safe method for the management of its train at that point, which, if adopted, would have saved the life of the intestate. As he alone disregarded it, and the engineer on No. 33 was not required to anticipate this negligence, his untimely death is referred by the law to his own fault in leaving his post of duty at a critical moment. If he did not leave the switch open, but it was changed by some

one else after he left his place, or even by any accident, it could have been readjusted to the main track by him if he had been there, and No. 33 would have passed, and not have taken the siding." *Holland v. Railroad*, 137 N. C. 373, 49 S. E. 362. And, again, at page 374 of 137 N. C., at page 362 of 49 S. E.: "Plaintiff's witness, Conductor Simpson, testified that he instructed Holland that morning to change the switch and lock it to the main line when he headed in, and, in his absence, to look out for the safety of the train. There was but one possible thing to do after locking the switch to the main line in order to further protect his train, which was on the siding, and that was to watch the switch, and see that it was not changed by any one else so as to endanger his train. The conductor further stated that he instructed him to look after the switches in his absence. If he had done this, the accident would not have occurred. There was only one inference to be drawn from the evidence, and that was against the plaintiff." We can only add to what is there said, that the intestate was the sentinel appointed by the defendant to watch and guard the switch, and forewarn incoming trains of any danger. He was the one man to whose keeping had been committed the safety of his comrades in the company's service, and of his employer's property, and he was more responsible for it than any one else. He failed in the performance of his duty at the very moment when his obedience to orders and his vigilance were most required to prevent the resulting catastrophe. His negligence was ever present, and the efficient and, indeed, dominant cause of his injury and death, reaching to the effect and therefore proximate to it. To subject the defendant to a recovery in such a case does not seem to be equitable, and would certainly contravene established principles of law. Plaintiff's death was caused not by the defendant's negligence, but by his own disobedience of instructions. *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Hicks v. Mfg. Co.*, 138 N. C. 319, 50 S. E. 703; *Stewart v. Carpet Co.*, 138 N. C. 60, 50 S. E. 562; *Biles v. Railway Co.*, 139 N. C. 532, 52 S. E. 129.

We find no error in the record, and the judgment is affirmed.

No error.

CANNADAY v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina. Dec. 22, 1906.)

1. CONTRACTS — VALIDITY — WHAT LAW GOVERNS.

The validity of a contract is determined by the law of the place where it is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, § 2.]

2. SAME — CONSTRUCTION.

A contract is to be interpreted in accordance with the law of the place where it is made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 11, Contracts, §§ 724-727.]

3. MASTER AND SERVANT—INJURIES TO SERVANT — CONTRACTS RELEASING LIABILITY — WHAT LAW GOVERNS.

An action against a railroad company by an employé to recover damages for personal injuries cannot be sustained in North Carolina, where a contract was entered into in another state whereby the employé agreed, at the time of his employment, that his acceptance of certain benefits from the relief department of the company would operate as a release of all claims against the company, and the employé did, after his injury, receive such benefits; the law of the state where the contract was made being that he would have no cause of action under those circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 137.]

4. SAME.

A contract exempting a railroad company in advance from liability to an employé for negligence is void.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 166, 167.]

Clark, C. J., dissenting.

Appeal from Superior Court, Guilford County; Ferguson, Judge.

Action by James Cannaday against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

This was an action for the recovery of damages for personal injury. The facts material to the decision of the appeal were as follows: The jury found, upon issues submitted to them, that the plaintiff was injured by the negligence of the defendant and that he did not by his own negligence contribute thereto. By way of further defense defendant alleged that prior to his employment plaintiff entered into a contract pursuant to which he became a member of the relief department, an organization formed by the several companies constituting the Atlantic Coast Line Railroad Company, for the purpose of establishing and managing a fund for the payment of definite amounts to the employés contributing thereto, entitling them, when disabled by accident or sickness, or their families in case of death, to certain amounts, the basis of which was fixed in said contracts. The said contract is set out in full, and among other provisions contains the following: "I also agree that, in consideration of the amounts paid and to be paid by said company for the maintenance of said relief department, and of the guaranty by said company of the payment of said benefits, the acceptance by me of benefits for injury shall operate as a release and satisfaction of all claims against said company, and all other companies associated therewith in the administration of their relief departments, for damages arising from or growing out of said injury; and, further, in the event of my death, no part of said death benefit or unpaid disability benefit shall be due or payable unless and until good and sufficient releases shall be delivered to the superintendent of said relief department of all claims against said relief department, as well as against said company and all other companies associated

therewith as aforesaid, arising from or growing out of my death, said releases have been duly executed by all who might legally assert such claims; and, further, if any suit shall be brought against said company, or any other company associated therewith as aforesaid, for damages arising from or growing out of injury or death occurring to me, the benefits otherwise payable and all obligations of said relief department and of said company, created by my membership in said relief fund, shall thereupon be forfeited, without any declaration or other act by said relief department or said company." It was further alleged that after the injuries sustained plaintiff received benefits pursuant to the said contract, evidence of which was set out in the record. Upon this defense the following issues were submitted to and found by the jury: "Was the plaintiff, at the time of his alleged injury, a member of the relief department of the Atlantic Coast Line Railroad Company in South Carolina, and did he agree to be bound by the rules and regulations of said relief department? Answer: Yes. Did the plaintiff, after his injury, and before the bringing of this action, accept and receive benefits from said relief department for said injury? Answer: Yes." It is admitted that the contract of employment was made in South Carolina, and that the contract by which plaintiff became a member of the relief department was also made in said state; that the service into which plaintiff entered was "as engineer to run an engine and train of cars from Florence, in said state, to Augusta, in the state of Georgia"; that the injury for which the action is brought occurred in the state of South Carolina; and that the acceptance of benefits under the provisions of the contract as found by the jury was in said state. There was judgment for plaintiff upon the verdict, and defendant appealed.

Rose & Rose & Son and King & Kimball, for appellant. Z. V. Taylor and E. J. Justice, for appellee.

CONNOR, J. (after stating the case). It is settled that "matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made." *Scudder v. Nat. Union Bank*, 91 U. S. 406, 23 L. Ed. 245. "The interpretation of a contract, and the rights and obligations under it of the parties thereto, are to be determined in accordance with the proper law of the contract. *Prima facie* the proper law of the contract is to be presumed to be the law of the country where it is made. *Dacey, Conf. Law*, 563. *Bowen, L. J., in Jacobs v. Credit Lyonnais*, 12 Q. B. 589, says: "It is generally agreed that the law of the place where the contract is made is *prima facie* that which the parties intended, or ought to be presumed to have adopted, as the footing upon which they dealt, and that such law ought, therefore, to prevail, in the absence of

circumstances indicating a different intention." 9 Cyc. 687. The principle is illustrated in *Bridger v. Asheville, etc., R. R. Co.*, 27 S. C. 456, 3 S. E. 860, 18 Am. St. Rep. 653. The action was for injuries alleged to have been sustained in North Carolina by the negligence of defendant. The defense of contributory negligence being pleaded, the question was whether, as held by the courts of this state, the age of the plaintiff precluded the defendant from relying upon it, and the decision of this question was made to depend upon the decisions of the courts of North Carolina. Simpson, C. J., said: "The injury was inflicted there, and, if the parties had remained in that state and brought action there, they would have been compelled to stand or fall by the law there. And we cannot see, upon principle, how stepping over the line could give the plaintiffs a new and altogether enlarged cause of action—in fact, a cause of action which he did not have before, and, therefore, which he could not have enforced in the tribunals having jurisdiction of the matter at its origin. * * * In such case, the plaintiff having no cause of action in North Carolina, where the injury was inflicted, he could have none here." The principle has been recognized and enforced by this court in *Watson v. Orr*, 14 N. C. 661, *Anderson v. Doak*, 32 N. C. 295, *Williams v. Carr*, 80 N. C. 294, *Hancock v. Telegraph Co.*, 137 N. C. 497, 49 S. E. 952, and *Hall v. Telegraph Co.*, 139 N. C. 369, 52 S. E. 50. The exceptions to the general rule are thus stated by Mr. Lawson, the editor of the excellent and exhaustive article on "Contracts" in 9 Cyc. 674: "The general doctrine that a contract, valid when it is made, is valid also in the courts of any other country or state, when it is sought to be enforced, even though, had it been in the latter country or state, it would be illegal and hence unenforceable, is subject to several exceptions: (1) When the contract in question is contrary to good morals; (2) when the state of the forum, or its citizens, would be injured by the enforcement by its courts of contracts of the kind in question; (3) when the contract violates the positive legislation of the state of the forum—that is, is contrary to its Constitution or statutes; and (4) when the contract violates the public policy of the state of the forum." These exceptions are grounded on the principle that the rule of comity is not a right of any state or country, but is permitted and accepted by all civilized communities from mutual interest and convenience, and from a sense of the inconvenience which would otherwise result, and from moral necessity to do justice in order that justice may be done in return. Note 49; *Gooch v. Faucette*, 122 N. C. 270, 29 S. E. 362, 39 L. R. A. 835.

We are thus brought to a consideration of the question whether the courts of South Carolina have interpreted the contract and passed upon the effect, upon his cause of action, of the election made by the plaintiff

to accept benefits from the relief department by reason of his injuries. This inquiry invites an examination of two questions: First, does the contract, as interpreted by the courts of South Carolina, undertake to release the defendant in advance from all claim or demand for injury sustained by reason of its negligence? Or, second, is it an agreement to elect, in the event of such injury, either to accept the benefits provided by the contract and release the company, or waive the benefit and sue on the cause of action? If the first be the proper interpretation of the contract, the question would arise whether it is not within one of the exceptions to the general rule of comity as stated by Mr. Lawson. If the second is the correct view, no such question can arise. The answer, of course, is dependent, not upon the interpretation which we would put upon it, but what interpretation the courts of South Carolina have put upon the contract. The defendant relies upon the case of *Johnson v. Railroad*, 55 S. C. 152, 32 S. E. 2, 83 S. E. 174, 44 L. R. A. 645. The plaintiff insists that, by reason of the course which that case took in the courts of South Carolina, the final result did not "become the law of the state, but merely of that case." This contention renders it necessary for us to notice the history of the case. The action was brought by the plaintiff, an employé, for the purpose of recovering damages for injuries sustained by the alleged negligence of the defendant. In addition to denial of liability on the alleged cause of action, the defendant by way of special defense set up a contract in all respects as the one before us, alleging the receipt of benefits under it and release from all claim or demand for damages. The defendant demurred orally to the "second affirmative defense," assigning as grounds of demurrer that the contract set out therein "was contrary to law and against public policy, and a release thereunder cannot be pleaded as a defense to an action for damages caused by the defendant's negligence." The demurrer was overruled by Watts, Circuit Judge, who said: "There is no question in my mind that a contract of this kind, whereby a railroad company attempts to relieve itself of any liability on account of negligence, is contrary to public policy, and, when the party enters into the contract beforehand, he would not be estopped from bringing his action for damages against the railroad company. It seems in this case that the plaintiff had entered into that agreement, relieving the railroad company, before he was injured. After he was injured, he was put to his election as to whether he would sue the company, or go ahead and carry out the contract and receive the benefits of that contract. It seems to me that the decision in the case of *Price v. Railroad Co.* (S. C.) 12 S. E. 413, 26 Am. St. Rep. 700, would control in this case, and I think the plaintiff, having elected to receive the benefits under that contract,

is now estopped from bringing his action against the railroad company." The basis of his honor's judgment overruling the demurrer becomes material, because of the subsequent course which the case took. The plaintiff appealed, stating five separate exceptions to the judgment. It is not necessary to set them out here. The Supreme Court of South Carolina consists of a chief justice and three associates. To provide for the contingency arising when, upon appeal, the justices were equally divided in opinion, it is declared by section 12, art. 5, of the Constitution, that the concurrence of three of the justices shall be necessary to a reversal of the judgment below. Provision is made for the decision in such contingency, when a constitutional question is involved, by which the circuit judges are called to the assistance of the justices in the decision of such question. In *Johnson's Case*, supra, the justices were equally divided; Mr. Justice Pope, writing an opinion concurred in by Mr. Justice Gary, for reversal of the judgment, and Chief Justice McIver, writing an opinion referred to as "dissenting," concurred in by Mr. Justice Jones, for affirming. In this condition of the case it is held by a unanimous court in *City of Florence v. Berry*, 62 S. C. 466, 40 S. E. 871, that, when "a judgment is affirmed by a divided court, such a judgment must be regarded as a judgment of the Supreme Court, and as such is binding authority in all subsequent cases, until it is overruled by competent authority." In view of the rule of comity, therefore, the interpretation and validity of the contract must be treated by us as settled by the courts of South Carolina. The principle announced by *Simpson, C. J.*, in *Bridger v. Railroad*, supra, applies with peculiar force. The plaintiff had no cause of action in South Carolina, and therefore has none here. Merely crossing the state line cannot enlarge or give a cause of action which he did not have in the state whence he came. Every fact and circumstance affecting the cause of action occurred in South Carolina.

This is conclusive of the appeal, unless, as contended by the plaintiff's counsel, the form of the pleading presents the question whether the defendant is seeking to use, not as a shield, but as a weapon, a contract which violates the settled policy of this state, or is prohibited by our employe's liability act. *Revisal 1905, § 2694*. The plaintiff's view is that he has established by the verdict of the jury a cause of action for an injury sustained by reason of the defendant's negligence, upon which he would recover, but for the affirmative defense relied on by the defendant, which, being executory, this court is asked to specifically enforce; that in respect to the contract the defendant is the actor, demanding affirmative relief. We do not concur in this view. Whatever may have been the character of the contract prior to the execution of the release by the plaintiff, by that act the cause of action was released for all

legal and practical purposes, and extinguished. In the courts of South Carolina the defendant pleads release by way of affirmative defense, and not as a counterclaim or cross-action. It is as if it had pleaded payment or accord and satisfaction, by which it avers that the plaintiff had at the time of bringing the suit no cause of action. This was the status of the matter in South Carolina, and it is in no respect different here. Did the court in South Carolina enforce the original contract, holding it not to be against public policy, or did it so interpret it that no release of a cause of action for negligence was effected by the contract, but that the release executed after the injury, in consideration of benefits received, operated to extinguish the cause of action? While there is apparently some divergence of view between the learned justices who wrote opinions in *Johnson's Case*, the prevailing opinion by the then Chief Justice, although called in the reports of the case "dissenting," clearly indicates that the decision, following the language used by Judge Watts, is put upon the interpretation of the contract. The Chief Justice says: "In the outset I desire to say what would seem to be needless, but for the fact that it appears to have been thought necessary to expend much time and labor upon the point, that I do not suppose any one doubts that a contract, whereby a railroad corporation or any other common carrier undertakes to secure immunity from liability for damages, resulting from the negligence of the carrier or any of its servants or agents, is contrary to public policy and therefore void. But the question here is whether the contract or arrangement set up in the affirmative defense is a contract for immunity from damages. I do not think it can be so regarded; for, on the contrary, the very terms of the contract necessarily assumed that the defendant is liable, and the whole scope and effect of the contract is to fix the measure of such liability and the manner in which such liability shall be satisfied." The learned Chief Justice proceeds to quote from a case decided by the Supreme Court of Pennsylvania: "He is not agreeing to exempt the company from liability for negligence, but accepting compensation for an injury already caused thereby." *Johnson v. Railroad*, 163 Pa. 127, 29 Atl. 854. He then proceeds to analyze the terms of the contract, setting forth clearly and forcibly his interpretation of it. We have no doubt that the decision is based upon two propositions: (1) That a contract made in advance to exempt a railroad company from liability for its negligence is contrary to public policy and void. It is so independent of the constitutional provision in South Carolina or our statute, which is in almost the same terms. *Harrill v. Railroad*, 135 N. C. 601, 47 S. E. 730. (2) That the contract as interpreted by the court does not have that effect. The case was heard before the special tribunal

provided by the Constitution of South Carolina upon the suggestion that a constitutional question was involved. By a per curiam opinion the judgment was affirmed, for the reason that no constitutional question was presented.

This view relieves us from considering the other branch of the controversy. It is conceded that the courts which have passed upon this form of contract have almost uniformly sustained it, upon the ground stated by Judge McIver. In deciding this appeal we do not express any opinion upon the question, except to say that we fully concur in the opinion that a contract to exempt a railroad company from liability for negligence is void. We have uniformly and frequently so held. The question as to the interpretation of this contract, when, if ever, presented to this court in a manner making it our duty to pass upon it, will be approached as an open question. We are informed that the question has been removed from the sphere of litigation by legislation in South Carolina. By the act of Congress the contract, or acceptance of benefits under it, is declared not to be a bar to an action for damages. It may not be improper to say that the contract does not commend itself to our judgment. In this case it appears that the plaintiff paid into the relief department \$72 and received by way of benefits \$68. We must, in obedience to the well-settled law of comity, declare that the plaintiff, having no cause of action in South Carolina, has none in this forum. The judgment must be reversed, and judgment upon the verdict be entered for the defendant.

Reversed.

CLARK, C. J. (dissenting). It is established by the verdict in this case that the defendant was guilty of negligence in allowing a collision of two trains in South Carolina, resulting in injuries to plaintiff, causing damages to him to the amount of \$1,800, and that he was not guilty of contributory negligence. There is no exception calling in question the correctness of the trial in these respects. The defendant relies upon a discharge or release by reason of benefits received from the "Atlantic Coast Line Relief Department." When the action is upon a contract made or a tort committed in another state, the laws of that state must be taken into consideration in passing upon the liability of the defendant. But when liability is established without question, as in this case, the matter of a discharge, whether by payment, release, or statute of limitations, is governed by the *lex fori*—the law of the place where the case is tried and where such defense is to be allowed or disallowed. If a contract made in North Carolina, on which the statute of limitations is three years, is sued on in New York, where the limitation upon that class of contracts is six years, the defense is governed by the latter limitation; and vice ver-

sa, when a suit is brought in this state on a cause of action accruing in New York. In the same way, if the plea of payment or release is one which cannot be sustained in good conscience, or is against the public policy of the state where the case is tried, the courts thereof will not hold it a valid defense to defeat a valid liability which the defendant has incurred elsewhere. The release here set up is by virtue of a transaction by which the plaintiff, who has paid in \$72, has received back \$68, and the defendant is insisting that that is a release of a liability for \$1,800 damages, legally ascertained, which the plaintiff has sustained by the wrongful act of the defendant. Such a defense is not good in *foro conscientia*, and in that matter the courts here are to be governed by their own rules of equity. There has been no consideration for the release, and, such being the case, the judge properly entered judgment in favor of the plaintiff upon the verdict.

It is strenuously argued by the able and learned counsel for the plaintiff that the "Atlantic Coast Line Relief Department" is an ingeniously devised plan to cause the employes of that company, at their own expense and by means of deductions from their wages, to insure the railroad company from liability for injuries sustained in its service, notwithstanding the provisions of the fellow servant act, now Revised 1905, § 2646. It is not necessary to go into that matter, as it is apparent that there was no consideration for the release here set up. But the act in question affects a most meritorious class of our citizens, engaged in hazardous quasi public service. They are deeply and vitally interested that judicial construction shall in no wise impair the just protection afforded them by that section, and especially by the last paragraph thereof: "Any contract or agreement, expressed or implied, made by any employe of such company to waive the benefit of this section, shall be null and void."

CITY OF HICKORY v. SOUTHERN RY.
(Supreme Court of North Carolina. Dec. 22, 1906.)

NUISANCE—INJUNCTION.

Though, in a suit to restrain a railroad from erecting a freight warehouse in a city on the ground that it would create a public nuisance by obstructing the view along the tracks and thereby make it dangerous for persons to cross the tracks, the jury found that the structure would constitute a public nuisance, the railroad should be permitted to avoid a perpetual injunction by erecting suitable gates and providing gatemen as usual and customary at dangerous crossings.

Clark, C. J., dissenting.

On rehearing.

For original opinion, see 53 S. E. 955. Decree modified.

Self & Whitener and T. M. Hufham, for appellants. W. B. Rodman, for appellees.

BROWN, J. This case is reported in 141 N. C. at page 716, 53 S. E. 955. Upon careful consideration of the petition to rehear the same, we are of opinion that the decree of the superior court should be modified. The action was brought to enjoin the defendant from erecting an addition of 70 feet to its freight warehouse on its property in the city of Hickory upon the ground, as indicated by the pleadings and plaintiff's evidence, that it would create a public nuisance by obstructing the view along the railroad tracks and thereby make it dangerous for persons to cross defendant's tracks at Marshal street. The following is the material issue submitted to the jury: "Will the enlargement of defendant's present freight depot by an extension on the Eastern side thereof constitute a public nuisance? Answer: Yes." When the fact of nuisance is established by the verdict of a jury, the ordinary judgment is that the defendant be required to abate it. It is not always that the "far-reaching arm of the chancellor," the writ of injunction, will be extended even then. The general rule is that an injunction will be denied in advance of the creation of an alleged nuisance when the act complained of may or may not become a nuisance according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual merely. That is the universal law in all the courts in this country. See 21 Am. & Eng. Encyc. Law (2d. Ed.) 705, where the cases are collected from all the states. Mr. High also states the law to be without a discordant note, that, when the injury complained of is not an existing nuisance per se, but may or may not become so according to circumstances, and when it is uncertain, "or productive of only possible injury," equity will not interfere. In support of that he cites 30-odd cases, two being from this state. All the decisions in this court support the rule referred to. *Simpson v. Justice*, 43 N. C. 115; *Barnes v. Calhoun*, 37 N. C. 199; *Wilder v. Strickland*, 55 N. C. 386; *Ellison v. Commissioners*, 58 N. C. 57, 75 Am. Dec. 430; *Walton v. Mills*, 86 N. C. 280; *Dorsey v. Allen*, 85 N. C. 353, 39 Am. Rep. 704. In the latter case Chief Justice Smith says: "While it is true that a business lawful in itself may become so obnoxious to neighboring dwellings as to render their enjoyment uncomfortable, whether by smoke, noxious and offensive odors, noise, or otherwise, and justify the protecting arm of the law, yet there must be the ascertained and not probable effects apprehended. When the anticipated injury is contingent and possible only, or the public benefit preponderates over the private inconvenience, the court will refrain from interfering." In *Barnes v. Calhoun*, supra, an action to restrain the erection of a mill, *Gaston, J.*, says: "But it [a court of equity] will only act in a case of necessity when the act sought to be prevented is not merely probable but undoubted, and it will be particularly cautious thus to in-

terfere when the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience." Mr. High, in his work on Injunctions, also says: "When an injunction is asked to restrain the construction of works of such a nature that it is impossible for the court to know until they are completed and in operation whether they will or will not constitute a nuisance, the writ will be refused in the first instance." Sections 488 and 489, note 1. It seems to us that Mr. Elliott has given us the true and just rule which should guide us in the disposition of this case, fair to plaintiff and defendant alike. He says: "Where a street is laid out across the right of way of a railway company at a point where the company has only one track, no question can justly arise as to the impairment of the company's franchise by such taking, for, under such circumstances, both the use as a highway and the use as a railroad can stand together, and do not interfere with each other." Elliott on Railroads, § 1104. The extension of defendant's warehouse and the safe use of Marshall street can easily coexist. The defendant can readily construct gates across the street for the protection of persons crossing the tracks from injury by its trains. There is no evidence that the defendant will not do this, and it can be compelled to do so by this court by order in this case. This court can direct a mandatory injunction compelling defendant to establish such gates and provide such gate-men as are usual at much frequented crossings, or it can direct that the defendant be enjoined from building the extension until it does erect such gates. It must be admitted that this will afford the most perfect relief and that conditions would be much safer than they now are or ever have been since the street was opened. We must take it as true that the record discloses the only purpose for which the suit is brought, viz., to lessen the danger to passers and traffic along Marshall street. The modification of the decree affords the most perfect safety possible. It is a method of safety universal in this country. We have a direct authority in this state for such an order. *Hyatt v. Myers*, 71 N. C. 273. In that case the nuisance complained of was a steammill across the street from plaintiff's residence. The fact of an existing nuisance was established by a jury. The court, notwithstanding the verdict, declined to enjoin the defendant, but directed him, of its own motion, to raise his smokestack 20 feet and to attach spark arresters thereto, or otherwise to abate the nuisance. So, if defendant's freight station was already extended, and an existing nuisance and danger as alleged, and the fact so found, the defendant should be allowed to abate the nuisance by establishing protecting gates. It cannot abate it now because it does not exist. In *Hyatt v. Myers*, 73 N. C. 233, Chief Justice Pearson states the law

to be that, even after a verdict establishing a nuisance, equity will not necessarily enjoin. The application of that remedy will always depend upon circumstances, the chief of which is, "can the trouble be otherwise remedied?" This case is cited and affirmed in *Brown v. Railroad*, 83 N. C. 130, by Judge Dillard, who holds, in substance, that equity will not enjoin, even after verdict establishing it, unless the nuisance is irreparable, or one "which cannot be otherwise relieved against." To the same effect is *Story, Eq.*, § 925; *Adams, Eq.*, 211; 8 *Dan'l. Chancery* 1587. In *Simpson v. Justice*, 48 N. C. 120, Chief Justice Pearson says that the jurisdiction of courts of equity to interfere by injunction in cases of this kind should be exercised "sparingly and with great caution." "There is," says that eminent judge, "an obvious difference between a thing which is a nuisance itself, and one which may or may not be a nuisance according to the manner in which it is used."

We therefore think it proper to direct a modification of the decree of the superior court so as to permit the defendant to remedy and guard against any possible danger to persons crossing its tracks at Marshall street by erecting suitable gates or barriers on its right of way across said street and to provide a gateman, as is usual and customary at all dangerous and much frequented railroad crossings in cities and towns. Said structure shall be such as is reasonably sufficient to afford protection to persons using said crossing from injury by passing trains and to be maintained by the defendant. Upon presenting its petition to the superior court and satisfying the judge thereof that defendant has fully complied with the decree as modified and amended, the perpetual injunction enjoining defendant from extending and enlarging its freight depot shall be vacated.

As to the other contention of defendant relating to the title to certain land, we will add nothing to what is said in the opinion at the last term. We generally affirm the judgment subject to the modification made. Let the costs of this rehearing be equally divided between plaintiffs and defendant.

Former decree modified.

OLARK, C. J. (dissenting). This is a petition to rehear this case which was finally decided 141 N. C. 716, 53 S. E. 956, by a unanimous court. It had twice before been before the court, 137 N. C. 186, 49 S. E. 202, and 138 N. C. 311, 50 S. E. 683. When the depot was put up in Hickory in 1859, nearly half a century ago, it was located in the woods. Now it is a growing, thriving town. The people there have not asked for the removal of the passenger station, nor, in this action, even that the freight depot now there should be removed, but they first asked the defendant for additional freight facilities. This not being granted they applied to the Corporation Commission, who three years ago in

December, 1903, ordered additional freight warehouse room. Instead of putting this additional freight warehouse out in the edge of town, as is usual, where the many tracks and shifting requirements could be provided for, the defendant insisted on enlarging the freight warehouse in the center of the growing town, with the evident result of greater interference with the transit of people and traffic from one side of the town to the other by long strings of box cars and the necessary shifting and moving thereof and the imminent danger to the lives and limbs of the citizens in traveling along their own streets, going across the tracks. Among instances of such results where the railroad has persisted in keeping its freight tracks within the populous part of the town is *Wilson v. Railroad*, 141 N. C. 346, 55 S. E. 257. The passenger station is not so objectionable in the heart of the town, for those trains are very short compared with the length of freight trains, make short stops, and pay some attention to a schedule, and do not cut out and leave cars, and transfer them (for Hickory is a junction point with another railroad) as is necessary with freight trains which come at any hour, day or night, remain an unconscionable time, and are moved back and forward to the greatest danger of the lives and limbs of citizens, passing from one side of the town to the other. The defendant's counsel have argued this case as if the addition of 70 feet to the warehouse with the additional obstruction to the view, of those passing across the track, was the whole of the evil sought to be prevented. The Corporation Commission having three years ago ordered additional facilities (an order which the defendant must some day comply with in spite of all the delays incident to this protracted proceeding), if these additional facilities are given by making this addition of 70 feet to the freight station now in the heart of the town, the result will be a permanent and every year greater increase in the number of freight trains, standing for unlimited time, upon the tracks and side tracks in the very center and heart of the town, moving and shifting, cutting out and putting in freight cars, severing one half of the town from intercourse with the other, except at imminent and deadly peril of life and limb.

The affidavit for the injunction in this case alleges the above facts, and that, if the proposed addition to the warehouse is not enjoined, the persons using said streets crossing the tracks "will have no means of ascertaining when they can cross the tracks of the defendant over said streets and will use the same in constant menace of loss of both life and property, and the situation so created will become a veritable death trap and that such building and platform will constitute a public nuisance of the worst kind" and, if permitted to be erected and maintained, will expose the plaintiff to numerous repeated and expensive actions for damages for injuries

to persons using said streets. The complaint reiterates this allegation and avers that "the defendant operates a large number of local and through freight trains in said city which trains are run at all hours of the day and night, that said trains are almost constantly and for long periods of time shifting and running backward and forward upon the tracks of defendant adjacent to said freight depot, and that persons about said passenger depot or engaged in loading or unloading freight are exposed to constant inconvenience and great peril by reason of the danger of their being run down by said trains to the injury of themselves and the destruction of their property, and the space between the defendant's tracks and its freight depot is so narrow, confined, and inadequate that it is utterly impossible for shippers or receivers of freight to gain access to said freight depot without endangering themselves and their property" and that the above-stated frequent shifting and moving of freight trains (which will not only continue but be increased if the additional freight facilities ordered by the Corporation Commission are given by adding to the present freight warehouse in the heart of the city) are a constant menace to the lives of those going to the passenger depot or crossing the track, the long line of freight cars besides the additional length of the warehouse, cutting off the view of approaching trains. There was ample evidence to support the above state of facts, which would be almost a matter of common knowledge, upon proof of the location and attending circumstances, for the streets and railroad tracks cross upon the same grade. The plaintiff offered proof of many tragedies that have occurred at that spot by reason of above matters, but was stopped by objection from the defendant.

The judge charged the jury: "A nuisance like the one complained of is the maintenance of a condition which seriously interferes with and interrupts the use of a street or the streets of a town, which are in general use and necessary for the convenience of the citizens and for the business in respect of travel or course of business either by obstructing the streets for an unreasonable proportion of the time, or by having it so that travelers along said street or streets, which cross the railroad at public crossings, cannot, by the exercise of reasonable ordinary care, with safety, pass over such crossings. But, if the condition merely gives inconvenience to the public, or causes some delay in their movement, which is incident to the operation of the railroad, this does not constitute a nuisance. If the jury shall find that the building the proposed extension on the east end of the freight warehouse of 70 feet will so change the condition in respect to Marshall street crossing that it will not be reasonably safe for persons exercising reasonable care, that will be a nuisance, and the jury should answer the fourth issue 'Yes.'" The jury so found. The de-

fendant cannot complain of this charge. If the proposed addition to the warehouse at that spot will increase the danger to the citizens, by the retention and increase of the freight trains shifting or halted on the track as well as by the added obstruction of the view, the court of equity must restrain the commission of the threatened act. Railroads are chartered primarily for the public benefit and convenience. The emoluments and enrichment of their owners are secondary in law, though of course the primary object with those who promote and operate these quasi public corporations. It is now well settled that their rates, and management are matters of public investigation, regulation, and control. They must exercise the public franchises granted them to further and advance the public welfare. At last term, 141 N. C. 721, 53 S. E. 955, we intimated the opinion that when the defendant erected the additional freight facilities required by the order of the Corporation Commission at some more suitable and less dangerous locality, it should remove all their freight business to that point. "Legislative authority to a railroad company to bring its tracks within municipal limits does not confer authority to maintain a nuisance." *Railroad v. Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 789, which has been quoted and followed; *Thomason v. Railroad*, 141 N. C. 300, 53 S. E. 955. The right to operate its trains through Hickory does not give it the right to unnecessarily imperil the lives of citizens of the town by shifting and moving its freight trains at a frequented center when this can be done without loss at a more suitable point. "*Sic utere tuo ut alienas non laedas.*"

The erection of gates is not suggested by either party and will be only a less public nuisance than the present situation. They will obstruct the use of the streets more and more as population increases, and injuries will occur especially at night, for they will not be always carefully guarded.

As to the other point presented in the rehearing, it is immaterial to the decision of this case and the injunction which is the object of it whether the defendant owns 100 feet on each side of the track or 400 feet width at this point. The proposed extension of the warehouse is up and down the track, and cannot be affected by that question in the least. If the defendant owned 400 feet, it could not use it for other purposes than as at present. While adhering to the correctness of the result reached on that point in the decision rendered more than two years ago, 137 N. C. 203, 49 S. E. 202, and twice reiterated since, it may be well to recall that the defendant itself took the same view, and, as stated 137 N. C. at p. 203, 49 S. E. 202 the record shows that "the defendant in open court agreed that it did not claim any part of the land described in the deed and plats, except the main track and 100 feet on each side from the center of the track, and that

it stood ready to have it so decreed by order of the court." In so doing, the defendant only agreed to what was its valid claim.

SUTTON v. DAVIS.

(Supreme Court of North Carolina. Dec. 22, 1906.)

1. VENDOR AND PURCHASER—DEFECTIVE TITLE—LOST DEED.

A deed in the line of a vendor's title, which had been executed by court commissioners appointed in judicial proceedings, but which had been lost or mislaid, did not constitute a defect in the vendor's title.

2. SAME—DESTRUCTION OF PROPERTY—FIRE—LOSS.

Plaintiff sold certain property to which he had a complete title to defendant, the deed to be delivered to defendant's attorneys in escrow, to be delivered to defendant on payment of the latter's note for the price. The deed was delivered in escrow and the note executed as agreed. Defendant took possession, made alterations, and procured insurance on the property, when the building was destroyed by fire, before the note was paid or the deed delivered. Held, that defendant was not entitled to a reduction of the value of the building from the amount due on the note, while still insisting on a delivery of the deed.

Appeal from Superior Court, Union County; Moore, Judge.

Action by F. M. Sutton against T. L. Davis. From a judgment in favor of plaintiff for less than the relief demanded, he appeals. Modified.

Plaintiff claimed and testified: That in June, 1904, he sold to defendant a house and lot in Waxhaw, N. C., for \$500, and defendant executed and delivered to plaintiff his sealed note for the purchase price, as follows: "\$500.00. Waxhaw, N. C., July 27, 1904. On or before January 1, 1905, I promise to pay to the order of F. M. Sutton the sum of five hundred dollars, with interest at 6 per cent. from date. This note given for purchase money for town lot and storehouse in Waxhaw, N. C. Witness my hand and seal. D. S. Davis. [Seal.]" That plaintiff had executed a deed for said lot to defendant under circumstances hereinafter set forth. That the sale was for cash, but, on defendant's request, plaintiff consented that the money should be payable on January 1st, as indicated. That, when plaintiff made the offer to defendant, the defendant accepted same by letter as follows: "Waxhaw, N. C., July 13, 1904. Mr. F. M. Sutton, Monroe, N. C.—Dear Sir: In answer to your letter of July 12th, I will accept your offer and take the house and lot for \$500, though it is a big price. Let me know when you will be ready to make the deed so I will be ready to pay for same. Make the deed to D. S. Davis. If agreeable to you, I would prefer giving you my note for the amount until January 1st, and securing it by note we have at Savings, Loan and Trust Company at Monroe for \$2,750.00, as the note will be

due then. Of course, your note would draw interest from date, though either way will suit me. Just suit your convenience and let me know what day you will make the deed. If you cannot come out here, you can have the paper fixed up in Monroe and turn them over to Messrs. Redwine & Stack. Transfer the insurance over to them and you can let me know whether you will want the money or my note signed by myself and brother, D. S. Davis. Please send me an order to Broom & Garrison for the keys and give me a few days' notice if you want the money down. Your early reply will oblige me, as the improvements I will want will cost about \$450.00, and I want to start at it right away. There is more to do than I first thought. Yours truly, T. L. Davis." That pursuant to the directions contained in this letter plaintiff executed and delivered a deed for the property to Redwine & Stack, and told Mr. Redwine to hold the deed till the money was paid. If they said the title was all right, defendant was to give plaintiff his note, which he did soon thereafter. That no one had ever informed witness that there was any deed missing in the line of his title till the fire occurred. Defendant answered, admitting the execution of the note in purchase of the lot, set up as a defense that as a part consideration of the trade, and as an inducement thereto, plaintiff represented that he had an unexpired fire policy on the property for \$300, which would afford insurance to that amount till January 1st, when the money was to become due, and plaintiff was to hold this as a collateral; and in case of loss by fire the amount realized from same was to go as a credit on the note. The answer claimed this \$300 as a credit, and offered to pay the \$200 over and above such amount. Defendant stated here that balance of contract was in letters, and admitted that the letter above set out was written by him for himself, and that he signed the name of T. L. Davis to it, and that it was understood between plaintiff and defendant that the deed was to be delivered whenever plaintiff could make defendant a good title, and defendant was to pay plaintiff then, and Redwine & Stack were to pass on the title. The defect urged by defendant against the title was as follows: That there was one missing deed which had been executed and delivered to C. Brown & Sons, under whom plaintiff claimed, by R. B. Redwine (of Redwine & Stack) and T. J. Jerome, as commissioners, who had made sale of the property under a decree of the court. The sale had been confirmed, title ordered, and deed executed. That same having been lost or mislaid, the commissioners, Jerome and Redwine, executed a substitute, which plaintiff had when suit was commenced; but this second deed had not been made at the time the fire occurred. Plaintiff denied that he had made any statements about any insurance policy.

It was further shown that soon after the trade defendant took possession of the property, and had ever since exercised ownership and control over it; that he had made an addition to the building, had same insured, and collected \$500 insurance thereon when it was destroyed by fire in November, 1904; the policy being on the entire building, covering the original building and the addition.

Issues were submitted and responded to by the jury as follows: "(1) Was the deed, dated July 28d, delivered to Redwine & Stack, attorneys for the defendant, by the plaintiff, to be held as an escrow and delivered to defendant upon the payment of the purchase price, \$500? Answer: Yes. (2) Was the building upon the lot described in the complaint destroyed by fire on the 25th day of November, 1904? Answer: Yes. (3) What was the value of the building on said lot on the 27th day of July, 1904? Answer: \$400. (4) What was the value of said lot without said building? Answer: \$100. (5) Was the plaintiff at the commencement of this action able to convey said lot in fee simple? Answer: Yes. (6) Did the plaintiff represent to the defendant that the insurance policy would not expire before the 1st day of January, 1905, as alleged in the answer? Answer: No. (7) Did the plaintiff represent to the defendant that he, the plaintiff, would hold the unexpired insurance policy for the benefit of the defendant, as alleged in the answer? Answer: No. (8) Did the plaintiff represent to the defendant that, if the house should be destroyed by fire before the maturity of the note, the amount of said policy, \$300, would be credited on the note sued on, and the defendant should be liable only for the balance of the note, as alleged in the answer? Answer: No. (9) Were the plaintiff's representations as to the insurance policy inducements to give the note and material parts of the consideration of the note sued on, as alleged in the answer? Answer: No. (10) Was the fact that there was a storehouse on said lot a material inducement and a material part of the consideration of the note sued on, as alleged in the answer? Answer: Yes."

Plaintiff moved for new trial for errors, etc., which was refused, and plaintiff excepted. Plaintiff then moved for judgment on the verdict for the amount of the note and interest. Refused, and plaintiff excepted. On motion of defendant, there was judgment on the verdict for \$100 and interest thereon from July 27th, date of note, and also interest on \$400 to time of fire. Plaintiff excepted and appealed.

Adams, Jerome & Armfield and F. F. Griffin, for appellant. A. M. Stack, for appellee.

HOKE, J. (after stating the case). The house, a substantial part of the subject-mat-

ter, having been destroyed by fire during the continuance of the contract, the plaintiff seeks to recover the full contract price; and the defendant, maintaining his right to a conveyance of the lot, seeks to establish a credit in his title to the extent of the loss.

It may be well to note that defendant here is not asking to be relieved of all contract obligation concerning the property, as in the case of *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65, cited and relied on by defendant. But on the facts established he asks judgment that credit on his note be allowed for the loss; and, on payment of the same after such credit, that a good and proper deed be delivered for the lot "on which the destroyed building stood." His defense, then, will rest on the theory described by Pomeroy as "partial specific performance with compensation"; and the general principle is stated by that author in his work on Contracts, at section 484, as follows: "When the vendor's title proves to be defective in some particulars, or his estate is different from that which he agreed to convey, or is subject to incumbrances or outstanding rights in third persons, or the subject-matter—generally the land—is deficient in quantity, quality, or value, it is plain that the contract cannot be specifically performed, according to its exact terms, at the suit of either party. In such a case there are only three possible alternatives for a court of equity to pursue—either to refuse its remedy entirely; or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give and to pay the full price as agreed; or to decree a conveyance of the vendor's actual interest, and allow to the vendee a pecuniary compensation or abatement from the price, proportioned to the amount and value of the defect in title or deficiency in the subject-matter. In determining which of these alternatives to adopt, it is evident that, under all ordinary circumstances, the second one would be extremely unjust and inequitable, and yet it is occasionally resorted to when the vendee is not in a situation which entitles him to favorable consideration. The first alternative might often contravene the wishes and interests of both the parties, and cannot therefore be taken as the general, or at least universal, rule. Still, if the deficiency or defect is large and material, and the purchaser is unwilling to accept a partial performance, this alternative must be adopted. The third is based upon equitable principles. It endeavors to preserve the rights of both the parties, and is therefore constantly resorted to and applied by courts of equity in aid of a vendee, and sometimes, although under more and greater restrictions, in aid of the vendor. There are circumstances, however, under which even a vendee is not allowed to avail himself of its doctrine." The principle here stated has been usually applied to cases where the defects urged as a ground for compensation existed when the contract was made:

but, when the circumstances required, it has also been extended to cases in which the defects arose afterwards.

This was so held in a case decided by the Supreme Court of Georgia. *Phinixy v. Guernsey*, 111 Ga. 343, 36 S. E. 793, 50 L. R. A. 680, 78 Am. St. Rep. 207. In that well-considered opinion Cobb, J., for the court, said: "The text-books and cases cited show that the doctrine of specific performance with compensation for defects, when the vendor cannot convey exactly what his contract calls for, is thoroughly established, and it is in rare cases where the court will refuse such relief at the instance of the vendee. It is true that in nearly, if not, all of the cases the inability on the part of the vendor to convey what the contract called for arose from some fact which was in existence at the time the contract of sale was made, such as defects in the title to a part of the premises, deficiency in quantity or quality or value of the property which was the subject-matter of the contract, and the like. There does not seem, however, to be any good reason why the principle should not be applicable where the inability of the vendor to convey a part of that which his contract stipulated for arose, subsequently to the making of the contract, out of some transaction in which the vendee was not involved; and the fact that the vendor was himself without fault would not seem to be an obstacle which would prevent the application of the rule. Requiring a vendor to pay damages to his vendee for a failure to convey property which, subsequently to the execution of the contract of sale, was destroyed by fire, is no greater hardship than requiring a vendor to pay damages on account of his having ignorantly, though honestly, and after the exercise of all possible diligence, bargained away something which he did not own, but which he believed was his own. That he would be required to pay damages in the latter case no one will doubt; that he should be in the former case ought not, it would seem, to be questioned upon principle." While this principle is well established, its application is not always permitted as a matter of absolute right, but, like the general doctrine of specific performance itself, of which this is a part, its application rests in the sound legal discretion of the court. As suggested in the extract from Pomeroy, "there are circumstances under which even a vendee is not allowed to avail himself of its doctrine." And, in section 844, this author further says: "In general the purchaser is entitled to compensation for a deficiency, except where the language of the agreement cuts off the claim; but this rule is sometimes, from the circumstances of the case, departed from, and the vendee left to the alternative of abandoning the contract entirely or of having specific performance without abatement of the price." The court is clearly of opinion that the present case comes within the exception here suggested, and that on the facts established by

the verdict, taken in connection with the admissions of the parties in the pleadings and testimony, the plaintiff is entitled to judgment for the amount of the note and interest, and without the reduction claimed by defendant. These facts disclose that the plaintiff is without fault or delay in the matter, having done all that he had agreed to do. He had executed and delivered the deed to Messrs. Redwine and Stack, the parties designated, to be delivered to defendant when he paid the purchase price. He had the title at the date of the contract. He had it when the suit commenced, and has it now, and is ready and able to convey the lot to defendant when the purchase price is paid.

Under the special facts and circumstances of this case the suggested defect is not deserving of serious consideration. A deed, in the line of plaintiff's title, which had been executed by court commissioners appointed in judicial proceedings, had been lost or mislaid. There is no doubt as to the fact that these judicial proceedings were in all respects regular. The sale had been confirmed and title ordered and made pursuant to the order. The commissioners were Messrs. Redwine and Jerome; Mr. Redwine being the attorney with whom the deed of plaintiff to defendant and title papers were left. There was nothing to be done except for Mr. Redwine to call in his associate in the matter, fill out a blank deed and sign same, and the alleged defect would have disappeared. As heretofore stated, such a defect, under the circumstances, was not of the substance, and should not be allowed to have substantial effect on the rights of the parties, either plaintiff or defendant. The plaintiff, then, has been without fault in respect to the title or delivery of the deed; and immediately after the contract the defendant entered into possession and control of the property as owner. He repaired and added to the building; has occupied and used it, and placed an insurance policy on it; and, when the same was destroyed, he collected the amount of the policy, which he retains. He is here now maintaining that he has a right to the lot under the contract, and prior to the time this contract was made there had never been anything required to secure a perfect title but the payment of the purchase money, payable by himself. It is undoubtedly the general rule "that when property is destroyed by fire, the loss will fall on him who is the owner at the time."

It is also a well-recognized principle that, where there is a contract for the sale and conveyance of realty absolute and binding on the parties, equity, for most purposes, will consider the contract as specifically executed. The vendee will become the equitable owner of the lands, and the vendor of the purchase money. After the contract the vendor is the trustee of the legal estate for the vendee. *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Brewer v. Herbert*, 30 Md. 801, 36 Am. Dec. 532; *Wetzler v. Duffy*, 78 Wis. 170, 47 N. W. 134,

12 L. R. A. 178; *White & Tudor, Leading Cases in Equity*, vol. 2, part 2, pp. 1108, 1109; *Bispham's Equity* (6th Ed.) § 364; *Pomeroy's Eq. & Jurisprudence*, § 1406, note 2. Pursuing the principle in *White & Tudor's Leading Cases*, supra, it is said: "It was declared in like manner by Duncan, J., in *Richter v. Sellin* [8 Serg. & R. (Pa.) 440], that 'equity looks upon things agreed to be done as actually performed.' Consequently, when a contract is made for the sale of land, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee for the vendor for the purchase money. So much is the vendee considered in contemplation of equity, as actually seised of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interval, because by the contract he is the owner of the premises, to every intent and purpose, in equity. It is accordingly well settled that if the premises are consumed by fire subsequently to the sale, or are swept away by a flood, or if they are injured by a tort-feasor, the loss will fall on the purchaser, who can neither make the deterioration a ground for refusing to accept a conveyance, nor rely on it as a defense to an action brought for the purchase money." The principle does not in strictness apply here because the contract, while binding, was not absolute and complete. *Lombard v. Congregation*, 64 Ill. 477. The deed, being in escrow, to be delivered on condition, no title passed till condition was performed. *Craddock v. Barnes*, at this term, 54 S. E. 1003. But the defendant, having taken possession of the property as owner, and having exercised and enjoyed all the authority and benefits of absolute ownership, the case is very nearly within the principle; and on the entire facts and circumstances heretofore stated we hold that the doctrine of compensation does not obtain here, and that plaintiff should have judgment for the amount of the note and interest without reduction. Appellant will pay costs of appeal.

Judgment modified.

HAIRSTON v. UNITED STATES LEATHER CO. et al.

(Supreme Court of North Carolina. Dec. 22, 1903.)

1. MASTER AND SERVANT — DEFECTIVE APPLIANCES—INJURY TO SERVANT.

An owner of an industrial plant used in connection therewith a railroad about 14 miles in length, on which it operated with its own crew engines and cars belonging to it, and railroad cars of others. The track was situated on a level bottom in and around the plant, and there would have been no difficulty in procuring automatic coupling devices. *Held*, that the failure to equip the cars with automatic couplers was negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 195, 215.]

2. SAME—DEFENSES—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Where the proximate cause of an injury to an employé was the employer's negligent failure to equip its cars with automatic couplers, the defenses of assumption of risk and contributory negligence were not availing unless the conduct of the employé amounted to recklessness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 554-556.]

3. SAME—NEGLECT OF FELLOW SERVANTS—DEFENSE—AVAILABILITY—STATUTES.

Fellow Servant Act (Revised 1905, § 2846), giving an employé of a railroad company suffering injury in the course of his employment in consequence of the negligence of a fellow servant, a right of action therefor, applies to a manufacturer operating in connection with its plant a railroad about 14 miles in length, on which its cars and engines are operated with its own crew, and an employé's right of action for injuries received while operating the cars is not defeated when the injuries were sustained by the negligence of a fellow servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 354-374.]

4. APPEAL—IMMATERIAL RULINGS.

Where, in an action for injuries to an employé, the defenses of assumption of risk, including the negligence of a fellow servant, and contributory negligence, were eliminated, exceptions addressed to questions involved in such defenses were immaterial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3381-3341.]

5. MASTER AND SERVANT—INJURY TO SERVANT — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE.

The rule that an action by an employé for injuries sustained by the employer's negligence in failing to equip its cars with automatic couplers, cannot be defeated by the defenses of assumption of risk, including the negligence of a fellow servant, and of contributory negligence, applies only to the protection of an employé wrongfully injured in the course of his employment.

6. TRIAL—SUBMISSION OF ISSUES.

Where, in an action for injuries to an employé alleged to have been received by the employer's failure to equip its cars with automatic couplers, the evidence was conflicting on the question whether the employé was injured in the course of his employment, or while he was acting in disobedience to the orders of his superiors, the court properly submitted the issue as a separate question.

Appeal from Superior Court, Buncombe County; O. H. Allen, Judge.

Action by Luther Hairston against the United States Leather Company and Old Fort Extract Works. From a judgment for plaintiff, defendants appeal. Affirmed.

There was allegation and evidence on part of plaintiff tending to show: That defendant, a corporation engaged in the business of manufacturing leather and extracting tannic acid, in aid of and as a part of its enterprise, had constructed and was using 12 to 14 miles of railroad track, standard gauge, in and around its plant at Old Fort, N. C., and in operating this road, had its own crew, engines, cars, etc., and also used and shifted the railroad cars of other roads on which wood required for its purposes was brought to its plant. This wood was brought

from various localities in railroad cars, and these cars were placed by the railroad on its side track, where the engines and crew of defendant company would move them onto the tracks of defendant, where they were unloaded, and the wood stacked between these tracks of defendant company, from which point the railroad crew afterwards, and as required, would load the wood on to its own cars, and haul same to points accessible and convenient to the chipper house where the machines of defendant company cut the wood up. Where the tracks permitted, by reason of being on an incline, the shifting of cars was sometimes done by hand, and especially was this true in pushing the cars from chipper house track into the chipper house yard, and up to the machines. That the cars of defendant were smaller than the railroad cars, being something like 18 feet in length, and not so high, and were without automatic couplers, the old style by link and pin being used for the purpose. That plaintiff was an employé of defendant company, whose duties called on him to work at the chipper machines, and, in the course and scope of his duties, he was called on frequently to move these cars and stop them, and couple and uncouple same; and on the occasion referred to, to wit, May 2, 1904, in the course of his duty, he was on a car which he had started, and was letting it roll down towards another car to which it was to be coupled. While plaintiff was so engaged, and as he was about to couple the cars he was on to another, the pin which had been prepared failed to drop properly so as to effect the coupling, but fell to the ground between the cars. That plaintiff, remaining on the car, got down on his all fours, and was reaching down to pick up the pin, when a co-employé on the third car allowed same to roll down against the car he was on, jolting plaintiff's hand between the draw-heads where it was mashed, and severely injured. That this employé, one Will Caldwell, could have seen how plaintiff was engaged at the time, there being no obstruction, and plaintiff being in full view.

Plaintiff claimed that on these facts, if established, defendant was guilty of actionable negligence: (1) In not providing the cars with coupling devices, as required by law. (2) In negligently causing the violent collision between the cars as above set forth, while plaintiff was in plain view of those in control of the car which ran into the one plaintiff was on. Admitting that the cars were without automatic couplers, defendant denied that there was any negligence on its own part, and claimed that it was no part of plaintiff's duties either to couple or uncouple cars, but that his duty was to work at the chipper machines, and alleged contributory negligence on part of plaintiff. Further, that plaintiff had assumed the risk of the injury which occurred to him, and

that he was injured by the negligence of a fellow servant in charge of the rear car, etc.

Defendant offered testimony to sustain his positions, and tendered issues as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? (2) Was the plaintiff, at the time he received the alleged injuries, acting in disobedience of the orders of the defendant given to him by his foreman, J. Y. Allison? (3) Did the plaintiff contribute to his injury by his own negligence? (4) Was the plaintiff injured by the negligence of a fellow servant? (5) Did the plaintiff assume the risk of an injury when he undertook to couple the cars outside of his regular duty? (6) Is the plaintiff entitled to recover damages, and if so, what sum?"

The court submitted the following issues which were responded to by the jury as follows: "(1) Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes. (2) Was the plaintiff, at the time he received the alleged injuries, acting in disobedience of the orders of the defendant given to him by his foreman, J. Y. Allison? Answer: No. (3) Is the plaintiff entitled to recover damages, and if so, what sum? Answer: \$1,000."

There was judgment on the verdict for plaintiff, and defendants excepted and appealed.

Merrimon & Merrimon, for appellants.
Locke Craig, for appellee.

HOKE, J. (after stating the case). In the cases of Greenlee and Troxler, both being actions to recover for injuries inflicted on employes by the negligent failure of railroad companies to furnish their cars with automatic couplers, the principle was announced that such a failure would amount to continuing negligence on the part of the companies which would shut off the defense of contributory negligence and assumption of risk.

In Greenlee's Case, reported in 122 N. C. 977, 80 S. E. 115, 41 L. R. A. 899, 65 Am. St. Rep. 784, it was held: (a) "The failure of a railroad company to equip its freight cars with modern self-coupling devices is negligence per se, continuing up to the time of an injury received by an employé in coupling the cars by hand for which the company is liable whether such employé contributed to such injury by its own negligence or not. (b) The former decisions of this court touching upon the duties of railroads to provide modern appliances by coupling cars otherwise than by hand and foreshadowing the early holding that the failure to do so would be negligence per se, and the act of Congress (Act March 2, 1893, c. 196, 27 Stat. 581 [U. S. Comp. St. 1901, p. 8174]), requiring self-couplers to be placed on all cars by January 1, 1898, and the general adoption by railroads of such self-couplers, made it the duty of defendant to adopt such devices, and

its failure to do so, whereby an employé was injured, was negligence per se. (c) The fact that an employé remains in the service of a railroad company, knowing that its freight cars are not equipped with self-couplers, does not excuse the railroad from liability to such employé if injured while coupling its cars by hand, the doctrine of 'assumption of risk' having no application where the law requires the use of new appliances to secure the safety of employées and the employé, being either ignorant of the law's requirement, or expecting daily compliance with it, continues in the service with the old appliances."

In *Troxler's Case* it was held: "(1) Reason, justice, and humanity, principles of the common law, irrespective of congressional enactment, and Interstate Commerce Commission regulation, require the employer to furnish to the employé safe modern appliances with which to work, in place of antiquated, dangerous implements, hazardous to life and limb, and the failure to do so, upon injury ensuing to the employé, is culpable, continuing negligence on the part of the employer, which cuts off the defense of contributory negligence and negligence of a fellow servant—such failure being the *causa causans*. (2) It is negligence per se in any railroad company to cause one of its employées to risk his life and limb in making couplings which can be made automatically without risk." 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 818, 70 Am. St. Rep. 580.

In *Hicks v. Manufacturing Co.*, 138 N. C. 381, 50 S. E. 703, it was said that both of these cases were approved; and further, that the principle therein announced would be further applied in cases of like peril and circumstance, and we think it should be applied here. The defendant company, being a large industrial plant, in connection therewith, and as part of same, has constructed and owns, in and around its plant at Old Fort, N. C., 12 to 14 miles of railroad track, standard gauge, on which it operates with its own crew, engines, and cars, and also the railroad cars of other companies carrying to that point the material required for its purpose. It is an enterprise of unusual extent and proportions, no doubt doing more hauling than many of the logging roads, which have been held as railroads under our decisions, and more shifting and coupling and uncoupling of cars than would be done on the same or much greater quantity of mileage in the operation of a regular railroad. The track being situated on a level bottom in and around its plant, there would seem to be no difficulty in the procurement and use of these coupling devices at comparatively small cost by means of which these cars could be coupled automatically, and without risk; and the judge below was correct in charging the jury that the failure on the part of the company to equip its cars with automatic

couplers was negligence, and that if such failure was the proximate cause of plaintiff's injury they would answer the first issue, "Yea."

The jury, under the charge, having found this issue against the defendant under the principles established in the *Greenlee* and *Troxler* Cases, both the defenses of assumption of risk, which ordinarily includes the negligence of a fellow employé, and that of contributory negligence are closed to defendant, and any issues addressed to these questions become immaterial and irrelevant unless perhaps the negligent conduct of the injured employé should amount to recklessness. Again, we have held at the present term, in *Bird v. Leather Co.*, 55 S. E. 727, that the act known as the "Fellow Servant Act," being Revisal 1905, § 2846, applies to the railroad of defendant company, citing *Hemphill v. Lumber Co.*, 141 N. C. 487, 54 S. E. 420. This statute, among other things, enacts that any employé of a railroad who is injured in the course of his service or employment by the negligence of a fellow servant, or by reason of any defect in the machinery, ways, or appliance of the company shall be entitled to maintain an action, and that any contract of an employer, express or implied, to waive the benefit of this section shall be void. This statute, in express terms, shuts off the defense of injury by negligence of a fellow servant, which was formerly open to defendant. And in *Coley's Case*, 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817, it was held that in cases where same applied, it barred all defenses by reason of assumption of risk unless the "apparent danger was so great that its assumption amounted to reckless indifference to probable consequences." There was no recklessness here, nor was there any evidence tending to establish it. On the contrary, the plaintiff appears to have been doing as well as could be done with the appliance given him; and he testified that if he had gotten down on the ground and under the car to pick up the pin, his injury, in all probability, would have been much more serious. These two defenses, then, being withdrawn from defendant, both under the decisions in *Greenlee* and *Troxler* and by the construction put upon the statute in *Coley's Case*, supra, the numerous exceptions addressed to these questions become immaterial, and the only defense open to defendant on the facts presented was whether plaintiff was injured in the course of his service and employment.

The principles held to be controlling in this case, both in the decisions and by the statute, apply only for the protection of employées who are wrongfully injured in the course of their employment. If this plaintiff went out of the line of his service and employment, and in disobedience to the orders of his superior, officiously undertook to couple and uncouple cars, when it was no part of his duty to do so; in that event, both of these

defenses would be open to defendant, and a different rule of responsibility would attach. The evidence was conflicting on this question; that of the plaintiff tending to show that plaintiff, at the time of the injury, was acting in the course of his employment; on the part of defendant, that plaintiff was acting out of the line of his duty, in disobedience to the express orders of his foreman. The court very properly submitted a separate issue as to this matter, and under a charge as favorable as defendant could expect, or had any right to ask, the jury have decided the question in favor of plaintiff, and this being true, under the principles discussed, and on the testimony, the plaintiff has a clear right of action.

There is nothing here said which conflicts in any way with the case of *Elmore v. Railway*, 132 N. C. 865, 44 S. E. 620. In that case, the court, in sustaining a recovery had by plaintiff in the court below, where a defendant had negligently failed to keep its cars supplied with automatic couplers which would work, held that the charge of the trial judge was sufficiently favorable to defendant—the same being as follows: "If plaintiff knew that the coupler was out of order, and that it was too dangerous to go between the cars to couple, and that plaintiff used his foot to make the coupling, and that, by reason of his position, he acted foolishly and without prudence with reference to the character of the work, and that this act was carelessness, the chances of safety being less in favor of him than against him, he would be guilty of contributory negligence, even if defendant knew of the defective condition of the coupler." 132 N. C. 865, 44 S. E. 620. As said by the court, this is sufficiently favorable to the defendant, for it is the rule which applies in ordinary cases of contributory negligence and assumption of risk. *Hinshaw v. Railroad*, 118 N. C. 1047, 24 S. E. 426. But in cases like the present, involving the principles established by the cases of *Greenlee and Troxler* and *Coley's Case*, where same applies, the correct rule is held to be as indicated in this opinion.

There is no error, and the judgment below is affirmed.

No error.

DUCKWORTH v. MULL.

(Supreme Court of North Carolina. Dec. 22, 1906.)

JUSTICES OF THE PEACE—CIVIL JURISDICTION—TORTS.

Under Const. art. 4, § 27, giving justices of the peace jurisdiction of actions on contract wherein the sum demanded does not exceed \$200, and "jurisdiction of other civil actions wherein the value of the property in controversy does not exceed \$50" and under Revisal 1905, § 1420, enacted in pursuance of the Constitution, a justice of the peace has jurisdiction of all actions ex delicto in which the damages demanded do not exceed \$50, and not merely

cases of tort involving property to the value of such sum.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 151.]

Walker and Connor, JJ., dissenting.

Appeal from Superior Court, Burke County; O. H. Allen, Judge.

Action by F. H. Duckworth against F. R. Mull. From a judgment of the superior court that the justice of the peace before whom the action was originally brought was without jurisdiction, plaintiff appeals. Reversed.

The material facts, as deduced in statement of case on appeal, are as follows: "This was a civil action tried by a justice of the peace in and for the county of Burke on the 28th day of June, 1904, and heard on defendant's appeal before his honor, O. H. Allen, Judge, and a jury, at June term, 1906, of Burke county superior court. The plaintiff made demand in the sum of \$50 for damage done to his property and premises by defendant in depositing the carcass of a dead horse near the lands of the plaintiff, whereby the comfort and enjoyment of his home was impaired, and a nuisance committed to his premises by the filth and stench arising and flowing therefrom. There was evidence on the part of the plaintiff tending to show that the defendant, on the 22d day of June, 1904, had placed in a gulley above his (plaintiff's) spring and premises, the carcass of a horse; that the point where the same was deposited was only some 50 yards above the head of a branch which ran within 10 steps of plaintiff's spring; and that when it rained, the water would run down the gulley from the carcass from the head of the branch and on down past the spring. There was evidence tending to show further that the plaintiff suffered great annoyance and discomfort from the stench arising from said carcass; that it could be noticed distinctly 300 yards below the premises and spring of the plaintiff, and in the field above his house; that his stock refused to drink in the branch at his watering place; that the buzzards sat in the trees and around the spring, and that he was forced to get water at another place; that plaintiff, prior to the beginning of this action, went to defendant and asked him to cover up or remove the carcass, but defendant refused to do so. At the close of plaintiff's testimony the defendant moved for judgment as of nonsuit under the Hinsdale act for want of jurisdiction in the justice of the peace before whom the same was begun, and of the superior court on appeal, to hear and determine the same. Motion allowed, and plaintiff excepts. Judgment for defendant, to which judgment plaintiff excepted and appealed to the Supreme Court."

Avery & Ervin, for appellant. Avery & Avery, for appellee.

HOKE, J. The Constitution of this state (article 4, § 27) ordains that justices of the

peace shall have jurisdiction under such regulations as the General Assembly shall prescribe, of civil action founded on contract wherein the sum demanded shall not exceed \$200, and wherein the title to real estate shall not be in controversy; and provides further that the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed \$50. Carrying out the provisions of this section, the Legislature has enacted as follows:

"Sec. 1419. Justices of the peace shall have exclusive original jurisdiction of all civil actions founded on contract except (a) wherein the sum demanded, exclusive of interest exceeds \$200.00; (b) wherein the title to real estate is in controversy.

"Sec. 1420. Justices of the peace shall have concurrent jurisdiction of a civil action not founded on contract wherein the value of the property in controversy does not exceed \$50.00."

Revisal 1905, §§ 1419, 1420.

By this statute, the Legislature has conferred on justices of the peace jurisdiction in terms certainly as broad as the Constitution permitted, and this jurisdiction, therefore, will depend on the true interpretation of the constitutional provision. The question involved here being one of civil jurisdiction, only the clauses of the Constitution pertinent to that inquiry have been quoted. And the subject of contract having been dealt with in express terms when the Constitution provided that jurisdiction could be conferred in "other civil action," it was referring to actions of tort, and the question presented here is whether this clause authorizing that jurisdiction could be given in "other civil actions where the value of the property in controversy does not exceed \$50," includes all torts or only a restricted class of torts. On that question we think that the decisions of this court already made, lead necessarily to the conclusion that the clause referred to comprehends, and was intended to comprehend, all actions *ex delicto*; that the term, "property in controversy" here used as determinative of jurisdiction, by correct interpretation, means the value of the injury complained of and involved in the litigation; and, where a plaintiff, in good faith states or limits his demand in actions of this character at \$50 or less, the justice, as provided by the statute, has jurisdiction concurrent with the superior court to hear and determine the matter. Thus in *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880, it was held: (a) "The provision in section 27, art. 4, of the Constitution, authorizing the General Assembly to give to justices of the peace 'jurisdiction of other civil actions wherein the property in controversy does not exceed fifty dollars,' is not a restriction, even by implication, to forbid conferring jurisdiction where damage, and not property, is in controversy. (b) Section 888 of the Code authorizing action for

"damages" not exceeding fifty dollars to property, though the property be of greater value, does not contravene section 27 of article 4 of the Constitution, and is authorized by section 12 of said article. (c) A justice of the peace has jurisdiction of an action for damages not exceeding fifty dollars for injury to personal property, though such property be of greater value than fifty dollars." This was an action for negligent injury to personal property, where the property, a horse and buggy, was shown to be worth more than \$100; but the injury thereto, the question in litigation, was alleged and proved to be less than \$50 and the verdict and judgment was upheld. And in the more recent case of *Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419, approving *Mallory v. Fayetteville*, it was held: "Courts of justices of the peace have jurisdiction to hear and determine actions for injury to personal property and to render judgments thereon, not exceeding \$50, and the jurisdiction is not determined by the value of the property injured, but by the amount demanded in the warrant or complaint." Justice Brown, in delivering the opinion, says: "The jurisdiction of the justice is not to be measured by the value of the property, but by the amount demanded in the warrant or complaint."

In both of these opinions the value of the property injured is rejected as the test of jurisdiction, and the value of the injury, as defined and limited by the summons and complaint, is adopted. And we are not impressed with the position taken that this addition to a justice's jurisdiction should be confined to actions for claim and delivery of personal property. While the proceedings of the convention of 1875—this being the convention by which the section in question was established—are not very fully reported, we know that one of the purposes considered most desirable at that time was to enlarge the jurisdiction of justices of the peace; and no good reason suggests itself why such a purpose should be stopped short by adding only one additional cause of action to the jurisdiction already had by these officers; and we know that the first Legislature which met after this change in the organic law enacted the statute as it now appears in Revisal 1905, § 1420: "Justices of the peace shall have jurisdiction of civil actions not founded on contract, wherein the value of the property does not exceed fifty dollars." The simple, natural interpretation of the statute would make it apply to all "civil actions not founded on contract," and should have much weight as the first legislative interpretation of the meaning of the clause in question. Again it is urged that, if the Convention of 1875 had intended to confer this extended jurisdiction in actions for tort, they would have used the terms, "in other actions where the amount demanded does not exceed \$50," as they did in speaking of contracts. The answer is that in contract the "sum de-

manded" would include every case of contract; whereas, in tort, these words would not have been sufficiently broad; inasmuch as they would have excluded actions for specific personal property, one of the most useful and common of the actions *ex delicto*. And it might be further answered that if the convention had intended to confine this jurisdiction to actions for claim and delivery, they could have easily said so; and they no doubt would, for they were a body of men who knew their minds, and knew how to express their meaning in apt and forceful language. We are clearly of opinion, as heretofore stated, that these words, "where the property in controversy does not exceed \$50" mean, and were intended to mean, the value of the injury involved in the litigation.

In the business affairs and transactions of individuals and the construction of instruments which concern the devolution and transfer of property between them, this term "property" has usually received a more restricted construction. It has been so in the decisions of our own court; but in Constitutions and in public statutes where the words permit, and the spirit and intent of the law require, the word "property" has frequently and more usually been accorded the broader significance which we have given it. In the sections of our Constitution protecting life and property, the term is held to include vested rights of action. As said in *Cooley* in *Constitutional Limitations* (7th Ed.) p. 577: "A vested right of action is property in the same sense in which tangible things are property, and is equally protected from arbitrary interference." And in *Black's Constitutional Law*, p. 432, it is said: "A cause of action, accruing at common law or by a contract, which is fixed and settled in a particular person, and continues in force, is a vested right within the protection of the Constitutions. It is property, and it cannot lawfully be divested by legislative interference, or by taking away the legal means of making it effective, or by so hampering it with conditions or restrictions as to render it practically worthless." Also *Angle v. Railway*, 150 U. S. pp. 1-19, 14 Sup. Ct. 240, 38 L. Ed. 55. And in *Railway v. Dunn*, 52 Ill. 260, 4 Am. Rep. 606, construing a statute giving to married women control over their separate property, the term "property" was held to include a right of action for personal injury. In delivering the opinion, C. J. Breese said: "If, then, it can be established that the right of action for this injury is property, as it came to her from a source other than her husband, then it was her separate property and comes under the operation of the act." And the Chief Justice then proceeds: "Chancellor Kent, in his commentaries, says another leading distinction in respect to goods and chattels is the distribution of them into things in possession and things in action. The latter are personal rights, not reduced to possession, but recoverable by suit at law.

Money due on bond or other contract, damages due for breach of covenant, for the detention of chattels or for torts, are included under this general head or title of things in action. 2 Kent's Com. (Comstock's Ed.) 432, under the head, 'of the nature and various kinds of personal property.' A right to sue for an injury is a right of action. It is a thing in action, and is property according to this authority." There are decisions by the Supreme Court of Michigan, Rhode Island, and Connecticut to like effect in questions of similar import. *Dunlap v. Ry.*, 50 Mich. 470, 15 N. W. 555; *Cooney v. Lincoln*, 20 R. I. 183, 37 Atl. 1031; *Hubbard v. Brainard*, 35 Conn. 563. There is a decision to the contrary in Wisconsin (*Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527). In that case, some weight was given to the wording of the particular statute. And apart from this, we do not think this case is well considered, or that it is in accord with the weight of authority.

We are therefore of opinion, and so hold, that the Constitution has granted the right to confer jurisdiction to the extent therein specified in the case of all actions arising *ex delicto*; and the Legislature having given this jurisdiction to justices of the peace, there was error in dismissing the case, and the judgment is reversed.

Judgment reversed.

WALKER, J. (dissenting). This is the first case, I believe, where a justice of the peace has been held to have jurisdiction of an action for the recovery of damages for a tort which did not consist in a direct injury to property. My own opinion is, and always has been, that it was never intended by Const. art. 4, § 27, to confer jurisdiction in actions not *ex contractu* except for the recovery of specific property or, at most, for the recovery of damages to property not exceeding the value of \$50. Jurisdiction of the justice could only be vested by express provision of the Constitution, or by legislative grant given in pursuance of the provisions of the Constitution. Const. art. 4, § 27, provides that "the several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed \$200, and wherein the title to real estate shall not be in controversy; and of all criminal matters arising within their counties wherein the punishment cannot exceed a fine of \$50, or imprisonment for thirty days. And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed \$50." The Constitution does not in terms confer jurisdiction upon justices to try actions for damages arising from torts, and it limits the power of the General Assembly in conferring jurisdiction to those cases wherein the value of the property in

controversy does not exceed \$50. In *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880, it was held that a justice of the peace has jurisdiction of an action for damages not exceeding \$50 for injury to personal property, though such property be of greater value than \$50; but this was held by a bare majority of the court, and with all respect, I submit, against the correct interpretation of the Constitution. Unless section 27 of article 4 is a restriction upon the legislative power to confer jurisdiction upon justices of the peace, then there is no restriction upon the legislative will in this direction, and jurisdiction may be conferred upon them in any amount and covering every variety of action.

Article 4, § 12, which is cited in the opinion in *Malloy v. Fayetteville*, in support of the decision in the case, concludes with the sentence, "so far as the same may be done without conflict with other provisions of this Constitution." Any allotment of other jurisdiction than that mentioned in section 27 is certainly in conflict with that section. The enumeration of powers which may be exercised is always held to exclude the exercise of other powers not enumerated. When the Constitution says, "and the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed \$50," it is manifest that the meaning would not be added to if it had said further "it shall confer no further or other jurisdiction." If section 12 of article 4 authorizes an allotment of jurisdiction not mentioned in section 27, why would it not be competent for the Legislature to increase the jurisdiction in actions founded on contract to any amount it pleases beyond \$200? Why would it not also be competent for the Legislature to give to justices of the peace jurisdiction in criminal matters without the limitation of punishment? Section 27 does not expressly forbid the Legislature to confer jurisdiction beyond \$200 in civil suits nor in criminal matters where the punishment exceeds a fine of \$50 or imprisonment for 30 days. It simply says that justices shall have jurisdiction up to that limit, but certainly does not say that they shall not have jurisdiction beyond that limit. It is true that there are a number of cases having their origin before justices of the peace which were brought to recover damages for injury to personal property and which came to this court and were upheld before the case of *Malloy v. Fayetteville* was decided, but not in a single one of those cases was the question of the constitutional power to confer jurisdiction raised. It appears for the first time in *Malloy v. Fayetteville*, and the authority of that case is greatly weakened by the force of the two dissenting opinions. Even if the Legislature could confer the jurisdiction on a justice of the peace of an action for the recovery of damages for injury to personal property, it appears to me that it has not done so.

Section 1420 of the Revisal of 1905 provides: "Justices of the peace shall have concurrent jurisdiction of civil actions not founded on contract, wherein the value of the property in controversy does not exceed \$50." This section is in exact harmony with section 27 of article 4 of the Constitution, and in express terms confers the jurisdiction which the Constitution permitted the Legislature to confer. The section relied on in the opinion of the court, in *Malloy v. Fayetteville*, is now section 1476 of the Revisal of 1905, and reads as follows: "All actions in a court of a justice of the peace for the recovery of damages to real estate, or for the conversion of personal property, or any injury thereto, shall be commenced and prosecuted to judgment under the same rules of procedure as provided in civil actions in a justice's court." This section assumes the existence of the jurisdiction of the justice in such cases, and merely provides rules for the conduct of trials; but it does not confer jurisdiction. It is significant that section 1420 appears in the Revisal under subdivision 8, c. 27, entitled "Civil Jurisdiction" while section 1476 appears under subdivision 7, c. 27, entitled "Rules of Procedure," section 1420, conferring the jurisdiction which the Constitution says the Legislature may confer, limits that jurisdiction to cases wherein the value of the property in controversy does not exceed \$50. Section 1476 places no limitation upon the jurisdiction. If section 1476 does confer jurisdiction upon justices of the peace to hear and determine cases involving injury to personal property, to what amount is their jurisdiction limited? The court, in *Malloy v. Fayetteville*, assumes that the amount is limited to \$50, but why to \$50? Section 1476 makes no limitation. It simply lays down the rule of procedure, which is certainly not the same thing as jurisdiction, and that rule of procedure is to be the same as provided in civil actions in the justice's court. Now there are two sorts of civil actions in the justice's court—one founded on contract wherein the jurisdiction is limited to \$200, and one founded on tort wherein the jurisdiction is limited to \$50. Which shall be the limitation here, and what did the Legislature mean? It seems clear to me that the Legislature, even if it had the power, has not conferred upon justices of the peace jurisdiction in matters of this sort. When the Constitution established the courts of justices of the peace, it fixed their jurisdiction, and when it conferred upon the Legislature the authority to add to that jurisdiction, it in express terms states in what particular it may add to it. But whether or not jurisdiction is conferred in cases of tort for injury to property, and is not confined to the recovery of specific property, an action, such as this, whether to property, person or character, is certainly one of first impression. The convention could not have intended to grant such jurisdiction in all cases of wrongs,

and without regard to their nature, by the mere use of the word "property," which has a well-defined meaning, when used in the Constitution in connection with the subject to which it relates.

In *Malloy v. Fayetteville*, it appears, at page 483 of 122 N. C., at page 880 of 29 N. E., that the present Chief Justice, who there spoke for the court, evidently thought there was a clear distinction between the word "property," as used in the Constitution, and the word "damages," or the right to recover them, and he places the decision of the court upon the ground that the right to recover "damages" as distinguished from "property" is conferred, and conferred only, by article 4, § 12 of the Constitution, which provides that the portion of power and jurisdiction, which does not pertain to this court, may be allotted and distributed by the Legislature among the other courts created by that instrument or which may be established by law, in such manner as it may deem best and that the Legislature has actually given the jurisdiction under this section by passing what is now section 1476 of the Revisal. But it has been shown, it seems to me, that no such jurisdiction was conferred by that enactment (Revisal 1905, § 1476) or intended to be conferred by Const. art. 4, § 12. But there is more to be said: When conferring jurisdiction of nonresidents upon courts, a sharp distinction has always been drawn between the word "property," and the term "subject-matter" of the action. The latter term signifies the nature of the cause of action and of the relief sought. It relates to the right to prosecute the particular suit and to obtain the relief demanded; while the word "property" is used in quite a different sense as denoting something tangible, or, at least, something which may be subjected to the process of the court, as in the case of attachment or garnishment. It is the res, and not the mere right, in the particular action, to sue for damages. *Cooper v. Reynolds*, 77 U. S. 308, 19 L. Ed. 931; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Foltz v. Railroad*, 19 U. S. App. 581, 60 Fed. 316, 8 C. C. A. 635; *Hall v. Hall*, 12 W. Va. 15. When we refer to the constitutional protection over property or the right of a married woman to acquire and own property in her own right, as her separate estate, or to the subjects of taxation, and perhaps there are some other instances, we may very well say that the word "property" as there used, should be considered as nomen generalissimum and should embrace within its meaning everything owned and possessed, whether tangible or intangible, for that is the manifest purpose. This meaning is given to the word, in order to comply with the evident intent, as ascertained from the context, and the necessity arising out of the particular nature of the law being construed. Cases referring to such a use of the word are not therefore in point. It would seem that my view is supported by the case of

Smith v. Campbell, 10 N. C. 590, where the court gave a restricted meaning to the word "property" when construing a clause of the Constitution in respect to the jurisdiction of a justice of the peace. See, also, *Pippin v. Ellison*, 34 N. C. 61, 55 Am. Dec. 403. When the word was used in the Constitution, it was meant to refer to the thing, for the recovery of which the action is brought, and not to the right to bring the action to recover that thing. It is the value of the former, and not of the latter, that determines the jurisdiction, and it can make no difference whether the thing to be recovered is personal property in possession or a chose in action. If either is the thing sought to be recovered, or the value of it, if there has been a conversion, it is the "property in controversy." The division of property into real and personal, and of the latter into property in possession and in action, can have no material bearing on this case, and will tend, I think, more to obscure than to elucidate the real question involved. The framers of the Constitution evidently meant that the thing, for the recovery of which, or of damages for its conversion, the suit is brought, should be considered as the property in controversy. This is the natural, and, it seems to me, the only meaning they could have intended to express. If it is not, it logically follows from the decision in this case that a justice will have the power to try all kinds of torts, such as libel, slander, seduction, and the many others known to the law. It cannot be that it was intended to confer such an extensive jurisdiction.

CONNOR, J., concurs in this dissenting opinion.

HILL et al. v. ATLANTIC & N. C. R. CO.
(Supreme Court of North Carolina. Dec. 22, 1906.)

1. CORPORATIONS—STOCKHOLDERS—MEETINGS.

It is essential to the validity of the acts of stockholders of a corporation that they should be assembled in their representative capacity in a meeting, they not being permitted to discharge any of their duties as stockholders unless so organized, though they may all have severally and individually given their assent to the proposed corporate action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 732.]

2. SAME—NOTICE.

Notice to each of the members of a corporation of the time and place of holding a meeting of stockholders is essential to the validity of the meeting, unless the stockholders are present in person or by proxy, or unless the time and place are definitely fixed by statute, charter, or usage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 734.]

3. SAME—CURING DEFECTS.

A railroad corporation voted to lease its road at a meeting of stockholders, which was illegally called. F., a stockholder, was present at the meeting and objected to the lease, and at the subsequent annual or stated meeting of

the corporation introduced a resolution instructing the officers of the corporation to take action to set aside the lease and recover the corporation's property, which resolution was defeated. *Held*, that the action at such subsequent meeting constituted a ratification of the lease and cured any defect in the notice given of the first meeting.

4. SAME—REGULARITY OF MEETINGS—PRESUMPTIONS.

In the absence of proof to the contrary, it will be presumed that an annual or stated meeting of the stockholders of a corporation was held in accordance with the requirements of the corporation's charter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 743.]

5. SAME—LEASING PROPERTY—RATIFICATION.

After a lease of the property of a corporation had been authorized at a stockholder's meeting, held pursuant to an insufficient notice, the regular annual meeting of the corporation was held, of which plaintiff had due notice. The president of the corporation at such meeting reported the material facts relating to the lease, and his report was received and adopted. *Held*, that such action implied that the lease was thereupon ratified without objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1554.]

6. SAME—OBJECTION BY STOCKHOLDERS—LACHES—WAIVER.

Where a stockholder of a corporation, with knowledge of the execution of a lease of all the corporation's property to another, maintained silence for over a year, during which time the lessee expended a large amount on the faith of the lease, and others acquired interests in the property, he waived his right to object to irregularities in the execution of the lease.

7. SAME—RESOLUTIONS—CONSTRUCTION.

A resolution authorizing the lease of corporate property required the lessee to deposit the sum of \$100,000, or United States bonds, bonds of North Carolina, or other marketable securities, to secure payment of rents, etc. The lease provided that the lessee should deposit \$100,000 in United States bonds, etc. *Held*, that the resolution required a deposit either of \$100,000 in money, bonds, or other marketable securities, having a current value of not less than \$100,000, and not that the deposit should consist of bonds or securities having a par value of \$100,000.

8. SAME—CORPORATE ACTS—WAIVER.

A resolution for the leasing of corporate property provided for the deposit of securities for the payment of rentals, etc., in the state treasury, but the deposit was, in fact, made with a certain trust company. The change was called to the attention of the stockholders by the president of the corporation at an annual meeting, at which a resolution was passed directing full inquiry into the matter of the deposit, and particularly as to when and where it had been made, etc., after which no further objection was made concerning the deposit. *Held*, that the stockholders thereby waived any objection to the lease because the deposit was not made with the State Treasurer.

9. RAILROADS—LEASES—COVENANTS—BREACH—FORFEITURE.

Where a railroad lease provided that the lessee covenanted during the continuance of the term not to fix or establish rates of local freight at a higher average rate than the average local freight tariff of the lessor at the time the lease was executed, but no clause of forfeiture was annexed, the provision was in the form of a covenant, the breach of which did not entail a forfeiture of the lease, but rather afforded an action against the lessee for damages.

10. CORPORATIONS—LEASES—TIME—VALIDITY.

Where the term of a lease of a corporation's assets extended beyond the time of the lessor's corporate existence as fixed by its charter, the lease was valid for the period of the lessor's corporate life, and to the extent that the lessor's charter might be extended, not exceeding the term of the lease.

11. RAILROADS—CHARTER—LEASE OF PROPERTY.

Acts 1848-49, p. 138, c. 82, incorporating the North Carolina Railroad Company, and conferring on it the right to transport passengers and freight, and authorizing it to "farm out" the right of transportation, authorized the company to execute a valid lease of its property and franchises to another railroad company.

12. COURTS—RULES OF PROPERTY—STARE DECISIS.

Where decisions of the Supreme Court of the state have become rules of property, the court is bound by the doctrine of stare decisis to follow them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 336-339.]

13. CORPORATIONS—ULTRA VIRES ACTS—STOCKHOLDERS—LACHES.

Where stockholders objecting to a lease of the corporate property alleged to have been executed ultra vires were guilty of laches in taking steps to have the lease set aside, until the rights of innocent third persons had intervened, and such stockholders had participated, at least to some extent, in the fruits derived from the lease, they were not entitled to relief.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, § 1564.]

Clark, C. J., dissenting.

Appeal from Superior Court, Craven County; Long, Judge.

Bill by W. F. Hill and others against the Atlantic & North Carolina Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

This suit was brought by the plaintiffs to annul the lease of the Atlantic & North Carolina Railroad Company to the Howland Improvement Company, now the Atlantic & North Carolina Company, one of the defendants. The action was commenced in the name of W. F. Hill, in behalf of himself and all other stockholders of the Atlantic & North Carolina Railroad Company. C. H. Foy and the board of commissioners of Craven county afterwards came in, and by leave of the court were associated with W. F. Hill as plaintiffs.

The lease was attacked upon the following grounds:

First. The meeting of the stockholders called by the then president of the company, and at which the resolution was passed which authorized the execution of the lease, was irregularly called; due notice of the meeting not having been given as required by the charter, and the meeting not having been held at the place designated in the call. The facts relating to this objection are as follows: The by-laws of the company provide that the president shall have the power to call occasional meetings of the stockholders at such time and place as he may think proper; first giving 20 days' notice thereof in two or

more newspapers published in Newbern. The president issued a call for an occasional or special meeting of stockholders to be held in Newbern on the 1st day of September, 1904, for the purpose of considering a proposition to lease the property, and so forth, of the company. The notice of or call for said meeting was published in but one newspaper, the Newbern Journal; it being at that time the only one published in said city. No personal notice of the meeting was ever given to any of the plaintiffs. Some of the stockholders assembled in Newbern at the time appointed in the notice and organized by electing a chairman and secretary. A report was made by the proxy committee through its chairman, Henry R. Bryan, and the meeting was then adjourned, to reassemble at Morehead City the same day at 3 o'clock p. m. The stockholders accordingly reassembled at Morehead City, and passed the resolution directing the lease to be executed. The plaintiff W. F. Hill was not represented at said meeting, either in person or by proxy. He was at the time the owner of one share of the stock of the company. The board of commissioners of Craven was represented and voted the stock owned by the county in favor of the resolution authorizing the lease to be made. C. E. Foy was present and formally protested against making the lease, and his protest was entered on the minutes. The lease was not read to the stockholders. The by-laws further provide that "no contract for the assignment, sale, or transfer of any corporate right, franchise, or privilege of the company shall be made till the question of sale or transfer shall have been submitted to a vote of the stockholders and such sale or transfer approved by a majority of private stockholders in the state." At the regular annual meeting of the stockholders of the Atlantic & North Carolina Railroad Company held on September 20, 1905, a resolution was introduced at the instance of W. F. Hill, one of the plaintiffs, instructing the president and directors of the lessor company to institute an action against the Atlantic & North Carolina Company, the lessee company, to cancel the lease made originally to the Howland Improvement Company, and to recover possession of all the property rights and franchises therein described. This resolution, on motion, was laid upon the table. The same resolution was introduced at a regular meeting of the directors on September 28, 1905, at the request of W. F. Hill, and was also laid upon the table. There was a regular annual meeting of the stockholders of the lessor company on September 22, 1904, which was held as provided by the company's charter, and of which all the plaintiffs had due notice. The plaintiffs, other than W. F. Hill, were represented at the meeting and participated in the proceedings. No steps were taken by any one to set aside the lease, which had then been

made; nor was its validity questioned in any way. The president of the company, James A. Bryan, submitted his annual report, and in it referred to the fact that the stockholders of the company, by a very large majority vote, had authorized a lease of its property and franchise to the Howland Improvement Company, "of which R. S. Howland is the progressive and enterprising president," and that an inventory of the property so leased was then being taken, and that Charles Dewey had been appointed to act with the expert of the lessee company to examine and report upon the condition and value of the roadbed, warehouses, and other property of the lessor company, their report to form the basis of the agreement for the actual transfer of the property from the lessor to the lessee. The president then proceeds to say: "In leasing your property to the Howland Improvement Company, while there was, and was to be expected, some opposition to it, the impression is becoming general that your act was a wise one, and will result in the near future in the developing and upbuilding of the entire section along its line, a condition much needed and long hoped for, but until now having little prospect of realization." The provisions of the lease relating to the rental are then set forth, giving the increasing amounts for the successive periods during the entire term. No objection was made to the report; but, on the contrary, it was received and approved by the stockholders and ordered to be recorded in the minutes. The lease provided as follows: "The said lessor for itself, its successors and assigns, does covenant and agree to and with the lessee, its successors and assigns, that the said lessor and its stockholders and directors will not do anything or take any action as such stockholders and directors that may or can interfere, in any way whatsoever with the free use and operation and convenience of said railroad and other property so hired, let, farmed out and delivered to the said lessee according to the terms and intent of these presents."

Second. The lessee has not made the deposit of bonds required to be made before the lease should become effective, and therefore nothing has passed to the lessee. The resolution adopted at the meeting of September 1, 1904, empowered the officers and directors to cause the lease to be executed, and to look after the details of the transaction. The directors afterwards formally ratified and approved the lease as submitted at the said meeting of the stockholders, and by resolution directed the property, rights, and franchises of the lessor company to be turned over to the Howland Improvement Company, upon the latter making the deposit required by the lease and complying with the conditions precedent mentioned in the lease. The provision of the lease in regard to the

deposit is as follows: "To secure the prompt and faithful payment of said rents and sums as above stipulated to be paid, and of all taxes payable on the demised railroad and property as herein provided, and the faithful performance of the covenants entered into herein by the lessee as herein set forth, the lessee does covenant to and with the lessor, its successors and assigns, that it will deposit and keep on deposit with the Treasurer of the state of North Carolina, or any such bank or banks or other depository as may be approved by the directors of the lessor from year to year, and all the time during the continuance of said lease, the sum of one hundred thousand dollars in U. S. bonds, or bonds of the state of North Carolina, or other marketable securities acceptable to the directors of the lessor, and having a market value of not less than said sum." At the meeting of September 1, 1904, "the matter of permitting the Governor of the state to look after the making of the deposit required of the lessee was informally discussed," and on September 3, 1904, the Governor deposited a certified check for \$100,000 (which was furnished by R. S. Howland for the lessee) in the Bank of Wayne, and received a certificate of deposit therefor from said bank in his own name as Governor of the state. On September 6, 1904, the president of the Atlantic & North Carolina Railroad Company, and the presidents, respectively, of the Howland Improvement Company and the Wachovia Loan & Trust Company, agreed that 80 of the North Carolina construction 6 per cent. coupon bonds, each of the denomination of \$1,000, be deposited with the said loan and trust company for the purposes set forth in the lease. The 80 bonds were purchased with money furnished by R. S. Howland, a part of which was the deposit in the Bank of Wayne; the certificate of deposit which was transferred to the seller being considered as so much cash paid on the purchase money. The bonds were deposited with the loan and trust company on September 13, 1904, and were accepted by the latter upon the trust just stated, and are still held by said company. At the time of the deposit and at the time of the trial of this case the said bonds were worth \$105,600. At a meeting of the directors of the lessor company held July 11, 1905, an inquiry was directed to be made by the president, under the advice of the general counsel, into the matter of the deposit required by the lease; it being \$100,000. At a meeting of the stockholders of the lessor company held September 28, 1905, the president, J. W. Graininger, read his report, which was adopted. In it the following statement was made in regard to the deposit: "For the faithful payment of all rents, taxes and other obligations assumed by the Howland Improvement Co. lessees of your road, they are under contract in the lease to deposit a sum amounting

to one hundred thousand dollars in U. S. bonds, or bonds of the state of North Carolina or other securities acceptable to the directors of your company. This deposit has been made by the lessee in 6 per cent. coupon bonds of the state of North Carolina maturing April 1, 1919, placed in the Wachovia Loan & Trust Co. of Winston-Salem, N. C."

Third. That the lessee has violated the contract on its part by increasing freight charges beyond what they were when the lease was executed. The lease contains the following clause: "The lessee doth covenant to and with the lessor, its successors and assigns that it will not at any time during the continuance of said term fix or establish rates on freight, called local freight, at a higher average price or rate from station to station than the average rate for local freight tariff as lawfully fixed and established by the lessor at the time of the execution of this lease." The lessee did increase the local tariff rates over what they were at the time the lease was made on divers articles mentioned in the case, such as green lumber, cotton, flour, and coal, but on dried lumber and certain other articles named they have been decreased.

Fourth. That the lessor company has no power to make the lease, and it is therefore void, as being ultra vires. The facts which relate to this contention, and which appear in the case, may be thus stated: It is provided by the lessor's charter:

"Sec. 17. That the said company shall have the exclusive right of conveying or transporting of persons, goods, merchandise and produce over the said railroad to be by them constructed, at such charges as may be fixed by a majority of the directors.

"Sec. 18. Be it further enacted, That the said company may, when they see proper, farm out the right of transportation over said railroad, subject to the rules above mentioned, and the said company and every person who may have received from them the right of transportation of goods, wares and produce on said railroad, shall be deemed a common carrier as respects all goods, wares and merchandise entrusted to them for transportation."

The company was incorporated on December 27, 1852, for the term of 99 years. The contract of lease is dated September 1, 1904, and it is provided therein that the lease shall commence on that day and continue thereafter for the full term of 91 years and 4 months. It demises the franchise and all the rights, privileges, and property of the lessor; and the formal transfer of the same took place on September 3, 1904. The capital stock of the lessee company is limited to \$1,000,000, to be divided into 10,000 shares of the par value of \$100 each, and 1,765 shares of the par value of \$176,500 had been issued when the lease was made. Since the execution of the lease, and prior to the commencement of this action, 1,323 shares of the capital stock of the lessor company have been trans-

ferred on its stockbook to new parties, and said transfers were based upon sales for value. Mr. Roberts, Mr. Jos. G. Brown, and Mr. Duncan testified that the stock of the lessor company had sold before the lease was made at from 20 to 30 cents on the dollar, while since it had sold as high as from 60 to 70; while Mr. C. E. Foy testified that before the date of the lease the stock had sold at 47 to 50, and after that date it had sold as low as 50, that he bought some in May, 1904, at 50, and that after that date it had sold as low as 50, and he had bought some at that price. Dr. Hughes testified that he had owned some of the stock for two years before the date of the lease, and had offered to sell it at from 25 to 30, but had not sold it until two or three months before said date, when it brought 47. Mr. C. E. Foy stated that some of the stock sold just before or just after the McBee receivership at prices ranging from 47 to 53½ cents on the dollar. The statements of all these witnesses were found to be correct, and are to be taken and considered as facts in the case. It also appears that dividends have been declared by the lessor company and paid out of funds received from the lessee under the lease, the payment in 1906 having been made directly by the lessee company, and that all the plaintiffs and the other stockholders, except the plaintiff, W. F. Hill, received the dividends for the years 1905 and 1906, paid to them, respectively, without any objection on account of the fact that they had been paid out of the rent or other funds received under the lease. The plaintiff Hill kept his dividend check for six weeks without objection. The lessee from September 1, 1904, to the date of bringing this suit has expended for betterments on the road and equipment between \$100,000 and \$200,000. The plaintiff C. E. Foy testified that he suggested the bringing of this suit to the plaintiff Hill, and agreed to save him harmless.

We have not set forth in detail the terms of the lease, as we do not consider it necessary to do so. It may properly be stated, though, that, among other things not deemed material, it provides for the expenditure of \$250 by the lessee within three years from the date of the lease for the permanent betterment of the roadbed, the equipment of the road, and the improvement of terminal facilities; for the insurance of the property and its preservation in good condition; for the indemnification of the company against any loss or damage by reason of a violation by the lessee of any of its duties or obligations or by reason of any tort committed by it for which the lessor in law could be held liable to the injured party; for the continued corporate existence of the lessor company, the expenses of maintaining it, and of providing a proper inspection of the company's property from time to time, to be paid by the lessee, the amount, though, not to exceed the sum of \$1,200. It is further provided

that, if the corporate life of the lessor is ended by the expiration of the term fixed by its charter before the term of the lease will expire, the lease shall in that case come to an end when the charter expires by its own limitation; but, if it is prolonged, then the lease shall continue so long as the charter does, but not beyond the time fixed in the lease. At the trial below it was agreed by the parties that a jury should be waived and the judge should find the facts and state his conclusions of law thereon, and render judgment accordingly.

We have made the foregoing statement of what we regard as the material facts from the findings as they appear in the record. The judge concluded as to the objection founded upon irregularities in calling and holding the corporate meetings that all the parties concerned had acted in good faith, and that these defects, if they are such, had been either waived, or the lease ratified, so far as they are concerned, by the subsequent proceedings and transactions. As to the deposit of the bonds, he ruled that there had been a substantial compliance with the stipulation in the lease, and that the default, in this respect, if there had been any, had also been waived. The objection that there had been an increase in the charges for freight was not regarded by him as a cause for forfeiture, but rather, if well grounded, as entitling the lessor to an action on the covenant. The last reason urged by the plaintiffs, namely, that the lease is ultra vires, was rejected by him, as the question which it raises had been settled by former adjudications of this court, which, under the doctrine of stare decisis, should not be disturbed. The court thereupon adjudged that the defendants go hence without day and recover of the plaintiffs their costs to be taxed, and the plaintiffs appealed after having duly excepted to the several rulings of the court and to its final judgment.

W. M. Clark, O. H. Guion, and L. I. Moore, for appellants. A. D. Ward, Aycock & Daniels, R. D. Gimer, and P. M. Pearsall, for appellee. Busbee & Busbee, for private stockholders.

WALKER, J. (after stating the facts). The plaintiffs seek in this action to set aside the lease made by the Atlantic & North Carolina Railroad Company to the Howland Improvement Company, which has been succeeded by the Atlantic & North Carolina Company, and which is now fully vested, with all of its rights and interests, under the said lease. It is asserted that the lease is void upon several grounds: (1) Because the meeting of the railroad company at which authority was given to execute the lease was not called according to the provisions of its charter, in that the requisite notice of the time and place of holding the meeting was not given, and that the meeting was not held at the place designated in the call. (2) That the lease has never taken effect, as the de-

posit of bonds provided for in the resolution of the stockholders of the railroad company has never been made; this being a condition precedent, the performance of which was required by the express terms of the resolution before there could be any valid execution of the lease. (3) The lessee has violated its contract by increasing the local charges for the transportation of freight above the tariff rates existing at the time the lease, if valid, was executed. (4) That the railroad company had no authority, under its charter or the general law, to lease its franchise and other property, and the proceedings by which it attempted to do so were ultra vires and the lease is therefore null and void. It is unquestionably true that no function of a corporation can legally be exercised except by and through its agents and representatives, either its directors when they are clothed with power for that purpose or the stockholders, who are the constituent members of the corporate body. It is therefore essential to the validity of their acts that they should be assembled in their representative capacity, as they are not permitted to discharge any of their duties unless thus organized into a deliberative meeting, though they may all have severally and individually given their assent to any proposed corporate action. *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017, 18 Am. St. Rep. 889. This rule of law is in accordance with a plain dictate of reason and justice. The corporation is entitled to the opinion and judgment of each of its members, or of each of its directors or other governing body, upon any and all measures taken in the transaction of its business affairs, and for the same reason is each stockholder, whose interests may be vitally affected, entitled to be present and to a reasonable hearing, and especially where anything is to be done likely to prejudice or impair his rights. This principle of the common law, expressed in one of its favorite maxims, is applicable, not only to judicial tribunals which pass in judgment upon individual rights, but to corporate bodies as well. Therefore has it always been conceded, as a just and indisputable rule in the law of corporations, that notice to each of the members of a corporation of the time and place of holding a meeting of the stockholders is absolutely essential to its validity, unless the stockholders are present in person or by proxy, or unless the time and place are definitely fixed by statute or by the charter, or, as it is said, by usage. *Clark on Corporations*, p. 464 (184); *Morawetz on Priv. Corp.* (2d Ed.) § 479. The majority can act for the corporation of which they constitute a part only at a meeting which has been regularly called, and the law permitting a majority thus to act and decide for the corporation against the will of the minority, when there is no restriction in the charter or the general law, presupposes that there has been discussion and deliberation in which all had the

right and the opportunity to participate. Failure, therefore, to notify even one of the members, either personally or in the manner provided by the charter, is fatal to the proceedings and transactions of the meeting. *Id.* We will assume, for the purpose of deciding this case, that the publication of notice in one newspaper, there being only one then published in Newbern, was insufficient as a legal notice under the charter, and that Hill had no notice of the meeting, and if this is so, and it were all that appeared in this case, we should be compelled to hold that the meeting was not regularly held, and its action in regard to the lease was void as to the protesting stockholder who was absent. But this is not all. No stockholder who was not present has complained of what was done at the meeting in Newbern, and the adjourned meeting at Morehead but the plaintiff Hill. Foy was there, and the board of commissioners of Craven county was duly represented. The meeting at which it was resolved to make the lease was held on September 1, 1904, first at Newbern, and then by adjournment at Morehead City in the afternoon of the same day. Hill was not present either in person or by representation. His coplaintiffs were, and the stock vote of the commissioners of Craven county was cast in favor of the lease. It is true that Foy protested against making the lease and threatened to institute legal proceedings to annul it; but he was there and participated in the meeting, and this fact dispensed with notice to him. He and the commissioners are, therefore, not in a position to complain of a want of notice. *Thompson on Corp.* §§ 712, 6184; *Clark, Corp.* p. 464.

How is it with Hill? So far we have assumed that he was not bound by the proceedings, but a subsequent annual or stated meeting of the corporation was held on September 20, 1905. In the meantime no action had been taken by Foy in execution of his threat to sue or to make good his protest against the action of the stockholders, although more than a year had elapsed since the lease had been executed. At the meeting of September 20, 1905, a resolution was introduced by Foy, at the instance of Hill (as the finding of the judge and the evidence show), instructing the proper officers to take such legal action as was necessary to set aside the lease and recover the company's franchise and other property from the lessee, and identically the same resolution was introduced, in the same way, at the meeting of the directors after the adjournment of the stockholder's meeting on the same day. Both resolutions were, on motion, laid upon the table, or, in other words, defeated. The defendants contend that this was a waiver of any irregularity in calling the meeting of September 1, 1904, or a ratification of what then was done in regard to the lease, so that any defect in the proceedings was cured, and the lease fully validated in respect to the

objection that there was no notice of the first meeting, or that it was adjourned from Newbern to Morehead, if that was irregular; and so we think. *Wells v. Gates*, 18 Barb. (N. Y.) 558; *Hotel Co. v. Marsh*, 63 N. H. 230; *Stokes v. Detrick*, 75 Md. 256, 23 Atl. 846. The plaintiffs' counsel seems, in his brief, to concede that this would be true, provided it appeared affirmatively that at the annual meeting the requisite majority had voted to table the resolution. It cannot well be argued that the refusal of the stockholders at that meeting to adopt the resolution of Hill, introduced by Foy, was not a distinct approval and affirmance by them of the action taken at the first meeting. *Zabriske v. Railroad*, 64 U. S. (23 How.) 381, 16 L. Ed. 488. It is hardly necessary to discuss or to cite cases for the purpose of sustaining so plain a proposition; but how stands the law with reference to the question presented by the contention of counsel? An examination of the authorities discloses that there is little or no disagreement as to the presumption of regularity with respect to an annual or stated meeting. It is settled that, in the absence of proof to the contrary, it will be assumed that such a meeting was held in accordance with the requirements of the charter. "If a stockholders' meeting," says Mr. Clark, "is irregularly called or conducted, the irregularity may generally be waived by the stockholders. They may ratify acts of the majority which are not binding because of irregularities, and thereby render them binding. Every reasonable intendment is to be made in favor of the regularity of stockholders' meetings, and the burden is upon one who claims that they were invalid to show the circumstances rendering them so. In the absence of evidence to the contrary, their legality will be presumed. The maxim of law in such cases is, 'Omnia rite acta presumuntur.' Thus it has been held that, in the absence of evidence to the contrary, it will be presumed that due notice was given to all stockholders. So it will be presumed that a quorum of members was present, unless the contrary clearly appears." *Clark on Corp.* p. 471. This presumption is indulged as to an annual meeting held under the provisions of the charter. With reference even to the case of a special meeting, where notice was required to be given, the very question we now have under consideration was presented in the case of *Insurance Co. v. Sortwell*, 90 Mass. 223, in which the court says: "The other objection to the legality of the meeting is that a quorum of members of the company, according to the requisition of the by-laws, was not present at the time the act was accepted. It is true that the record does not show affirmatively that 15 members of the company were present at the meeting; nor is it necessary that it should. The contrary does not appear. It is sufficient that the record shows that the meeting was duly called, and proper notice of it seasonably given. The law will assume, in the ab-

sence of evidence, that a proper number were present to transact the business for which the meeting was called. Illegality will not be presumed, but the contrary. The maxim of law in such cases is, 'Omnia rite acta presumuntur.' *Sargent v. Webster*, 13 Metc. (Mass.) 504, 46 Am. Dec. 743." See, also, *Thompson on Corporations*, § 3928 et seq. The charter appoints the time for holding the general meetings (fourth Thursday in September), and, as we understand, there is no point made because of any omission to give notice of the annual meeting held September 28, 1905. But, even in regard to that and to all other matters, the law presumes regularity and the performance of all conditions essential to the validity of the proceedings, in the absence of any showing that there was a failure in some material respect to observe the directions of the charter. The unequivocal act of tabling the resolution of the plaintiff Hill we must hold to be a clear ratification of the lease binding upon the company and all of its stockholders, so far as any irregularity in the calling or manner of holding or conducting the former meeting is concerned. We have not yet referred to the fact that "a regular annual meeting was duly held as provided by the charter on September 22, 1904, of which the plaintiffs had due notice" (Finding No. 28), and at which Mr. Bryan, the president of the company, reported the material facts relating to the lease. His report was received by the meeting and adopted. (Finding No. 38.) This was a distinct and emphatic approval of the lease by the clearest implication and without any objection from a single stockholder. *Thompson on Corporations*, § 3928; *Zabriske v. Railroad*, supra.

But we also think that the silence and inaction of the plaintiff Hill from September 1, 1904, to September 28, 1905, was a waiver of any right he originally had to object to irregularities of which he now complains. He has forfeited by his conduct any right he had in the beginning. It is a general rule of law, as well as of good morals and fair dealing, that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he has failed to do so at the first proper and opportune moment. The acquiescence of one who might have taken advantage of an error obviates its effect. "Consensus tollit errorem." Upon this maxim of the law depends the important doctrine of waiver; that is, the passing by of a thing. "Silence always implies consent," says another cardinal maxim of the law. "Qui tacet consentire videtur." "Where, however," as we are told by Mr. Broom, "an irregularity has been committed, and where the opposite party knows of the irregularity, it is a fixed rule, observed as well by courts of equity as of common law, that he should come in the first instance to avail himself of it, and not

allow the other party to proceed to incur expense. 'It is not reasonable afterwards to allow the party to complain of that irregularity, of which, if he had availed himself in the first instance, all that expense would have been rendered unnecessary'; and therefore, if a party, after any such irregularity has taken place, consents (expressly or impliedly) to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known." *Broom's Legal Maxims* (8th Ed.) p. 137. What he clearly means is that a party must not only threaten or declare his purpose to do a certain thing if his objection is ignored, but he must follow up his protest by appropriate action; otherwise he will be deemed to have abandoned his original intention and to have condoned the imputed wrong. This rule, though applied usually to matters of pleading and procedure, is yet equally applicable to all cases where the question of laches is involved, and is generally favored in a court of equity. The doctrine is well stated in *Thompson on Corporations*, § 4534, where it is substantially said that while a court of equity will interpose at the suit of a single stockholder to enjoin acts done by the officers of a corporation irregularly or in excess of their powers, which are injurious to his rights, or acts ultra vires (*Thompson on Corp.* § 4520), yet, if he has stood by until the transaction to which he objects has become executed, he will not afterwards be heard to complain; and this is so, although the party who may have dealt with the corporation in the particular case knew of the irregularity of the proceedings or the invalidity of the transaction. When the act is done in good faith for the benefit of the company, although not done as it should have been, the stockholder must dissent within a reasonable time, or his assent will be presumed, and he will be estopped from gainsaying the validity of the transaction by his silence, when he ought to speak and act, it being such a neglect of duty that he is not entitled to the consideration of a court of justice, and especially is this principle enforced when the objectionable act may be followed by a large expenditure of money, in which case the stockholder should not only enter his protest seasonably, but follow up the same by active and preventive means, for it is obviously against good conscience that one who has the power to prevent the alleged injurious proceedings should stand by and see work prosecuted and money expended that may result to his benefit and afterwards raise his objection thereto. He may not thus wait unreasonably and pocket the gain of the venture if successful, and then, if so minded, fall back upon his protest as a saving of his legal remedy. Such a course of conduct is the full equivalent of bad faith and the doors of the court are shut against him, because he cannot enter it, as he should,

with clean hands and a clear conscience. His neglect to act, and not merely to speak, at the proper time, bars his right to remedial justice, as effectually as his neglect to protest would have done. *Watt's Appeal*, 78 Pa. 370. "The stockholder of a corporation who seeks to prevent the consummation of an illegal corporate act, or to avoid it, should be swift to make known his desires and assert his rights through the tribunals appointed for that purpose." *Thompson v. Lambert*, 44 Iowa, 247. It is his duty to act and with reasonable promptness. *Zabriskie v. Railroad*, supra. If he has refrained from this obvious course of action until the matter is fully consummated, or, as in this case, until the lease transaction has proceeded to completion, instead of invoking the restraining power of the court at the proper time, it would be exceedingly unjust to listen to his appeal when he has thus come too late and after costly improvements have been made, large sums expended in execution by the lessee of its part of the contract, and extensive dealings in the stock of the company have taken place, all perhaps in reliance upon his long-continued silence and inaction as evidence of his acquiescence in the existing situation, and upon the reasonable supposition that his threat to sue was merely an idle one, or that upon mature consideration he had changed his mind. *Clegg v. Edmondson*, 8 De Gex M. & G. 787; *Ashurst's Appeal*, 60 Pa. 290; *Railway v. Railway*, 3 De Gex M. & G. 341; *B. C. Co. v. Lloyd*, 18 Ves. 514; *Rogers v. Cruger*, 7 Johns. (N. Y.) 611; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Wood v. C. W. Co.* (C. C.) 44 Fed. 146, 12 L. R. A. 168; *Stokes v. Detrick*, supra; *Lyceum v. Ellis* (Super. Ct.) 8 N. Y. Supp. 867. The doctrine, therefore, is so firmly established as to be placed beyond the reach of cavil, and it is a very clear and salutary rule in the law of agency adopted for our guidance that when the principal, with the knowledge of all the facts, acquiesces expressly or impliedly by his silence in the voidable acts of his agent, done under an assumed authority or in disregard of prescribed methods, he cannot be heard afterwards to impeach them under the pretense that they were done without authority, or even contrary to instructions. *Bank v. Reed*, 1 W. & S. 101. This is tantamount either to a waiver or ratification, and is based upon the idea of laches. The maxim of the law that every ratification relates back and is equivalent to a prior command ("*Omnis ratihabito retrotrahitur et mandato priori equiparatur.*") is as much predicable of corporate as it is of individual ratification—that is, of the corporation and stockholder alike—and with the same force and conclusiveness in the case of each of them, and the precedent authority is equally to be presumed as to each in the absence of dissent from the unauthorized act. In either case, if the principal neglects promptly to disavow the

act of his agent or his trustee, by which the latter has transcended his authority, he thereby makes the act his own, and will no longer be heard to question its validity. *Kelsey v. Bank*, 69 Pa. 426; *F. W. Pub. Co. v. Hiltson*, 80 Tex. 216, 14 S. W. 843, 16 S. W. 551; *Sheldon v. Eickemeyer*, 90 N. Y. 614. An express assent, it is said, is not essential on the part of the stockholder or the corporation in order to operate as an equitable estoppel and defeat the right afterwards to disaffirm or repudiate the alleged irregular act. It may be inferred from the failure not only to promptly condemn the unauthorized, although not illegal, act but to seek judicial redress for the wrong or a preventive remedy to stay the hands of the offending agent. If this doctrine of equitable estoppel applies to the transaction of corporate or associate bodies as well as to persons acting in a natural capacity, and there never was any doubt that it does, then no case can call more strongly for its application than the one now before us. The previous conduct and present attitude of the plaintiffs are not calculated to produce a favorable impression upon a court administering equity. That they have been tardy in coming forward with their grievance and very slow in vindicating their supposed right in the only practical way it could be done cannot be doubted, and objections now come from them with bad grace who have for so long a time slept upon their rights. They must make a better showing of wrongs which they have suffered, and also of reasonable and timely efforts to obtain relief against them, before a court of equity will interfere in their behalf to set aside an executed contract, and especially as it is well-nigh impossible to place the parties in statu quo. *Bimpfel v. Railroad Co.*, 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121; *M. H. Co. v. Phalen*, 128 Pa. 110, 18 Atl. 428; *Gordon v. Preston*, 1 Watts (Pa.) 385, 26 Am. Dec. 75; *B. C. Co. v. Lloyd*, supra. The plaintiffs come at this late day for a redress of their alleged grievances, and ask for equitable relief to cancel the lease, while they should have appeared and commenced their opposition much sooner, when they could have done so with more show of reason and justice. The laws assist those who are vigilant and not those who sleep over their rights is a fundamental rule in equity, which is not only eminently just, but is necessary to the protection of those who are more watchful and careful of their interests and who otherwise may be made to suffer innocently, if the law should favor one guilty of such laches. We have discussed this branch of the case fully, as our decision upon the first objection urged by the plaintiffs will have an important bearing upon most of the other grounds of opposition to the lease, and will make the task of deciding them much less difficult.

Before proceeding further, we cannot do better than direct attention to the steady and unvarying current of judicial thought

upon this subject, as indicated in the decisions of some of the courts whose opinions are entitled to the highest respect, and who have had similar questions under consideration. "If he [the complainant] wants protection against the consequences of an ultra vires act, he must ask for it with sufficient promptness to enable the court to do justice to him without doing injustice to others." *Rabe v. Dunlap*, 51 N. J. Eq. 48, 25 Atl. 962. "Shareholders cannot lie by, sanctioning, or by their silence at least acquiescing in, an arrangement which is ultra vires of the company to which they belong, watching the result, if it be favorable and profitable to themselves to abide by it and insist on its validity, but, if it prove unfavorable and disastrous, then to institute proceedings to set it aside." *Gregory v. Patchett*, 33 Beav. 595. In *Kent v. Mining Co.*, 78 N. Y. 159, it was said: "Acts of a corporation which are not per se illegal or malum prohibitum, but which are ultra vires, affecting, however, only the interests of the stockholders, may be made good by the assent of the stockholders, so that strangers to them, dealing in good faith with the corporation, will be protected in a reliance on those acts. It is not needed that there be an express assent upon the part of the stockholders to work an equitable estoppel upon them. When they neglect to promptly and actively condemn the unauthorized act, and to seek judicial relief after knowledge of the committal of it, this will be deemed an acquiescence in it; and, if innocent third persons have been led thereby to put themselves in a position where harm would come to them if the act were held invalid, the stockholders are estopped from questioning it. An unconscionable arrangement will not be disturbed where there has been a ratification of it with knowledge of all its bearings, after time has been had for consideration." Mr. Noyes says: "Acquiescence for an extended period, during which time the interests of third parties have intervened, may itself constitute laches and prevent a stockholder from attacking a consolidation even on the ground of fraud." *Intercorp. Rel.* 49. All these authorities and others of equal force and directness were cited and approved by this court in *Spencer v. Railroad Co.*, 137 N. C. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604, to the carefully prepared opinion by Mr. Justice Connor, in which case we refer for a clear and conclusive vindication of the principles, both by reason and precedent. "It is not to be understood that courts will refuse to protect the rights of a single stockholder, if invaded by the majority, however large, or refuse relief against aggressions of consolidated capital, however powerful," says the court in that case. But the injured party must move in due time to assert his right, and before the transaction has been fully consummated and the interests of third per-

sons have become involved. We there quoted with approval the following passage from *Pender v. Pittman*, 84 N. C. 372: "This equity ought to be promptly asserted, and not deferred until by a sale other interests may intervene, rendering it inequitable, if practicable, to reverse what has been done and restore matters to their former condition. An injunction against carrying out a contract of sale made under a power contained in a mortgage will not be granted when the relief to which the plaintiff considers himself entitled is not sought until the sale has been made and the rights of a purchaser have intervened." We will have occasion again to refer to *Spencer v. Railroad Co.*, when we reach another important, and, perhaps, the leading question raised in this case.

The next objection made by the plaintiffs is that the deposit of bonds was not made as required by the resolution of the stockholders, and that this was a condition precedent to the effective execution of the lease, and, not having been complied with, the lease is void. Fulfillment of this stipulation is made by the express terms of the resolution of September 1, 1904, a condition precedent to its validity, and we will so treat it, so far as the resolution is concerned. In respect to this provision, there is some slight difference in the phraseology of the resolution and that of the lease itself. The resolution requires the deposit of the sum of "\$100,000, or United States bonds, or bonds of the state of North Carolina, or other marketable securities acceptable to the directors of the company, and having a market value of not less than said sum, as security for the payment of the rentals, interest and charges and the performance of the conditions of the lease," while the lease itself provides that there shall be a deposit of \$100,000 in United States bonds or bonds of the state of North Carolina or other marketable securities, etc. (pursuing thereafter the language of the resolution), with this further provision: "Which said deposit and security, or any equivalent for it which may be substituted therefor may be applied [as in the lease is specified]." In the resolution it is provided that the deposit shall be made and kept with the Treasurer of the state, and in the lease that it shall be kept with the Treasurer, or in any such bank or banks, or other depository, as may be approved by the directors of the lessor company. The resolution makes this deposit a condition precedent, while in the lease the provision as to the deposit takes the form of a covenant, for it says: "And to secure the prompt and faithful payment of the said rents and the sums as above stipulated to be paid and of all taxes, and the faithful performance of the covenants made herein by the lessee, the said lessee does hereby covenant to deposit and keep on deposit with the State Treasurer," etc. We are clearly of the opinion that the provision as contained in the resolu-

tion was intended to mean, and its wording so implies, that the lessee should deposit either \$100,000 in money or bonds or other marketable securities having a current value of not less than that sum, and not that the deposit should consist of bonds or other like securities having a par value of \$100,000. The idea was to have \$100,000 on deposit to secure the performance of the stipulations of the lease, and that it should, at all times, be kept equal to that amount, whether it be in so many dollars or in bonds or other securities of not less value than that number of dollars. The words, "and having a market value of not less than that sum," refer to their immediate antecedents, "the bonds or other securities," and not to the \$100,000 as having the value of that sum, or, in other words, as being equal to its own value, which would be a solecism. This is the clear import of the language employed in the resolution, and, as thus construed, there was a substantial compliance with the requirements of the resolution in this respect. We think that the substitution in the lease of the word "in" for the word "or," which is in the resolution, was merely accidental, and that it was not the purpose to change the substance of the provision as found in the resolution. Besides, if the language of the lease is construed by itself, it is evident the same meaning was intended as that we give to the provision in the resolution. The change in the lease from the phraseology of the resolution, and especially the use of the expression, "which said deposit and security or any equivalent for it which may be substituted therefor," it seems to us plainly evinces the intention to have been to require so many dollars to be deposited or securities of an equivalent market value, without any special regard to their par value.

The same reasoning also applies to this ground of complaint as that we applied to the first objection of the plaintiffs to the lease, namely, the want of sufficient notice of the stockholders' meeting. The fact that the deposit had been made with the Wachovia Loan & Trust Company was called to the attention of the stockholders by the president of the company at the annual meeting held on September 28, 1905. If the change of the depository from the state treasury to the loan and trust company was not authorized, and did not meet with the approval of the stockholders, they were put on inquiry by the report of the change in the depository, and no complaint was made, although that was the time to speak and to raise objections. A resolution was passed at the meeting held on July 11, 1905, directing a full inquiry to be made by a committee into the matter of the deposit, and particularly as to when and where it had been made, and this inquiry was required to be conducted under the advice and guidance of the general counsel of the company. The stockholders must be held to have had knowledge of everything which such an

inquiry would have disclosed, and it appears from the subsequent report of the president that they did have such knowledge. We could hardly hold that they did not have knowledge of the contents of the lease (which varied from the resolution and authorized the change in the depository) when it was provided that it should be executed by the directors. They accepted and approved the form of the lease. It was so executed, and then an inquiry was ordered to be made into the matter of the deposit. If they did not have full knowledge of the contents of the lease, they should have had it. Much less evidence than we have here has been held sufficient to fix a party with notice. *Bunting v. Ricks*, 22 N. C. 130, 82 Am. Dec. 699; *Blackwood v. Jones*, 57 N. C. 54; *May v. Hanks*, 62 N. C. 310; *Ijames v. Gaither*, 93 N. C. 358; *Hulbert v. Douglas*, 94 N. C. 122; *Bryan v. Hodges*, 107 N. C. 492, 12 S. E. 430. Those cases decide that the law will presume knowledge by the stockholders from their laches in not informing themselves, as they were called upon to do so by being put on their guard, if they did not in fact have knowledge, which we think it appears they did have, when the finding of facts by the court upon this point are properly considered. But acquiescence to be inferred from long delay, more than a year, coupled with their silence and the failure to object at the seasonable moment, as effectually deprives the plaintiffs of this ground of objection as it did of the other. In a case strikingly similar to ours in respect to the deposit the court said that the facts showed that the corporation had notice of the place of deposit under circumstances not as strong as those in this case; its attention having been called sharply to the fact by a letter from its treasurer requiring remittances to be sent during his absence to another than the appointed depository, and that it acquiesced in the change of the depository by reporting to the stockholders that its funds were in the hands of the new depository. "The conduct," says the court, "of the corporation constituted a ratification of the act of the treasurer (if his act it was) in selecting the place of deposit, and absolved him from liability in that regard." *Railroad v. Dixon*, 114 N. Y. 80, 21 N. E. 110. It is true the court finds that at the time of the execution of the lease no deposit had been made with any one, and that the change of the depository was not made by the directors, but by agreement between the president of the lessor company and the president of the lessee company, though the matter of permitting the Governor of the state to look after the making of the deposit was discussed informally at the meeting of the directors on September 1, 1904, and he caused to be purchased the 80 bonds which were subsequently deposited with the loan and trust company, they being worth \$105,000, and that in changing the place of deposit the officers and all others participating acted in perfect

good faith, nothing to the contrary having been alleged or proved. If all this was irregular and unwarranted, the court was right in deciding, upon the authorities we have already cited, that it, as well as the other alleged omissions and defects in the proceedings and transactions, had been fully waived, and the lease in respect to them had been ratified by the subsequent conduct of the stockholders, including the plaintiffs.

As to the objection now urged that there has been an increase in the local freight charges in violation of the terms of the lease, it is sufficient to say that the stipulation not to raise the rates is in the form of a covenant without a clause of forfeiture annexed to it, as there is in the case of the deposit. If the lessee fails to make and keep that good, the lessor has the right to re-enter and determine the lease, but not so if the freight charges are increased. It seems, and we will hereafter show, that in the latter case the parties did not intend that a failure to comply with the covenant should work a forfeiture of the lease, but simply that it should give to the lessor a cause of action on the covenant for its breach. The law leans against any construction of a stipulation in a contract which will involve a forfeiture, and will construe it to be a covenant rather than a condition subsequent. "As conditions subsequent tend to destroy estates, they are not favored in law, and, if it is reasonably doubtful whether a provision in a conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be the latter." 1 Cyc. 1050. And this would be so even if the lessor has any other remedy by which to get redress, or by which to enforce a compliance with the stipulation. The fact that this provision is in the form of a covenant, and that it is not mentioned in the clause of forfeiture and re-entry, would seem to indicate clearly that its violation was not intended by the parties to be good cause for terminating the lease. But the lessor company has not attempted to re-enter for a breach, even if it has the right to do so, which we need not therefore, decide. If the covenant has been broken and there is a continued infraction of it, we do not mean to say that a court of equity could not afford relief by a mandatory injunction or other appropriate equitable remedy and compel strict observance of the stipulation, though in the form of a covenant, if sufficient ground is shown for its interference, and especially if from the peculiar nature of the covenant the breach cannot be compensated in damages recoverable at law, or if the legal remedy would for any other reason be inadequate.

The learned counsel for the plaintiffs contended that the term of the lease would extend beyond the time fixed by its charter for the corporate existence of the lessor company. It has been settled by the authorities that such a lease is certainly valid for the period of the corporate life of the lessor, and will

extend beyond that period if the charter is renewed and the lessor's corporate existence is thereby extended, and by this process it may endure for the full term, and provision is made in this lease to meet just such a contingency. 23 Am. & Eng. Enc. of Law (2d Ed.) 781; Noyes on Intercorporate Rel. § 201; 5 Thompson on Corp. § 5896; 8 Cook on Corp. p. 2594; Baldwin's Am. Railroad Law, p. 458; Gere v. Railroad, 19 Abb. N. C. (N. Y.) 198; Railway v. Railway, 51 Fed. 809, 2 C. C. A. 174; Id., 168 U. S. 592, 16 Sup. Ct. 1173, 41 L. Ed. 265; Wood on L. & T. § 61, p. 144; Brown v. Schleier, 118 Fed. 961, 55 C. C. A. 475. And this accords perfectly with the reason of the thing and the justice of the case. We are not now referring to the right or the power of the lessor company to make the lease under its charter or the general law applicable to such cases; but, assuming for the present that the power exists, the correctness of which assumption we will consider hereafter, we decide only at this stage of the case that the lease is in all other respects valid.

This brings the discussion to the principal question raised by the plaintiffs, and upon which, we take it, they mainly rely for success; and that is whether this lease is ultra vires or beyond the power of the lessor to make. This is an exceedingly important matter, but the difficulty of deciding it is greatly lessened by the former decisions of this court. If it were an open question, we might be confronted by a very serious problem, which would require the gravest consideration, but we do not think that such a situation is presented. The right to discuss the question has been foreclosed by adjudications which we, under established principles, are not at liberty to disregard, if we were inclined to do so. We must consider the former decisions of this court as authoritative and conclusive upon us. By referring to the charter of the North Carolina Railroad Company (Acts 1848-49, p. 188, c. 82), we find that by sections 18 and 19 (page 146) the right to transport passengers and freight and the power to "farm out" the right of transportation were given to that corporation in the same language used in sections 17 and 18 of the charter of the lessor company in this case. The corresponding sections in the two charters are copies of each other. The North Carolina Railroad Company in September, 1871, leased its road and all its rights and franchises to the Richmond & Danville Railroad Company, a foreign corporation, for 30 years, with a right to change the gauge of the track. An action was brought by the state to test the validity of this lease, and to enjoin the change of the gauge; the plaintiff alleging that the lease was executed without any authority of law and that the change of gauge would be injurious to the state and its citizens. This court, after a careful consideration of the question at issue, decided that the power to "farm out" which was given by the charter fully authorized the making

of the lease, and that it was lawful and valid. The court also decided that under the general law and the charter the lessor company had the right to change the gauge of its road, which right passed to the lessee by the lease. There was a dissenting opinion, and, too, a very able one, as were all of the opinions of the eminent judge who wrote it, but this does not affect the authority of the decision as a judicial precedent, or take it out of the rule of stare decisis, but really emphasizes the fact that the case was well considered. State v. R. & D. Railroad Co., 72 N. C. 634. This is not all. The Legislature by Acts 1874-75, p. 185, c. 159, prohibited any railroad company in the state, except those having a narrow gauge, from increasing the gauge of their tracks, under heavy penalties. The Richmond & Danville Railroad Company, defendant in the former case, and certain of its officers, caused the gauge of the track of the North Carolina Railroad Company to be widened from 4 feet 8 inches to 5 feet, and thereupon the said company and its officers were indicted for violating Acts 1874-75. The court decided upon the special verdict that the defendants were not guilty, and the decision is placed upon the ground that the North Carolina Railroad Company had leased its franchise, privileges, and property to the Richmond & Danville Railroad Company, which included the right or privilege of changing the gauge of the road, and that the lease was valid in every particular, and was not ultra vires as contended by the state through its Attorney General. State v. R. & D. Railroad et al., 73 N. C. 527, 21 Am. Rep. 473. It expressly affirmed its former decision in State v. Railroad, supra, in the strongest and most emphatic language. It held that the charter of the North Carolina Railroad Company was a contract which could not be violated by the state in the form of legislation or otherwise; and, secondly, that the lease between the North Carolina Railroad Company and the Richmond & Danville Railroad Company was inviolable upon well-settled principles of law. Referring to the former decision of the court involving practically and substantially the same question, the court, by Mr. Justice Rodman (who clearly assented to the view of the court as stated in the former opinion), said: "It must be assumed in considering this case that the matters decided in the case of the state against the same company, which is now a defendant, are the settled law of this state, and admit of no question. Two things were decided in that case: (1) That the lease of its road, etc., by the North Carolina Railroad Company to the Richmond & Danville Railroad Company was lawful and valid. (2) That the lessee by virtue of the lease had up to the passage of Acts 1874-75 a right to change the gauge of the North Carolina Railroad." 73 N. C., at page 529 (21 Am. Rep. 473). The court then observes that the state owned a large majority

of the shares of stock in the North Carolina Railroad Company at the time the lease was made, and had supreme control over every act and contract of the company, and the lease could not have been made without its express consent. It also referred to the fact that the lessor company had covenanted in the lease not to interfere by its servants or agents with the free use and convenient operation of the railroad, and for these additional reasons it could not be heard to question the validity of the lease or to molest the lessee in the use of the road or in changing the gauge. These considerations apply with equal force to this case, as similar provisions to those mentioned are to be found in the charter of the Atlantic & North Carolina Railroad Company and the lease it made to the Howland Improvement Company. Indeed, the charter of the Atlantic & North Carolina Railroad Company seems to be substantially a copy of the charter of the North Carolina Railroad Company, and the lease made by it to the Howland Improvement Company is, in all particulars pertinent to the matters presented in this case, substantially like that of the North Carolina Railroad Company to the Richmond & Danville Railroad Company. It is utterly impossible to escape the conclusion that the question of *ultra vires*, now raised in behalf of the plaintiffs, has been decisively answered by this court against their present contention more than 34 years ago, in the case of *State v. Railroad*, 72 N. C. 634, and afterwards, upon reconsideration of the whole matter and a review of that decision, it was solemnly adjudicated by the court in *State v. Railroad*, 73 N. C. 527, 21 Am. Rep. 473, that such a lease purporting to have been made under a power given in words identical with those used in the charter of the Atlantic & North Carolina Railroad Company was not only authorized by those words and valid in that respect, but was not *ultra vires*. It is therefore entirely too late under the circumstances, and in view of these precedents, for the plaintiffs to again raise the question as to the true meaning of the words "to farm out," or to question the validity of the lease upon the ground that it is *ultra vires*. We will not attempt to discuss the question ourselves as if it were *res nova*, for it is not, and every consideration of public policy and good faith requires that we should accept the interpretation given to those words by this court, and also its decision as to the power of the railroad company to make the lease, as a finality, and we therefore hold that the lease is not *ultra vires* because it has been so decided, and is not open for readjudication.

It is said, though, that we are not bound by those decisions. Why not? The doctrine of *stare decisis*, commonly called the "doctrine of precedents," has been firmly established in the law, and is applicable to this case, if to any. It means that we should

adhere to decided cases and settled principles, and not disturb matters which have been established by judicial determination. The precedent thus made should serve as a rule for future guidance in deciding analogous cases, and it should especially be controlling, as we will hereafter see, if, as in this case, persons in their business relations and in making their contracts have acted upon the faith of its correctness and in reliance upon its continuance as a rule of law, so that rights have become vested which will be seriously impaired if the rule thus established is reversed. This is not only a sensible, but a just, principle, and a contrary rule would manifestly be inequitable. Let us give solemn heed to the impressive language of Lord Kenyon, when laying an injunction upon the judges to abide by former decisions. "I cannot legislate," said he, "but by my industry I can discover what my predecessors have done, and I will tread in their footsteps." These words which fell from the lips of a great judge cannot be too often carefully weighed by us, when situated as we now are and as he was at the time he uttered them. A law writer who has given special study to the question says that similar principles govern the courts in ascertaining the legislative will, and construing statutes and fundamental laws, to those which control their action in announcing the doctrines of the common law, as applicable to the causes which come before them for adjudication (*Wells on Res Adjudicata*, p. 554, § 604), and it was said, too, while discussing the doctrine of *stare decisis*. Again, in this connection, he says: "The community to be affected by it [a former decision] have acted upon it in a vast number of judicial relations. Rights of property which have grown up under it have changed hands and passed through numerous ramifications, until it has become imperative to regard it as a rule of property, which no power can disturb. What our present opinion may be, as to the merits of the decision in that case, is now of no consequence whatever. In construing statutes and the Constitution, the rule is almost universal to adhere to the doctrine of *stare decisis*. This is an adjudicated question, and the subject of its correctness is to us a sealed book." *Id.* § 605. The same author, quoting from Mr. Fearn, says: "If rules and maxims of law were to ebb and flow with the tastes of the judge, or to assume that shape which in his fancy best becomes the times, if the decisions of one case were not to be ruled by, or dependent at all upon, the former determinations in cases of a like nature, I should like to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase." *Id.* § 599. And, we add, what person would enter into a contract based upon the meaning of a statute once construed,

without first taking a fresh opinion from the court? "Where a judicial interpretation has once been put upon a clause, expressed in a vague manner by the Legislature, and difficult to be understood, that ought of itself be a sufficient authority for adopting the same construction. Buller, J., said: 'We find one solemn determination of this doubtful expression in the statute, and, as that construction has since prevailed, there is no reason why we should now put another construction on the act on account of any supposed change of convenience.' This rule of construction will hold good, even if the court be of opinion that the practical construction is erroneous; so that, if the latter be res integra, the court would adopt a different construction. Judicial use and practice will have weight, and where continued for a long time will be sustained, though carried beyond the fair purport of the statute." 2 Lewis' Sutherland on Stat. Const. (2d Ed.) § 475. Lord Cairns said: "I think that with regard to statutes it is desirable not so much that the principle of the decision should be capable at all times of justification, as that the law should be settled, and should, when once settled, be maintained without any danger of vacillation or uncertainty." *Commissioners v. Harrison*, L. R. 7 H. L. 9. "Under the application of the doctrine contained in the maxim, '*Stare decisis et non quæta movere*,' where a series of decisions, or even a single decision, of a court of last resort has been accepted as the proper interpretation of the law and has been acted upon and become a rule of property, the courts are slow to interfere with the principle announced by the decision, and it may be upheld even though they would decide otherwise were the question a new one." 26 A. & E. Enc. (2d Ed.) p. 161. We have repeatedly said that the weightiest reasons make it the duty of the court to adhere to its decisions. *Weisel v. Cobb*, 122 N. C. 67, 80 S. E. 312.

But there is another well-grounded principle that enters into this case and should have a place in this discussion. It is clearly stated by Lord Mansfield: "When solemn determinations acquiesced under have settled precise cases and become a rule of property, they ought, for the sake of certainty, to be observed as if they had originally formed a part of the text of the statute." *Wyndham v. Chetwood*, 1 Burrow, 419. We adopted that rule in *Long v. Walker*, 105 N. C. 109, 10 S. E. 858, where it was held that a former adjudication of the court in construing a statute or the organic law should stand when it has been recognized for years, and in such a case the principle settled or the meaning given to the statute becomes a rule for guidance in making contracts and also a rule of property, and that it should not be disturbed, even though the conclusion reached may not be satisfactory to the court at the

time the same matter is again presented. To the same effect are *Grantham v. Kennedy*, 91 N. C. 151, and *Kirby v. Boyette*, 118 N. C. 244, 24 S. E. 18, in which case the court, applying the doctrine of *stare decisis* and referring to a principle which had been established by a decision of the court for 30 years, said: "Can this court, consistently with its constitutional obligation to adhere to decisions which may have become a rule of property, alter or modify the principle upon which the people of the state have been invited to invest their money for so long a period? The proposition upon which the contention of the petition to rehear is based is unsound in law, and cannot be acted upon without grave danger to the rights acquired under a well-founded confidence in the stability of judicial decisions. The theory is that if a court, in the elucidation of the questions involved in any given controversy, finds it necessary to crystallize the law upon the subject into a clean-cut rule, which will prove a guide to the profession, such rule may be abrogated after it has been acted on for over 30 years, because the case in hand might have been decided by stating the principle governing the particular case, instead of the broader one founded upon the reason of the thing, but decisive also of other cases as well as that at bar. To lend our sanction to such a view of the law would be to imperil the security of many principles upon which titles have been acquired under the advice of the most competent counsel. A due regard for vested rights necessarily constrains a court to reject such a theory as little short of revolutionary." In *Young v. Jackson*, 92 N. C., at page 148, this court said: "The case cited was decided in 1875. It has been treated as a proper construction of the statute in question, and, as thus construed, it has been acted upon, no doubt, in many cases. To disturb it would unsettle titles and give rise to much confusion and injustice. We cannot think of doing so." "After the meaning of a statute," it is said in a work of high authority, "has been settled by judicial construction, the construction becomes, as far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of legislative enactment, and contract obligations entered into or vested rights acquired while the former decision was in force cannot be impaired." 26 A. & E. Enc. 179. See, also, *Douglas v. Pike County*, 101 U. S. 677, 25 L. Ed. 968. "A change in judicial construction in respect to a statute should be given the same effect, in its operation on contracts and existing contract rights, that would be given to a legislative amendment; that is to say, its operation must be prospective, not retrospective." *Lewis v. Sym-*

mes, 61 Ohio St. 471, 56 N. E. 194, 76 Am. St. Rep. 428. In considering the effect of overruling a decision upon existing contracts, the court in *Falconer v. Simmons*, 51 W. Va. 177, 41 S. E. 193, said: "An overruled decision is regarded as not law, as never having been law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision. To this rule there is one exception that where there is a statute, and a decision giving it a certain construction, and there is a contract valid under such construction, the latter decision does not retract so as to invalidate such contract." This court in *State v. Bell*, 138 N. C. 877, 49 S. E. 163, gave practical effect to the rule that the reversal of a precedent should not be allowed to work an injustice, by requiring that the case then under consideration should be tried anew, not according to the principle as then decided to be the correct one, but according to the former adjudication, simply because the party is presumed to have acted in reliance upon it. Was that not the only fair and proper course to pursue, and would any other have commended itself to our sense of right? The opposite ruling would have met with strong condemnation, as being contrary to the plainest principles of justice. Speaking of a like case, Lord Kenyon said: "It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years." *Rex v. Younger*, 5 Dumf. & El. (Term Rep.), at page 450. Of the same purport as the cases just cited is *Township v. State*, 150 Ind. 168, 49 N. E. 961, where the court says: "Courts will not so apply a change made in the construction of the law as it was held to be in the overruled case as to invade what are considered vested rights, or, in other words, while as a general rule the law as expounded by the last decision operates both prospectively and retrospectively, still courts are required to and do confine it in its operation so as not to impair vested rights, such as property rights or those resting on contracts express or implied." There are many decisions by the Supreme Court of the United States to the same effect. The doctrine is clearly stated in *Louisiana v. Pillsbury*, 105 U. S. 295, 28 L. Ed. 1090, quoting from *Douglas v. County of Pike*, *supra*, as follows: "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text it-

self." And, again, it is briefly put thus: "A change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment." *Anderson v. Santa Anna*, 116 U. S. 356, 6 Sup. Ct. 413, 42 L. Ed. 116. The rule, in a somewhat modified form, is clearly and strongly stated in *Olcott v. Supervisors*, 16 Wall. (U. S.) 678, 21 L. Ed. 382, thus: "This court has always ruled that if a contract, when made, was valid under the Constitution and laws of a state as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature or judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract, in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule." Cases from that court may be cited almost without number, so frequently and consistently has the rule been announced. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175, 17 L. Ed. 520; *Township of Pine Grove v. Talcott*, 19 Wall. (U. S.) 68, 22 L. Ed. 227; *Ins. Co. v. Debolt*, 16 How. (U. S.) 416, 14 L. Ed. 997; *Taylor v. Ypsilante*, 105 U. S. 74, 28 L. Ed. 1008; *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50, 19 L. Ed. 594.

An excellent statement of the doctrine of stare decisis will be found in Black's *Interp. of Laws*, 375 et seq., where it is substantially said that an authoritative judicial construction put upon a statute has the force of law by becoming, as it were, a part of the statute itself. The importance of this rule arises out of the fact that the declared meaning is at once accepted as correct by those whose rights or whose business conduct may be affected by it, and many transactions may depend for their validity upon the permanence of the interpretation thus given to the words in question. "The court almost always, in deciding any question, creates a moral power above itself; and, when its decision construes a statute, it is legally bound, for certain purposes, to follow it as a decree emanating from a paramount authority, according to its various applications in and out of the immediate case." *Bates v. Relyea*, 23 Wend. 386. "We hold the doctrine to be sound and firmly established that rights to property and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the state, and which were valid contracts under the statute as thus interpreted, when the contracts or investments were made, cannot be annulled or divested by subsequent decisions of the same court overruling the former decisions: that, as to such contracts or investments, it will be held that the de-

decisions which were in force when the contracts were made had established a rule of property, upon which the parties had a right to rely, and that subsequent decisions cannot retroact so as to impair rights acquired in good faith under a statute as construed by the former decisions." *Farrior v. Mortgage Co.*, 92 Ala. 176, 9 South. 532, 12 L. R. A. 856. This rule is one made by the law at the call of justice, and in obedience to the plain dictate of common sense, to protect a contract made on the faith of an exposition of the terms of a statute in the former decision, and which should, as to that contract, at least remain unimpaired, so that no detriment will come to parties who have thus dealt with each other in the honest belief that the same construction will be placed upon a statute under which they have contracted and which is expressed in identically the same language. It is not unreasonable that they should be so influenced in their conduct, and not by the opposite belief that the court of last resort in the state will so vacillate in its decisions as to give two radically different constructions to the same words. A court would stultify itself if it should hold that parties might have acted upon any such belief. The people are supposed to have confidence in their highest court, at least to the extent of ascribing to it the virtue of consistency and a desire to see that by no lack of stability in its decisions shall any citizen be jeopardized or prejudiced in his rights because he has simply acted upon the supposition that what the court has so solemnly determined will again be its decision upon the same state of facts, or that at least, if it does change its mind, his rights and interests will be thoroughly safeguarded. If courts proceeded upon any different theory in the decision of causes, the people would be left in a state of uncertainty as to what the law is, and could not adjust their business affairs to any fixed and settled principles, which would, of course, produce most mischievous, if not disastrous, consequences. A court, therefore, is not always at liberty to inquire, in passing upon a case before it, what is the law, for investigation should sometimes stop when it has been ascertained what has already been decided on the subject. *Wells Res. Adj.* § 598. In *Los Angeles v. Water Co.*, 177 U. S. 575, 20 Sup. Ct. 736, 44 L. Ed. 886, the court sums up the clear result of all the authorities, citing many cases, as follows: "At the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decision of the highest court of the state that the Constitution of the state permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the Legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions."

There is still another principle, in some

respects like the one just discussed, that we should consider in this connection. It is thus stated in *Bradley v. Ballard*, 55 Ill. 419, 8 Am. Rep. 650: "While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporations in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though ultra vires, of which they have received the benefit. This is demanded by the plainest principles of justice." A full discussion of the doctrine will there be found with the citation of many cases to sustain it. *Thompson v. Lambert*, 44 Iowa, 239; *Sheldon v. Elckemeyer*, 90 N. Y. 607; *Stokes v. Detrick*, 75 Md. 256, 23 Atl. 846; *Thompson on Corporations*, § 4534; *Noyes Intercorp. Rel.* § 196. And the doctrine of laches also applies to acts alleged to be ultra vires. The illegality of corporate acts must be promptly exposed, and relief will be denied the corporators who wait until the evil has been done and the interest of innocent third parties has become involved. *Zabriskie v. Railroad*, 28 How. (64 U. S.) 361, 16 L. Ed. 488. The objection of a stockholder to the lease of a railway company alleged to be invalid comes with bad grace after he has received the profits of the completed transaction. He will not be permitted in this way both to approve and disapprove the act of the corporation. *Dimpfel v. Railway Co.*, 110 U. S. 210, 3 Sup. Ct. 578, 28 L. Ed. 121. The general principle deducible from the authorities is that if the alleged illegal transaction has been fully consummated and large expenditures of money have been made, the benefit of which has been received by the corporation and the objecting stockholder, and the rights of third parties have intervened, so that the status quo cannot be restored, and the cancellation of the contract upon the ground of its being ultra vires would defeat justice or work a legal wrong, a court of equity will interfere, if at all, only at the instance of the state. *Thompson on Corp.* §§ 8438, 8318-8323. The case of *Railroad Co. v. Railroad Co.*, 145 U. S. 898, 12 Sup. Ct. 953, 36 L. Ed. 748, is directly in point and "on all fours" with this case. If anything, the plaintiffs in this case can have less ground on which to stand and demand relief than did the plaintiff in that case. The difference, if any, between the two cases is in favor of the present defendants. There the plaintiff company leased its road to the defendant in perpetuity, which leasing the court held to be invalid. The lessor brought the suit to cancel the lease as being ultra vires, but the court refused to entertain its bill upon the ground that the contract had been fully executed, and further held that both the corporation and its stockholders were barred by laches; and in this connection it says: "When the parties are in pari delicto, and the contract has been fully executed on the part of the plaintiff by the conveyance of property, or by the pay-

ment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to recover back the property conveyed or money paid under the contract. Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches." It would seem impossible to distinguish the two cases in this respect. See, also, *Harwood v. Railroad*, 17 Wall. (U. S.) 78, 21 L. Ed. 558; *Rabe v. Dunlap*, 51 N. J. Eq. 40, 25 Atl. 959. This court has recently given its assent to the same principle, as one not only just in itself, but as peculiarly fit to be applied to such cases, when parties have waited, especially when they had full knowledge of the facts, and, as the very nature of the transaction shows, when new rights and interests necessarily have arisen, before they invoked the aid of the court. It was there held that when a stockholder fails for two years to bring an action to annul a consolidation of two corporations alleged to be ultra vires, and in the mean time the agreement has been fully executed and third parties have acquired interests in the consolidated company, a court of equity will not grant the relief demanded, namely, that the transaction be set aside. *Spencer v. Railroad*, 137 N. C. 107, 49 S. E. 96, 1 L. R. A. (N. S.) 604. These principles clearly apply to this case, for the court has found as facts that the lease was made and all the dealings between the parties were conducted in good faith and with an honest purpose, and that there has been a transfer of a large number of the lessor's shares of stock and other transactions which involve the interests of third parties; that the plaintiffs Foy and the board of commissioners have accepted and appropriated to their own use the dividends paid to them, and which were so paid from money received from the lessee, under the terms of the lease; and that large expenditures have been made by the latter, and that the plaintiff Hill kept his dividend check for six weeks without objection. These and many other facts found by the court and already stated show how grossly inequitable it would be to listen with favor to the plaintiffs' appeal for relief.

While we have discussed the case in some of its aspects upon the plaintiff's assumption that the lease is void, it must not by any means be inferred that we assent to that proposition, because we do not think they can at this late day be heard to say that it is ultra vires; this court having said most positively and unequivocally that it is not. We must accept that decision as a final and conclusive exposition of the words of the charter under which the lessor claimed the right to lease its franchise and property. It is not, there-

fore, ultra vires, because this court has said that it is not, and that is quite sufficient for our guidance, and as irrevocably fixes the meaning of the words of the charter as if they had been so unmistakably interpreted by the Legislature, and that very meaning had been written into the charter by it and the power to lease had thereby been expressly given without leaving any room for construction. The authorities applicable to this view of the case have been copiously cited.

Before closing this opinion we must direct attention to the exact analogy, nay the precise sameness, of word for word, between the charter of the lessor in this case and that of the North Carolina Railroad Company, which was construed in *State v. Railroad*, 72 N. C. 634, and *State v. Railroad*, 73 N. C. 527, 21 Am. Rep. 473. The one is manifestly a literal copy of the other. Upon what rule of construction can it be argued that when identical language is used, in attempting to express the same idea and evidently to confer the same power, we should give to the words employed by the Legislature two different and opposite interpretations, and thus defeat that purpose. Identity of language necessarily implies identity of meaning, and every principle of logic and fair construction requires us so to decide. The two clauses were inserted in the charters of the respective companies, whose railways constitute, with the Western North Carolina Railroad, one continuous state line from the mountains to the seashore, now under the control of the Corporation Commission, which body can compel proper connections and traffic arrangements for the convenience of the public. Two of these charters were granted at the same session of the General Assembly (1854-55), and the other a few years prior thereto (1849), and they were framed necessarily with a common intent, and therefore expressed in identical words. We have not been endowed with faculties so subtle and so acute as to be able to distinguish between things not merely similar, but exactly the same. In *Logan v. N. C. Railroad Co.*, 118 N. C. 945, 21 S. E. 961, Mr. Justice Avery, speaking for the court, says: "The question of the authority of the lessor company 'to farm out' its franchise and property to the lessee is no longer an open one. *State v. Railroad*, 72 N. C. 634." This was said in 1895, just 23 years after the decision in the principal case. In *Harden v. Railroad*, 129 N. C. 356, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747, decided in 1901, Mr. Justice Clark, while expressing a possible doubt as to the correctness of the original construction of the charter of the North Carolina Railroad Company, yet said, for the court, that it was not "a new question" (*res integra*), and therefore not open for reconsideration. Numerous other cases decided both before and after that time have in the same way recognized the construction of the words of the charter, to which we have so often referred, as a settled one. There

are findings of fact in this case to the effect that the executive department of the government has accepted this court's former construction of the words "to farm out" as the correct one and acted upon it by taking part in making a lease of the North Carolina Railroad Company to the Richmond & Danville Railroad Company, first in 1872 and again in 1895, and also in leasing the franchise and property of the Atlantic & North Carolina Railroad Company to one Best in 1881; two Governors of the state having actually participated in making the leases of the Atlantic & North Carolina Railroad Company, and the state holding the majority of the stock in each of the lessor companies, and having, therefore, the power to control their action through its proxy and the directors appointed in its behalf.

The fact that the intention to make a lease must have been known to the public for some time prior to its final execution, as the notice of the meeting while not conforming strictly to the requirement of the by-laws must have been seen and read by many, and was actually known to two of the plaintiffs, and the additional facts that no other stockholder resorted to any legal measures to prevent its execution, and that the state, holding a majority of the shares of stock and a controlling interest in the corporation, approved and voted for the lease, through its proxy or other representative, and its directors afterwards ratified it, and that through its Governor, it helped to carry out one, at least, of its important provisions—furnishes plenary proof that the public generally acquiesced in the construction which this court had placed upon the words used in the charter, as the state in its corporate and sovereign capacity, in attending meetings by proxy and receiving dividends from the North Carolina Railroad Company and in other ways, had done for many years. Under such accumulated circumstances showing an acceptance of this court's interpretation of those words, should it now be open to challenge by the plaintiffs? We clearly think not. It also appears that in 1897 a bill was introduced in the House of Representatives for the purpose of annulling the lease of the North Carolina Railroad Company to the Southern Railway Company the successor of the Richmond & Danville Railroad Company, and that during the debate upon that bill several members assailed the lease of 1895 upon the ground that it was ultra vires, and that about the same time the then Governor of the state threatened to attack the lease, and that in 1897 a suit was brought in the superior court of Craven county to enjoin the leasing of the franchise and property of the Atlantic & North Carolina Railroad to another company, and that a restraining order was continued to the hearing by the judge of that court upon the ground that such a leasing would be ultra vires, notwithstanding the decisions of this court in *State v. Railroad*, 72 N. C. 634, and *Id.*, 73

N. C. 527, 21 Am. Rep. 473. It is stated that the bill failed to pass in the House, and as the Legislature took no action to prevent the making of the lease of the North Carolina Railroad to the Richmond & Danville Railroad Company or the Southern Railway Company, and has never attempted to have the same annulled, it would seem that the legislative department is committed to the validity of the lease. The Governor's threat made in 1897 should have no influence in this case in any view; but it may, also, be said of it that it was contrary to the well-defined policy of the executive department, both before and after his incumbency. As to the ruling of the judge of the superior court, it can add nothing to the case in favor of the plaintiffs, he not having appellate jurisdiction, and, besides, his ruling was seemingly erroneous upon a well-settled principle which requires the lower courts to respect and observe the decisions of this court until they are overruled or reversed. We have discussed these matters because the facts are in the case and to exclude the inference that we had overlooked them, but we consider them as manifestly irrelevant and as being entitled to no weight in forming our conclusion, except the facts found by the judge which tend to show that executive and legislative sanction was given to the construction of the charters which this court adopted years ago.

As, by virtue of the authority vested by the law in us, we require respect for and submission to our decisions, we should not do less than render the same degree of respect to them ourselves, and not overrule them, even if we should differ from our predecessors, who were as able as we to decide wisely, impartially, and correctly, unless the injury is so great as to imperatively demand such action, and provided that, in doing so, we do not commit a greater wrong and inflict greater injury than we would by adopting the opposite course. If we have overruled cases in the past, it was because we found that no appreciable harm would be done in those particular instances. We have unanimously overruled a case at this term, and reinstated a former precedent, precisely for the reason that no rights had accrued under the overruled case and no injury would therefore result; but, on the contrary, to let it stand and thereby set aside the former precedent, which it had itself overruled, would have greatly impaired, if not utterly destroyed, rights which had been acquired upon the faith of the correctness and stability of the first decision. No principle of the law has been more carefully preserved and cherished than the one embodied in the ancient maxim of *stare decisis*, which has been found to be essential, under an enlightened public policy, to prevent wrong and to execute simple justice. The people yield submission to the law, as expounded by the courts, because they have respect for their judgments and confidence in their integrity of purpose, but if, by a shifting and vacillat-

ing course of decision, the law becomes unsettled and inevitable disaster and oppression follow the uncertainty thus created, they will forfeit that respect and confidence which judges should so much desire, and which is so important to the proper administration of the law and to the welfare of the state. The people may then well say to us, "Keep [not] the word of promise to our ear and break it to our hope." Better it will be to be guided by that salutary and conservative maxim of the common law which our predecessors so much revered and have admonished us to follow, and which an eminent author has said "furnishes indubitable evidence of the law-abidingness of the English-speaking people, a feature which is indelibly stamped upon every aspect of their civil and political life."

The defendant's counsel contended that a plaintiff must have a case of substantial merit when he applies to a court of equity for relief, and that no such case is presented in this record. We have refrained from discussing that phase of the case at length, though there is much to be said in regard to it. How the plaintiffs have been prejudiced in any way as stockholders we have been unable to see, as the market price of the stock has advanced from \$30 to \$70 per share since the lease was made, their property has been enhanced in value by improvements and betterments, and the lessor company has apparently a brighter prospect than it ever had before, as under the former management it was in a languishing condition. But, notwithstanding the plaintiffs have not as yet been substantially damaged in the least, we have considered their case upon its legal merits, and as if they had been, or upon the assumption that, whether substantially damaged or not, they may as stockholders attack the validity of the lease, and, further, as if they had really brought this suit in good faith to right what they conceive to be a wrong. His honor, Judge Long, though himself expressing a doubt as to the correctness of the former rulings of this court, deemed it his duty, as he declared, to follow the settled rule of the law, and not to disturb the construction of words more than once solemnly adjudicated. After a most careful and intelligent statement of the facts, and an able and forceful presentation of the law of the case, his honor held that the lease is valid, and that the plaintiffs are not entitled to the relief they demand, and, having so found, he adjudged that the action be dismissed at the cost of the plaintiff. In the findings of fact, in the opinion of the court as to the law and as to its duty in the premises, and in the judgment rendered we fully concur.

Before concluding we must advert to another matter which it seems to us affects the integrity and authority of this court. It is always a matter for regret when any questions are brought into discussion which have no proper place in a judicial opinion of any kind, and especially where those

questions not only do not relate to the law of the case, but are entirely foreign thereto, and, while of public importance, are only political in their nature and fit subjects for debate on the hustings or in the legislative hall and not in this forum. We must decline to enter upon the consideration of any such matters, but confine ourselves to the facts stated in the record and the law arising thereon, as we are enjoined to do and as the great example of our predecessors, if nothing else, should lead us to do. If we unsettle the foundations of the law by substituting our own individual opinion of what is right, often biased and prejudiced, for the safer, wiser, and more temperate rule of the law, we will surely bring discredit upon our decisions and justly merit, as we will certainly receive, the condemnation of the people.

We find no error in the rulings of the court. Affirmed.

BROWN, J. (concurring). I concur fully in the able and exhaustive opinion of Mr. Justice WALKER, who speaks for the court in this case. As to whether the lease of the Atlantic & North Carolina Railroad was wise or not is not for this court to say. Suffice it that it was made by the administration of Governor Aycock, an able and patriotic son of our state, after long and patient consideration and supported by a well-defined and pronounced public sentiment, so much so that the succeeding General Assembly refused to take any steps to disturb it. The state and other stockholders are now in receipt of a large revenue from it, something they never received before. I shall not discuss the wisdom or folly of government ownership of railroads, state or national. Those who wish to be informed as to the wretched failure of this state in managing and owning railroad property will do well to read the able article of Hon. Thomas B. Womack on the subject in the December number, 1906, of *World's Work*. The reader will also be enlightened as to the enormous losses of the states of Missouri and Pennsylvania when engaged in similar business by reading the instructive article of Mr. C. M. Keys in the same number of that magazine.

CLARK, C. J. (dissenting). Passing by the patent objections (1) that the so-called lease was made at a meeting irregularly called, due notice thereof not having been given as required by the charter, and held at a place not designated in the call; (2) that the deposit of bonds required by the lease to be made before the lease should become effective has not been made as stipulated; and (3) that freight rates have already been increased in violation of the express provision that this should not be done, which was an indispensable agreement without which the lease would not have been made, we will come at once to the fatal defect that the company was without any power whatever in its charter to lease out

its property and franchises, and thus wholly abdicate the discharge of those duties in consideration of the undertaking to render which its charter and franchises were granted. All authorities concur, and even the defendant admits that the lease could not be legally made unless in the charter, or by special act of the Legislature, the power to lease was expressly conferred. "The lease by a railroad company of all its road, rolling stock and franchises, for which no authority is given in its charter, is ultra vires and void," says the highest court of the Union. *Thomas v. Railroad*, 101 U. S. 71, 25 L. Ed. 950; *Railroad v. Railroad*, 118 U. S. 290, 6 Sup. Ct. 1064, 30 L. Ed. 83; *Transportation Co. v. Pullman*, 139 U. S. 49, 11 Sup. Ct. 478, 35 L. Ed. 55. The attempted lease is all the more questionable in this case, because not only is there no such power in the charter or in any statute, but, the state being the owner of a great majority of the stock, the control of this great work, held in trust for all the people and for future generations, should not pass to the hands of a nonresident syndicate to be operated for their profit and emolument and in furtherance of their own policies, and to the destruction of the last hope of the accomplishment of the great public policy of a system of state internal improvements so wisely laid out and planned by our fathers, and paid for out of a constricted public treasury without consulting the people of the state represented in their Legislature, when the General Assembly was to assemble within less than four months. There should have been a halt made before the control of a great piece of public property, built out of the taxes of the people, was handed over to strangers, and put beyond further operation in the public interest, until at least the people whose property it was could have been consulted. The haste of the lessee to accomplish this transfer without consulting the real owners of the property and their Legislature, the only body which had power to confer a right to lease it, must be noted. Why was not the opportunity given the General Assembly to express the public wish as to this disposition of so large a part of the state's property? Why was not time allowed at least to give due notice of the meeting as required by the charter, and why was not the meeting held at the place named in the call? Why were not the bonds stipulated to be deposited so deposited before the lessee took possession of the state's property, and why has the stipulation against an increase of rates, without which the contract would not have been made, been so soon ignored and disregarded? All these indicia of haste would be potent in considering the validity of a transaction in which private parties engaged. Why should they not be considered and weighed when they concern the transfer forever from the

people of the state, without consulting their representatives in the General Assembly, of the control of so great and valuable a property, and which is on the point in the near future of becoming immensely more valuable with our increasing wealth and population, and the retention of the control of which would, by the state's regulation of its rates and charges, be so important a factor and check upon the rates charged by the other railroads of the state which have passed into the control of other nonresident syndicates.

Section 18 of the charter provides as follows: "The said company may, when they see proper, farm out the right of transportation over said railroad, subject to the rules above mentioned, and the said company and every person who may have received from them the right of transportation of goods wares and produce on said railroad shall be deemed a common carrier as respect all goods, wares and merchandise entrusted to them for transportation." It must be apparent to any one who reads that paragraph of the charter that it did not authorize the company to make any lease of all its rights, properties, and franchises; yet that is the sole reliance of the defendant in its search for legislative power conferred to make the lease. The meaning of these words cannot be more clearly stated than by Bynum, J., in 72 N. C., at page 648, who, after stating that not a single decision in this state or elsewhere had ever maintained such a construction—and it may be added that not one here or elsewhere has done so since—adds: "A right of transportation over a road is one thing, and the road itself with its engines, shops, and property is certainly another, and these can no more be confounded than rent can be with the land out of which it issues. One is a right of passage over the corpus, the other is the corpus itself. A lease of the road would carry the right of transportation as an incident; but the right of transportation would not carry the road; for, if so, every wagoner at a toll gate who buys a ticket over a turnpike for a year or a term of years thereby acquires a lease of the road and its management. Nothing is more common than for all roads, with connecting lines, to farm out the right of transportation over their lines, and in this day of close connections and rapid transit the practice is indispensable to successful business. We every day see this right farmed out to express companies and by one company for the cars and freight of another and for special purposes. At many of our depots we see freight cars painted and marked the 'Yellow Line,' the 'Green Line,' the 'Blue Line.' What does it all mean? These cars belong to vast incorporated companies of these names which are doing nearly all the fast transportation of the United States, yet they do not, as I am informed, own a mile of road. Their business is to furnish cars and freight which they agree to deliver. In order to do so, they hire or 'farm'

from the railroad companies the right of transportation over their lines at stipulated rates and speed. One company furnishes the road and motive power and farms out the right of transportation to the other company, which supplies the rolling stock and delivers the freight." Judge Bynum then proceeds and conclusively shows the origin and use, for 200 years, of the term "farm out the right of the transportation," and how it came to be inserted in railroad charters, and that its significance has always been as above stated, and has never at any time been understood as conferring the right to sell or lease the railroad property and franchises. He then truthfully added: "No authority or decision is cited to sustain this lease, and we may fairly conclude that the judgment here is without a precedent." The foregoing is quoted from the dissenting opinion of Mr. Justice Bynum in *State v. Railroad*, 72 N. C. 640. That dissent was well received by the profession at the time, and the writer believes, has since been generally deemed by it as the true statement of the law, like Judge Iredell's famous dissent in *Chisholm v. Georgia*, 2 U. S. 419, 1 L. Ed. 440, and Justice Brown's dissent in *Income Tax Case* (*Reagan v. Trust Co.*) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014. The opinion of the court was supported, as Judge Bynum said, by not a single citation, then, and no opinion has been since rendered to support it. On the contrary, on every occasion in which it has since been referred to, this court has either markedly refrained from indorsing it, or has intimated against its correctness.

The able and learned counsel in this case did not argue that this isolated decision was correct, nor is the opinion of the court herein based on its correctness. The defense rest their case upon the doctrine *stare decisis*, and, though "*decisis*" is in the plural, the defendants' counsel presented but that single case. When a decision is wrong, this court has overruled it, though it has been again and again repeated, notably *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677; *Watson v. Watson*, 56 N. C. 400, and there are many others. Certainly when there is only one decision, and that is clearly wrong upon its face, is supported by no precedent, before or since, and is opposed to the public policy of the state, it would be singular if the courts were compelled to repeat the error, instead of correcting it. Nor can the doctrine that the decision has "become a rule of property" be invoked. Railroad leases are not a matter of every day dealing. This is the first time since the case in the 72 N. C. that the construction of such a clause has been presented to the court. The clause construed is not even a provision of a general law, but is merely a clause in a private act, and now a similar clause in another private act is before us. If the former construction was wrong, now at the first opportunity it should be corrected. The former decision after it

was made was conclusive between the parties thereto and as to that character. It would not have been conclusive even between the same parties in a second lease, especially after the doubt cast upon it, and for this reason, when a second lease was proposed, it was signed at midnight to avoid an injunction from a state court, and the lessee obtained in the federal District Court a validating decision, which is not put upon the correctness of the decision in 72 N. C. 634. The judge (*Simonton*), a good lawyer, was careful to put his ruling upon the sole ground that the Supreme Court of the state had so held. *Southern R. Co. v. N. C. R. Co.* (C. C.) 81 Fed. 595.

A construction by the court of one private statute does not establish a rule of property as to rights claimed under another private statute, although the language of the two may be similar, or even identical. *Williamson v. Berry*, 8 How. (U. S.) 495, 12 L. Ed. 1170; *Hatch v. Burroughs*, 1 Woods (U. S.) 439, Fed. Cas. No. 6,203; *Barber v. Railroad*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925; *Wood v. Brady*, 150 U. S. 18, 14 Sup. Ct. 6, 37 L. Ed. 981. The charters of both the North Carolina Railroad and the Atlantic & North Carolina Railroad have been held to be private statutes. *Hughes v. Com'rs*, 107 N. C. 598, 12 S. E. 465; *Durham v. Railroad*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1; *Logan v. Railroad*, 116 N. C. 940, 21 S. E. 959.

Besides what is above said, this lease should not be held valid because of an erroneous decision, between other parties, construing a clause in another and different private act, and which decision has never since been held correct for many reasons, among them: (1) When *State v. Railroad*, 72 N. C. 634, was decided, it received the vote of but three judges out of five, and the lower court (*Albertson*) had held against its validity. It has been argued that the lease having been made by the executive department, charged with operating the property, the courts should not intervene. It would seem that this was a mistaken view, for to the legislative, not to the executive, department belonged the function of permitting the property to be leased, and the trust confided to the state directors by the statute was to operate the state's property, not to lease it and pass its control away from the state into alien hands, as is well said by Bynum, J., in 72 N. C. 634. (2) The decision in 72 N. C. 634 was not only called in question by the division of the judges, and the inherent error apparent on inspection, but it has never been held to be correct since, not even (as we have seen) in the opinion in the federal court in 81 Fed. 595, which sustained the second lease of the North Carolina Railroad, not because the decision in 72 N. C. 634 was correct, but simply because it had been made. In the following cases only has it been referred to in this court since, and in not one of them with approval. In *State v. Railroad*, 73 N. C. 529, 21 Am. Rep. 473, *Rodman, J.*, who had not sat in

State v. Railroad, 72 N. C. 634, because interested as a stockholder in the North Carolina Railroad, referred to the said decision in 72 N. C. as *res judicata* (which it was as between the parties), and held that the state could not forbid the lessee to change the gauge. He placed his opinion in 73 N. C. on the ground that the Legislature could not forbid the change of gauge upon the since wholly discredited and overthrown doctrine that the state could not in any respect regulate the management of the railroad, neither its rates of fare and freight nor the location of its station houses, nor any other detail of its economic management. Bynum, J., again dissented, and time has vindicated his judgment. Indeed, Pearson, C. J., had long previously in *State v. Matthews*, 48 N. C. 459, held the true doctrine that the Legislature, notwithstanding the charter, could "afterwards regulate the speed at which the cars shall run," and control in other respects, adding, "The sovereign being presumed to reserve to itself the right of regulation of all such matters in the absence of an express contract to the contrary." *State v. Railroad*, 72 N. C. 634, was first mentioned again in *Logan v. North Carolina R. Co.*, 116 N. C. 245, 21 S. E. 959, where this court merely said that the validity of the lease was "*res judicata*" between the parties, but no intimation was given that it had been correctly so held. In 120 N. C. 624, the General Assembly addressed an inquiry to the Supreme Court, in whose reply, through Chief Justice Faircloth, it is said: "Without expressing any intimation either way upon the question whether the power to lease its road is vested in the North Carolina Railroad Company by its charter," etc. The inquiry was upon a clause in a pending bill by which it was sought to validate the new lease of the North Carolina Railroad. The court refused to say that the decision in 72 N. C. was correct, and the bill did not pass. *State v. Railroad*, 72 N. C. 634, was next mentioned in *Hardien v. Railway*, 129 N. C. 358, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 749, where the court, referring to the second lease of North Carolina Railroad said, "If the lease is valid because made subsequent to the decision of a divided court in *State v. Railroad*, 72 N. C. 634," etc., and also saying (page 356), "If it were a new question, the court might possibly hold with Judge Bynum." The court thus recognized that as to the North Carolina Railroad the matter was *res judicata*, but refused to approve the decision. The next and last reference was made by Mr. Justice Connor in *Land Co. v. Hotel*, 132 N. C. 533, 44 S. E. 89, 61 L. R. A. 937, where he says: "Bynum, J., in his very able dissenting opinion in *State v. Railroad*, 72 N. C. 645, says: 'No railroad scheme was ever devised by more of the wisdom and patriotism of the state. It was intended to be in fact what it was in name, the North Carolina Railroad, which, when completed from the Atlantic to the Tennessee line, would radiate a uniform system of lateral roads con-

necting all parts of the state in a common brotherhood by an easy and convenient intercommunication of trade and travel.'" Judge Connor further says (page 534 of 182 N. C., page 44 of 44 S. E. [61 L. R. A. 937]): "It is difficult to believe that the policy of the state for nearly a century was to be reversed, and the prospective seaport was to be hampered by the grant of the absolute ownership of the entire water front thereof separate and distinct from the ownership of the abutting lands; that the state was to part with this property which it held in trust for all of its citizens. Nothing save a clear declaration of such purpose would justify such conclusion." This was found so "difficult to believe" that Judge Connor, speaking for us, held that we did not believe it. Certainly, then, we cannot believe without "a clear declaration of such purpose" that the state intended to grant away the control, not merely of a water front, but of the line of railroad which she had built to that port and "held in trust for all its citizens." Thus we see that the solitary case invoked to wrest this property from the state was not only, as Judge Bynum said, "without authority or decision cited to sustain it and without a precedent," but it has received no support since from any decision in any other court, and always when referred to since in this court it has either been cited only as being *res judicata* of that particular lease or a strong intimation of its doubtful character was recorded. This, as well as the other circumstances calculated to discredit its authority, was well known to the defendant, and it took this lease little more than 90 days before the Legislature would meet, which could alone confer the power to lease, according to the decisions of the United States Supreme Court and all other precedents, and now asks us to hold such lease valid because of that one entirely unsupported decision. The lessee knew it had been questioned and doubted. It took with notice that it was not an "approved precedent." (3) The citation of the lease of the North Carolina Railroad Company is peculiarly unfortunate. The history of that first lease is not in this record, but there was nothing in its negotiation which could recommend it as a precedent. The company now operating it as lessee reports to the Corporation Commission that it made for the year ending June 30, 1906, over \$1,000,000 net profits, after paying the rental, all operating expenses of all kinds, including maintenance of equipment and of roadway, damages, salaries, taxes, and charges of all kinds. Thus the people of the state have paid their rent and taxes of the lessee and all expenses of every kind, and we are presenting the lessees yearly a net profit of over \$1,000,000. The Corporation Commission Reports are as official as those of this court of the state treasury, and may properly be referred to. With this annual loss of over \$1,000,000 to the people of the state from the decision of a divided court, which decision has not since been approved,

we might well refuse to approve it now, when another piece of the state's property is about to pass from its control, and the sole authority invoked is that decision. This leasehold of the North Carolina Railroad, which cost the lessee nothing, and on which the people are paying the rent and all expenses, besides making the lessee an annual present of over \$1,000,000 is said to be counted in its mortgage as worth \$12,000,000—a princely gift. In truth, on a 4 per cent. basis, the lease is worth \$25,000,000, and this value will increase, unless rates of transportation are largely reduced.

If this lease was ultra vires, there could be no ratification of it. If the words conferring the right "to farm out transportation over the road" could not confer on the company the right to lease the road itself and all its property and franchises, certainly the receipt of rent from an illegal lease could not confer the power to lease which the Legislature has not given. In *Railroad v. Railroad*, 130 U. S. 22, 9 Sup. Ct. 409, 32 L. Ed. 837, Miller, J., said, quoting *Railroad v. Riche*, L. R. 7 House of Lords, 653: "A contract not within the scope of the powers conferred on a corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action." This is cited and approved in *Transportation Co. v. Pullman*, 139 U. S. 55, 11 Sup. Ct. 478, 35 L. Ed. 55. In the same case and in *Thomas v. Railroad*, 101 U. S. 83, 25 L. Ed. 950, is a full collection of authorities of the highest courts in this country and in England, all holding that "a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good. The due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions which undertakes without the consent of the state, to transfer to others the rights and powers conferred by the charter, and relieve the grantees of the burden which it imposes is a violation of the contract with the state and is void against public policy." Repeated reference has been made in opinions of this court to the wise and patriotic system of railroads which our fathers planned and built. Seventy years ago they began with an efficient system of state regulation of railroads by the only practical plan of state ownership. Now when all the world has turned to that system, by either taking over the sole ownership or a controlling interest, save only this country and England, in both of which the tide is setting in the same direction, we have before us the question of the validity of transferring to alien hands the last piece of the state's once magnificent patrimony. It may be well to recall the method by which that patrimony has piece by piece disappeared, as shown in our statutes and judicial reports, and by common knowledge. As long as the Wilmington & Weldon Railroad Com-

pany received a bare support from a sparse population and an impoverished country, it was undisturbed, but as soon as it gave unmistakable signs of becoming profitable a syndicate, by insisting that the state could not properly manage it, because it had not till then been profitable, procured the passage of an act by which the state exchanged its shares in that road for the same face value of its bonds. As those bonds were then quoted around 85, and there is good reason to believe that the stock has since been watered more than 25-fold, Douglas, J., in *Corp. Com'n v. Atlantic Coast Line R. Co.*, 137 N. C. 25, 49 S. E. 191, the syndicate is now receiving dividends on more than \$70 from the public for every \$1 invested in acquiring from the state this valuable property. Next the North Carolina Railroad gave signs of becoming valuable, and then the present northern syndicate has made it a leasehold property, worth over \$25,000,000, from which they receive an annual profit of over \$1,000,000 as we have seen. Next came the Raleigh & Gaston and Raleigh & Augusta Railroads whose state stock was acquired by the process of being exchanged for depreciated state bonds, and its stock has been watered six-fold. Then the Western North Carolina Railroad was sold for a beggarly sum and bonded and stocked (as the Railroad Commission Reports of that day showed) for \$74,550 per mile, on which the public were to pay dividends and interest. And now the last fragment of the state's great system, the Benjamin of our hopes, is to pass into alien hands. It lingered last only because it was the last to show signs of coming profitability. In *Railroad v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176, the Supreme Court of the United States held that if a Legislature fixed rates that would permit a railroad company to earn 4 per cent. net on the true value of its property, after purging its expense account by legal investigation from exorbitant salaries and illegal disbursements, the courts could not interfere. As the state now parts with the control of its last railroad on the ground that it has not hitherto been profitable, it is well to recall that the same pleas were made by syndicates who were anxious to relieve the state of the burden of the other state railroads now so profitable, and that, if they had not been hearkened to, the people of this state would now be paying no taxes of any kind whatever, or would be receiving reduction in freights and fares of the amount of all their taxes. Illinois and New Jersey are both free from payment of any or a large part of their state taxes by reason of those states acting wisely as to its ownership of railroads. By the report of the Corporation Commission for the present year, it appears that (using round numbers) the state taxes are \$2,500,000, county taxes aggregate \$2,500,000, town taxes \$1,500,000, school taxes \$1,500,000—a total of \$8,000,000 of taxes. During the same time the receipts of railroads within this state from intrastate freight and passenger and its pro rata, ac-

cording to mileage from through traffic, was (counting on the same rate of increase since June 30th) over \$27,000,000. Their expenses, by their own showing, unpurged as suggested in the above decision in 143 U. S., was \$17,000,000, leaving \$10,000,000 net profits, most of which has been carried out of the state to our impoverishment. Not all of this has been earned, it is true, on the railroads whose controlling interest was once owned by the state which thus preserved an efficient control. These figures are pertinent, and should well make us pause before we hold valid this passing over to alien lands of the state's last property upon the authority of a single decision, erroneous on its face, without precedent when delivered by a divided court and which has not been since approved or followed till now.

We were told on the argument that the lease should be favored if the law was doubtful, because state management was bad, and free passes had been illegally issued. These arguments would have been more in place in an argument before the General Assembly upon an application for authority to lease, but, if it was admissible for counsel to present it, it is not improper to say that the publicity possible under state ownership enabled the discovery to be made of this handful of illegal passes issued by the Atlantic & North Carolina Railroad Company. What would have been the discovery if the same calcium light of publicity had been turned upon the syndicate owned railroads? Would it have been better? In *State v. Railroad*, 122 N. C. 1069, 30 S. E. 183, 41 L. R. A. 246, Douglas, J., states that the number of free passes in this state were over 100,000. As to the management of the railroads under private ownership, it has been more profitable certainly; but profitable to whom? Not to the public, who pay into the treasuries of the syndicates over \$10,000,000 in excess of all expenses and some \$7,500,000 after paying their taxes and rentals, and after allowing 4 per cent. net profit on the \$70,000,000, at which they list the true value of their properties. Is there any cause in this to increase the number of privately owned railroads at a loss to the state of her last remaining railroad?

But finally we are told that these corporations were at least better managed than when in private hands. Are the daily reports of wrecks, deaths of passengers and employes, missed connections, delayed freights, fewer than when the state owned the railroads and public opinion exerted a direct pressure upon officials? Are the salaries of the higher officials less, or the pay of the working force greater, or their hours shorter than when the officials in charge of the railroads knew that the public eye was upon them, and could command their discharge of duty? When the divided court in 73 N. C. denied the right of the Legislature to regulate the gauge, Judge Bynum asserted that the state did

have that power, and with prophetic vision foretold that the gauge would be changed back, and that there would be the same gauge throughout the Union. It has come to pass. He, also, said this (at page 654 of 72 N. C.), which comes more and more clear to the sight of all men as the years unfold before us: "The rapid multiplication of these bodies, their resources, and far-reaching ambition, their ubiquity and vast combinations, all moved and directed by concentrated power and talent, constitute them a distinct and almost independent and overshadowing power in our governments, and, in fact, the great social and political problem of the age. Whether they shall control the government or governments shall control them are questions that are forcing themselves upon public attention and fast assuming practical importance. They should and will be maintained in the exercise of all their essential and legitimate powers as necessary and useful institutions of modern civilization. But if, in addition to the dangerous power of transferring all their property and franchises to anybody and anywhere, it should also be held that their corporate powers are such contracts as put them beyond the reach of all legislative check or control in the interest of society, then the problem will have been solved. The government in my opinion will have abdicated its sovereignty, heretofore supposed to be inalienable, and society will be left without protection to chartered irresponsibility."

PEDRICK et al. v. RALEIGH & P. S. R. CO.

(Supreme Court of North Carolina. Dec. 22, 1906.)

1. NAVIGABLE WATERS — OBSTRUCTION — BRIDGE—PUBLIC NUISANCE—RIGHT TO SUE.

The owner of a sawmill on a river, located above a proposed bridge, who alleged that he procured logs to be sawed in the mill in rafts coming down the river, both from above and below the bridge, and that he shipped his lumber to market over the river in barges, which must be towed by tugboats through the draw on the bridge, had a sufficient interest in the river, different from the public at large, to entitle him to sue to restrain the construction of the bridge as an alleged public nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 139½, 140.]

2. SAME — CITIZENS OF ADJOINING TOWN — NAVIGATORS.

Citizens of a town adjoining a river, and persons who owned and ran sailboats thereon, had not a sufficient interest in keeping the river open for navigation to entitle them to sue to restrain the construction of a bridge across the river as a public nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 139½, 140.]

3. NUISANCE — PUBLIC NUISANCE — INJUNCTION—PARTIES—STATE.

The state is a proper party to a suit to restrain a public nuisance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, § 197.]

4. RAILROADS — CHARTERS — CONSTRUCTION — CROSSING RIVERS.

The charter of a railroad authorized it to construct a road from Raleigh, in an easterly direction, through Pitt county, running to or near the town of Greenville; thence on the south side of Tar river to some point on or near and across the river "above or near" the town of Washington, which was on the north side of the river. *Held*, that the railroad was authorized to cross the river on a bridge, not necessarily "above" the town of Washington, but either "above or near" such town.

5. NAVIGABLE WATERS—BRIDGES—CONTROL.

The power to control the management of a drawbridge over a navigable stream after its construction, by requiring the draw to be kept open at all proper times, etc., in the interest of the public welfare, is in the federal and state government.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 2.]

6. SAME—NUISANCE.

A drawbridge over a navigable stream is not necessarily such an obstruction to navigation as to constitute a nuisance, unless the obstruction materially interrupts general navigation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, §§ 78–99.]

7. SAME—INJUNCTION—EVIDENCE.

Where a railroad had full power to construct a drawbridge over a navigable stream, evidence *held* insufficient to show that the contemplated bridge would constitute such a nuisance as would justify a preliminary injunction restraining its construction.

8. SAME — CONTROL — STATE AND FEDERAL GOVERNMENT.

The control of navigable waters within the state is in the state; the authority of the general government being only cumulative to protect from an interference with commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Navigable Waters, § 2.]

Appeal from Superior Court, Beaufort County; McNeill, Judge.

Action by Le Roy Pedrick and others against the Raleigh & Pamlico Sound Railroad Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This action is brought by the plaintiffs, citizens of the town of Washington, for the purpose of enjoining defendant corporation from constructing and maintaining a bridge across the Pamlico river, a navigable waterway, wholly within this state, at the said town, for that "said bridge will materially burden, impede, and obstruct navigation over said river, and will constitute a public nuisance by rendering it difficult to pass said bridge with sailing vessels, and floating rafts, barges, and other crafts, which are constantly plying the waters of said stream in their commerce with the said town and counties bordering on the waters of Pamlico Sound." The plaintiff S. R. Fowle alleges that "he is the owner of a large sawmill, situated on said river above the proposed bridge, and is engaged in the manufacture of lumber, and is compelled, in the prosecution of his business, to float his logs to his said mill on the waters of said river in rafts and to ship lumber from his said mill in barges." Plaintiffs Pedrick and Rose are the owners of sailing vessels,

and engaged in the occupation of running the same between the docks of the said town and parts of the said river below the proposed bridge and the counties bordering on Pamlico Sound. Plaintiffs allege that sailboat navigation will be peculiarly obstructed by said bridge, because of the effect of adverse winds, in the presence of which sailing vessels are compelled to tack and take different courses, which cannot be done in the space of 70 feet, the width of the draw in said bridge. They further allege that barges and floating rafts will be practically impossible of navigation because of the manner in which they are drawn by tugs, using ropes of such length that they cannot be controlled, but are subject to be dashed against the bridge by side winds, etc. They further allege that the charter of defendant corporation does not authorize the construction of said bridge at the proposed point; that the construction of said bridge above the docks of the town fully accomplishes the purpose of defendant's charter, and but slightly affects the navigation above the town. They further allege that the charter only authorizes defendant to construct a bridge across Tar river, the mouth of which is at a point about three miles above the town of Washington.

The defendant admits that it has begun the construction and proposes to complete a railroad bridge across the river near Washington, at a point where said river is about one-half mile wide and at which there is but one channel, of 8 feet in depth and 100 feet in width; that the said bridge is being constructed under the authority of the Legislature of this state, and by virtue of authority of the Secretary of War and the engineering department of the government of the United States; that prior to granting such authority the said Secretary of War investigated and passed upon all matters pertaining to or affecting the navigation of the said river by vessels of every character; that said bridge is being constructed under the rules and regulations specified by the Secretary of War, and will be, when completed, with the draw across the channel of said river, in all respects a modern structure of the most approved construction, and will not interfere with, obstruct, or retard navigation by vessels of the character navigating said river. A map showing the channel, piers, and construction at the channel is attached to the answer. Defendant further avers that the aforesaid railroad, running from the city of Raleigh to the town of Washington, was not practicable of construction in any other place or in any other manner than that in which it has been laid out, located, and is being constructed, and that there was no other practicable way of entrance and crossing of the aforesaid river than that which has been adopted by the board of directors, authorized by the Legislature, and approved by the Secretary of War in the place and at the point where it now proposes to construct the afore-

said bridge. It is admitted that the plaintiff S. R. Fowle is the owner of a sawmill situated on said river; but this defendant avers that his aforesaid sawmill is only one of many mills located above said bridge, and the construction of this bridge will not and has not in any manner affected the aforesaid plaintiff S. R. Fowle in any other way or manner than the general public using said river for navigation. It is further averred that no sailing vessel can now utilize said channel under adverse winds without the aid of a steam or power craft, and that, when the proposed bridge is completed, instead of a channel 100 feet in width and 8 feet in depth, there will be two channels, 70 feet in width each, dredged to a depth of 9 feet for the use of such vessels; and it is denied that the construction of the aforesaid bridge will inconvenience, obstruct, or hinder navigation on said river by any manner of craft; and it is further denied that the plaintiffs or either of them have any peculiar or especial property or interest in the navigation of said river, or would be affected by the construction of said bridge to any greater extent than the general public by reason of the construction thereof, and that either of them would suffer any special irreparable damage thereby. It is stated: That in 1903 the Legislature of the state of North Carolina granted to this defendant power to locate, construct, and operate a railroad for the transportation of passengers, freight, mail, and express from Raleigh, in Wake County; thence in an easterly direction through Wilson county, running near the town of Wilson; thence through Pitt county, running to or near the town of Greenville; thence, on the south side of Tar river, to some point on or near, across river, in Pitt or Beaufort counties, above or near the town of Washington; thence to or near the town of Washington, or to some point in an easterly direction, to tide water in the eastern section of North Carolina, on or near the Pamlico river or sound, as shall be determined by the said board of directors. That, pursuant to the power in said charter granted, the defendant company proceeded to lay out and locate its line of railroad as in its charter authorized to do, and at said time located and determined upon the crossing of the aforesaid river at the point at which it now proposes to construct its said bridge. That thereafter, to wit, after its aforesaid line had been run and located and after its board of directors had determined upon a crossing of said river at the point designated, the Legislature of North Carolina further extended the rights, powers, and privileges of the defendant company, by private laws of North Carolina (Acts 1905, p. 17, c. 5), ratified 2d day of February, 1905, to construct said road from the town of Greenville; thence in an easterly direction through Pitt county, to or near some point on the south side of Tar river in Pitt or Beaufort counties; thence to or near the town of Washington, or to some

point in an easterly direction to tide water in the eastern section of North Carolina, on or near the Pamlico river or sound, as shall be determined by the board of directors. That, undertaking to locate its aforesaid line of railroad, this defendant has made careful examination and has made accurate surveys, and to this end has expended a large amount of money in its attempt to locate its railroad, and that there is no other point at which the crossing of said river can be established consistent with the powers and rights and privileges granted by the aforesaid Legislature, and this defendant avers that the right to build the aforesaid bridge at the point at which it proposes to build the same, and the adoption by its board of directors of this point of crossing the aforesaid river, was in strict compliance and in accordance with the granted power and authority of the Legislature of the state of North Carolina and the general law of said state. That, pursuant to the granted authority and power of the Legislature and the authority of the Secretary of War so obtained, this defendant began and is actively engaged in the construction of a railroad about 140 miles in length, and to this end has expended many hundred thousands of dollars, and is now expending many thousands of dollars each day, for the completion of its aforesaid railroad. That it has fully constructed about 25 miles of railroad, and will have completed the construction of about 40 miles more of railroad by January 15, 1907, and is in the process of constructing the entire line of its railroad. That in its works aforesaid, in the process of completion, this defendant company has been and is acting in good faith, upon the assumption and belief and advice that its aforesaid charter authorized and empowered it to cross the river at Washington as it is proposing to do, and if it were now stopped in the construction of said bridge it would entail a loss upon this defendant company of many thousands of dollars, and each day's delay it may be forced to suffer to gratify the plaintiff and others would be an inestimable damage, and would seriously affect this defendant in carrying out its purposes and plans regarding the development of the eastern section of North Carolina and the completion of its line of railroad for the use and convenience and advantage of all the people of eastern North Carolina. The defendant further averred that it was amply solvent and able to respond in damages for any injury which plaintiffs might sustain by reason of the construction of said bridge, etc.

The complaint is verified by plaintiff S. R. Fowle, and the answer by C. O. Haines, president. Summons was issued the 24th day of September, 1906. Pursuant to notice, a motion for an injunction to enjoin the construction of said bridge was heard before Judge McNeill, October 15, 1906. Both parties filed a number of affidavits tending to support their several contentions. Motion

for injunction was denied, and plaintiffs appealed.

Shepherd & Shepherd, for appellant. L. I. Moore, Stephen C. Bragaw, and Aycock & Daniels, for appellees.

CONNOR, J. (after stating the case). This appeal was argued before us with marked ability and learning, counsel citing authority for the support of their several positions. His honor did not find the facts upon which he based his judgment refusing the injunction. It will be convenient, in the discussion of the questions presented, to state the uncontroverted facts material to the decision. The town of Washington, conceded to be a prosperous commercial community, containing about 8,000 inhabitants, is located on the north side, we will assume, of Pamlico river, about 36 miles above its mouth and (for this purpose) about 3 miles below the conjunction of said river with Tar river. The said river, from its mouth to and above said town, is navigable. Considerable traffic has been and is now carried on by the people of said town, over said river, with people living above and below Beaufort and adjoining counties. Said traffic is carried on by means of sailing, steam, and gas vessels of considerable tonnage. Said river flows by and past the entire length of said town. There are a large number of wharves, stores, and warehouses, together with several sawmills, to which logs are brought in rafts from above and below said town, and the lumber is carried to market on barges towed by tugs down said river. These mills and wharves are located both above and below the county or highway bridge which crosses said river, abutting on one of the streets of said town; the larger number of said mills and wharves being below said county bridge. The county bridge has a draw of 36 feet.

The defendant's resident engineer makes an affidavit, to which is attached a map showing the formation of the banks of the river, width of the channel, location of bridge, distance, etc. We find no contradiction, in any material respect, of the statement made in this affidavit. After stating his opportunities for knowing the facts to which he testifies, he says: "That from a point below the draw of the said bridge, a distance of 2,500 feet, the channel runs a practically straight course, about northwest by north coming up, and southeast by south going down; that the channel continues then in a straight line above the said draw for a distance of 1,300 feet; that any vessel coming up the said river has a direct approach to the said draw of 2,500 feet, and any vessel going down the said river has a direct approach to the said draw for a distance of 1,300 feet; that a direct approach to the draw in the county bridge, which crosses the said river from Bridge street, in said town, going up the said river, is about 450 feet, and that coming down the said river a direct approach can be

made to the said county bridge draw for a distance of about 950 feet; that above the town of Washington the channel becomes more winding and crooked, and there is no point on the river, between the town of Washington and the point $3\frac{1}{2}$ miles up the said river, where the channel continues a straight course for a longer distance than 2,400 feet; that affiant has had opportunities of experience and observation in the matter of the construction of bridges across navigable waters, and knows that the bridge now being built by the said company is modern in character and of approved design, and that the draw of the said bridge is of the character recognized by the experts as being safe, convenient, and readily opened and closed, and such as is in common use in railroad bridges at this time; that from Willow Point, above, the course of the river is very winding, with sharp turns and short stretches of water, and the location of a bridge across the stream above Willow Point would, of necessity, more seriously interfere with the navigation of said river above Willow Point than can the bridge, located as is now proposed, be to navigation upon the river from Washington to points below; that during the month of September pilings were driven at the points at which will be placed the center pier and end piers of the draw of the said railroad bridge; that from the time of the driving of these pilings until this date there has been left open and clear for the passage of water craft, something more than half of the total space that will be provided for the passage of such craft after the said draw is completed; that during this time—that is to say, from the early part of September—affiant has been daily either on the said river or on the shore thereof opposite the proposed draw, and has seen every day numbers of sailing vessels, steamers, gas boats, tugs and barges, and tugs with rafts of logs in tow, pass through said space without delay, inconvenience, or difficulty; that affiant has at times seen a tug with two barges in tow, the said barges lashed together, pass through the said space, and has at other times seen the tug with two barges, one behind the other, pass through the said space without difficulty; that during the period of time referred to the wind has been variable, unusually heavy tides have prevailed, and a considerable portion of the time the weather has been what is commonly called stormy; that the construction of the said bridge in accordance with the plans will not have the effect of causing the channel of the river, either at the draw of the bridge or above or below the same, to fill up, but, on the contrary, the tendency would be to avoid the result; that the plan upon which said bridge is being constructed will leave a space in the channel of the said river not less than 70 feet wide, and another space of the same width, which will become a part of the channel; that the plan attached shows the

general elevation of the draw span of this railroad bridge and the depth of the water on each side of the center pier and between it and the two end piers; that upon the plan is indicated the relative location of the center and end piers, the space left open for the passage of water craft, and the depth of the water at mean low-water level; that this plan has been made after a thorough sounding and examination of the said river and the bottom thereof, and is correct; that the depth of the water between the center pier and the end pier, to the south, runs from 10 feet on the southern edge to 12 feet next the center pier; that the depth of the water, between the center pier and the north end pier, runs from 12 feet 6 inches to 13 feet, and this depth is practically maintained in the channel for a distance of about 200 feet below the draw and for the same distance above."

The defendant's charter (Priv. Laws 1908, p. 3, c. 1) authorizes the company to construct a railroad from Raleigh, in Wake County, "in an easterly direction * * * to or near the town of Greenville; thence, on the south side of Tar river, to some point on, near, across river in Pitt or Beaufort counties, above or near the town of Washington; thence to or near the town of Washington, * * * as shall be determined by said board of directors." The charter was amended by the General Assembly (Priv. Laws 1905, p. 17, c. 5), permitting the road to be carried to Snow Hill, in Greene County; thence to Greenville; thence "to or near some point on the south side of Tar river in Pitt or Beaufort counties," etc. Defendant alleges, and it is not denied, that prior to the amendment of its charter by the General Assembly of 1905 it "proceeded to lay out and locate its line of railroad, and determined upon crossing the said river at the point at which it now proposes to construct its bridge," and that on the day the summons was issued in this action the bridge was more than one-fourth completed. We omit any reference to the affidavit showing the progress of the work and present condition of the bridge.

Before proceeding to discuss the question whether and to what extent the proposed bridge would impede, obstruct, or interfere with navigation, we will dispose of the two preliminary questions raised by the pleadings and argued before us: (1) Are the plaintiffs, or either of them, entitled to sue; that is, have they alleged such special and peculiar damage, different in kind from the public generally, by reason of the construction and maintenance of the bridge, as under the settled principles of law give them a right to sue? (2) Does the charter of defendant road authorize it to construct a bridge over Pamlico river at any point, or is it restricted to the construction over Tar river?

The obstruction or interference with the navigation being a public nuisance, it is elementary learning that no private citizen may

sue therefor, unless he suffers some damage which is not common to the public, or, to express it affirmatively, he may sue by showing that he sustains some special peculiar injury different in kind from the public. *Manufacturing Co. v. Railroad*, 117 N. C. 579, 23 S. E. 43, 29 L. R. A. 700, 53 Am. St. Rep. 600, where the authorities are cited in a well-considered opinion by Mr. Justice Avery. The question is discussed and the latest authorities cited in *Joyce on Nuisances*, 267, 271. We have no difficulty in finding that none of the plaintiffs who sue, in respect to their citizenship of the town of Washington, are entitled to do so upon the averment in the complaint. Mr. Fowle avers that he is the owner of a sawmill on said river, located above the proposed bridge, and that he procures the logs to be sawed at his mill in rafts coming over said river, both from above and below the proposed bridge; that he ships his lumber to market over said river in barges, which must be towed by tugboats down the river and through the draw in the bridge. Plaintiffs Pedrick and Jones say that they own and run sailboats on said river, passing from the docks above the proposed bridge into Pamlico Sound, etc. It is not clear, upon the authorities, whether the allegations bring these plaintiffs within the principle entitling a private citizen to sue in such cases. If we look beyond our own decisions, we find much conflict in the cases applying the rule. We incline to the opinion, without undertaking to discuss and reconcile them, that upon the allegations in the complaint plaintiff Fowle is, upon the authority of *Manufacturing Co. v. Railroad*, supra, entitled to maintain the action. *Baird v. Shore Line R. R. Co.*, 6 Blatchf. (C. C.) 276, Fed. Cas. No. 758; *Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255; *Wood on Nuis.* 853. The right of plaintiffs Pedrick and Jones is much more doubtful. We do not very clearly perceive how their right to use the right of navigation for the purpose of having their boats to pass up and down the river differs, in kind, from that of all other persons. Mr. Wood says: "It is not enough that he has sustained more damage than another. It must be of a different character, special and apart from that which the public, in general, sustains, and not such as is common to every person who exercises the right that is injured." *Nuisances*, 646. In *Clark v. C. & N. Railroad Co.*, 70 Wis. 593, 36 N. W. 326, 5 Am. St. Rep. 187, Lyon, J., says: "The complaint herein alleges that the plaintiff owns a steam yacht upon which he desires to travel daily and carry passengers between Neenah and Appleton; that in his business of a manufacturer he is largely interested in transporting freight up and down the Fox river, past the point where defendant's bridge is located, and would transport such freight by river, but for the bridge; but now boat, passengers, and freight have

to take a circuitous route by reason of the bridge. The complaint fails to state where the plaintiff's business is carried on, or that he owns any property affected by the alleged nuisance, or that he has ever made any attempt to pass the bridge or that he has any riparian rights affected by it. The whole substance of the complaint is that he desires to navigate the Fox river, where the bridge stands, with his yacht, and to transport passengers up and down the river at that point; but he cannot do so because of the bridge, and is compelled to take a longer route to reach desired points. If there is any element of special damage alleged in the complaint, damage not suffered by the whole public who navigate or may desire to navigate Fox river between the same points, we fail to discover it." *Manson v. Railroad*, 64 S. C. 120, 41 S. E. 832; *Swanson v. M. & R. Boom Co.*, 42 Minn. 532, 44 N. W. 986, 7 L. R. A. 673. We are of the opinion that the plaintiffs, other than Mr. Fowle, fail to show any right to sue. It is not very clear that he has such right; but, as he alleges that he owns and operates a mill on the banks of the river, and is, in that sense, an abutting owner, we think, and for the purpose of passing upon the other questions hold, that the action will lie. It is held by some courts, and with reason, that a court of equity will entertain a bill to enjoin a proposed public nuisance by one who might not be able to maintain an action at law. "The strictness of the original rule has been greatly modified since the days of Lord Coke." *Joyce on Nuis.* § 424; *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. 570, 23 Am. Rep. 673, 9 L. R. A. 726. In such cases, the reason upon which the principle is founded, to avoid a multiplicity of suits, does not apply. It is uniformly held, however, that the courts in such cases will act with great caution in interfering at the suit of private citizens. The state is the proper party to complain of wrong done to its citizens by a public nuisance.

In regard to the second question, it will be well to state, as the basis of this discussion, a few elementary principles before proceeding to consider the peculiar language of the charter. The power to regulate the use of navigable waters in the state, subject to the power in the national government, is in the General Assembly. The law is thus stated by Battle, J., in *State v. Dibble*, 49 N. C. 108: "The Neuse river having been thus recognized as a navigable water, the defendants had the right, in common with all other citizens, to navigate it with their boats, and, as an incident of such right, to remove all obstructions not put there by or under the sovereign power. It is admitted that the sovereign power in this case is the General Assembly of the state." It is clearly within the power of the Legislature to authorize a railroad corporation to cross,

and, of course, erect a bridge over, a navigable stream. Both constitute, in this sense, a part of the system of public highways of the state. These propositions are not denied by the learned counsel for plaintiffs. It is suggested that, by a proper construction of the charter, the defendant is restricted to the construction of a bridge across the Tar river, and that the eastern terminus of this river is at Willow Point, about three miles above the town of Washington. Defendant suggests that the point is not the terminus of Tar river, but that it continues by that name until it reaches and passes the town of Washington. It is conceded that the eastern terminus of the river is not fixed by any legislation. We do not deem it at all decisive of the right of defendant to cross the river "near" Washington to fix the exact terminus. It is evident, from the language of the records and affidavits, that, whatever may have been the understanding in the past, the town of Washington is now understood to be located on the Pamlico river. We note that the charter of the Washington Toll Bridge Company, granted December 24, 1812, empowers the company "to build a bridge across Tar river, above the town of Washington, in Beaufort county, and near the said town, to commence at Bridge street." *Washington Toll Bridge Co. v. Commissioners*, 81 N. C. 491. It also appears, from the record set out in that case, that subsequent legislation referred to it as Pamlico river. The Century Dictionary refers to Tar river as "flowing into Pamlico Sound. It is called in its lower course Pamlico river." In "North Carolina and its Resources," a work published by authority of the State Board of Agriculture (1896) p. 122, it is said of Tar river: "At Washington it expands into a broad estuary, navigable for sea-going vessels, and thence takes the name of Pamlico river." We note these descriptions of the river, not as showing that Washington is, as a matter of law or fact, on the Tar river, but as indicating that the exact terminus is not known, and that, in construing the charter, this fact should be kept in view. It is well known that in our state other rivers have been called by more than one name in different localities. The purpose of the Legislature was to authorize the defendant to construct a road from Raleigh to Greenville; thence on the south side of Tar river to Washington, which is on the north side of the river, the exact status of which, in respect to its name, is not ascertained. No one doubts that the road was to cross "the river in Pitt or Beaufort counties, above, or near, the town of Washington, as shall be determined by the board of directors." These facts are thus settled. It was to cross the river from the south to the north side, to some point "above or near the town of Washington." It is not seriously contended that the road must cross at Willow Point,

or that to cross at such point is either desirable or practicable.

We fully concur with the position of the learned counsel for plaintiff in regard to the rule by which grants of power to corporations are to be construed. The authorities cited sustain them. "All public grants are strictly construed. Nothing can be taken against the state by presumption or inference." *Delaware R. R. Tax*, 18 Wall. 206, 21 L. Ed. 888; *State v. Freeport*, 43 Me. 202. In ascertaining whether the charter authorizes the construction of a bridge over a navigable stream, being in derogation of a public right, the rule of strict construction would be invoked, and the power would not be found unless expressly given. The construction of somewhat similar language was before the Supreme Court of Massachusetts in *Fall River Iron Works Co. v. Railroad*, 87 Mass. 221, where Bigelow, C. J., said: "We cannot doubt that, where an unrestricted grant of power is made to a corporation to construct a road between two points, it carries with it the right to cross navigable waters, if they interfere in a course or route which is otherwise reasonable and practicable, and if the road can be constructed without destruction of the public easement or seriously impairing its convenient enjoyment and use." The power to cross the river is given by necessary implication. It would be to attribute to the Legislature either ignorance of the geography of the state or a purpose to trifle with an important subject to say that it did not know that to leave Greenville at a point on the south side of Tar river and go to Washington did not necessarily involve crossing some river "above or near Washington." Having reached the conclusion that the defendant has, by its charter, the right to cross—that is, construct a suitable bridge over—the river, the question arises whether it is restricted to such crossing "above" Washington. To adopt this construction would be to eliminate the word "near." If the Legislature intended to fix the point of crossing definitely "above" Washington, it was unnecessary to use the word "near." As said by the Supreme Court of Massachusetts: "The first and most obvious suggestion is that the Legislature did not intend to fix with absolute certainty and precision the point of departure for the new road which the defendants were authorized to build. In using language which was so vague and indefinite as to leave open for future determination the location of this point, it is clear that, owing to the nature of the ground, or for some other sufficient reason, it was not deemed expedient or necessary to fix it with accuracy. It is also clear that, in thus omitting to designate it, it was their intention to delegate the power of locating it definitely to the defendants or their agents, and to vest in them the exercise of the needful judgment and discretion to carry into effect the authority which they intended to grant." *Farnham on Waters*, 827 (a). Thus we find in the defendant's

charter power given the board of directors to determine the point of crossing the river—of course, to be exercised within the limits of the grant—"above, near," the town of Washington. This is the usual form in which the termini of proposed railroads are fixed. It is necessarily so, because we know from observation that the exact termini of railroads are never fixed until after the charter is granted; hence words similar to those found here are generally used, followed by the power to the directors to fix them by survey or otherwise. Justice Bigelow in the case cited says: "It follows that unless the defendants have clearly exceeded the limits of this discretion, and have acted either in bad faith or in disregard of the just limits which by a reasonable construction of the words of the statute should be put on their power to fix the terminus a quo, they cannot be deemed to have invaded the plaintiffs' rights, or be held amenable to process restraining them from prosecuting their work and constructing their road, according to the plan. * * * They are authorized to commence at a given point or near it. If they embrace the latter alternative, a wide range is necessarily left open to them. The word 'near,' as applied to space, can have no positive or precise meaning. It is a relative term, depending, for its signification, on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects." *Wood, Nuls*, § 274. We think this correctly states the rule of construction, and, applying it to this case, we are of the opinion that it was within the limits of the power conferred upon the directors of the defendant, acting in good faith and with a due regard to the rights of the public, to locate the bridge below the town of Washington.

We are thus brought to a consideration of the question whether the location, in the light of the evidence before us and for the purpose of disposing of this appeal, is reasonably necessary to the accomplishment of the purpose for which the power is granted, and whether, in the light of such evidence, we can say that it is reasonably practicable to locate the bridge above the county bridge. We concur with the plaintiff in saying that if the location of the bridge below the town will create a nuisance, and if defendant reasonably can accomplish the same purpose by placing it above the town, the charter will be so interpreted as to confine it to such location. 16 A. & E. Enc. (1st Ed.) 1001. In *Hickok v. Hines*, 23 Ohio St. 523, 13 Am. Rep. 255, it is said: "Corporations or public officers are not authorized to obstruct the navigation of a river, under a legislative grant of power merely for the building of a bridge across the river, when the bridge can reasonably be constructed so as not to destroy the navigability of the river." In that case the court found that the effect of the proposed bridge "would effectually destroy all navigation and

practically destroy the navigability of the river above the bridge." The right to build a bridge was not denied, but the contest related to the kind of a bridge that might lawfully be constructed. An injunction was sought only against the building of a bridge "without a draw." *Selman v. Wolfe*, 27 Texas, 68, was an action for damages for obstructing a navigable stream. The jury found that the obstruction was a nuisance, and the court held that the statute under which plaintiffs in error constructed the bridge, did not authorize them to do so. We have held at this term, in *Thomason v. Railroad* (N. C.) 55 S. E. 198, that power conferred upon a railroad company to construct and operate a railroad must be exercised with a due regard to the rights of the public and of the owners of property abutting or near to the road. In *Met. Asylum Dist. v. Hill*, 6 L. R. (1890-81) 193, the jury, upon an issue submitted, found that the erection of the hospital for the reception of smallpox patients would be a nuisance, endangering the health of the persons living near by. It was ruled by the House of Lords that the language of the statute did not authorize the establishment and maintenance of the nuisance. The power being in the Legislature to authorize the obstruction of a navigable stream by the erection of another highway, as a county bridge or a railroad bridge, the courts will not undertake to control the exercise of the power. The question whether the proposed bridge, if an obstruction, is necessary for the public convenience, is for the Legislature; but, in interpreting statutes by which it is claimed the power is conferred, the courts will apply the rule of strict construction and interpret them upon the theory that the Legislature did not intend to confer power to unreasonably or unnecessarily obstruct the highway or navigation. *Farnham on Waters*, § 1296.

For the purpose of deciding the controverted questions of fact, necessary to dispose of the motion for an injunction, in no manner affecting the rights of either the state or such persons as may be entitled to sue, to have these questions in some appropriate action decided by a jury, we are confined to the complaint and answer, together with the affidavits and exhibits filed. It is not seriously contended that the proposed bridge will obstruct—that is, altogether prevent—boats, barges, or rafts passing up and down the river, or that in the mode of its construction, in respect to the draw and the caisson upon which it rests, the most approved methods have not been adopted. The objection is directed to the location of the bridge, and not to its kind or construction. It is alleged, and not contradicted, that it is being constructed in accordance with the plans and specifications of the War Department and its engineers. The power to control the management of the bridge after its construction, by requiring the draw to be kept open at all proper times, the removal of rafts or debris, the dredging of the

channel, if found to fill up by reason of the caissons, and in all other respects in which the public welfare, interest, and safety is involved, is ample in both federal and state governments. We are therefore to eliminate all other questions and consider the testimony only in regard to the location. We find, upon an examination of the authorities, a recognition of the principle that where two rights exist, public as well as private, they must be used and enjoyed in the light of the maxim, "*Sic utere*," etc. *People v. R. R. Co.*, 15 Wend. 134. The rule laid down by Mr. Farnham, and which we think correct, is: "As commerce upon land has increased and become more important, its requirements have modified to some extent the old rule which prevented any interference whatever with navigation rights, and each right modifies the other; so that the obstruction to the navigation will not be regarded as unreasonable and a nuisance, unless it is material and unnecessary, in view of the requirements of the land traffic." 2 *Waters*, 1290. He further says: "If a bridge is necessary for the convenience of the public, and does not prevent the free use of the stream as a public highway, although causing some slight inconvenience to those who had been in the habit of navigating the stream, by obliging them to take some additional precautions in passing it, it is not necessarily a nuisance. The fact that the channel is somewhat abridged, or that vessels are delayed to a slight degree, does not render the bridge a nuisance." Mr. Justice McLean, in *Works v. Junction R. R.*, Fed. Cas. No. 18,046, says: "A drawbridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance. The delay is submitted to in consideration of the benefits conferred." The discussion of the judge in this case is enlightening and apposite to the one before us. "To constitute nuisance, the obstruction must materially interrupt general navigation." *State v. Wilson*, 42 Me. 9; *Woodman v. Pittman*, 79 Me. 456, 10 Atl. 321, 1 Am. St. Rep. 342. In *Attorney General v. Del. & B. R. R. Co.*, 27 N. J. Eq. 1, 27, it is said: "The rule of law is that where a bridge over a navigable stream is erected for public purposes, and produces a public benefit, and leaves reasonable space for the passage of vessels, it is not indictable; and another rule is that the bridge must appear plainly to be a nuisance before it can be so decreed, since a court of equity proceeding by bill, like a criminal court trying an indictment, must give the defendant the benefit of all reasonable doubts." *Williams v. Beardsly*, 2 Cart. (Ind.) 591.

We have examined with care the affidavits filed in the case. Eliminating the complaint and answer, we find an irreconcilable conflict of opinion in the affidavits, while there is but little of fact. Seventeen persons, who either own or operate sail, steam, or gas vessels and boats on said river, express the opinion

that the proposed bridge will seriously impede, impair, and obstruct navigation. Twenty-one persons, who say that they are in the same position to form opinion, are equally explicit and positive in expressing the opinion that the proposed bridge will not materially burden, impede, or obstruct navigation upon the said river, nor will it seriously interfere with, or tend to diminish or discourage, commerce upon the said river. Each of the affiants gives the reasons upon which their opinions are formed. It is impracticable for us to discuss them in detail. We are not sufficiently familiar with the questions involved to do so intelligently. We take, merely as illustrating the divergence of opinion, the affidavit of Mr. Bell, who says that he is 62 years of age and has been for many years engaged in navigating the river. His opportunity is evidently good for forming an opinion. He says that the bridge will seriously obstruct navigation, giving his reasons therefor. Capt. Springer, on the other hand, says that for 25 years he has navigated the river. He says that in his opinion no such result will follow. Both appear, from their affidavits, to be intelligent, honest men. They are a fair sample of the other affiants. A large number of citizens, engaged in all kinds of occupations and professions, express divergent opinions. If we were controlled in our judgment by numbers, the defendant would have the advantage. Recurring to the parties to the action, we note that the complaint, used as an affidavit, is not verified by Mr. Pedrick or Mr. Jones. The affidavit of Mr. Havens is very full and explicit, he has large opportunities for knowing the conditions, and his opinions are entitled to much weight. Mr. Packard, an intelligent and evidently well-informed man and resident engineer of defendant, says that he has unusual opportunities for observing the character and class of commerce carried on upon the river; that he has made careful sounding examinations and surveys for the purpose of ascertaining the depth, width, character, and course of the channel for a distance both above and below the town of Washington. He gives the result of his work as stated herein. He says that during the month of September pilings were driven at the points at which the center pier and end piers of the draw will be located; that from the time of the driving of the pilings to that of making the affidavit there has been left open something more than half of the total space that will be provided for the passage of boats when the bridge is completed; that during this time he has been daily either on the river or the shore opposite the proposed draw, and has seen every day numbers of sailing vessels, steamers, gas boats, tugs and barges, and tugs with rafts of logs pass through said space without delay, hindrance or difficulty; that during said time the wind has been variable, usually heavy tides have prevailed, and for a considerable portion of the time the weather has been what is commonly called stormy.

Capt. Mohan says that he is engaged in navigating the river, transporting lumber and general freight to and from Washington and Philadelphia and other Northern points; that his "barge is a vessel of 432 tons, 183 feet and 7 inches on keel, and about 190 feet and 10 inches beam, and about 12 feet deep, and one of the largest which comes into these waters"; that barges can be navigated through the draw in the proposed bridge without difficulty; and that the bridge will not impede, burden, or obstruct navigation. He gives the width of draws and manner of construction of bridges over a number of navigable rivers between Washington and Philadelphia, showing that the draw in the bridge in controversy corresponds with many others. He says: "Affiant does not know of any drawbridge across any river in North Carolina that is more easy of access and less difficult to pass through, or that constitutes less of an obstruction to navigation, than will the drawbridge now being constructed by defendant." In the light of this conflict of opinion, and in view of the fact that courts of equity are cautious in interfering with a public improvement upon an allegation of apprehended injury, we would hesitate to enjoin the further construction of this bridge. Judge McLean in *Works v. Junction Co.*, supra, a controversy much like this, says that, where the evidence is equally balanced, "the preventive and extraordinary remedy invoked ought not to be given."

Several witnesses express the opinion that it would be practicable for defendant to locate its bridge above the county bridge. The testimony in this respect is conflicting. In *Barnes v. Calhoun*, 87 N. C. 199, plaintiff sought to enjoin the construction of a mill, for that it would create a public nuisance, robbing lands, and injuring the health of the people. The testimony was conflicting. Judge Gaston said: "Upon the whole, we confess that the strong leaning of our opinion is with those who think that the apprehensions of the plaintiff are not without foundation. But we do not, on that account, feel ourselves authorized to grant the extraordinary remedy, which he asks of us. We entertain no doubt of the right of this court thus to act in cases of undoubted and irreparable mischief, and we hold that it may thus act upon the application of individuals, not only in the case of a private nuisance, but, where the individuals suffer special injury, in the case of a public nuisance also. *Spencer v. London & Birmingham Railroad Co.*, 8 Simons, 193. But it will only act in a case of necessity where the evil sought to be prevented is not merely probable, but undoubted. And it will be particularly cautious thus to interfere where the apprehended mischief is to follow from such establishments and erections as have a tendency to promote the public convenience." He emphasized the right of the plaintiff to sue at law for damages, and, if necessary, upon a verdict establishing the nuisance, apply for

equitable relief. In *Attorney General v. Lea*, 38 N. C. 301, Judge Nash, citing *Attorney General v. Blount*, 11 N. C. 384, 15 Am. Dec. 526, says that the court will enjoin a public nuisance "*in a plain case.*" (Italics his.) In this case an injunction to enjoin the erection of a public mill was dismissed. In *Simpson v. Justice*, 43 N. C. 115, plaintiff sought to enjoin a private nuisance. Pearson, J., says that the fact of nuisance must be established by an action at law or "*by strong and unanswerable proof.*" (Italics his.) The same principle controlled the court in *Wilder v. Strickland*, 55 N. C. 389; Nash, C. J., saying that, if the erection of the mill should result in a nuisance, the courts of law would be open to the complainants. *Hyatt v. Myers*, 73 N. C. 232; *Dorsey v. Allen*, 85 N. C. 353, 39 Am. Rep. 704; *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761, 65 L. R. A. 930, 102 Am. St. Rep. 555. When we look into other jurisdictions, we find the same rule uniformly adhered to. In *Eaton v. N. Y. & L. B. Railroad Co.*, 24 N. J. Eq. 49, which was a bill to enjoin the construction of a bridge over a navigable water, the chancellor said: "The work which is sought to be enjoined is a public enterprise of much importance to the people of the state, who, through their Legislature, have authorized its construction. I find no evidence of bad faith on the part of defendant, nor even any interpolation of it. This court is always reluctant to stay the progress of such enterprises, and will only do so in a case clearly calling for its intervention." He further says that, if the defendants have done any wrong or unauthorized act, "they may be called to answer for it in a court of law. They receive no license or immunity by the refusal of this court to interfere with them on this application."

There is another view of the case pressed upon our attention. It appears that the defendant made contracts for the construction of the bridge and expended large amounts of money in the preparation for its placing; that for several months it was at work thereon; that pilings were driven, the foundation of the structure made, and, as one witness said, about one-fourth of the work done, before any application was made for an injunction. It is said, in reply to this, that plaintiffs had made application to the Attorney General to institute suit and were awaiting action by him. While the delay in bringing the action is not controlling in our minds, we cannot disregard the facts in the record. It is manifest that the question of the location of the bridge has been discussed by the citizens of Washington and the defendant for some time, and that there is a division of public opinion in regard to it. The reports of Capt. Johnson of the Engineer Corps shows this. The surveys were being made, and many and most unmistakable steps were taken showing that defendant had selected the location for the construction of this bridge. The observations of the chancellor in *Eaton v. N. Y. & L. B.*

R. R., supra, in this aspect of the case, are in point. It may be proper to say that we do not concur in the view, pressed by defendant, that the decision of the Secretary of War permitting the location of the bridge is conclusive. The control of its navigable waters is with the state; the authority of the general government being only cumulative protection from an interference with commerce. *Lake Shore & M. R. R. v. Ohio*, 165 U. S. 385, 17 Sup. Ct. 357, 41 L. R. A. 747.

Upon a careful review of the evidence and authorities, we concur with his honor, and his judgment must be affirmed.

BROWN, J., did not sit on the hearing of this case.

BLEDSON v. COLUMBIA MILLS CO.
(Supreme Court of South Carolina. Dec. 11, 1906.)

APPEAL—DISMISSAL—SERVICE OF CASE AND EXCEPTIONS.

Under Code Civ. Proc. § 345, providing that, where appellant fails to prepare his appeal, it shall amount to a waiver thereof, unless the court permits it to be perfected as provided by sections 339 and 349, where the case and exceptions were not served within the statutory time, and there was no satisfactory excuse, the appeal should be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2507-2510, 3126, 3127.]

Appeal from Common Pleas Circuit Court of Richland County.

Action by one Bledsoe against the Columbia Mills Company. Judgment for plaintiff, and defendant appeals. Dismissed.

The facts on which this motion was made are substantially as follows: A verdict was obtained in favor of plaintiff at April term, 1906, Richland county. Motion for new trial was made, and on August 15, 1906, the circuit judge granted a new trial nisi. On August 25th plaintiff remitted amount required by order nisi. On August 28th notice of appeal was served by Messrs. Abney & Thomson, attorneys of record for defendant. Judgment was entered September 28th. October 2d Mr. Thomson notified Messrs. Abney & Thomson that appeal had been abandoned, and asked payment of judgment and costs. Beginning with August 15th Messrs. Abney & Thomson continuously tried to obtain an adjustment of the differences between them and the casualty company conducting the suit, giving notice from time to time of the condition of the case and of the contention of plaintiff's attorneys, which culminated on October 11th in notice to defendant of their withdrawal from the case on that date. The import of this notice seems not have been comprehended by defendant until further correspondence. On October 27th Mr. Shand was informed that his services were desired by defendants in the appeal, and on Monday, the 29th, he

looked into the matter, but was unable to serve his proposed case on that day. After communications from defendant and attorneys of casualty company, case for appeal was made up and served on November 3d and "return" filed in this court. Plaintiff's attorney returned proposed case served.

Frank G. Tompkins, for the motion. R. W. Shand, opposed.

PER CURIAM. This is a motion to dismiss the appeal herein for failure to serve case and exceptions for approval, as required by law. Section 345 of the Code of Civil Procedure provides that, whenever the appellant fails to prepare his appeal, his failure to do so shall amount to a waiver thereof, unless the court permit the appeal to be perfected, as provided in sections 339 and 349.

It appearing that the case and exceptions were not served in the time required by law, and there being no satisfactory showing that the said default was due to mistake or excusable neglect, the court is of the opinion that the appeal should be dismissed.

ALDRICH v. ALDRICH et al.

(Supreme Court of South Carolina. Nov. 21, 1906.)

1. PARTITION—VALUATION BY COMMISSIONERS—SETTING ASIDE.

The circuit court will not set aside the valuation put by commissioners, in partition, on lands to be divided, unless it is so gross and unequal as to warrant an inference of unfair or improper motives.

2. SAME—ADVANCE IN BID.

Though parties dissatisfied with the valuation of commissioners, in partition, may bring the property to sale by securing a bid for a material advance in price over such valuation, the return of the commissioners cannot be vacated by the unsecured bid of a stranger to the record.

Appeal from Common Pleas Circuit Court of Barnwell County; Prince, Judge.

Action by Alfred Aldrich, executor, against Rosa Aldrich and others. Decree for plaintiff, and defendants S. A. Richardson and Nell Duncan appeal. Affirmed.

B. T. Rice, for appellants. D. S. Henderson, for respondent.

JONES, J. The executor of Mrs. Martha Ayer Aldrich brought this action to obtain a construction of her will, to adjust the rights and equities of the parties beneficiary thereunder, and to partition the lands known as "The Oaks" among her devisees, they to account for the value of advancements in the final division. Judge Gage made a decree, to which no exception has been taken, construing the will as intending that her children, devisees, should share equally after deducting advancements, and ordering that a writ of partition be issued to five commissioners, two to be named by the plaintiffs, two by the defendants, and the fifth by the clerk, direct-

ing them to ascertain and report the value of certain lands specifically devised by testatrix to her daughters, Miss Rebecca Aldrich and Mrs. Mary Aldrich Allen, and the value of certain lands given by the testatrix in her lifetime to her daughters, Mrs. Sarah Aldrich Richardson and Mrs. Cornelia Aldrich Duncan, valuation to be made as to the time of their gift by the testatrix, directing also that \$2,700 be charged against the share of Mrs. Allen, and \$1,500 against the share of her daughter, Mrs. Daisy Aldrich Bonham, as advances made to them respectively, and referred to in the will. The plaintiff, Alfred Aldrich, and the defendant Mrs. Rosa Aldrich, having admitted receiving advancements exceeding the value of their shares, claimed no further interest in the estate. The decree of Judge Gage concluded as follows: "That, after recommending what lands shall be sold for the purpose of paying the specific bequests and legacies mentioned in the will, and the costs of proceedings, said commissioners do forthwith divide the undivided residue of the lands of said estate between the said Robert Aldrich, Rebecca Aldrich, Sarah Aldrich Richardson, Mary Aldrich Allen, Daisy Aldrich Bonham, and Cornelia Aldrich Duncan, equally after deducting from the share of each for equality of partition the value of advancements heretofore made them, ascertained by the commissioners as hereinbefore directed, or as recited in said will. That any of the parties have leave to apply at the foot of this decree for such further orders as may be necessary to carry the same into effect." The commissioners appointed under this order were J. C. Griffin, J. R. Harden, W. W. Moore, N. F. Kirkland, Jr., and W. I. Johns, and, after being sworn and viewing the land, the commissioners made their return—a majority report by the first four named commissioners and the minority report by Commissioner Johns. The majority report valued the tract conveyed to Mrs. Richardson in the lifetime of the testatrix at \$2,960, and the tract conveyed to Mrs. Duncan at \$3,040, and recommended that Mrs. Duncan pay Mrs. Richardson \$40, so as to make the sum advanced to each \$3,000. Each of these tracts contained about 400 acres and were, therefore, valued at about \$7.50 per acre. Commissioner Johns, making the minority report, valued these lands as not exceeding \$4 to \$5 per acre at the time of the gift of them by the testatrix. With respect to these valuations three contentions were raised before Judge Prince in behalf of Mrs. Richardson and Mrs. Duncan by exceptions to the return of the commissioners: (1) That the commissioners violated the order of Judge Gage requiring valuations as to the time of the conveyance; (2) in not appraising without reference to improvements subsequently placed thereon by the grantees; (3) that the valuation was excessive. Judge Prince overruled these exceptions and sustained the majority report. The appellants, Mrs. Richardson and

Mrs. Duncan, renew their contention by exceptions to this court.

The first and second grounds of objection were properly overruled by Judge Prince, as there was no evidence offered to show that the commissioners violated the order of Judge Gage in this particular; on the contrary, it appeared by the oath of Kirkland, one of the commissioners, that the commissioners did value these lands as of the date of their acquisition by the defendants, which was before any improvements were placed thereon by the defendants. The third objection is very satisfactorily disposed of by Judge Prince in this language, which we quote in full:

"As to the third ground of objection alleging excessive valuation, which has been supported by a number of affidavits, while it is true that a return to a writ in partition may be assailed in this way, and in a proper case may be set aside and the writ in partition recommitted to the same or some other commissioners, yet it is not a practice to be favored, and should be done only in extreme cases, such, for instance, the authorities say, as where fraud or misconduct can be imputed to the commissioners. I find nothing of the sort in this case. It is simply a matter of opinion among the various parties who have testified pro and con, and the affidavits are as numerous and strong on the one side as on the other, and, as the affiants are nearly all strangers to me, I have no means of judging of the weight I should attach to their several statements. The tribunal designated by the law for the ascertainment of values and the equal division of the lands is the commissioners in partition, and their judgment must be held in higher esteem than any other. They are supposed to be not only good and true men of sound judgment and discretion, but chosen with reference to their special fitness for the duties assigned to them, and selected upon the highest principles of fairness to all parties, two chosen by the plaintiffs, two by the defendants, and the fifth by the clerk of the court, all sworn to fairly and impartially perform the duty imposed upon them. The tribunal thus selected is calculated to inspire confidence, and, in the absence of anything going to impeach the bona fides of their acts, their decision should be final. It is rarely the case that, in the division of a large estate among a great many parties, all will be satisfied with the return of the commissioners, and, if their decision can be set aside simply because some are dissatisfied with the result and produce affidavits of those who differ in opinion with the commissioners as to values, the same thing would be gone over and over again and again as long as honest men differ in opinion, and there would be no end to the litigation. The law I think well settled in conformity with the foregoing views. *Geer and Wife v. Wind's Ex'rs*, 4 Desaus., page 85, where it is held that 'the return of commissioners in the division of land on writ of partition will

be supported by the court unless clearly shown to be erroneous and unjust.' 'In the absence of any evidence, the court is bound to assume that the commissioners, in compliance with their sworn duty, acted fairly and impartially, and made such partition as in their judgment was best for the interest of all parties concerned.' *Riley v. Gaines*, 14 S. C. 454, 458. For these reasons, exceptions 1 and 2 are overruled. I have hesitated much in coming to this conclusion, for the reason that I have been profoundly impressed with the strength and force of the argument of counsel for the defendants.

"There is another reason why I do not feel at liberty to sustain the first two exceptions, and it is this: In my opinion, the decree of his honor, Judge Gage, practically constitutes the commissioners in partition arbitrators to ascertain and report the value of the lands advanced these excepting defendants. Their return, therefore, should not be disturbed unless for reasons that would set aside an award of arbitrators appointed under the rule of court. The award of arbitrators will not be disturbed by the court unless it is made clearly to appear that they exceeded their authority, or were guilty of corruption or partiality. In this case no such showing is made. Besides, in *Buckler v. Farrow*, Rich. Eq. Cas. 178, 180, in speaking of the commissioners in partition, the court uses this language: 'The commissioners are the agents of the parties, acting under the authority of the court, and they are as much bound by their return, made in due form, fairly and impartially, as a plaintiff and defendant would be by any award of arbitrators made under a rule of court.' There is no doubt that this is true, and, if true, the burden of showing the mala fides of the commissioners is on those who attack their return. 'An award will not be set aside except for corruption or partiality in the arbitration or for some manifest error made by them.' *Askew v. Kennedy*, 1 Bailey, 46."

It is urged by appellant that the court erred in holding that the return of commissioners could not be assailed except for fraud or misconduct; whereas, it should have been held that said report could be assailed for mistake and manifest injustice, and that the preponderance of the proof was that the said return was unjust. Even if it should be conceded that a preponderance of the evidence outside the report of the commissioners on the lands given Mrs. Richardson and Mrs. Duncan was too high, it was proper to sustain the valuation made by the commissioners, unless the court was satisfied that the valuation was so grossly incorrect and unequal as to warrant an inference that the commissioners acted from an unfair or improper motive. It is a matter of common knowledge that men of experience may honestly differ as to the value of lands. So long, therefore, as the valuation by commissioners may be accounted for on this ground it should be sustained.

and it is not sufficient to overthrow a valuation by commissioners merely to show that, in the opinion of other honest and experienced men, the true value is higher or lower than that made by the commissioners under oath. The rule in England, as stated in *Freeman on Co-Tenancy and Partition*, § 525, is that "It is improper for the court to interfere with the valuation of commissioners, unless there be some mistake in it so gross as to induce the court to think that the commissioners have acted from unjust, corrupt or fraudulent motives." Such is the rule in this state, and the courts apply substantially the same rule in vacating the return of commissioners in partition as are applied in vacating awards of arbitrators appointed under order of court. In *Greenville v. Spartanburg*, 62 S. C. 105, 125, 40 S. E. 147, it is declared that, to avoid an award, it is necessary to show that the arbitrators exceeded their power, or were guilty of fraud, corruption, or partiality, or were influenced by some gross and palpable mistake of law or fact. It is true that the return of commissioners in partition is not absolutely final and is to be submitted to the court for confirmation, still, in confirming or rejecting said return, the court will not retry matters of valuation which it was the duty of the commissioners to determine, but will consider the objections and evidence presented against the return only with a view to ascertain whether the return is the result of the fair and impartial judgment of the commissioners and within their power to make.

After setting off to Miss Rebecca Aldrich 100 acres of "The Oaks" tract, including the ancestral home of Aldrich, and 50 acres of said tract in addition to the "Shuck" tract of 150 acres to Mrs. Allen, as to which no contention has arisen, the majority of the commissioners appraised the residue of "The Oaks" tract, consisting of about 352 acres, at \$15 per acre, and allotted to Robert Aldrich 200 acres thereof, valued at \$3,000, and to Mrs. Bonham 100 acres, valued at \$1,500, which, with \$1,500 of property previously advanced, made her portion \$3,000, and recommended a sale of the remaining 52 acres of "The Oaks" tract. Commissioner Johns, in his minority report, valued these lands at \$25 per acre, and states his reasons therefor as follows: "My valuation of \$25 per acre of 'The Oaks' place is based expressly upon the fact that, upon a careful examination of the lands, I find that it is covered with very fine pine timber, and is very near the town of Barnwell, and also is a magnificent tract of land with little or no waste land; and upon the fact that I offered to the majority of the board of commissioners to take the entire tract of 367 acres (same being left after said specific devises to Mrs. M. A. Allen and Rebecca Aldrich) at the price of \$25 per acre, and pay the cash for same upon examination of deeds." It appears that about 225 acres of this land is woodland, as stated in the affidavit of W. W. Duncan. In support of the

motion to vacate the return of commissioners, the appellants submitted a number of affidavits, among them one by Commissioner Johns, declaring his willingness to take the residue of "The Oaks" tract at \$25 per acre, another, H. W. Richardson, declaring that he would purchase 100 acres of said tract, either woodland or cultivated land, at \$25 per acre, another by D. C. Burckhalter, declaring that he would be willing to purchase 100 acres of said woodland at \$25 per acre, and another by W. L. Cave, that he would purchase the entire woodland of said tract at \$25 per acre and pay cash therefor, either at public or private sale. In overruling the objection to the valuation of the commissioners, Judge Prince decided as follows:

"What I have said as to the valuation by the commissioners of lands owned by Mrs. Richardson and Mrs. Duncan, in considering the first two exceptions, applies with much greater force to objections raised in exceptions 3 to 7, inclusive, as to the valuation of the lands allotted by the commissioners to Robert Aldrich and Mrs. Daisy A. Bonham. It was clearly within the province of the commissioners to go upon these lands, fix their value, and assign them by tracts to the parties entitled thereto. This they have done and the presumption is that they have done so honestly and fairly. This presumption must obtain until overthrown by a clear preponderance of the evidence. I cannot find that the preponderance of the evidence is against the valuation fixed by the commissioners. There are numerous affidavits pro and con, but they satisfy me that honest men not only may, but will often, differ in opinion. In thus holding I am not unmindful of the affidavits of those who say they will pay \$25 per acre for certain of these lands, nor have I forgotten the minority return of W. I. Johns, one of the commissioners. It must be noted that the witnesses, except Mr. Johns, say they will bid \$25 per acre for only a given number of acres. This may be true, and a limited number of acres may really be worth that price, when the tract taken as a whole may not be worth more than the amount fixed by the commissioners. But it should be specially noted that there is not in the affidavits anywhere any evidence that either of these parties, including Mr. Johns, is in such financial condition as to be able to make good his offer. Again, it should be remembered that neither of these persons are parties to this action, and the court has no jurisdiction over them as to compel compliance with their several offers."

The appellants, by their exceptions, raise two main contentions as to the allotment of "The Oaks" tract: (1) That said lands were valued excessively low by the commissioners, and their return should be set aside. (2) That the offer of a substantial bid for the land in advance of the valuation by the commissioners should shake the proposed allotment and bring the land to sale, under the

authority of *Moore v. Williamson*, 10 Rich. Eq. 328, 73 Am. Dec. 98.

The first contention has been disposed of by what has been said in reference to attacking the return of commissioners. The evidence did not satisfy the circuit court that the commissioners were guilty of any fraud, corruption, or partiality in making said valuation, and we cannot say that the preponderance of the evidence is against the view of the circuit court. In the case of *Moore v. Williamson*, supra, the court held that a party dissatisfied with the rate at which land is recommended by commissioners in partition to be assigned to another may always bring the property to sale by making and securing a bid for a material advance in price over the value assessed by the commissioners. In the present case no party to the suit has made and secured a bid for the land, and we know of no precedent in this state which allows such privilege to one not a party. Parties have interest in the question whether the land shall be partitioned in kind or sold for partition. The court has jurisdiction over such parties and may, by proper orders, require a deposit of money or bond to secure such bids, or may otherwise secure the bids in the disposition of the interest of the party in the premises. If, therefore, the doctrine of *Moore v. Williamson* be regarded as an exception to the general rule already announced as to the grounds upon which the return of commissioners may be overthrown, we are unwilling to extend the exception by allowing such return to be vacated by the unsecured bid of one not party to the record.

The foregoing views control and overrule all the material exceptions.

The judgment of the circuit court is affirmed.

FRIERSON v. JENKINS et al.

(Supreme Court of South Carolina. Dec. 1, 1906.)

JURY—RIGHT TO JURY TRIAL.

In an action for admeasurement of dower, demandant has no right to submit to the jury the entire case, but only special issues, the action not being one to recover possession of specific real or personal property, or for the recovery of money only, within Code Civ. Proc. 1902, § 274, in which cases a jury is authorized, but is within section 275, providing that every other issue is triable by the court, which may order the whole issue or any specific question to be tried by a jury.

Appeal from Common Pleas Circuit Court of Lee County; Gary, Judge.

Action by Eliza Frierson against Mary Jenkins and others. From and order refusing jury trial, plaintiff appeals. Affirmed.

See 51 S. E. 862.

A. B. Stuckey, for appellant. McLaughlin & Henderson, for respondents.

POPE, C. J. On the 18th day of January, 1905, the plaintiff, in effect, complained of

the defendants as follows: That in 1904. Richard Frierson departed this life, being survived by his widow. That the said Richard Frierson was possessed, at his death, of three tracts of land; one containing 100 acres; another 82 acres; the third 25 acres. That the defendants Mary Jenkins, alias Mary Frierson, and Katie Jenkins, alias Katie Frierson, are in possession of said three tracts of land, claiming to be the owners thereof. That the defendant Nathan Barnett claims some interest in said lands. That the rents, income, and profits of the three tracts of land are in possession of the two defendants Mary Jenkins, alias Mary Frierson, and Katie Jenkins, alias Katie Frierson, amounting to \$200, since the death of the said Richard Frierson; and that the plaintiff is entitled to her one-third part thereof as her dower and also one-third part of said rents and profits as a part of her dower, wherefore she demanded that her said dower should be admeasured to her, including her one-third share of said rents and profits. That the two defendants answering as Mary Frierson and Katie Frierson, the latter appearing by her guardian ad litem, denied specifically all the allegations of the complaint except that they admit the death of Richard Frierson at the time stated in the complaint, but denied the coverture of the plaintiff and Richard Frierson. They also admitted that the said Richard Frierson was seised at his death of the three tracts of land as aforesaid, but denied the claim of dower of the complaint therein. The two defendants also admitted that they were in possession of and claimed the ownership of the lands described in the complaint, and also that the codefendant Nathan Barnett as executor of the last will of Richard Frierson, deceased, held a valid mortgage on the said lands—the three tracts aforesaid. All three of said defendants demanded that the complaint should be dismissed with costs. Upon these pleadings the case was placed on calendar No. 1 of the March term, 1906, of court of common pleas for Lee county, and came on for trial before his honor, Judge Ernest Gary, and a jury. After the reading of the pleadings, his honor held that the case was not on its proper calendar, and withdrew the case from the jury. The following is the order passed by his honor, Judge Gary: "This case being upon calendar 1, and a jury having been impaneled to try the same, upon the reading of the pleadings herein, I conclude that the case was not on the proper calendar; that there was nothing under the law for the jury to try, and of my own motion withdrew the case from the jury. In other words, the admeasurement of dower is regulated by statute and there is no provision for the jury to admeasure the same." From this order the plaintiff appealed on the following grounds: "(1) Because, under the pleadings in this case, the case was properly docketed on calendar No. 1, and triable by jury, and the presiding judge, it is respectfully

submitted, erred in holding that the case was not upon the proper calendar. (2) Because the action being one for the recovery of freehold estate was properly triable by jury, and his honor erred in not holding so. (3) Because an action for dower is an action at common law, and the trial of such action by a jury is guaranteed under article 7 of the Constitution of the United States. (4) Because, under the Constitution and laws of this state, the issues raised by the pleadings in this case should be tried by jury, except where the parties consent to a trial otherwise, and his honor erred in not so holding. (5) Because the answers having denied the coverture of the plaintiff with Richard Frierson, deceased, in whose estate the plaintiff claims the dower, an issue of fact and of title was thereby raised, and the mode of trial of the same should be by jury, whose finding might be simply, 'We find for the defendant,' or 'We find for the defendant,' and his honor erred in not so holding."

The practical question presented by the exceptions is whether his honor, the presiding judge, erred in withdrawing the case from the jury, in the absence of an order that the specific question of fact raised by the pleadings should be tried by the jury. Section 2399 of the Code of Laws is as follows: "Any woman who is entitled to dower or thirds in the lands of which her deceased husband was seized in fee, at any time during their marriage, may apply to the judge of probate of the county in which their said lands are situated, for a writ of admeasurement thereof, to be directed to certain persons, who shall be appointed for that purpose." Section 2400 provides that the summons be issued and directed to the heir at law of the deceased, or the party in possession, to show cause why the prayer of the petition should not be granted. Section 2401 provides for the ordering of a writ for the admeasurement of dower in case sufficient cause is not shown against the petition, and directs the manner in which commissioners shall be appointed to execute the writ. Section 2407 is as follows: "The appointment of commissioners and the issuing of the writ and other proceedings in relation to the allotment and admeasurement of dower in the circuit courts, shall be made to conform as nearly as may be to the law regulating the allotment of dower in the probate court, as prescribed in this article."

Prior to the Constitution of 1868, which provides that there should be only one circuit court having civil jurisdiction, a claimant in dower had the right to institute proceedings for the admeasurement thereof, either in the court of equity or common pleas. When the petition was filed in the court of equity, even that court usually employed the instrumentality of commissioners provided by the statute to ascertain the value of the dower, but the commissioners were not authorized by the statute to assess a sum of money in

lieu of dower until they had determined that the land could not be fairly divided without manifest disadvantage. *Gibson v. Marshall*, 5 Rich. Eq. 254. If, under the former practice, the proceedings were instituted in the court of common pleas, and an issue of fact was raised by the pleadings, the practice was to frame an issue as to such fact and submit it to a jury. *Righton v. Righton*, 1 Mill, Const. 130. The jury, however, could not render a general verdict. In the case of *Pickett ads. Peay*, 1 Nott & McC. 16, there was an application for dower, the declaration alleged the marriage and seisin of the husband, the jury rendered a verdict in favor of the plaintiff for \$200. Upon a motion to set aside the verdict, the court said: "The jury had no power to find such a verdict. The issue submitted to them was whether defendant was married and whether her husband was legally seised. The verdict is therefore irregular, and must be set aside. If the jury had found the issue for the plaintiff, a writ of dower would then have been issued to commissioners, according to the provisions of the Act of Assembly, whose duty it would have been to have admeasured dower, or assess a sum of money in lieu thereof." These authorities show that the plaintiff, under the former practice, would not have had the right to submit the entire case but only specific issues to the jury.

Let us see what changes have been made since the adoption of Code of Civil Procedure. Section 274 provides that an issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived. Section 275 is as follows: "Every other issue is triable by the court, which, however, may order the whole issue or any specific question of fact involved therein to be tried by a jury, or may refer it as provided in sections 292 and 293." The action of the plaintiff herein was not instituted to recover possession of specific real or personal property, nor was it for the recovery of money only. The case, therefore, does not come within the provisions of section 274, but of section 275. When the issue was raised by the pleadings as to the coverture of the plaintiff and her alleged husband, a request should have been made for the court to frame an issue as to such fact, if the plaintiff desired that it should be determined by a jury. It would then have been the duty of the judge to grant the request, to try the issue himself, or direct a reference, and, if the issue was decided in favor of the plaintiff, then it would have been incumbent on the circuit judge to direct a writ to commissioners for the admeasurement of dower.

As the issue was not properly submitted to the jury, there was no error in withdrawing the case from their consideration.

It is the judgment of this court, that the judgment of the circuit court be affirmed, without prejudice to the right of the plaintiff to proceed in the manner provided by law.

Ex parte GANTT.

(Supreme Court of South Carolina. Nov. 21, 1906.)

EXECUTORS AND ADMINISTRATORS — APPLICATION FOR APPOINTMENT—DENIAL—APPEAL.

When in proceedings to determine the right to administer an estate, an appeal is taken from the probate court to the circuit court, on the ground that the lower court erred in not finding the petitioner was an heir at law of the intestate, before submitting that issue to the jury, the circuit court need not require that petitioner *prima facie* establish such relationship, nor is it necessary for it to determine that the evidence on that issue is conflicting or evenly balanced.

Appeal from Common Pleas Circuit Court of Barnwell County; Purdy, Judge.

Petition of Jesse T. Gantt, Secretary of State, as escheator, for letters of administration upon estate of Jane R. Moody, to be granted to H. L. O'Bannon. J. J. Braxton intervened, asking for letters appointing him administrator as the brother of intestate. From probate decree refusing administration to both, both appeal. From circuit order sending issue to jury, petitioner Gantt appeals. Affirmed.

B. T. Rice, for appellant. Robt. Aldrich and D. S. Henderson, for respondent.

POPE, C. J. Jane R. Moody, widow of W. W. Moody, departed this life intestate and childless. Her brother, James J. Braxton, took charge of her estate, claiming to be her sole heir at law and next of kin.

Jesse T. Gantt, as Secretary of State, and as such officer, by law escheator, filed his petition in the probate court of Barnwell, S. C., wherein he sought the appointment of H. L. O'Bannon, Esq., as administrator of the estate of Jane R. Moody, deceased, on the ground that she was an illegitimate, and her estate had thereby been forfeited to the state of South Carolina. The probate judge of Barnwell county issued his usual citation to the kindred and creditors of the said Jane R. Moody. Within the limit fixed by law, James J. Braxton appeared, stating that he was the brother of said Jane R. Moody, deceased, and claimed to be the only heir at law and next of kin of the said Jane R. Moody, and, as such, entitled to the administration of her estate. The parties introduced testimony on that issue. Whereupon the Hon. John K. Snelling, as probate judge of Barnwell county, made his decree, of date 22d of August, 1905, wherein he decided that the preponderance of the evidence was against James Braxton being the brother of Jane R. Moody, deceased; also, that James J. Braxton was a nonresident of the state of South Carolina, being a resident of Georgia. Therefore, he denied letters of administration to James J. Braxton. He also held that the probate court did not have jurisdiction of the question of escheat, but such question was alone with the court of common pleas, and, therefore, he refused letters of adminis-

tration to H. L. O'Bannon. Both parties appealed from this decree: First, because the probate judge erred in deciding that James J. Braxton was not the brother of Jane R. Moody, deceased; and, second, because the probate judge erred in refusing to grant letters of administration on the estate of Jane R. Moody, deceased, unto James J. Braxton. The petitioner, Jesse T. Gantt, appealed from said decree, because the probate judge erred in holding that court had no jurisdiction to consider the matter of escheat, and refused letters of administration on the estate of Jane R. Moody, an alleged bastard, unto H. L. O'Bannon.

When the questions raised by the appeal were before his honor, R. O. Purdy, the said James J. Braxton moved that the following issue be submitted to a jury for trial: "Was James J. Braxton a brother of the deceased, Jane R. Moody?" The circuit judge "ordered this issue for trial, and also ordered that on the trial of this issue, the testimony taken heretofore *de bene esse* and such testimony as has been agreed to be used on appeal, may be used, as well as any other testimony which may be offered at the trial." From this order the appellant, Jesse T. Gantt, appealed on the following grounds:

"(1) Because his honor erred in not holding that before such order could be granted, a *prima facie* showing must be made by the moving party, that he was the brother of Jane R. Moody; whereas, his honor should have held that no showing whatever was made by the respondent, J. J. Braxton, that he was the lawful brother of Jane R. Moody." We are unable to sustain this ground of appeal. The question underlying the rights of the parties to this controversy is, "was James J. Braxton the brother of Jane R. Moody?" To be considered a brother, it was necessary, of course, that he should be a legitimate brother. No necessity existed that a *prima facie* showing of the affirmative of this question should be first established. This exception is overruled.

"(2) Because his honor erred in not holding that the evidence submitted and offered by the respondent, J. J. Braxton, showed that Jane R. Moody was a bastard, and that, therefore, she could not have any lawful brother or heir at law; whereas, his honor should have held that the overwhelming evidence contained in the moving papers of respondent, J. J. Braxton, showed that Jane R. Moody was a bastard child of Sally Braxton, the mother of said J. J. Braxton." The circuit judge did not hold, as herein complained of. He found that all these things were involved in the issue of fact, which he referred to a trial by jury. Such being the conclusion of the circuit judge, he could not have so decided when he ordered that issue to be tried by a jury. This exception is overruled.

"(3) Because his honor erred in not holding that the evidence offered in this proceeding

in the probate court by J. J. Braxton, showed that Jane R. Moody was a bastard; whereas, his honor should have held that the preponderance of the evidence introduced before the probate court by J. J. Braxton and by him used in his moving papers herein, showed conclusively that Jane R. Moody was a bastard, and as such bastard could not have any lawful brother." The circuit judge was evidently unwilling to pass upon any such issue of bastardy; he sought to have this issue tried by jury. We overrule this exception.

"(4) Because his honor erred in not holding that the circuit court had only appellate jurisdiction of the proceedings herein from the probate court, and the respondent, J. J. Braxton, based his motion alone upon the proceedings had in the probate court, and that the evidence shown thereby was neither contradictory nor doubtful; whereas, his honor should have held the whole record from the probate court, relied upon by J. J. Braxton, proved conclusively that Jane R. Moody was a bastard, and that the testimony was neither doubtful nor contradictory, and he should have decided the issues raised by the said J. J. Braxton in his appeal herein from the probate court, without referring the said issue to a jury." Section 60 of the Code of Procedure of 1902 of this state lays down the rule to govern the hearing of appeals in the circuit court from a judgment rendered by the probate court: "Any question of fact * * * to be decided, issue may be joined thereon under the direction of the Court, and a trial thereof had by jury." *Stewart v. Blease*, 4 S. C. 37; *Ex parte White*, 33 S. C. 442, 12 S. E. 5; *Ex parte Apeler*, 35 S. C. 417, 14 S. E. 931. In the case last cited, at page 421 of 35 S. C., page 931 of 14 S. E., it is distinctly held that the court of common pleas has the right, except in matters for the recovery of money only or of specific, real or personal property, to frame an issue of fact and send it to a jury for trial. The case or proceedings, as filed by the probate court in the court of common pleas, shows that the fact of the relationship of J. J. Braxton with the deceased, Jane R. Moody, was a question of fact upon which issue the decision in this case would turn. There was a serious conflict in the testimony involved here. We do not see that there was testimony offered which would conclusively show that Jane R. Moody was a bastard, and that the testimony on this subject was neither doubtful nor contradictory. This exception is overruled.

"(5) Because his honor erred in not holding that the issue asked for by J. J. Braxton to be referred to a jury could only be granted in case the evidence was contradictory, conflicting or evenly balanced as to said J. J. Braxton being a brother of Jane R. Moody; whereas, his honor should have held that the evidence offered by J. J. Braxton in support of his motion was neither contradictory nor

so nearly balanced nor so conflicting as not to render it necessary to refer said issue to a jury to decide said question of fact." Whatever the trial judge held necessary to raise the issue of fact for trial by jury, is included in his order for said trial. We have already passed upon this ground of appeal. It is therefore overruled.

"(6) Because his honor committed an abuse of his discretion in referring to a jury the issue, 'was J. J. Braxton a brother of Jane R. Moody?'" We are unable to see the abuse of discretion herein involved. This exception is overruled.

It is the judgment of this court, that the order appealed from be sustained.

STATE v. THOMAS.

(Supreme Court of South Carolina. Dec. 10, 1906.)

1. CRIMINAL LAW — INDICTMENTS — NOLLE PROSEQUI.

It is not an abuse of discretion on the part of a solicitor and an error on the part of the presiding judge to allow the solicitor to nol. pros. the first indictment with the avowed purpose of getting out a second bill and coupling the trial of the defendant with that of another charged with a separate offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 689.]

2. INDICTMENT — CONSTRUCTION — CONTRADICTIONS.

That the grand jury found no bill on a count charging two persons with larceny, and a true bill on a count charging one with the same larceny and the other with receiving the stolen goods, is not contradictory.

3. CRIMINAL LAW — INSTRUCTIONS — ADMISSIONS.

It is not error to refuse a request as to admission of guilt of one of two defendants, where the court instructs that such admission is binding only on the one making it.

4. SAME—REASONABLE DOUBT.

Where the court has instructed that the state must prove guilt to the satisfaction of the jury beyond a reasonable doubt, a further instruction that "in other words, we want your judgment. What is your honest good judgment in this case?" is not erroneous.

Appeal from Common Pleas Circuit Court of Marlboro County; Gary, Judge.

Eliza Thomas was convicted of larceny, and appeals. Affirmed.

T. I. Rogers, for appellant. J. M. Johnson, for the State.

POPE, C. J. The defendants were indicted for the larceny of three finger rings of the value of \$150. The defendant, Eliza Thomas, was convicted of the larceny of the finger rings, while the defendant, Anna Rogers, alias Anna Hearsey, was convicted of having received the three rings knowing that they had been stolen. The latter made a confession, but the former stoutly denied the crime. The solicitor gave out three bills of indictment, one after another, entering a nol. pros. as to the first indictment. Then

he entered a nol. pros. on the second indictment. On the third indictment, defendant appellant objected to the sufficiency of the finding of the grand jury on the ground that the same was contradictory and uncertain. Then the presiding judge overruled the objection, and both of the defendants were ordered to trial before one and the same jury. Both defendants were found guilty generally.

The last indictment was in these words: "The state of South Carolina, county of Marlboro. At a court of general sessions begun and holden in and for the county of Marlboro, in the state of South Carolina, at Bennettsville, in the county and state aforesaid, on the third Monday of October, in the year of our Lord one thousand nine hundred and five, the jurors of and for the county aforesaid, upon their oath present, that Eliza Thomas and Anna Hearsey, otherwise called Anna Rogers, late of the county and state aforesaid, on the ninth day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at Bennettsville, in the county and state aforesaid, three finger rings of the value of one hundred and fifty dollars, of the proper goods and chattels of Mrs. Sallie Douglas, then and there being found, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, upon their oath aforesaid, do further present that Eliza Thomas, on the ninth day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at Bennettsville, in the county and state aforesaid, three finger rings of the value of one hundred and fifty dollars, of the proper goods and chattels of Mrs. Sallie Douglas, then and there being found, feloniously did steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the state. And the jurors aforesaid, upon their oath aforesaid, do further present, that Anna Hearsey, otherwise called Anna Rogers, late of the county and state aforesaid, on the ninth day of June, in the year of our Lord one thousand nine hundred and five, with force and arms, at Bennettsville, in the county and state aforesaid, three finger rings of the value of one hundred and fifty dollars, of the proper goods and chattels of Mrs. Sallie Douglas, by Eliza Thomas, then lately before feloniously stolen, taken and carried away, of and from the said Eliza Thomas, unlawfully, unjustly and for the sake of wicked gain, did buy and receive, she, the said Anna Hearsey, knowing the aforesaid goods and chattels to have been lately before feloniously stolen, taken and carried away, against the form of the statute in such cases made and provided, and against the peace and dignity of the state."

The grand jury found no bill on the first count, but found a true bill on the second count against Eliza Thomas, who alone was indicted for the theft of the three rings; and on the third count the grand jury found a true bill against Anna Rogers, alias Anna Hearsey, who was charged therein with buying and receiving the three rings from Eliza Thomas, knowing the said rings to have been lately before feloniously stolen, taken, and carried away. When the first count was eliminated from the indictment, the second count became the first count, and likewise the third count became the second count. After the verdict of guilty as to Anna Rogers, she did not appeal, but Eliza Thomas appealed on five grounds, which we will consider in their order, to wit:

"(1) Because it was an abuse of discretion on the part of the solicitor, and an oversight on the part of the presiding judge, to allow the solicitor, over the protest of the defendant, to enter nol. pros. upon the first indictment found against Eliza Thomas, for the avowed purpose of giving out the second bill and coupling her trial with that of another defendant charged with another and separate offense." We fail to discover any error as here pointed out. It has been a long established practice in this state for the solicitor to nol. pros. indictments until a proper one can be submitted. As was said by Judge Whitner, as the organ of the court in the case of *State v. McKee*, 1 Bailey, 651, 654, 21 Am. Dec. 499: "The solicitor has the right to enter a nolle prosequi at any time before the jury is charged but not after." Chitty, in his *Common Law*, 478, says: "A nolle prosequi may be entered during all the stages of pleading to the indictment." This ground of appeal is overruled.

"(2) Because the first and second counts of the indictment charged the defendant, Eliza Thomas, with one and identically the same offense, and the grand jury having found 'no bill' on the first count, and 'true bill' on the second count, the two findings are contradictory, the one of the other, and there was no certain finding of a true bill by the grand jury against said defendant. And the presiding judge erred in refusing to arrest judgment and grant a new trial on this ground." In the indictment the counts are not numbered. For convenience they are referred to as first, second, and third. But when the grand jury returned no bill as to the first, it was no longer to be considered as the first count, but the second count became first, and third became the second count. There was perfect certainty in the findings of the grand jury, and therefore it was not error in the circuit judge in refusing to arrest judgment and grant a new trial on this ground.

"(3) Because his honor erred in failing

and refusing to charge the following request of the defendant: "Testimony has been admitted in this case tending to prove statements made by the defendant, Anna Hearsey. This testimony was admitted as against her only. This is not proper or competent testimony against Eliza Thomas, and the jury must not allow such testimony to affect their finding as to her." The circuit judge, when testimony was admitted in the trial of the cause, as to the confessions made by Anna Rogers, alias Anna Hearsey, repeatedly declared that such testimony could only be applied to Anna Rogers, but could not be applied to Eliza Thomas. This ground of appeal is overruled.

"(4) Because his honor erred in using the following language in charging the jury: 'In other words, we want your judgment. What is your honest good judgment in this case? If upon the first count you are trying, your judgment after hearing the testimony, after hearing the facts—that is what you must be guided by—is what the law expects of you—your best judgment, that is all that is required of you; if your judgment leads you to the conclusion that Eliza Thomas committed larceny in taking the rings; that is, that she feloniously took them and carried them away—if that is your judgment on this testimony, you find her guilty. And that would end the case as to her.'" The appellant has been led into this error as to the circuit judge by failing to quote his language just before the language of this exception. The circuit judge said in his charge: "Now what must be the proof before you? The law does not require that you should be satisfied of any question of fact to a moral certainty; because that would be an extreme case for the trial of a question of fact. You did not see it; are not supposed to have seen it; and are supposed to know nothing of the question of fact personally. Therefore, you must get it second-handed, and the law does not expect of the state to prove to your satisfaction to a moral certainty the question of fact; but it does say it must prove it to your satisfaction beyond a reasonable doubt." This exception is overruled.

"(5) Because it was an abuse of discretion in the presiding judge to refuse the defendant's motion for a new trial upon the ground that there was no sufficient competent testimony to warrant the finding of the jury." There was no error in the circuit judge, as here pointed out. The responsibility of the verdict was upon the jury. There was an abundance of testimony to justify this verdict. This ground of appeal is overruled.

It is the judgment of this court that the judgment of the circuit court be, and the same is, affirmed.

ARMSTRONG v. ROSS.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

1. SPECIFIC PERFORMANCE—SALE OF REALTY—EXECUTORY CONTRACT.

Courts of equity enforce specific performance of executory contracts for the sale of real estate according to the true intent and meaning of the parties, as disclosed by the contract considered as a whole, and do not hold themselves bound by all the technical rules applicable to deeds passing title, which have, for their foundation, reasons of public policy designed to give stability to legal titles.

2. MINES AND MINERALS — SALE OF COAL LANDS—CONSTRUCTION OF CONTRACT.

A contract for the sale of real estate which, read in connection with deeds and other written instruments to which it refers, shows on its face that the subject of sale was a portion of a certain vein of coal lying partly under a certain tract of land, described and conveyed in the deeds to which the contract refers, and separately described and treated as coal in said deeds, as known to the parties to the deeds and contract, in point of existence, area, location, and relative position, does not include other veins of coal in said tract of land which were not so known to them.

3. SAME.

Such a contract is not ambiguous on its face, nor is a latent ambiguity therein disclosed by the discovery, in the application thereof to its subject-matter, that there are other veins of coal in the land.

4. EVIDENCE — PAROL EVIDENCE — WRITTEN CONTRACT.

The fact that the area and location of the coal was known, disclosed by the terms of the contract, is a part of the written description thereof, to be observed in applying the contract to its subject-matter, and, for the incorporation thereof into the contract, as an element within the intent of the parties, the aid of parol evidence is not necessary.

5. VENDOR AND PURCHASER—CONTRACT — RESCISSION.

Refusal of the vendee in an executory contract of sale of real estate to perform the contract according to the true interpretation thereof, accompanied by an offer to perform in accordance with the vendee's own erroneous interpretation thereof, does not entitle the vendor to rescission.

6. SAME.

To work a release of a contract, a refusal to perform it must be distinct, unequivocal, and absolute, and must be treated and acted upon as such by the party to whom the broken promise or agreement was made.

(Syllabus by the Court.)

Appeal from Circuit Court, Taylor County.

Bill by Adolphus Armstrong against E. L. Ross. Decree for plaintiff, and defendant appeals. Reversed and remanded.

Dent & Dent, for appellant. Mollohan, McClintic & Mathews, for appellee.

POFFENBARGER, J. E. Lodge Ross complains of a decree of the circuit court of Taylor county requiring him to specifically perform a contract for the sale of certain coal in place, made between him and Adolphus Armstrong, in a manner greatly variant from his interpretation of the contract, but conforming exactly to that of the plaintiff, Armstrong. The memorandum of the sale executed by Ross and delivered to Armstrong

reads as follows: "I sell to A. Armstrong the coal in the Barnes & Smith land bought by me under decree at last court. There is to be 27 acres of the coal & if not that much coal in the land enough to come from the Smith adjoining land to make the 27 acres as in the deed of said George H. Smith to Jasper M. Smith. For which Armstrong is to pay \$500.00 & I am to make him a genal warranty deed for the coal with the right to mine and remove the coal free of damage under the surface, and to air and drainage but he is not to have right of way or roads on the top or surface of the land on which to remove the coal. E. Lodge Ross." Their respective contentions make it necessary to set forth, with some degree of particularity, the documentary evidence relating to the coal, to which reference is made in the memorandum, which describes it as that which the vendor had bought "under decree at last court." That decree was made in a suit brought to sell the real estate of Jasper M. Smith, who acquired it by conveyance from G. H. Smith, to whom it had been conveyed by J. H. Barnes and wife. In the deed from Barnes to G. H. Smith there was granted, to the latter, "a certain tract or parcel of land containing 38½ acres, lying in the waters of Black creek in said county [Taylor] and ten acres of coal adjoining said 38½-acre tract. Each of said tracts was further described as adjoining the land owned by James W. Batson. The deed then described the 38½-acre tract of land, but not the 10 acres of coal, by metes and bounds. The deed from George H. Smith and wife to Jasper M. Smith conveyed the 38½-acre tract, describing it by metes and bounds, as it was described in the other deed, and then conveyed the coal in the following terms: "And also twenty-seven acres of coal a part of the same underlying the said tract of land in case there should not be that quantity of coal underlying the said tract of 38½ acres then the residue of the 27 acres of coal is to be surveyed from the coal of the said George H. Smith immediately adjoining the coal under the said 38½ acres tract so as to make in all the said full quantity of 27 acres of coal." The decree of sale under which Ross purchased describes the land as follows: "All that certain parcel of land in this county lying on the waters of Berkeley Run and adjoining lands of Jordan H. Barnes, James W. Batson and others, containing 38½ acres and also 27 acres of coal underlying the said tract and other land adjoining thereto, all of which was conveyed to him by George H. Smith and wife by deed dated July 20, 1892." Upon the memorandum above quoted, the plaintiff demanded, and the court decreed to him, all the coal in the tract of land, which consists of two or more veins, and, in addition thereto, 3.88 acres out of the upper or Pittsburg vein of coal in the adjoining lands of George H. Smith, so as to make 27 acres of the Pittsburg vein, it having been ascertained by survey that there were only

23.12 acres of that vein in the 38½-acre tract. At the date of the making of the contract, the existence of but one vein of coal in the land, the Pittsburg vein, was known. The plaintiff so testifies. This was the upper vein, cropping out on the hill side, and not coextensive with the tract of land.

The defendant's contention is that the plaintiff is entitled, under the contract, to have a conveyance of 27 acres of the Pittsburg vein, and no part of any other coal in the 38½-acre tract. He insists that, in construing the contract, the court should take into consideration the situation of the parties, the circumstances surrounding them, and the knowledge they had, respecting coal in the land, at the time the contract was made. Standing upon the strict letter of the written contract, reciting the sale of the coal in the land bought by the vendor under the decree, the plaintiff denies the admissibility of any parol evidence, and insists that an interpretation of the contract, in accordance with the view of the defendant, in the light of the parol evidence adduced, would work a violation of the rule of law which forbids the introduction of parol evidence to contradict, vary, add to, or alter the terms of a written instrument. In taking this position, counsel for the appellee assume, for this contract, the solemnity of a deed, and would apply to it a technical rule of construction peculiar to deeds, namely, that a grantor cannot, by a subsequent clause in his deed, destroy or nullify a grant made by him in a preceding clause thereof, and that intention disclosed by earlier clauses in a deed will control that revealed by later ones. Dev. Deeds, § 838. Under it, the stipulation, "I sell to A. Armstrong the coal in the Barnes & Smith land bought by me under decree of last court," might not be narrowed by the second paragraph of the memorandum, stating the area of the coal and referring to the Smith deed for a description thereof, but we are not called upon to decide the question, for two reasons: First, the rule invoked has been very much impaired, if not abolished, by decisions of this court and the great weight of modern authority; secondly, the rule, if operative in all its pristine vigor and strength, would not be applicable in the construction of this mere executory contract of sale. "It is an old rule that, in the construction of deeds, the earlier clauses control the later ones, but this rule, in effect, is practically abrogated, or if employed is only resorted to when reconciliation becomes impossible. The later and better rule would seem to be that inconsistencies are to be reconciled, and, while the former rule may still be applied where a subsequent clause would defeat the grant, it is never permitted to prevail where there is room for construction. If it is the clear intent of the grantor that apparently inconsistent provisions of a deed shall all stand, such limitations upon, and interpretation of, the literal signification of the language used will be imposed as will give effect, if possible, to all of its

provisions. On the other hand, where the intention of the parties is decisively shown from one clause, the intention thus shown will control, notwithstanding ambiguity and inconsistencies in other clauses." *Warvelle on Vendors*, § 855. "Repugnant words must yield to the purpose of the grant where such purpose is clearly ascertained from the premises of the deed, though such words stand first in the grant." *Goldsmith v. Goldsmith*, 46 W. Va. 428, 33 S. E. 286. A clause in a deed, reserving a life estate in land to the grantor, subsequent to an ostensible grant, in the same deed, of the land in fee simple, is valid. *McDougal v. Musgrave*, 46 W. Va. 509, 33 S. E. 281. No legal title has passed by this contract. It is a mere agreement to convey, for the enforcement of which the appellee has called upon a court of equity. Such court will enforce it only in accordance with the true intent and meaning of the parties thereto. Their contract has not yet progressed to that condition which would place it within certain technical rules applicable to deeds and similar instruments, passing title, which have for their foundation reasons of public policy, designed to give stability to titles, and are not applicable to contracts which remain in fieri. This distinction is recognized by decisions authoritative in this court. *Newman v. Kay*, 57 W. Va. 98, 117, 49 S. E. 926, 68 L. R. A. 908; *Thompson v. Jackson*, 3 Rand. (Va.) 504, 15 Am. Dec. 721. See, also, *Sugden on Vendors*, chapter 8, § 5, p. 491, where additional decisions are referred to.

It may be asserted, without citation of any authority for the proposition, that the admissibility of parol evidence is dependent upon whether the contract is ambiguous. It is necessary, therefore, to determine whether this contract is ambiguous in any sense. The two kinds of ambiguity need be here defined, and the first inquiry is whether the contract is ambiguous on its face. As has been stated, it refers to the decree under which the purchase was made, and the decree refers to the deed by which Jasper M. Smith obtained it. A significant reference to be added is the direct one of the contract itself to the deed from George H. Smith to Jasper M. Smith, in the stipulation that "there is to be 27 acres of coal & if not that much coal in the land enough is to come from the Smith adjoining land to make the 27 acres as in the deed of said George H. Smith to Jasper M. Smith." By these references the decree and deed are made part of the memorandum. The manner in which that deed deals with the tract of land and the coal is peculiar. In one paragraph it conveys the tract of land, without exception or reservation, and thereby necessarily conveys all the coal under it. It then conveys, separately and distinctly, 27 acres of coal, described as lying partly under the tract of land. For some reason, it described, if it did not convey, the land and the coal as separate and distinct things, although part

of the coal was included in the land, and so much of it as was in the tract of land need not have been conveyed separately if, indeed, upon the true interpretation of the deed, it was. If George H. Smith had conveyed the 38¾-acre tract of land, and then, after reciting it to be the intention that the grantee should have 27 acres of coal, in connection with the land, and the existence of a doubt as to whether the land contained so many acres of coal, had granted, conditionally, out of his adjacent lands, enough coal to make good a deficiency, if there should be any, the effect would have been practically the same, unless there is significance in the separate treatment of the coal and the land. But the question to be solved here is one of intention expressed in the contract, not construction of the deed. Why did the parties to the deed adopt such a peculiar description of its subject-matter and attempt to make a double conveyance of part thereof? They attempted to treat the coal and the land as two distinct subjects, although the coal was part of the land and could have passed by the conveyance thereof. Moreover, the area of the land was greater than the area of coal, the quantity whereof was warranted, and yet the parties assumed the probability of a deficiency in the acreage of coal. This countenances the view that they contemplated coal which was not coextensive in area with the land conveyed, and tends to explain the reason for treating the land and the coal as separate subjects of conveyance. Evidently they did not contemplate a vein or body of coal equal in area to that of the land. Moreover, the deed evinces an intent to convey, in connection with the land and under it, only 27 acres of coal, even though there should be 38¾ acres of coal in the land. This is the letter of the deed. Legally, the force and effect of the deed might be different. With this, we have nothing to do. We are not construing that deed, nor seeking the intent of the parties to it, further than it has been carried into the contract. The object of our search is the intent of the parties to the contract which refers to the deed, but is limited to the coal "as in the deed of said George H. Smith to Jasper M. Smith." Does this mean the coal as described in that deed, or the coal as conveyed thereby? That deed conveyed all the coal in 38¾ acres of land, but not as coal, and the parties, in executing it, were under the impression, for some reason, that the coal they had in mind, although underlying the land, was less in area than the land, and probably less than 27 acres. Therefore, they gave it a definite description, treated it as a separate entity, and attempted to convey it as a separate and distinct thing. It does not appear from the face of the deed or contract how many veins of coal were in the land, or how many were known to exist therein at the time the contract was made, and yet both assume that there is coal in the land. Both

evinced a clear intention to deal with a thing, the existence of which was known. Both bear evidence on their faces that, not only the existence of the thing was known, but that the parties had knowledge of its relative location and quantity. The knew its area was less than that of the land, that it lay adjacent to the lands of George H. Smith, and that it did not extend from the George H. Smith line to the opposite side of the tract, for, if they had not known that, the provision for a deficiency would have been ridiculous and absurd, since there could not be less than 27 acres of coal in a tract of 38 $\frac{1}{4}$ acres of land, if the acreage of the coal equaled that of the land. The court judicially knows that, when a vein of coal is known to exist in a small tract of land, and does not crop out within the boundaries thereof, and the topography of the land is such as not to indicate that it runs out within the boundaries, parties are accustomed to deal with it upon the assumption that the vein is persistent, substantially uniform, and coextensive in area with the boundaries of the land. When, therefore, they put into their contract a stipulation or warranty, providing for a deficiency, in a stated area less than that of the land, or adopt a description which indicates a smaller area, the court is bound to impute to them knowledge thereof, and, when the terms of the contract or deed go further and show that they knew the relative location of the coal in the land, it becomes absolutely certain that the subject-matter of the stipulation, covenant, or description, is a definite, specific, and known thing. That thing, whatever it is, was sold by Ross to Armstrong. Its description in the contract, aided by the deed referred to, is reasonably certain. It is the coal conveyed and purchased *eo nomine*, the known and described coal, not necessarily all the coal in the 38 $\frac{1}{4}$ -acre tract. This is the construction of the contract on its face—from the terms used in it. It remains only to find the subject thereof, the thing which answers the description, a step necessary in the application of every deed and contract, however definite and certain in its terms, and in the process of which parol evidence is always admissible. From this conclusion, it results that the contract is not ambiguous on its face.

But, in attempting to apply the contract to its subject-matter, it is found that there are two similar, but not, in all respects, like, veins of coal, one of which fits the description exactly, while the other does not. Of the latter, the parties had no knowledge at the time of the making of the contract. It is not uncertain in quantity. It exceeds the area mentioned in the contract. Its location is such that it touches the boundaries of all the lands adjoining the 38 $\frac{1}{4}$ -acre tract. If, by reason of indefiniteness in the descriptive terms of the contract, it were doubtful which of the two veins of coal was intended, what is known as a latent ambiguity would have been de-

veloped, by their discovery, and parol evidence, showing the situation of the parties, the surrounding circumstances, their knowledge and conduct, would be admissible, as a means of resolving the doubt. But the aid of such evidence is not necessary in this instance. The description goes far enough to make it legally certain that the deep vein is not the one intended. On this point, namely, whether it is necessary to call in the aid of parol testimony, the first impression would be that it is, because the fact that the Pittsburgh vein was known to the parties is involved, and this must be shown by extraneous evidence. Not so, however, for the reason that a part of the description itself is, as we have shown, that the location, quantity, and relative situation of the coal were known. In so treating the coal and dealing with it, the parties distinguished it from unknown coal. That it is coal, so known at the date of the contract is, therefore, a part of the written evidence, to be observed in seeking the subject of the contract. Parol evidence to introduce it into, and make it part of, the written description is not necessary any more than in the case of a deed granting land and describing it as known in a particular manner, or by a certain designation. The aid of parol evidence is not needed for any purpose other than the application of the descriptive matter of the contract to its subject, a very different thing from that of introducing into the written description terms which the parties must have intended to put into it, but, for some reason, omitted. That the construction of a contract, in which there is a latent ambiguity, by the aid of parol evidence, is tantamount to the reading into it of terms which the parties intended should be a part of it, but failed to express, is revealed by a little attention to the decisions in which this operation has been performed. It happened, in *Simpson v. Dix*, 131 Mass. 179, that the name of the grantee was Daniel Eastman, and that there were two persons of that name, resident in the same town, father and son; and the question, to be determined by the aid of parol evidence, was which of the two men was intended. As the deed did not add the word "Junior" nor the word "Senior" to the name of the grantee, it was impossible to determine that question from its face. Had it been discovered by parol evidence, that the son was intended, the deed would have operated as if it had described the grantee as Daniel Eastman, Junior. This would have been the equivalent of reading into it the term "Junior," or some other expression meaning the same thing. Exactly the same situation was disclosed, and the same course pursued, in *Kingsford v. Hood*, 105 Mass. 495. When the ambiguity relates to the subject-matter of the deed, the same principle operates in the same way. A lease was made of property described in it as the "Adams House, situate on Washington street, in Boston." No difficulty was experienced in ascertaining the building

and grounds, known as the "Adams House," but certain parts of that building were used for hotel purposes and the others for shops, and a doubt arose as to whether it was the intention to lease the entire property or only so much of it as was used for hotel purposes. By the aid of parol evidence it was discovered that only the parts used as a hotel were intended. Then the contract was enforced as if the description had been written "so much of the Adams house as is used for hotel purposes." *Sargent v. Adams*, 3 Gray (Mass.) 72, 63 Am. Dec. 718. A case almost exactly like it is that of *Alger v. Kennedy*, 49 Vt. 109, 24 Am. Rep. 117. But to make the matter conclusive, if it cannot be said under the authorities that this contract is free from ambiguity, both patent and latent, enough has been said to show that its terms do not, with certainty, import a grant of both veins of coal. Hence, parol evidence would be admissible to show which vein was intended, if it be certain, from the face of the contract, as we think it is, that only one was intended; and also, to show that but one was intended, if the contract does not, on its face, reveal that, for the terms used do not certainly import that all the coal in the land was intended. Parol evidence is admissible to explain patent, as well as latent, ambiguities. *Crislip v. Cain*, 19 W. Va. 438; *Winton v. McGraw* (W. Va.) 54 S. E. 506; *Hansford v. Coal Co.*, 22 W. Va. 70. Treating the contract as a mere option, counsel for the appellant say, upon the authority of *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540, 24 L. R. A. 339, and *Weaver v. Burr*, 31 W. Va. 736, 8 S. E. 743, 3 L. R. A. 94, failure, on the part of the appellee to accept performance as offered by the appellants, excuses and releases the latter from performance. As it is a contract of sale and not a mere offer to sell, this position is untenable.

Again, it is said the parol evidence shows the parties were not in accord as to what the subject of sale was. Enough has been disclosed already to make the fallacy of the contention apparent.

Lastly, a claim to the right of rescission is founded upon the refusal of the appellee to accept performance as offered by the appellant, the interpretation of the latter having been the correct one, and his offer an expression of willingness to perform to the extent of his duty in the premises. Since the refusal was not absolute, the rule invoked does not apply. To work a release, a refusal to perform "must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made." *Swiger v. Hayman*, 56 W. Va. 123, 126, 48 S. E. 839, 107 Am. St. Rep. 899; *United States v. Smoot*, 15 Wall. (U. S.) 38, 21 L. Ed. 107; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984. If this were not the law, it would be a dangerous thing to stand upon a controverted construction of a contract. Every man would act at his peril in

such cases, and be subjected to the alternative of acquiescing in the interpretation adopted by his opponent, or putting to hazard his entire interest in the contract. The courts have never imposed terms so harsh, or burdens of such weight. It would amount to a virtual denial of the right to insist upon an honest, but erroneous, interpretation.

As, tested by the principles and conclusions herein stated, the decree appealed from is erroneous, it will be reversed, the appellee here adjudged and decreed to be entitled only to a conveyance of 27 acres of the Pittsburg vein of coal, according to the survey made in the cause, of which 23.12 acres lies in the 38 $\frac{1}{4}$ -acre tract of land and 3.88 acres in the adjacent Geo. H. Smith tract, and the cause remanded for further proceedings according to the principles herein stated, and further, according to the rules and principles governing courts of equity.

ICE v. MAXWELL et al.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

1. BROKERS—SALE OF REAL ESTATE—COMPENSATION.

Where an agent is empowered to procure a purchaser for real estate within a stipulated time, and is to receive a certain compensation for his services, he will not be entitled to recover such compensation unless he furnishes a purchaser within that time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 68.]

2. SAME.

But where the owner or principal has waived the performance of the contract within the time agreed upon, and accepts the services of the agent and recognizes and treats the contract as still in force, the agent will be entitled to compensation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 68.]

3. SAME—QUESTION FOR JURY.

Where there is evidence showing or tending to show that the time within which a contract was to have been performed has been waived, or that the contract has been continued, the question should be submitted to the jury.

4. SAME—WAIVER OF CONDITIONS OF CONTRACT.

Where the contract is thus continued, or the time within which the sale was to have been made is waived, without reference to the agent's compensation, the presumption is that he is entitled to recover the sum originally agreed upon.

5. SAME.

If an agent is empowered to procure a purchaser for real estate at a certain price, and for his services is to receive a stipulated compensation, such agent will be entitled to recover the compensation fixed, where he procures a purchaser with whom the owner negotiates a sale, although the owner may accept a less sum than that at which he authorized the agent to make sale.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 66, 67.]

6. PRINCIPAL AND AGENT—COMPENSATION.

To entitle an agent to recover for services rendered, it is not necessary to show an express

request. A request may be implied from all the facts and circumstances of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 197.]

7. ESTOPPEL.

Ordinarily, if one labors for another, or renders him services in his business from which the owner receives a benefit, and the one who receives the services stands by and sees what is being done without making objection, he is estopped to deny that the services were rendered at his request.

8. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION.

If a person acts as agent without authority, and his acts are ratified, he is entitled to compensation the same as though he had been duly authorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Agent, § 200.]

(Syllabus by the Court.)

Error from Circuit Court, Randolph County.

Action by E. Clark Ice against W. B. Maxwell and others. Judgment for plaintiff, and defendants bring error. Reversed, and new trial granted.

Bent & Spears, for plaintiffs in error. Harding & Harding, for defendant in error.

SANDERS, J. This is an action of assumpsit, brought in the circuit court of Randolph county by E. Clark Ice against W. B. Maxwell, E. P. Loudin, William Flint, and Arnold Cunningham. To a judgment dismissing the action, the plaintiff applied for and obtained a writ of error.

The plaintiff assigns as error the giving of three certain instructions for the defendants, and that the verdict is contrary to the law and the evidence. By instruction No. 1, the jury were, in effect, told, if they believed from the evidence that a contract was entered into between the plaintiff and defendants, in December, 1902, by which the latter agreed to pay to the plaintiff \$500 provided he would furnish a purchaser for the Achelles and Stockbridge lands at \$30 per acre, and provided further that he would furnish such purchaser prior to the 28th day of February, 1903, or before the defendants should themselves sell the land to a purchaser other than the one furnished by the plaintiff, and that the plaintiff failed to furnish the purchaser within said time, or to notify the defendants that he had made sale of the property, they should find for the defendants. Instruction No. 2, in effect, presents the same question as is presented by instruction No. 1. Therefore, they may be disposed of together.

The objection insisted upon is that these instructions are binding, and by them it is made imperative that the plaintiff furnish a purchaser at \$30 per acre before the 28th day of February, 1903, and that, unless the jury believe from the evidence that such purchaser was furnished within that time, or the defendants notified of such purchaser, then they should find for the defendants. Maxwell and Cunningham had the agency to sell about 1,600 acres of land in Randolph county from

the owners, Stockbridge and Achelles. This agency was to expire on the 28th day of February, 1903. After having procured the agency, Maxwell solicited the plaintiff to find a purchaser for the land, and they had some conversations in regard to it, but without coming to any definite conclusion. Later the defendant Cunningham, in the presence of Maxwell, also requested the plaintiff to find them a purchaser. It was finally agreed that the plaintiff would undertake to do so, and in consideration thereof he was to be paid the sum of five hundred dollars. The time within which the purchaser was to be furnished is in dispute. The defendants claim that it was to have been done before the 28th day of February, 1903, while the plaintiff claims that the time was not limited. The defendants also claim that the purchaser to be furnished was one who would buy the land at the price of \$30 per acre, while the plaintiff claims that he was only to price it to prospective purchasers, and that the defendants were to finally agree with them as to the purchase price of the property. The plaintiff's agency was not exclusive. He had only to put prospective purchasers in communication with Maxwell and Cunningham, who were to conduct all negotiations in consummating the purchase, and were to show the land. It is undisputed that the purchasers for the property were not furnished prior to the 28th day of February, 1903. On the 27th day of February, before the agency expired, the defendants purchased the property. After this time, and about the 11th of March, the plaintiff introduced to the defendants, Maxwell and Cunningham, parties who, a few days afterwards, entered into a contract for the purchase of the land in question, at the price of \$27 per acre.

In view of these facts, should the jury have been told that, unless the plaintiff found a purchaser at the price of \$30 per acre before the 28th day of February, 1903, they should find for the defendant? While it is true there is a conflict in the evidence upon these points, and the jury may have found that the plaintiff contracted to furnish a purchaser at \$30 per acre before the 28th day of February, yet, in the light of all the evidence and circumstances in the case, it is contended that these instructions misconceive the case and fall short of presenting it to the jury in its entirety, and that, inasmuch as they are binding and direct a verdict for the defendants, this should not have been done. Where an agent contracts to furnish a purchaser for lands at a stipulated price, and such agent does furnish a purchaser whom the owner accepts, and, in the negotiation of the transaction, the owner agrees upon and accepts a different price from that at which the agent was instructed to sell, still such agent would be entitled to his compensation. It cannot be said that, where an agent has procured a purchaser for a piece of property, the owner can deprive him of his commission or com-

pensation by accepting such purchaser and agreeing to take a less sum than the agent agreed to furnish the purchaser for. "If an agent with authority to sell on a certain commission, in the event of a sale, procures a purchaser, at the price and on the terms authorized, who would take the property at the price, and the owner of the property steps in, ignores the agent, and sells to the purchaser so secured, at the same price and on the same terms, or for a less price, and on the terms proposed to the purchaser by the agent, even if they were different from the terms stipulated in the authority to sell, the owner is liable to pay to the agent the amount of commission stipulated to be paid. He will not be permitted to take advantage of the negotiations made with the purchaser by the agent, and then escape the liability to pay him the stipulated commission." *Reynolds v. Tompkins*, 23 W. Va. 235. "If the agent introduces the purchaser, or gives his name, whereby the sale is effected, although the sale be perfected by the principal, and even though the owner vary the terms from the first negotiation, he will be entitled to compensation." *Beauchamp v. Higgins*, 20 Mo. App. 514. "Where, by a special contract, a broker is not to be paid commissions unless he sells the property at a stipulated price, the sale by him at such a price is a condition precedent to his right to compensation, unless, pending the negotiations and whilst the agency remains unrevoked, the owner consents to a sale at a different price. If a broker introduces the purchaser or discloses his name to the seller, and, through such introduction or disclosure, negotiations are begun and the sale of the property is effected, the broker is entitled to his commissions, although, in point of fact, the sale may have been made by the owner. Where property is sold at a particular price with the consent of the owner, the broker who effected the sale is entitled to his commissions although he may not have been requested by the owner to sell at that price, under an agreement to pay commissions." *Jones v. Adler*, 34 Md. 440; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Hinds v. Henry*, 36 N. J. Law, 328; *Clark & Skyles on Agency*, § 773, p. 1665, citing numerous cases. "As to whether the services rendered by an agent in any particular case amounts to such performance as will entitle him to commissions or compensation must be determined from the facts and circumstances of the case." *Clark & Skyles on Agency*, § 771, p. 1657.

The jury should not have been told that the plaintiff, to entitle him to recover, should have produced a purchaser who was willing to pay \$30 an acre for the land. But this would probably be harmless error if that part of the instruction is correct which says that the purchaser must be furnished before the 28th day of February, because, in that event, if the purchaser were not furnished within that time, the plaintiff's right to maintain an action would be barred, and in

no event could he recover. A party undoubtedly has the right, in creating an agency for the sale of lands, to fix the life of the agency, and, when this is done, or where the agent is given a certain time within which to make a sale, his right to make such sale does not extend beyond that period, unless the time within which it is to be done is waived, or the contract is continued, expressly or impliedly. It is a condition precedent to the recovery of compensation for the plaintiff's services that he make the sale within the time stipulated, and unless he performs this condition, he cannot recover. "If the contract of employment between the broker and the principal provides that the undertaking shall be performed within a limited time, the broker is not entitled to, nor can he demand, commission for his services not accomplished by him within that time." *Clark & Skyles on Agency*, § 778, p. 1679. Innumerable cases could be cited to this effect as this is the universal doctrine. But, while this is the rule, it does not apply in this case, because there is evidence tending to show that the plaintiff was permitted to continue in the employment of the defendants after the 28th day of February, and that he was, after that time, recognized as their agent. He states that he talked to Mr. Maxwell frequently in regard to the matter, and that it went along until up in the spring some time, or about the 1st of March, and one time he was talking to Mr. Maxwell, who notified him that the defendants were in a hurry to sell the land, and said they had to raise about \$16,000, and about the 11th of March he produced the purchasers. This conversation was evidently after the defendants had become the owners of the land. If they had, at this time, nothing but an agency, it would not have been necessary for them to have secured this sum of money. Furthermore, at the time the purchasers were actually furnished, Maxwell and Cunningham said nothing to Ice by which he could infer that his agency was not continuing, but they accepted the purchasers furnished by him, thereby accepting the fruits of his labor. Ice says that Loudin told him after the contract of sale was made that he and his associates would pay the \$500 as soon as the money from the transaction was received by them. Also, Maxwell told the plaintiff that they were not treating him just right about it, and said he understood that the plaintiff was entitled to \$500 for making the sale. Maxwell states that it was agreed among the defendants long after the sale was made that the plaintiff was entitled to \$100 for his services. None of the defendants who testified denied this. After the sale was made and before the deeds were delivered, Ice went to Maxwell and secured from him \$125, stating that the amount could be taken out of his commissions. These facts tend to show that the contract was continued, and that the defendants waived performance of

it at the time at which they claim it should have been performed. The agency of Cunningham and Maxwell only extended until the 28th of February, and, for this reason, they probably wanted to sell by that time, but on the day previous to the time at which their agency would have expired they, together with the other defendants, became the owners of the land, and from that time they were still desirous of selling, and all these facts and circumstances should be considered by the jury in determining whether the time was waived and the contract continued. "When, by an express contract, an agent is employed to sell real estate within a stipulated time, and to receive a certain compensation for his services, he may recover for his services in making such sale after the time limit, where the principal, with knowledge of the sale, accepts the services and treats the contract as still in force." 3 Page on Contracts, § 1502.

We intimate no opinion as to what these facts establish, because the case must be remanded for a retrial, but we have briefly related certain of the facts to show that there is evidence tending to establish the fact that the contract was continued, and the time for the performance thereby waived. If the contract was continued, or the defendants waived the performance of it within the stipulated time, the presumption of law is that the plaintiff was to receive the same compensation as provided for by the contract originally made. "If an agent, employed at a compensation for a definite term, continues in the principal's service after the expiration of that term, without any new or other arrangement, he will be presumed to be continuing on the old terms, and there can be no recovery on a quantum meruit." *Mechem on Agency*, § 608; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Ranck v. Albright*, 36 Pa. 367. "If an agent, employed at an agreed price for a certain time, continues in the same employment after the expiration of the term without any new agreement, the presumption of law is that he continues at the original rate of compensation, and there can be no recovery upon a quantum meruit." 1 Am. & Eng. Ency. Law, p. 1116. *Spence v. Wilmington Cotton Mills*, 115 N. C. 210, 20 S. E. 372; *Doty v. Case & Willard Co.*, 50 Hun (N. Y.) 595, 3 N. Y. Supp. 510; *N. H. Iron Foundry Co. v. Richardson*, 5 N. H. 294; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; *Sines v. Supts. of the Poor*, 58 Mich. 503, 25 N. W. 485; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410. "Where an agent has been employed for a specified time at a specified compensation, and after his term of employment has expired continues to render services to his principal, in the same line of business as formerly, in the absence of a special agreement otherwise, it will be presumed that he intended to continue in the service at the previous rate of compensation, and he will not be permitted to recover on a

quantum meruit." *Clark & Skyles on Agency*, § 354, p. 909. Consequently, under these authorities, and under the facts and circumstances of this case, the court should not have limited, by its instructions, the time within which the plaintiff was to furnish such purchaser to the 28th of February, but the question should have been left to the jury to determine whether or not it was continued beyond that time, or whether the defendants waived the time within which such purchaser should be furnished, and if they should find that the contract was continued, or the time for its performance waived, then the compensation to which the plaintiff would be entitled is the sum which the parties fixed by the original agreement. And again, if the jury should conclude that the contract was made whereby the purchaser at the price of \$30 was to have been furnished before the 28th day of February, and that such purchaser was not furnished, and that the contract was not continued and the time of performance not waived, this instruction calls for a verdict for the defendants, notwithstanding there is evidence tending to show that the plaintiff is entitled to recover upon the quantum meruit. Of course, if the contract was continued in force, and the time of performance waived, a recovery, if any, would have to be upon the contract, and not upon the quantum meruit, but, if it was not continued, and expired by limitation, and the time of performance had not been waived, then the question would arise, what, if anything, would the plaintiff be entitled to recover upon the quantum meruit? Under the facts, this question should have been presented to the jury, but by these instructions it was taken from them. When there is no express contract, and the plaintiff seeks to recover for his services, he must show a request. No recovery can be had for a voluntary service. But a request may be express, or it may be implied from all the facts and circumstances of the transaction, as will hereafter appear. "Where commissions are not the appropriate mode of compensation, and there is no fixed recompense agreed upon, and the services are performed under circumstances implying a promise to pay for them, the agent will be entitled to receive such compensation as he may be able to show the services were reasonably worth." *Reinhard on Agency*, § 266, p. 255. "The intention to compensate an agent may be implied from the beneficial nature of the service, and when a party knows that services are being performed for him by another and makes no objection thereto, and then receives the benefit thereof, he will be compelled to pay for such services what they are reasonably and fairly worth." *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Hatch v. Purcell*, 21 N. H. 544; 1 Am. & Eng. Ency. Law (2d Ed.) 1096, 1097, and cases cited. "If a person acts as agent without authority, and his acts are

ratified, he is entitled to compensation just as though he had been duly authorized." 1 Am. & Eng. Ency. Law (2d Ed.) 1101. "Ordinarily, if one man labors for another, or renders him services in his business, from which the latter derives a benefit, and the one who receives the services stands by and sees what is done without making objection, he is estopped to deny that the services were rendered at his request." Reinhard on Agency, § 63; Blossom v. Cannon, 14 Mass. 177; Guild v. Gould, 15 Pick. (Mass.) 129.

Instruction No. 3, in effect, tells the jury that, if they should believe from the evidence that the defendants Maxwell and Cunningham made sale of an undivided interest in the land to Flint and Loudin, and that they purchased the remaining interest therein, on February 27, 1903, and that thereafter the defendants made no new or additional contract with the plaintiff in reference to the sale, and that the plaintiff did nothing further thereabout after February 27th, except to introduce to Maxwell and Cunningham E. E. and F. C. Wheeler, who later purchased the land, then the plaintiff, under the evidence, would not be entitled to any compensation in the shape of commissions, and could only recover such sum as the work actually done in making the said introduction was worth, provided a definite amount as to the value of the time and labor in introducing the purchasers should be shown. This instruction undertakes to measure the amount which the plaintiff would be entitled to recover on the quantum meruit, and the question is, does it apply the proper rule? The plaintiff was a real estate agent; was so treated by Maxwell and Cunningham when they first approached him in reference to a sale of the land. He is supposed to be familiar with the market, and to be better able to handle matters of this kind than one who had not given his time and attention to it, and in this case he had written letters to various parties, offering this land for sale; he had received several communications in regard to it, and referred them to Mr. Maxwell, and consulted him in reference to it, and on the 11th of March, acting as such agent, he produced these purchasers to Maxwell and Cunningham. Now, is it to be said that the compensation to which he is entitled is to be measured by the actual time and labor spent in introducing these parties to Maxwell and Cunningham? To so hold would be a misconception of the case. These instructions are too narrow; they do not cover the entire case. If the evidence is such as warrants a recovery in favor of the plaintiff on the quantum meruit, he is entitled to such sum as his services as such real estate agent, in making the sale, and under all the circumstances, are reasonably worth. This instruction limits the recovery to the actual introduction of the parties. This, we think, should not have been done.

It is claimed that the defendants admitted liability in the sum of \$100. This we will not

pass upon, as the case must go back for a new trial, and it would not be proper to intimate any opinion upon the weight of the testimony.

The judgment of the circuit court is reversed, the verdict of the jury set aside, and a new trial awarded.

GAULEY COAL LAND ASS'N v. SPIES et al.
(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

1. EQUITY—PLEADING—ANSWER—PERMISSION TO FILE.

Where an answer which presents no defense is offered, the court should, upon objection, refuse to permit it to be filed.

2. PROCESS—SERVICE.

Quere, where a process is served by an individual, is it necessary for the affidavit or return showing the time and manner of service to also show the place of such service?

3. APPEAL—AMENDMENT OF PROCEEDINGS IN COURT BELOW.

Pending an appeal and supersedeas in this court, the return of service of process commencing a suit may be amended in the lower court upon proper application and notice to the opposite party; and, if the amendment is allowed, such fact may be shown to this court by supplemental record.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2. Appeal and Error, § 2199.]

4. SAME—EFFECT OF AMENDMENT.

When an amendment is thus made and so shown, if it appears that it was properly made, and that the defective service is thereby cured, it will relate back to the time of service, and will obviate the error in that regard.

5. VENDOR AND PURCHASER—VENDOR'S LIEN—ENFORCEMENT—SALE.

Section 1a, c. 132, Code 1899 (section 3993, Ann. Code 1906), which provides that a decree for the sale of real estate of the value of \$500 or more shall be advertised by the commissioner or person appointed to make the sale in a newspaper published in the county where such real estate is situated, is mandatory, and where a suit is brought to enforce a vendor's lien retained in a deed conveying the timber upon various tracts of land, some of which are situated in one county and some in another, the decree should provide for the publication of the notice of sale in both counties.

(Syllabus by the Court.)

Appeal from Circuit Court, Greenbrier County.

Bill by the Gauley Coal Land Association against Henry Spies and others. Decree for plaintiff, and defendants appeal. Modified and affirmed.

Henry Gilmer and H. L. Van Sickler, for appellants. Williams & Dice, for appellee.

SANDERS, J. This is a suit in chancery, brought in the circuit court of Greenbrier county, by the Gauley Coal Land Association against Henry Spies and B. H. Ely, having for its object the enforcement of a vendor's lien retained by the plaintiff in a deed executed by it to the defendants, conveying to them all of the timber above a certain size standing upon various tracts of land in Greenbrier and Nicholas counties. From a

decree in favor of the plaintiff, the defendants have appealed.

The defendants demurred to the bill, assigning as a ground therefor that the plaintiff filed copies of the contract, notes, and schedule of tracts of land as exhibits with the bill, when it had the original notes and a duplicate original of the contract and schedule of tracts. A party is not required to file with his bill the original papers which form the basis of his claim, but he may aver the contents of these papers, or file copies of them with his bill as exhibits, at his pleasure. It is not ground for demurrer that he does not file the originals. The bill is clearly good, and the demurrer was properly overruled.

It is also claimed that the court erred in sustaining the exceptions of the plaintiff to the answer of Henry Spies. There were no exceptions to the answer, properly speaking. Exceptions are only taken to an answer after it is filed. This answer was not filed, but upon objection the court rejected it. A court should, when an answer presents no defense to a bill, refuse to permit it to be filed when objected to. This answer presents no defense whatever. It does not deny a single allegation of the bill, neither does it allege affirmative matter of any kind. It is said, however, that it alleges that the plaintiff has computed interest on interest, and that therefore it constitutes a plea of usury, and is sufficient under sections 6 and 7, c. 96, Code 1899 (sections 3431, 3432, Ann. Code 1906). The answer charges that there is no statement contained in the bill showing the amount due, and then says that the plaintiff has, in ascertaining the amount due, calculated and charged interest on interest, thus making the transaction usurious. The bill does not show any calculation as having been made by the plaintiff. It simply alleges the sale of the timber to the defendants at a stipulated price, and that the defendants executed their notes for the deferred payments, and that all except two of them are due. Copies of the notes are exhibited with the bill, and no calculation is made. It is purely a question of calculation for the court. The plaintiff does not claim usury. It only claims the amount of the notes, with interest. The answer certainly presented no issue, and the court properly refused to allow it to be filed.

The next ground for reversal is that the court overruled the motion of the defendant Ely to quash the return of service as to him. He appeared specially and moved to quash the return, on the ground that it failed to show in what county service was had. The court overruled the motion, and the defendant Ely withdrew from the case. The process was served by an individual, and an affidavit was made as to the manner and time of service, but it failed to show where it was served. A personal decree was rendered against the defendants; hence the necessity of personal service. Where was this process

served? Was it within the jurisdiction of the court? It does not show this expressly; and, as it does not, where do we get the information? The process was directed to the sheriff of Monroe county, and, this being so, is there a presumption that it was served in that county? If not, the service would not be good. There would necessarily have to be such presumption to sustain it. Where a process is served by an officer, whose duty it is to do so, it is not necessary for the return to show that it was served in his bailiwick. An officer is presumed to have discharged his duty, and not to have exceeded his powers. We cannot presume that, when a process is delivered to an officer to be served, he will do an unlawful act by serving it outside of his county; but it is presumed he did not do so. We will not decide this question, as the amendment of the return has made the decision of it unnecessary. Since the motion to quash in the circuit court, and since the allowance of the appeal and supersedeas, the plaintiff, after having given notice to the defendant Ely, applied to the circuit court for permission to amend the return, to which amendment the defendant Ely objected, but the court overruled the objection and permitted the return to be amended so as to show that the process was served in Monroe county. This appears from the supplemental record filed herein; it being the record made upon the motion to amend. The amendment being allowed, it cures the return, and relates back to the time of service. *McClure-Mable Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921.

The question then arises: What effect is to be given to the amendment, as regards the decision of this case? Should we disregard the amendment, and adjudicate upon the record as it stood at the time the appeal was allowed, or should we consider the record as it now stands? Courts now allow amendments with great liberality, where the ends of justice will be promoted and no injustice done. What injustice was done, or can be done, by allowing this amendment to be made? The answer must be that, instead of doing an injustice, it is the establishment of truth, and thereby prevents the miscarriage of justice. Why should a judgment or decree be avoided when the process has been properly served, and when this fact can be made known by allowing an amendment? The amendment having been properly made, and it being brought to the attention of this court by the supplemental record, we should consider the record as it appears, although partly made since the allowance of the appeal, and, when we do so, we find that the process was properly served, and that the court had jurisdiction of the person of the defendant Ely. If we should reverse, the circuit court, when the case goes back, could allow an amendment to be made, and when so made it would relate back to the time of service. Then, if this is so, why should this dilatory measure be indulged in, when there is certainly no good

reason for it? "A return of service may be amended after appeal or pending writ of error, as in the appellate court upon appeal, or in the trial court pending writ of error, in which case the amendment is shown by a supplemental record." 18 Ency. Pl. & Pr. 968. The practice of allowing amendments pending an appeal is amply supported by the authorities, some of which are *Capehart v. Cunningham*, 12 W. Va. 750; *Hopkins v. B. & O. R. Co.*, 42 W. Va. 535, 26 S. E. 187; *McClure-Mable Lumber Co. v. Brooks*, 46 W. Va. 732, 34 S. E. 921; *Shamberg v. Noble*, 80 Pa. 158; *Irvine v. Scobee*, 5 Litt. (Ky.) 70; *Brown's Adm'r v. Hill*, 5 Ark. 78; *Blizzell et al. v. Stone & McDonald*, 8 Ark. 478; *Love-land v. Sears*, 1 Colo. 433.

Another point relied upon by the defendants is that the decree did not provide for the proper advertisement of the sale of the property, in this: that there are various tracts of land proceeded against, some lying in Greenbrier and some in Nicholas counties, and that the decree only provided for the advertisement in a newspaper published in Greenbrier county, when it should have required it to be advertised in newspapers published in both counties. Section 1a of chapter 132, Code 1899 (section 3993, Ann. Code 1906), provides "that whenever a court shall hereafter decree the sale of real estate, if it appears to the court that such real estate is of the value of five hundred dollars or more, it shall prescribe in the decree that such sale shall be advertised in a newspaper, by the commissioner or person appointed to make the sale. It shall always be advertised in a newspaper published in the county, if one be published therein, where the real estate to be sold is situated." This statute was before this court in *Duncan v. Custard*, 24 W. Va. 731, and it was held to be mandatory, and that it was error not to require the land to be so advertised if it appears to the court that it is of the value of \$500 or more. While this statute was so construed, yet that case differs somewhat from the case we have here. There it appeared that the value of the property was over \$500, and the court held it was error not to advertise it in a newspaper. Here it sufficiently appears that the value of the property is more than \$500, and the decree only required it to be advertised by publication in Greenbrier county. Therefore the question presented is: Does this statute mean that when a suit is brought to sell several tracts of land, some of which lie in one county and some in another, that the sale shall be advertised in a newspaper published in both counties, or that it shall be so advertised in the county where the suit is brought and decree pronounced?

Counsel for the appellee argue that the timber decreed to be sold is situated upon one continuous tract of land. The record does not verify this argument. Therefore the reason for it fails. Inasmuch as it ap-

pears that the timber stands upon several distinct tracts, and as it does not appear that these tracts are contiguous, we are not called upon to decide whether or not a decree providing for the sale of a tract of land, or several contiguous tracts, lying partly in one county and partly in another, shall provide for the publication in a newspaper of the notice of sale in both counties where the land lies. In construing this statute, we must endeavor to reflect the intention of the Legislature. That intention, as manifest from the terms of the statute, is to give notice coextensive with the bounds of the land to be sold, in order that competitive bidding may be stimulated. This notice is for the benefit of the creditor, as well as the owner of the land. The former is interested in the land bringing the amount of his debt, while the latter is naturally desirous of the land selling for as large sum as possible. If the decree had provided for the advertisement of the notice of sale by publication in a newspaper in Nicholas county, we apprehend that it would not be contended that such advertisement was a compliance with the terms of the statute. Yet that would have been as substantial a compliance as the decree which provided for the advertisement in Greenbrier county, when a portion of the land lies in Nicholas county. The statute says that the court shall prescribe in the decree that such sale shall be advertised in a newspaper, and that it shall always be published in a newspaper published in the county where the land to be sold is situated, if one be published therein. There are no exceptions, but in every instance in which such property is decreed to be sold this statute has commanded that it shall be advertised in a newspaper published in the county. What county? Its language seems to be clear when it says in the county where the land lies—not in the county where a part of the land lies, but in the county where the real estate to be sold is situated.

But it is said that it must be presumed that the lower court instituted an inquiry and found that there was no newspaper published in Nicholas county, else it would, in its decree, have provided for the advertisement of the notice of sale in that county. We cannot see why this presumption should obtain. The statute is mandatory, and the decree should show a compliance with its provisions. If the court had entered into an inquisition and found that there was no newspaper published in Nicholas county, the decree should have stated that fact. But on this subject it is silent, and it is manifest from all the circumstances that the attention of the court was not directed to this statute when the decree was entered, and that it was not intended to give any notice of sale in Nicholas county, because there is no provision for any kind of notice whatever in that county. If no newspaper be published there, such other notice as is re-

quired by law should have been provided for. It is also said that the defendants, had they desired publication in more than one county, should have brought the matter to the attention of the court. We do not think that the defendants were required to take this step. The court was undertaking by its decree to sell their property, and they had the right to remain quiescent, as they did, and insist that all the provisions of the statute in such cases were complied with.

Complaint is made that the lower court refused to suspend the decree of February 6, 1906, to give the defendants time within which to apply for an appeal and supersedeas. There may be instances where to refuse to suspend a decree or judgment serious injury might result, but we fail to see how the refusal to suspend this decree can operate prejudicially to the defendants. Before the decree was enforced this court allowed an appeal and supersedeas. Therefore the action of the lower court in refusing the suspension is rendered immaterial.

For the foregoing reasons, the decree of the circuit court will be modified, so as to provide for advertisement of notice of sale in both counties; and, as so modified, will be affirmed.

STATE, to Use of BILLINGSLEY, v.
STUTLER et al.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

APPEAL—RECORD—BILL OF EXCEPTIONS—NECESSITY.

A case in which the assignments of error involving the evidence cannot be considered, because the evidence was not made a part of the record by proper bill of exceptions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2433, 2910.]

(Syllabus by the Court.)

Error from Circuit Court, Marion County.

Action by the state, to the use of Morgan Billingsley, against William A. Stutler and J. L. Bice. Judgment for plaintiff, and defendants bring error. Affirmed.

F. T. Martin and U. N. Arnett, Jr., for plaintiffs in error. C. H. Leeds and W. S. Meredith, for defendant in error.

COX, J. This action of debt on bond was instituted by the state of West Virginia, suing for the use of Morgan Billingsley, against William A. Stutler and J. L. Bice, in the circuit court of Marion county, resulting in verdict and judgment for the plaintiff for \$250. The defendants bring the case here by writ of error for review.

The assignments of error involve the evidence. The only bill of exceptions in the case is as follows: "Morgan Billingsley v. William A. Stutler & others. Action of Debt. Bill of Exceptions. Be it remembered that upon the trial of this action, and af-

ter the jury had rendered its verdict, and before the court had entered judgment thereon, the defendants moved the court to set aside the verdict and grant them a new trial, on the grounds that the said verdict is contrary to the law and the evidence, which said motion, and argument of counsel thereon, being considered by the court, was overruled, and the court entered judgment thereon, to which action of the court, overruling said motion to set aside said verdict and grant them a new trial, the defendants excepted, and asked that all the evidence taken in said case, and submitted to and considered by the jury, and reported, and that said exceptions, be certified and made a part of the record, which is accordingly done, and the court certifies that the following is all of the evidence offered or read in behalf of either party hereto, except the declaration and notice thereto in the ejectment case of said Billingsley v. William A. Stutler and others, referred to in this case, which said papers seem to be lost or misplaced, and are not now in the papers of this cause. Done this 22d day of April, 1906. John W. Mason, Judge of the Circuit Court of Marion County." Following this bill of exceptions in the printed record are these words: "The evidence heretofore referred to is as follows." Then follows, after a caption, what purports to be the questions and answers of witnesses and documents exhibited therewith. It does not appear that the evidence was annexed to or incorporated in the bill. The bill in no way identifies the evidence which was intended to be made a part of it. The words, "The evidence heretofore referred to is as follows," do not appear to be the words of the judge signing the bill. They are found after his signature. The bill is wholly insufficient to make the evidence a part of it or of the record. Tracy's Adm'x v. Carver Coal Co., 57 W. Va. 587, 50 S. E. 825; McKendree v. Shelton, 51 W. Va. 516, 41 S. E. 909; Dudley v. Barrett et al., 58 W. Va. 235, 52 S. E. 100; and other cases.

Another fatal objection to the bill of exceptions is that it does not purport to make all the evidence adduced on the trial a part of the record, and there is no other bill of exceptions. Under these circumstances, we must presume that there was evidence which fully sustained the verdict. Dudley v. Barrett et al., supra; State v. Ice, 34 W. Va. 244, 12 S. E. 695; Bank v. Bank, 3 W. Va. 386; Edgell v. Conaway, 24 W. Va. 747; Hunter v. Stewart, 23 W. Va. 549. It is true that we find in the printed record what seems to be a copy of the record of a proceeding whereby a declaration and notice in a certain action of ejectment by Morgan Billingsley v. William A. Stutler et al. were supplied; but the certificate to the copy of the record of that proceeding is unsigned by the clerk or any one else. If it were properly signed, the supplied declaration and notice were not made a part of the record in this case by

bill of exceptions as a part of the evidence adduced upon the trial of this case.

The evidence is not a part of the record, and the judgment must be affirmed.

Affirmed.

BARE v. CRANE CREEK COAL & COKE CO.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

1. MASTER AND SERVANT—EMPLOYMENT OF MINOR—ASSUMPTION OF RISK.

A minor who enters the employment of another assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 538-543.]

2. SAME—INCAPACITY OF MINOR.

It is actionable negligence for an employer to engage and place at a dangerous employment a minor, who, although instructed, lacks sufficient age and capacity to comprehend and avoid the dangers of the employment, if the employer has or should have notice of the minor's age and lack of capacity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 141, 314-316.]

3. SAME—NOTICE OF INCAPACITY.

The employer of a minor, without other notice, is charged with notice of such lack of capacity as is usual among minors of the same age, so far as the minor's age is or should be known to the employer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 141, 314-316.]

4. SAME—BURDEN OF PROOF.

The burden of proving that a minor employed had greater than the usual capacity of minors of the same age rests upon the employer; and the burden of proving that the minor had less than such usual capacity rests upon the minor, or the one seeking to recover damages on account of his death.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 896.]

5. SAME—NEGLIGENCE—QUESTION FOR JURY.

A case proper for submission to a jury.

(Syllabus by the Court.)

Error to Circuit Court, Mercer County.

Action by G. L. Bare, administrator, against the Crane Creek Coal & Coke Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

G. J. Holbrook and Harold A. Ritz, for plaintiff in error. A. W. Reynolds, for defendant in error.

COX, J. This action was instituted in the circuit court of Mercer county by G. L. Bare, administrator of his son, Jonas E. Bare, deceased, against Crane Creek Coal & Coke Company, a corporation, to recover damages on account of the death of Jonas E. Bare. After the plaintiff's evidence had been introduced upon the trial, the defendant, without introducing evidence, moved the court to strike out the plaintiff's evidence and to direct a verdict for defendant, which motion was sustained. A verdict for defendant, and a judgment dismissing plaintiff's action, followed. The plaintiff brings the

judgment here by writ of error for review.

The plaintiff offered evidence on the trial tending to prove that the boy, Jonas E. Bare, was employed by the defendant as "trapper" or "doorkeeper" in an entry of the mine of defendant; that the boy was killed while so engaged; that his duties were to open and shut the door across the entry where he was stationed, for the passage upon the track of mine cars propelled by an electric motor, and to signal for the passage of cars upon that track by manipulating an electric light or lights by means of a "cut-out switch," thus indicating when the track was clear and when it was proper for cars to pass; that the light was located inside the door; that there was an opening in the door, through which the signal light was visible from the entry in front of the door; that, shortly previous to the death of the boy, a train of 16 cars was passing into the mine along the main entry leading to the door where the boy was stationed; that before reaching the door the brakeman on the train whistled for signals, and saw the signal light indicating that the track was clear and that it was proper for cars to proceed; that the brakeman did not see that the door was closed; that the brakeman then signaled the motorman; that eight of the front cars were cut off, and caused to run on the main straight siding leading to the door where the boy was stationed; that the cars struck the door, knocking it down and wrecking the cars, or a number of them; that upon an examination of the wreck the boy was found beneath it under the cars, about 25 or 30 feet from the door, with his head injured and his life extinct; that about 15 or 20 minutes before the wreck a tracklayer, with another person, passed out through the door; that the tracklayer then saw the boy lying on his back between the rails of the track; that the person with the tracklayer said to the boy, "Don't lay there and let that motor run over you and kill you"; that the boy laughed, and said "he wasn't going to sleep"; that, after the tracklayer and the person with him passed out, the boy shut the door with his foot; that the signal lights were not on when these persons passed out of the mine; that the boy was killed some time after 3 o'clock in the afternoon of February 23, 1904; that the boy had been on duty about seven hours that day; that the boy was past 12 and under 13 years of age when he was killed; that he was "tolerably small of his age"; that at the time the boy was employed his father told the one employing him that the boy was in his fourteenth year; that the father afterwards ascertained that the boy was in his thirteenth year. The evidence does not show what previous experience the boy had in this employment. His father testified that he saw the boy while he was working in the mine, and saw the place where the boy was working, before he (the father) "got crippled," but he does not say when he was crippled.

pled. As to the capacity of the boy, his father says: "He was just a common child; just like a common child." The evidence does not tend to show whether the boy was instructed in the duties or dangers of his employment or not. There are other features of the evidence unnecessary to detail.

The ground of this action is negligence. The burden is on the plaintiff to prove that the negligence of the defendant was the proximate cause of the injury resulting in the death of the boy. *Butcher v. W. Va. & P. R. R. Co.*, 37 W. Va. 180, 16 S. E. 457, 18 L. R. A. 519. Negligence implies breach of duty, either of omission or commission. The question for our determination is: If the jury had found a verdict for the plaintiff on this evidence, would it have been the duty of the court to set the verdict aside; or, in other words, was the evidence sufficient to support a verdict for the plaintiff? *Dye v. Corbin*, 59 W. Va. —, 53 S. E. 147. The evidence in this case tended to show that the boy was under 13 years of age when he was killed. The duty of an employer in engaging and placing a minor at a dangerous employment is largely measured by the capacity of the minor to comprehend and avoid the dangers of such employment, when the employer has or should have notice of the minor's capacity. 20 Am. & Eng. Enc. Law, 99; *Goff's Adm'r v. Railroad Co. (C. C.)* 36 Fed. 299. The questions of the assumption of risks, ordinary and extraordinary, of the benefit of instructions (if any) by the employer, and of contributory negligence, hinge upon the question of the capacity of the boy for the particular work in which he was engaged. The employer of a minor, without other notice, is charged with notice of such lack of capacity as is usual among minors of the same age, so far as his age is or should be known to his employer. The burden of proving that a minor employé had greater than the usual capacity of minors of the same age rests upon the employer; and the burden of proving that the minor had less than such usual capacity rests upon the minor, or the one seeking to recover damages on account of his death. 1 *Shearman & Redfield on Neg. (5th Ed.)* § 218; *Molaske v. Coal Co. (Wis.)* 58 N. W. 475; *Wynne v. Conklin*, 86 Ga. 40, 12 S. E. 183.

It is actionable negligence for an employer to engage and place at a dangerous employment a minor who, although instructed, lacks sufficient age and capacity to comprehend and avoid the dangers of the employment, if the employer has or should have notice of the minor's age and lack of capacity. *Thomp. on Neg.* § 4689; 20 Am. & Eng. Enc. Law, supra; *Goff's Adm'r v. Railroad Co.*, supra; 1 *Shearman & Redfield on Neg.*, supra.

The rule in relation to assumption of risks by minor employés is correctly stated by this court in *Williams, Adm'r, v. Coal & Coke Co.*, 55 W. Va. 84, 48 S. E. 802. It is that a minor who enters the employ of an-

other assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding. The apparent risks assumed are those which the minor has the capacity to comprehend and avoid. See, also, *Turner v. Railroad Co.*, 40 W. Va. 675, 22 S. E. 83; *Giebell v. Collins Co.*, 54 W. Va. 518, 46 S. E. 509; *Thomp. on Neg.*, supra; 1 *Labatt on Master & Servant*, 291. In determining the capacity of the minor to perform the work and avoid the dangers of a particular employment, the character of the work, the circumstances under which it is to be performed, and the previous experience of the minor should be considered. 1 *Labatt on Master & Servant*, supra.

The evidence tends to show that it was the duty of the boy to open and close the door across the mine entry for the passage of electric cars, and to manipulate the signal light or lights by means of a "cut-out switch" for such passage. This employment was attended with danger. It required care, watchfulness, concentration of mind, and continuity of purpose. A failure to exercise these qualities of mind in the performance of his duties would probably entail great danger of injury or loss of life. Were such duties only consistent with, or were they beyond, the capacity of an ordinary boy under 18, or even under 14, years of age? The defendant claims that it must be presumed that the boy was instructed as to the dangers of his employment, in the absence of any showing to the contrary. If he was instructed, the question of capacity to comprehend and follow the instructions and avoid the dangers arises.

The matter of contributory negligence presents the same question of capacity. The capacity of a minor employé is the measure of his responsibility. If he has not the capacity to comprehend and avoid the dangers to which he may be exposed, negligence will not be imputed to him from the fact that he unwittingly exposes himself to such dangers. 1 *Minor's Inst.* 505; *Thomp. on Neg.*, supra; *Shearman & Redfield on Neg. (5th Ed.)* 73a. It is said that the statute (*Ann. Code* 1906, § 412) permits the employment of a boy over 12 years of age in a coal mine. We do not think that section has any bearing on the duties of an employer toward a minor employé over the age of 12 years.

Considering the fact that the evidence tends to show that the boy was actually under 13 years of age, and was represented at the time of the employment to be in his fourteenth year, and the other circumstances which the evidence tends to prove, this evidence should have been submitted to the jury to determine the question of the capacity of the boy by its verdict. "The rule may be laid down generally that the age, the capacity, and discretion of a child to observe and avoid dangers are questions of fact to be determined by the jury; and his responsibility is to be measured by the degree of capacity he is thus found to possess." 1 *Minor's Inst.*

505. "The true rule would seem to be that the court should take the question away from the jury where the clear weight of evidence shows that the child had a capacity for self-protection, which he culpably omitted to use, in face of a danger which he knew and sufficiently apprehended, but not otherwise." See, also, 1 Shearman & Redfield on Neg. §§ 73a, 218; Buswell on Personal Injuries, § 203; Thomp. on Neg. § 4687; Ketterman v. Railroad Co., 48 W. Va. 606, 87 S. E. 683; Williams v. Coal Co., supra.

For the reasons stated, the judgment is reversed, a new trial awarded, and the case remanded to be further proceeded with according to law.

WEAVER v. R. L. NEAL & CO.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

1. FRAUDULENT CONVEYANCES—TRUST DEED—CONSIDERATION.

A provision, in a deed of trust of goods to secure an indorser of a note, that it shall also secure the indorser for a future indorsement of the note, does not render the trust fraudulent on its face as to creditors.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 24, Fraudulent Conveyances, § 213.]

2. CONFUSION OF GOODS.

A deed of trust on a stock of store goods is given to secure an indorser on a note, and the debtor, while in possession, mingles with the goods conveyed additional store goods, the indorser or trustee not consenting, and an execution from a justice is later levied on the whole stock. The trustee files his petition before the justice to release the goods from the levy, under Code 1899, c. 50, § 152 [Code 1906, c. 50, § 2103]. The burden is not on the trustee before recovery to identify and separate the goods specified in the trust from the goods mingled with them, but is on the execution creditor to identify the additional goods.

(Syllabus by the Court.)

Error from Circuit Court, Wirt County.

Action by F. G. Weaver, trustee, against R. L. Neal & Co. Judgment for defendants, and plaintiff brings error. Reversed.

T. A. Brown, for plaintiff in error. Wm. Beard, for defendants in error.

BRANNON, J. R. A. Reese made a deed of trust, conveying all his personal property, including a stock of goods, to Weaver, trustee, to secure a negotiable note made by Reese, payable to J. A. Wiseman, in 90 days, at the Wirt County Bank. After this deed of trust had been executed, R. L. Neal & Co. caused a writ of fieri facias to be levied on the stock of goods. Then Weaver, trustee, filed before the justice who issued the execution a petition under chapter 50, of section 152 of the Code of 1899 (Code 1906, c. 50, § 2103) setting up his title and claim under the deed of trust, and asking that the stock of goods be released from said execution, and asking that the right of property be tried. After trial before a justice, the case went by appeal to the circuit court of Wirt county,

where a jury was impaneled to try the case; but the court struck out the plaintiff's evidence, and directed a verdict for the defendant, and rendered judgment thereon.

Counsel for Weaver endeavors to exclude the evidence on the ground that the bill of exceptions does not sufficiently incorporate it to bring it before this court; but we think that the bill is ample to do so. It says that "the certificate of evidence certified by John T. Harris, official stenographer of the circuit court of Wirt county, is hereby certified, filed herewith, and made a part of this bill of exceptions." We find the full oral evidence, with a formal certificate by Harris that it is all the evidence given in the case. This clearly identifies the evidence.

The execution creditor claims that the deed of trust is fraudulent and void, as to creditors, on its face. It is not claimed that oral evidence proves such impeachment, but that its vice is shown by the deed. To establish this we can look only at the face of the deed of trust. Landeman v. Wilson, 29 W. Va. 702, 2 S. E. 203. We do not find such fraud on the face of the deed. The deed provides that the trustee sell at the maturity of the note. It cannot be said that sale under the trust is unreasonably postponed, as it was only four days from the date of the trust to the maturity of the note. The deed contains no reservation or power to the debtor—none whatever. It does not give him power to sell, or to retain possession, or to consume or in any wise use the property, so as to enable us, for such grounds, to stamp the deed with fraud, as in Livesay's Ex'r v. Beard, 22 W. Va. 585. Nor does the deed postpone the right of the trustee to take possession until maturity of the note, as in that case. He could take possession the moment the deed was executed. We find no provision authorizing the debtor to replenish the stock of goods. The deed does not cover after-acquired goods. If it did so, there might be an inference of an intent to let the debtor still have the benefit of the goods and to waste them from creditors, as held in Shattuck v. Knight, 25 W. Va. 590, and Landeman v. Wilson, 29 W. Va. 702, 2 S. E. 203. We do not find earmarks of fraud referred to in the many cases in this court of deeds fraudulent on their face. Bartles v. Dillon, 56 W. Va. 383, 49 S. E. 414, holds that a deed of trust will not be held fraudulent per se, unless its provisions plainly show that it was not made in good faith, but only as a colorable security. The only questionable feature of this deed is a provision that it is to secure any future indorsement by Wiseman of the note. The debt is an honest debt, as nobody questions, and we do not think that such a provision is a badge of fraud. This deed was good when made, and this clause does not change its character. It does not put it in the power of the debtor to postpone sale under the trust, nor does it bind Wiseman at all to make a future endorsement. The

clause gave the debtor no power whatever to enforce such indorsement.

Another point to sustain the judgment made by counsel is this: Reese purchased a small quantity of new goods, and intermingled them with the old goods conveyed by the deed of trust. Wiseman is not shown to have consented to this. It is claimed that Weaver, the trustee, is to be treated as plaintiff, suing for specific goods, and that he cannot recover, because there is a confusion of goods; that he must point out the particular articles to which he had legal title under the trust, and, failing to do so, must fail in his claim, on the ground that where there is a confusion of goods, rendering their separation impossible, a plaintiff, in detinue or other proceeding to recover particular property, must pick out his property. Now, the trustee had prior right and legal title over the execution creditor. That execution could not be levied on the property conveyed in the trust, because of the well-settled rule that where property is conveyed under a deed of trust it cannot be levied upon. The creditor by execution has a lien upon it, subject to the trust, a charge on the surplus; but he cannot levy on the tangible personal property. He must enforce his equity in chancery. *Doheny v. Atlantic Co.*, 41 W. Va. 1, 23 S. E. 525; *Coutts v. Walker*, 2 Leigh (Va.) 208. It follows that that levy was void, conferring no title. Seeing that the trustee had a perfect legal title, and the execution creditor none, we think that the execution creditor cannot say that the burden is upon the trustee to identify that part of the stock of goods covered by his trust before he can recover; but the burden is rather on the execution creditor to show what articles of the stock of goods his levy operates upon, as he could have no claim to those articles conveyed in the deed of trust. So holds *Kreuzer v. Cooney*, 45 Md. 582. There one Stewart sold type in a printing office to Kreuzer by bill of sale, and Stewart, remaining in possession, bought and mingled additional type, and then sold to Cooney. Held, that Stewart's title was superior to Cooney's, that the case was to be treated as between Stewart and Kreuzer, and that Cooney got no title to the type sold to Kreuzer, and Kreuzer could maintain replevin against Cooney. It is the law that when one has charge of another's goods, and mingles them with his own, he forfeits his own, unless he can separate them. So held in that case. *Trapnell v. Conklyn*, 37 W. Va. 242, 16 S. E. 570, 38 Am. St. Rep. 30; *Brakely v. Tuttle*, 3 W. Va. 86, 126; 2 Schouler, Personal Prop. § 47. So, if we test the matter as between Reese and Weaver, Reese must pick out the goods he mingled with the others, and so must Neal & Co.; else Weaver gets all under his deed of trust. The case from Maryland above cited says the rule or law of confusion must operate in favor of Weaver, not in favor of the execution creditor. In *Adams v. Wildes*, 107 Mass. 123, a

mortgagor in possession of goods failed to keep them separate from his, purposely or through carelessness, and sold all to a third person. Held, the mortgagee may replevy the whole from the purchaser, unless the latter identifies the articles not embraced in the mortgage. The court said: "It was the duty of the defendant, as he only succeeded to Gay's title subject to the mortgage, to identify the specific articles not in the mortgage." See note 2, 6 Am. & Eng. Ency. L. (2d Ed.) 598, citing that case.

At this point I meet with the case of *Rose v. Sharpless*, 33 Grat. (Va.) 153, where a man had some goods paid for and some not paid for, and he mingled them, and then claimed to exempt them under the exemption law from liability for purchase money of part of the goods. The court held that the burden was on the man who claimed to exempt them to separate them from the goods that had been paid for, "and, he failing to do this, they will all be treated as not having been paid for, as far as the homestead deed is concerned, and therefore not exempt under the law." I think that the matter is to be tested as if between Reese and Weaver the trustee, and that the burden to discriminate the goods is on the execution creditor. I find in 2 Schouler, Personal Prop. § 48, the following: "In the analogous case of chattels specifically pledged or mortgaged for a debt, confusion will sometimes effect an extension of the creditor's security, and sometimes impair or take it away altogether; for, if the debtor, having possession, mingle the pledged or mortgaged goods with other goods of his own, they are all brought under cover of the original security because of his conduct, while the secured creditor in possession, who is guilty of a corresponding intermixture, must bear the consequence of his folly." As is said in *Kreth v. Rogers*, 101 N. C. 263, 7 S. E. 682, one party or the other must suffer, and surely it is not the man having prior claim, guilty of no blame.

On these principles we conclude to reverse the judgment, and set aside the verdict, and remand the case for a new trial. Judge SANDERS and I would enter judgment for Weaver, as the case involves, and is dependent on, questions of law.

Ex parte CALDWELL.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

STATES—POWERS OF HOUSE OF DELEGATES.

The House of Delegates has no power, by its independent action, to raise a committee of investigation, with power to sit during the recess of the Legislature after the close of the session of the Legislature.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Application by Charles T. Caldwell for writ of habeas corpus to W. H. Carfer, sheriff and others. From a judgment dismiss-

ing the writ, plaintiff brings error. Reversed, and discharge ordered.

Charles T. Caldwell, for plaintiff in error. Chilton, MacCorkle & Chilton, for defendants in error.

BRANNON, J. Charles T. Caldwell presented to the judge of the circuit court of Wood county his petition for a writ of habeas corpus stating and showing that he had been arrested by the sheriff of Wood county under a certain writ of attachment signed by James Seaman, chairman of a committee appointed by the House of Delegates, commanding the sheriff to attach the body of said Caldwell, and have him before said committee to answer for contempt in failing to appear as a witness before said committee. The House of Delegates on the 24th day of February, 1905, adopted a resolution reciting that Gov. Albert B. White, in a written communication to the House of Delegates, had requested it to make an investigation of certain charges made against him, and authorizing the Speaker to appoint a committee of three members of the House to investigate the charges, and empowering the committee to compel the attendance of witnesses and send for persons and papers, and to sit after the adjournment of the session of the Legislature. The committee, sitting after the adjournment of the Legislature, summoned Caldwell to appear before it as a witness upon the subject-matter of investigation by the committee, and he had refused to do so, and the committee awarded a writ of attachment directed to the sheriff of Wood county to attach and bring Caldwell before it to answer for contempt in failing and refusing to appear. The judge of the circuit court awarded the writ of habeas corpus, and the sheriff filed a return setting up the said resolution of the House of Delegates, the action of the committee under it, the disobedience of Caldwell under its summons, and said order of attachment, as cause of the arrest and detention of Caldwell. Caldwell moved to quash and demurred to the sheriff's return. The circuit court of Wood county overruled the demurrer and motion to quash and a motion to discharge the prisoner, and remanded Caldwell to the custody of the sheriff, and dismissed his writ of habeas corpus. Caldwell contests the validity of the writ of attachment on the ground of total want of power in the committee.

The sole cause of Caldwell's arrest is his failure to appear before the committee as a witness. This presents a crucial question. Has the House of Delegates power, by its separate resolution, to raise a committee for such investigation to sit after the adjournment of the regular session of the Legislature? Section 1, of art. 6 of the Constitution, says that "the legislative power shall be vested in a Senate and House of Delegates." Both branches constitute that body called the "Legislature." The Legisla-

ture is directed by the Constitution to meet on a fixed day every two years, and the whole frame, spirit, and provisions of the Constitution contemplate that acts of legislation shall be done by the two houses sitting at the same time. The two houses sit at the same time, neither having the power to adjourn over three days without the other. They meet in a session limited to 45 days, and when that limit comes it operates the dissolution of both houses, neither branch having any power to go on separately thereafter, nor has either body power to meet again alone. The Constitution contemplates that the power of the Legislature shall be exercised by the concurrence of the two houses. To make legislative action operative in the future, whether by act or resolution, there must be the consent of the two houses. If the enactment is of such a character as to require an act, as distinguished from a resolution, then an act passed by both houses must be made; if the enactment or order is of such nature as it may be affected by resolution, it must be made by the joint action of both branches to operate after adjournment. When the powers of one branch are ended, the powers of the other branch are ended. If we give effect after adjournment to the mere resolution of one branch, it is in effect the continued power of that single branch. If the powers of that branch are at an end, the powers of a committee appointed by it are also at an end. The limb cannot exist after the body has perished. The agent or deputy cannot act after his principal is extinct. If the branch cannot act, how can a committee act deriving its life from the branch? There can be no question but that during the session one branch can appoint a committee alone to act during the session because each body had power of action during the session to entertain bills, and may use a committee to investigate and report upon any matter which may come before it. Each branch can agree to or disagree in the action of the other branch. During the session it may have a committee to investigate and report to it. This is necessary to enable it to perform its part in the legislative function committed to both houses. The Congress of the United States is composed of a Senate and House of Representatives, and in those two branches the federal Constitution vests all legislative powers granted by it, as our Constitution vests in the Legislature the legislative power of the state. There is no doubt of the power of either branch of Congress or Legislature to appoint a committee of investigation, without the concurrence of the other branch, to act during the session. In *re Chapman*, 166 U. S. 861, 17 Sup. Ct. 677, 41 L. Ed. 1154; *Anderson v. Dunn*, 6 Wheat. (U. S.) 204, 5 L. Ed. 242; *Ex parte Dalton*, 44 Ohio St. 142, 5 N. E. 136, 58 Am. Rep. 800. And there is no doubt that both branches of the Legislature can pass a joint resolution operative in future, after ad-

journment to glean information for legislation, if a resolution is proper, just as they can pass an act. The passage of such a resolution, in a proper case, is no less a performance of a legislative function than the passage of an act, and it requires the dual consent. An act of one body, operative during recess, as for a statute, would be null, and so would a resolution. It cannot be doubted that, by joint resolution, a committee may be authorized to sit after adjournment.

It may be asked: How does it come that both branches can pass a resolution to operate and be carried into effect after adjournment, while one branch is denied that power? There are two answers. One is that both houses can pass an act to operate after adjournment, and both houses can pass a resolution to operate after adjournment, because they have the concurrent action of both branches, whereas the act or resolution of one house has not, and the Constitution plainly contemplates that no act or ordinance having legal force after adjournment shall be passed by one branch. The other answer is that the Legislature may meet again after adjournment, whereas one house cannot alone meet. When the Legislature once adjourns, neither house can meet again alone. We are cited to the case of *Commercial Bank v. Worth*, 117 N. C. 146, 23 S. E. 160, 30 L. R. A. 261, for the position that either house may appoint a committee to sit after adjournment. It does not so hold. It holds that a committee appointed by both branches cannot sit in vacation, unless authorized to sit after adjournment, but if so authorized, it may do so; but that refers to a resolution adopted by both branches and does not assert the power of one branch to pass a resolution appointing a committee to sit after adjournment, even if the resolution so authorized. We are also cited to the case of *Branham v. Lange*, 16 Ind. 499. That did not involve the power of one branch of the Legislature to appoint a committee to sit after adjournment. It holds that the Legislature has power to authorize a committee to sit in vacation, but does not say that one branch may do so. The act involved is one of both branches, not, as in this case, the action of one branch alone. The court construed the act as empowering the committee to sit after adjournment. *Cooley's Constitutional Limitations*, page 193, is referred to, saying that, "Such a committee has no authority to sit during a recess of the House which has appointed it, without its permission to that effect; but the House is at liberty to confer such authority if it see fit." *Cooley* cites the *Indiana Case* and some cases not in the library. The *Indiana Case* does not support *Cooley's* text.

Another consideration bearing against the power of one branch to raise this vacation committee is this: The Constitution does, in terms, confide to each branch separately cer-

tain powers, as, for instance, to punish or expel its own members, to provide for its own safety and against disturbance of the transaction of its work, obstruction of the proceedings of itself or officers, or assault, threat, or abuse of its members, preferring impeachments, trying them, and confirming gubernatorial nominations. Now, the fact that the Constitution carefully specifies numerous separate powers for each branch, and gives to both together all legislative power, is strong to show that other separate powers do not exist, on the rule that where certain things are expressed others are denied. We should say so particularly as to a constitutional question, organizing the state government. It cannot be said that each house, as an inherent or implied power, has right to appoint this committee to glean information essential to legislation. This pertains to legislation, which must come from both houses. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377, largely limits inherent powers in Congress, giving only those absolutely essential for granted powers, and denies power in a committee of one branch to investigate private affairs, as being foreign to the function of the House. True, that was under the federal Constitution, which is one of limitations, whereas the state Legislature may legislate where not prohibited; but the principle of that case tends to show that as all power is by the Constitution vested in two bodies, and separate powers are sedulously specified, we must not violate the plan of the Constitution, though a state Constitution, by a claim of inherent powers. Why is there in the House of Delegates any silent power absolutely essential to the transaction of its business, to justify this committee? Any legislation suggested by its research must come from both Senate and House.

The main reliance of the committee is section 7, c. 12, Code 1899 (Code 1906, § 260). "When the Senate or House of Delegates, or a committee of either house, authorized to examine witnesses, or to send for persons and papers, shall order the attendance of any witness, or the production of any paper as evidence, a summons shall be issued accordingly, signed by the presiding officer or clerk of such house, or the chairman of said committee, directed to the sheriff or other proper officer of any county, or to the sergeant at arms of such house, or any person deputed by him. And when served, obedience thereto may be enforced by attachment, fine or imprisonment, at the discretion of the House which appointed the committee; and if the committee be authorized to sit during the recess of the Legislature or the recess of the House which appointed the committee, then obedience to the summons may be enforced by said committee as aforesaid. And when a committee is appointed by each House under any joint or concurrent resolution, and directed to sit jointly, with authority to examine witnesses, or send for persons and papers,

the summons aforesaid may be signed by the chairman of the committee on the part of the Senate or the chairman of the committee on the part of the House of Delegates; and obedience thereto may be enforced as aforesaid by the House which appointed the committee, which directed the summons to be issued; and if such committees be authorized to sit during the recess of the Legislature, then obedience to the summons aforesaid may be enforced as aforesaid by the committee which directed the summons to be issued." The last part in terms applies to joint and concurrent resolutions, and need not be considered. The first part we construe to apply where the committee is to act during the session, in which case there is no question of its power to sit in a temporary recess during the session; or if it is to sit during the recess after final adjournment, it must have authority from both houses to do so. It is true the language contemplates action of a committee appointed by one house "authorized during the recess of the Legislature"; but notice that the power to sit during the recess must be "authorized"—which means that the authority to so sit must be conferred by both houses. If we do not give it this construction, I do not see how provisions touching committees of one house could be harmonized with the Constitution, § 1, art. 6, which, as above stated, vests the entire legislative power of the state in the two branches of the Legislature. We must give the section such a construction as will harmonize it with the Constitution, if possible.

But there is another reason why that statute cannot be relied on to legalize this committee's action. Does it originate, create, vest power in one house to raise a committee to sit after adjournment? Is that the office of the statute? We think not. Its office is to provide how the attendance of witnesses shall be secured where the power to issue process exists in the committee, not to confer power to sit. It is the office of the Constitution, not the statute, to confer legislative power. If this is the true construction, and we think it is, it does not enact power in one branch to raise a committee to sit after adjournment, and no question of the constitutionality of the section comes up. We, therefore, hold that the resolution of the House of Delegates conferred no power upon the committee to sit during the recess, and is void, and cannot support the writ of attachment.

Since the opinion was prepared to this point, we have been furnished with an opinion delivered October, 1906, by the Ohio Supreme Court in *State ex rel. v. Gullbert*, 78 N. E. 931. The Ohio Senate passed a resolution raising a committee to investigate charges of corruption in the government of the city of Cincinnati. The Legislature passed an act appropriating money for "contingent fund of the Senate for the use of the select investigating committee." The commit-

tee acted and incurred certain expenses, for payment of which its chairman issued voucher, and the Realty Company in favor of which the voucher was for rent of room, and light for sessions of the committee, demanded of the State Auditor a warrant for it, and the Auditor refused to issue a warrant, and application was made to the Supreme Court for a mandamus to compel him to do so. The court refused the writ. It held that the Senate had no power to raise a committee by its sole action, as the whole legislative power of the state was vested by the Constitution in the two branches of the Legislature as a unit, and not in the Senate or House acting separately, and one branch has no power so acting of independent legislation, except as expressly granted by the Constitution, or necessarily implied in the express grants. The court relied on that clause of the Constitution, like our section 1, art. 6, vesting the legislative power in a Senate and House of Delegates. When it was argued that the act appropriating money for contingent fund of the Senate for the use of "select investigating committee," ratified the committee, the court said that this committee was not specifically named in the appropriation, and the act referred to committees constitutionally appointed; and furthermore, if the act could be held to apply to that committee, it would be void, as the legislative power was delegated to the Legislature, and the Legislature "cannot redelegate it to another body." It said, "If a single branch has no constitutional power to appoint this committee, it must be obvious that the whole Legislature cannot authorize it to do so." It was suggested that "an act to authorize committees of the General Assembly to compel the attendance of witnesses and other purposes" authorized the committee in question. The court said the act was not to be held to so authorize the Legislature or one branch, but its object was to provide means of enabling lawful committees to act; but if it could be construed, to authorize a single branch to do so, it would be unconstitutional. It conceded power to either house to appoint committees as to matters over which each house had express authority in the Constitution. When the power to raise the committee was rested on inherent power in each house to glean information, the court denied such power.

Our conclusion is to reverse the judgment dismissing the writ of habeas corpus, and discharge Caldwell from custody.

Ex parte BLIZZARD.

(Supreme Court of Appeals of West Virginia.
Dec. 4, 1906.)

Error to Circuit Court, Wood County.

Habeas corpus by Reese Blizzard against W. H. Carfer, sheriff and others. Writ denied, and plaintiff brings error. Reversed

Charles T. Caldwell, for plaintiff in error. Mollihan, McClintic & Mathews, for defendants in error.

BRANNON, J. Reese Blizzard was attached by the person by the sheriff of Wood county under a process ordered by a committee of the House of Delegates sitting during the recess of the Legislature, to answer before that committee for contempt in refusing to appear before that committee as a witness, and he sued out a writ of habeas corpus, which was dismissed by the circuit court of Wood county, and he remanded to the sheriff's custody. He sued out a writ of error from this court which we now decide. The case is precisely similar to that of *Ex parte Caldwell* (decided on the same day with this case) 55 S. E. 910. Both Caldwell and Blizzard were attached under the same process, and for the same cause. The same proceedings were had in both cases. The decision of one fully controls the principles involved in the other, and it is sufficient to refer to the opinion in that case for the reasons of decision in this case.

The judgment is reversed, Blizzard discharged from custody, and the writ of habeas corpus dismissed.

ROBERTS v. NAPIER BROS.

(Supreme Court of Georgia. Nov. 12, 1906.)

1. JUSTICES OF THE PEACE—APPEAL—BOND. It is essential to the validity of an appeal in a justice's court, not in forma pauperis, that the appellant give bond and security for the eventual condemnation money. Civ. Code 1895, §§ 4140, 4458.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 550.]

2. SAME—VALIDITY.

An instrument purporting to be an appeal bond, which is not signed by a surety, is fatally defective. *Gordon v. Robertson*, 26 Ga. 410; *McMurria v. Powell*, 48 S. E. 354, 120 Ga. 766, and cit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 554.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Napier Bros. against J. M. Roberts. Judgment for plaintiffs. From an order dismissing an appeal from a justice, plaintiffs bring error. Affirmed.

Jno. R. Cooper, for plaintiffs in error. R. L. Anderson, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

SKINNER v. BRASWELL et al.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. HUSBAND AND WIFE—CONVEYANCES—VALIDITY.

Where a husband, as agent, bargained for the sale of the property of his wife, and she

executed a deed thereto, a purchaser for value took a good title, although the money so obtained was used to pay the debts of the husband, provided the purchaser was not a creditor to be thus paid, and was not a party to any scheme or arrangement whereby the money paid for said property was to be used in any particular way; and the fact that the wife, in signing the deed, acted under the duress of the husband, will not vitiate the contract, where it does not appear that the purchaser had any notice, or reason to apprehend, that the husband had coerced the wife into signing said deed. *Hughie v. Hammett*, 31 S. E. 109, 105 Ga. 368; *Rood v. Wright*, 53 S. E. 390, 124 Ga. 849.

2. TRIAL—DIRECTING VERDICT.

"The mere fact that there are conflicts in the testimony does not render the direction of a verdict in favor of a party erroneous, when it appears that the conflicts are immaterial, and that, giving to the opposite party the benefit of the most favorable view of the evidence as a whole and of all legitimate inferences therefrom, the verdict against him is demanded." *Sanders Mfg. Co. v. Dollar Savings Bank*, 35 S. E. 777, 110 Ga. 559.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 342.]

(Syllabus by the Court.)

Error from Superior Court, Emanuel County; B. T. Rawlings, Judge.

Action between N. J. Skinner and E. R. Braswell and others. From the judgment. Skinner brings error. Affirmed.

Herrington & Mitchell, for plaintiff in error. Saffold & Larsen, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

CARGER v. MACON RY. & LIGHT CO.

(Supreme Court of Georgia. Nov. 9, 1906.)

STREET RAILROADS—COLLISION—EVIDENCE—NONSUIT.

The evidence was of such character as to require the submission of the issues involved to a jury, and it was error to grant a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 251, 253.]

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Emma Carger, administratrix, against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Reversed.

R. D. Feagin, for plaintiff in error. Roland Ellis, for defendant in error.

ATKINSON, J. When the motorman saw that the mules being driven by the plaintiff's intestate in the street, where he had a right to be, were being frightened by the car, was it not his duty to stop, in order to give the intestate some opportunity of avoiding a catastrophe? Under those conditions, was it not negligence to continue his approach, sounding the gong? These were questions for the jury. See, in this connection, *Oates v. Metropolitan Street Railway Company*, 68 S. W. 906, 168 Mo. 535, 58 L. R. A. 447. The evidence was not such as would have author-

ized the court to hold that the viciousness of the animals was the proximate cause of the injury. That question was one, also, for the jury. It was erroneous to grant a nonsuit.

Judgment reversed. All the Justices concur.

THURMOND v. C. L. GROVES & CO.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. COURTS—MUNICIPAL COURTS—PROCEDURE—OPENING DEFAULT—CITY COURTS.

This case is controlled in principle by that of *Dodson Printers' Supply Co. v. Harris*, 41 S. E. 54, 114 Ga. 966 (2), 968, 969. While generally the rules of practice in the superior court are made applicable to the city court of Washington, except as in the act establishing that court provided, yet, as to cases returnable to the monthly term of such court, the practice in the superior court in regard to appearance days, the allowance of 30 days in which to open defaults, and the discretionary power to do so thereafter, is not applicable. The first term is the trial term; and the presiding judge is not vested with discretion to open a default and allow a plea to be filed at a later term. Acts 1905, pp. 404, 405, §§ 17, 18; *Morgan v. Prior*, 36 S. E. 219, 110 Ga. 791.

2. APPEAL—PRESUMPTIONS—DEFAULT.

If there were any duty on the part of the judge to mark the case in default under this act, in the absence of anything appearing to the contrary, the presumption would be that he did so. *Norman v. Great Western Tailoring Co.*, 49 S. E. 782, 121 Ga. 813.

(Syllabus by the Court.)

Error from City Court of Washington; S. H. Hardeman, Judge.

Action by C. L. Groves & Co. against F. W. Thurmond. Judgment for plaintiffs, and defendant brings error. Affirmed.

F. H. Colley, for plaintiff in error. J. M. Pitner, for defendants in error.

LUMPKIN, J. Judgment affirmed. All the Justices concurring.

LOVELADY v. ROBERTS & MCCLURE.

(Supreme Court of Georgia. Nov. 16, 1906.)

APPEAL—REVIEW—REFUSAL OF NEW TRIAL.

No error of law being complained of, the jury have found in favor of the defendants, and, there being sufficient evidence to authorize the finding, there was no abuse of discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Cherokee County; Geo. F. Gober, Judge.

Action by Roberts & McClure against A. J. Lovelady. Judgment for plaintiffs, and defendant brings error. Affirmed.

Griffin & Attaway, for plaintiff in error, Geo. I. Teasley and P. P. Du Free, for defendants in error,

LUMPKIN, J. Judgment affirmed. All the Justices concur.

LONG v. BANK OF MINDEN.

BANK OF MINDEN v. LONG.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. APPEAL—FAILURE TO FILE BRIEFS—DISMISSAL.

When, for want of time to hear, during a particular term of the Supreme Court, oral argument in civil cases entered upon the docket thereof, the court passes an order requiring parties to file briefs in such cases, and limits the time for so doing to a day named, all such cases must be treated as though they had been called for oral argument on that day; and consequently cases in which briefs have not been filed for plaintiffs in error by the day named fall within the operation of rule 24 (26 S. E. ix), and will be dismissed for want of prosecution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3108.]

2. SAME—EXCUSE.

Such cases can be saved from dismissal only when the plaintiff in error is prevented by providential cause from complying with the terms of the order requiring the briefs to be filed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3105.]

3. SAME.

The ordinary delays of the mail do not constitute providential cause.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action by the Bank of Minden against W. G. Long. Judgment for plaintiff, and defendant brings error, and plaintiff assigns cross-error. Writ of error in each case dismissed.

S. L. Olive and Z. B. Rogers, for plaintiff in error. J. N. Worley and H. J. Brewer, for defendant in error.

COBB, P. J. The Bank of Minden sued Long in the city court of Elberton, and recovered a judgment. The defendant made a motion for a new trial, which was overruled, and he filed a bill of exceptions, assigning error upon this judgment. The plaintiff filed a cross-bill, assigning error upon the refusal of the judge to dismiss the motion for a new trial, and also filed an independent bill of exceptions containing the same assignment of error. For want of time the Supreme Court was unable to hear oral argument in all civil cases entered upon the docket of the March term, 1906. On June 22, 1906, an order was passed directing and requiring briefs to be filed on July 16th in all cases in which oral argument had not been heard by that date, and it was also provided that a call of the docket would be had on July 18th, and cases in which no briefs had, on or before July 16th, been filed for plaintiffs in error, would be dismissed for want of prosecution, unless a sufficient reason to the contrary was shown. The cases now before us were embraced in this order. When the docket was called on July 18th, it appeared that no briefs had been filed on July 16th for the plaintiff in error in the case of Long v. Bank of Minden. It did appear that a brief

for plaintiff in error had been delivered to the clerk by mail on July 17th. Application was made to allow this brief to be filed as of July 16th. This application was based upon a written showing that counsel had deposited the brief in the post office at Elberton on the afternoon of July 15th, at such an hour as that two mail trains would pass which would bring the brief to Atlanta for delivery by mail on July 16th, if forwarded by due course of mail. It does not distinctly appear where the delay in the mails occurred, but it does appear that the package left Elberton in time to have been delivered in Atlanta on the 16th in due course of mail.

Under an order of court of the character above indicated, all cases embraced therein must be treated as though they had been called for argument upon the day fixed for the filing of the briefs, and consequently a case in which no briefs had been filed by that day falls within the operation of rule 24 (26 S. E. ix) of this court, which declares that "on the call of a case, if the plaintiff in error be unrepresented, * * * the case will be dismissed for the want of prosecution, and will not be reinstated except for providential cause." *Irwin v. Railway Co.*, 113 Ga. 185, 38 S. E. 407; *Irwin v. Williams*, 113 Ga. 187, 38 S. E. 408; *Fannin County v. Dorsey*, 113 Ga. 187, 38 S. E. 408. The application to file the brief as of July 16th must be treated as in the nature of a motion to reinstate the case, and therefore cannot be granted unless the grounds stated therein constitute providential cause why the brief was not filed on July 16th. The ordinary delays of the mail do not constitute providential cause. *Griffith v. Mitchell*, 117 Ga. 476, 43 S. E. 742. (4) It therefore follows that the writ of error in the main case must be dismissed for want of prosecution.

As the effect of this dismissal is to affirm the judgment in the main bill, it renders unnecessary a discussion of the points raised in the other bills of exceptions, and these will also be dismissed.

Writ of error in each case dismissed. All the Justices concur.

LONG v. HODGES.

(Supreme Court of Georgia. Nov. 10, 1906.)

APPEAL—DISMISSAL.

This case is controlled by the rulings this day made in the case of *Long v. Bank of Minden*, 55 S. E. 915.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action between N. G. Long and Samuel Hodges. From the judgment, Long brings error. Dismissed.

Saml. L. Olive, for plaintiff in error. Joseph N. Worley, for defendant in error.

OOBB, P. J. Writ of error dismissed. All the Justices concur.

CONNELLY et al. v. CONNELLY.

(Supreme Court of Georgia. Nov. 10, 1906.)

TRIAL—NONSUIT.

Some evidence having been submitted by the plaintiffs which would have authorized the jury to find a verdict in their favor, the court erred in granting a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 332, 333, 338-341.]

(Syllabus by the Court.)

Error from Superior Court, Newton County; L. S. Roan, Judge.

Action by H. E. Connelly and others against J. T. Connelly. Judgment for defendant, and plaintiffs bring error. Reversed.

Greene F. Johnson, for plaintiffs in error. Jas. F. Rogers, for defendant in error.

BECK, J. The plaintiffs in error, as heirs at law of James Connelly, deceased, filed an equitable petition against the defendant in the superior court of Newton county, seeking to recover certain land and to have a deed, made by the deceased to the defendant, delivered up and canceled, on the ground that the deceased did not have the capacity to make it. At the conclusion of the evidence introduced by the plaintiffs, the court, upon motion, awarded a judgment of nonsuit, to which decision the plaintiffs excepted. An examination of the evidence in the case, which we do not attempt to set out, convinces us that the court erred in granting the nonsuit, and that the question of the mental capacity or incapacity of the deceased to make the deed in question should have been submitted to the jury. More than one witness testified that in the opinion of the witness the grantor did not have sufficient mental capacity to transact business and to make a valid deed; the witnesses stating at the same time facts, circumstances, and matters coming under their observation upon which they based their opinion as to the mental condition of the defendant's grantor. Whether their conclusions were correct or not was a question for the jury, and the court erred in holding that, as a matter of law, there was not sufficient evidence to authorize a verdict in plaintiff's favor.

Judgment reversed. All the Justices concur.

J. EVERETT & SON et al. v. M. FERST'S SONS & CO.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. BILLS AND NOTES—ATTORNEY'S FEES—RETURN DAY.

The expression "return day," as used in the act of 1900, amending Civ. Code 1895, § 3667 (Acts 1900, p. 53; Van Epps' Code, Supp. § 6185), means the same as "filing day," or the last day on which suits may be filed so as to be returnable to the next term. *Barley v. Bennett*, 33 Ga. 146; *Hood v. Powers*, 57 Ga. 245.

2. SAME—DIRECTING VERDICT.

Consequently, where the undisputed evidence showed that written notice was given,

as provided in said section, by the holder of certain promissory notes, which contained obligations to pay attorney's fees, of the holder's intention to sue and of the term of court to which suit would be brought, it was not error for the court, on the trial of a suit brought upon such notes, to direct a verdict for the plaintiff for the amount of the attorney's fees stipulated in the notes, though subsequently to the return day, and before the first day of the term, the defendant had fully paid the principal, interest, and accrued costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 272, 1946, 1947.]

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Brannen, Judge.

Action by M. Ferst's Sons & Co. against J. Everett & Son and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

R. Lee Moore, for plaintiffs in error. Groover & Johnston, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

WILLIAMS v. COOLEY.

(Supreme Court of Georgia. Nov. 16, 1906.)

MANDAMUS — COURT STENOGRAPHER — TRANSCRIBING NOTES.

Where a defendant was indicted for a felony, and upon his trial was convicted, but the jury convicting him recommended, under the provisions of the Penal Code of 1895, § 1036, that he be punished as for a misdemeanor, which recommendation was approved by the trial judge, the duty devolved upon the stenographer of the court who reported the case, under the Penal Code of 1895, § 981, to transcribe his stenographic notes of the evidence and charge of the court and file the same in the office of the clerk of the court; and upon refusal so to do the writ of mandamus, at the instance of the defendant, would lie to compel the performance of that duty.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Application of John Williams for writ of mandamus to E. H. Cooley. From an order denying the writ, plaintiff brings error. Reversed.

J. C. Edwards and I. L. Oakes, for plaintiff in error.

ATKINSON, J. The Penal Code of 1895, § 981, provides as follows: "On the trial of all felonies the presiding judge shall have the testimony taken down, and, when directed by the judge, the court reporter shall exactly and truly record, or take stenographic notes of, the testimony and proceedings in the case, except the argument of counsel. In the event of the jury returning a verdict of guilty, the testimony shall be entered on the minutes of the court, or in a book to be kept for that purpose." Under the provisions of that law it is the duty of court stenographers in all felony cases, where defendants have been convicted, to transcribe their notes and file

the same with the clerks of court for the purpose of going upon the minutes. Assault with intent to murder is a felony, and upon conviction the offense was rendered none the less a felony because, under the provisions of the Penal Code of 1895, § 1036, the jury trying the defendant saw fit to recommend that he be punished as for a misdemeanor, and the judge, regarding the recommendation, actually sentenced him as for a misdemeanor. Where one is placed on trial for a felony, it is the indictment that gives character to the charge against the accused, and determines whether the testimony shall be taken down. Under section 981, when the defendant is indicted for a felony, it is the duty of the court to require the stenographer to report the case. That section does not contemplate that the court shall await the termination of the case to determine whether or not it is a felony, and whether or not he must require it reported. The court sees by inspection of the indictment that the case is a felony, and the trial proceeds under all the rules prescribed for the trial of felonies. He may be convicted of the offense charged or of a lesser offense, or acquitted; but regardless of the result, it could not be said after the trial that the defendant had not been tried for a felony. The language of the Code is: "On the trial of all felonies." It is evident that the court's duty on the trial of the case was to require it to be reported, because it was a felony. After reporting "the testimony and proceedings in the case, except the argument of counsel," the stenographer, upon one contingency only, is required to transcribe and furnish to the clerk his stenographic notes. What is that contingency? That the jury return a "verdict of guilty." Nothing further is required to create the contingency; and, if it arises by the finding of a verdict of "guilty," no qualification of the verdict by way of recommendation to mercy can destroy the contingency.

In so construing section 981 we have not been unmindful of section 1036 of the same Code. That section permits certain felonies (and among them assault with intent to murder) "on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial * * * [to] be punished as misdemeanors," and authorizes the judge trying the case, if he sees proper, in his punishment to "reduce such felonies to misdemeanors." This section is one of a forgiving character, and looks only to leniency to the defendant after trial and after his guilt has been established. By this act it was never intended to dispense with any of the machinery of the law provided for the trial of the felony case. The Legislature did not intend to dispense with any of the rules or procedure theretofore employed touching the trial of the accused. In so far as it affects the case now involved, the duties of the court stenographer are not different from those imposed upon him in

any other felony cases where there is conviction without recommendation. He should transcribe his notes to be entered upon the minutes. His compensation should come from the county, just as he is paid for reducing the evidence to stenographic notes. If he refuses to transcribe and file notes, he can be compelled to do so by the writ of mandamus sued out by the defendant. From what has been said, it follows that the judge committed error in refusing to sanction the petition.

Judgment reversed. All the Justices concur.

COWDERY v. GREENLEE.

(Supreme Court of Georgia, Nov. 14, 1906.)

1. VENDOR AND PURCHASER—DEFAULT OF VENDOR—OBJECTIONS TO TITLE—ACTION ON CONTRACT.

After a prospective purchaser of land under an executory contract of sale has pointed out his objections to the title and has declined to perform, for specific reasons assigned, he cannot, in defense to a suit for damages for a breach of the contract, urge additional objections to the title which the owner was given no opportunity to meet, and which were known to such purchaser at the time the specific objections were made.

2. SAME — CONTRACT — CONSTRUCTION — TITLE REQUIRED.

Under a stipulation that the purchase will be made unless the vendor's title be "legally insufficient" and he shall fail to perfect the same within a reasonable time, it is not the right of the purchaser to demand a perfect record title or to refuse to pay the purchase money simply because one of the muniments of title is a deed which is not attested in such manner as to entitle it to record, there being no pretense on his part that a failure to have it duly registered in any way affected the validity of the vendor's title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 238, 244, 246.]

3. SAME—MEASURE OF DAMAGES.

The refusal of the purchaser to perform will not give to the owner the right to resell the land at the risk of the former and hold him liable for a deficiency in the price realized, the true measure of damages being the difference between the contract price and the market value of the land at the time of the breach.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 48, Vendor and Purchaser, §§ 955, 956.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by M. D. Cowdery against M. H. Greenlee. From the judgment plaintiff brings error, and defendant assigns cross-error. Judgment on both main and cross bill of exceptions. Reversed.

The plaintiff, Mrs. Minnie D. Cowdery, declared on a written contract, signed by her and the defendant, Mrs. M. H. Greenlee, for the sale by the former to the latter of a house and lot in the city of Atlanta. The agreed purchase price was \$4,200; the purchaser to assume a loan of \$2,500, which was an incumbrance on the property, and to make a cash payment of \$1,700. This agreement was

made "subject to right of purchaser to investigate titles to the property and to decline to perform if title of the vendor [should] be legally insufficient and she [should fail] to perfect same within a reasonable time," and the writing contained a stipulation that the cash payment was to be made when the vendor complied with her "obligation to make satisfactory showing as to title." The contract was executed on the 12th day of May, 1904. The plaintiff alleged in her petition that she "faithfully performed all the conditions to be by her performed, and did, on the 28th day of May, 1904, after allowing defendant a reasonable time to examine and pass on plaintiff's title, offer to convey title to said realty to defendant, subject only to the incumbrance mentioned in said written agreement," and did then tender to the defendant her warranty deed to the property, but the defendant declined to perform her obligations under the contract, and failed and refused to pay the price agreed upon as the consideration of the sale. The plaintiff thereupon notified defendant of her intention to proceed to resell the property at the defendant's risk and to hold her responsible for any loss or expense that might be incurred; on June 18, 1904, the plaintiff did sell and convey the premises to one Burnham for the sum of \$4,000, which was the best price she was able to obtain for the property; and she sought by this suit to recover damages to the amount of \$500, which represented the difference between the contract price the defendant had agreed to pay and the sum actually realized after deducting from the amount for which the property was resold, agent's commissions, and lawyer's fees. The defendant admitted in her answer that she had entered into the contract declared on, but insisted that the titles of the plaintiff were, for specified reasons, "legally insufficient and unsatisfactory to the defendant," and the plaintiff had refused to perfect the same. The defendant also pleaded in bar that the plaintiff had voluntarily released her from all obligation to perform the contract, the plaintiff saying a higher price had been offered for the property by another person who wished to buy it. By way of demurrer, the defendant raised the point that, even if the plaintiff was entitled to recover anything under the allegations of her petition, which was denied, the items of loss therein set forth did not constitute any legal or proper measure of damages for a breach of the contract. The demurrer was overruled by the court, and the defendant filed exceptions pendente lite. The trial on the merits resulted in a judgment of nonsuit. Exception is taken by the plaintiff to this judgment, as well as to various rulings made during the progress of the hearing with regard to the admissibility of evidence offered by her for the purpose of showing title. The defendant, by cross-bill of exceptions, complains of the overruling of her demurrer to the plaintiff's petition.

It appeared from the testimony of the plaintiff that the defendant had declined to carry out the contract because her attorney raised certain objections to plaintiff's title, one of which was that a deed to her from her husband, J. W. Cowdery, was not officially attested in such a way as entitled it to record. Another objection urged had reference to a suit by one Johnson against J. W. Cowdery respecting the line between the property of the former and that which the plaintiff had agreed to sell to the defendant. This suit, the plaintiff testified, had been wound up a year before the trade was made, and the sheriff had put Johnson in possession of the strip claimed by him some time before the defendant ever came to see the property. The plaintiff's immediate predecessor in title, J. W. Cowdery, went into possession under a deed from A. J. West to him, dated July 23, 1895, and remained in continuous possession until he sold and conveyed the property to her in 1899, when she entered and held it up to May, 1904. She undertook to carry the burden of showing a complete chain of title from the state down to her husband, and offered in evidence a deed to her, dated February 25, 1899, and admitted to record on March 3d of that year, headed "State of New Jersey, Somerset County," signed "J. W. Cowdery," and attested as follows: "Signed, sealed and delivered in presence of: Frank W. Somers, County Clerk of Somerset Co.; Augustus Vanderver." There was also on the deed the impression of a seal bearing the words, "Seal of the County of Somerset." The defendant objected to the admission of this deed on the ground that it was not properly attested for record, and the plaintiff then offered in evidence certain general statutes of the state of New Jersey for the purpose of showing that the county clerk of Somerset county was the clerk of a court of record, and that the seal affixed to the deed was the seal of a court of record. The court, at the instance of the defendant, refused to admit this evidence or to allow the plaintiff to make similar proof by introducing the interrogatories of the deputy clerk of Somerset county, N. J., respecting the character of the court of which the official witness to the deed was the clerk. The attorney who represented Mrs. Cowdery pending her negotiations with Mrs. Greenlee testified that, when the attorney she had employed to investigate the title raised the objection that the deed was not properly attested, his attention had been called to the statutes of New Jersey making the county clerk the clerk of a court of record and the county seal the seal of a court of record. The presiding judge thereupon sustained the defendant's objection to the introduction of the deed, and granted her motion for a nonsuit.

Geo. Gordon and J. A. Branch, for plaintiff in error. O. L. Pettigrew, for defendant in error.

EVANS, J. (after stating the facts). 1. It was not incumbent on the plaintiff to show, as she undertook to do, that she had perfect title to the property which she had contracted to sell to the defendant. The refusal of the latter to carry out the contract was based upon two specific objections to the title, and all other objections which were known to the vendee, and which might have been, but were not, urged against the sufficiency of the vendor's title, were waived. *Fenn v. Ware*, 100 Ga. 563, 28 S. E. 238; *Atlanta Trust Co. v. Close*, 115 Ga. 939, 42 S. E. 265; *Gavan v. Norcross*, 117 Ga. 363, 43 S. E. 771. "Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and different consideration. He is not permitted to thus mend his hold. He is estopped from doing it by a settled principle of law." 2 *Herman on Estoppel*, 947. This doctrine is especially applicable in a case such as the present, where the owner of property expressly stipulates in an agreement of sale that, if the prospective purchaser finds any flaws in the title, he shall point them out to the owner and afford him a reasonable time within which to perfect his title. The evidence discloses, and the defendant in her answer admitted, that she declined to complete the purchase for two reasons, and for two reasons only; therefore she could not urge in defense to the suit any additional objections to the title, nor could she call upon the plaintiff to assume the burden of proving that the title was without blemish. All it was necessary for the plaintiff to establish was that, under the terms of the written agreement, the defendant was unwarranted in declining to perform for either of the reasons assigned by her, and had, by waiving all other objections which might have been urged, relieved the plaintiff of all obligation to take further steps to comply with her original undertaking "to make satisfactory showing as to title." The plaintiff did show beyond question that there was no merit in the objection that she was not in a position to convey all she had contracted to convey, because of a suit brought against her immediate predecessor in title by an adjoining proprietor to settle the location of the dividing line between their lots. The case must accordingly be made to turn upon the question whether or not the plaintiff was under an obligation to meet the further objection that the deed made to her by her husband was not attested in such manner as to entitle it to record.

2. The purchaser did not stipulate in the written agreement that she was to get a perfect record title. On the contrary, she agreed to buy subject only to the condition that she should have the right to investigate the title and decline to perform if the vendor's title was found to be "legally insufficient" and she should fail to perfect it within a rea-

sonable time. "A promise to convey a good title is always implied in an executory contract for the sale of lands, and a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title knowing its defects." 26 Am. & Eng. Enc. L. (2d Ed.) 106. "But, while a defect in the record title may, under certain circumstances, furnish a defense to the purchaser, there is no inflexible rule that a vendor may furnish a perfect record or paper title." Id. 107. "A title dependent upon adverse possession under color of title is generally held sufficient if there be no reasonable doubt as to the nature and duration of such possession and the title thereby acquired." Id. "The nature of the title which a vendor must be qualified to convey where a good title is implied or contracted for is frequently described as a 'marketable' title, or one free from reasonable doubt; that is, not only a title valid in fact, but one that can be again sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. * * * But, while a purchaser will not be compelled to take a doubtful title, the doubt must be more than a bare possibility; it must be a reasonable doubt." Id. 109-111. A title which exposes the vendee to litigation, because dependent upon a judgment which is not conclusive upon all persons at interest, has been held not to be marketable. *Swayne v. Lyon*, 67 Pa. 436. So, also, where the title is in doubt because it cannot be ascertained whether an heir, who had suddenly disappeared and had not been heard from for a number of years, was, in point of fact, as was supposed, no longer in life. *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195, 8 L. R. A. 591, 17 Am. St. Rep. 634. However, the danger of litigation must be real or apparent and to be apprehended because of some irregularity in legal proceedings or sales made thereunder, or because of some matter of fact, the real truth as to which cannot be ascertained with reasonable certainty. 26 Am. & Eng. Enc. L. (2d Ed.) 111. It has been held that a stipulation in a contract that the title of the vendor must be "first class" means simply that the title shall be marketable. *Vought v. Williams*, supra. Certainly, a stipulation that the purchaser will buy unless the title be "legally insufficient" means no more, and cannot support the construction that the vendor undertook to sell a title which appeared perfect on the records or to make a showing of title deeds which were entitled to record. In *Carolina Savings Bank v. McMahon*, 37 S. C. 309, 16 S. E. 31, the Supreme Court of South Carolina ruled that: "A purchaser of land cannot object to a deed in the muniments of his vendor's title because of the absence of the official title of the person before whom the probate was made, where there is sufficient evidence to show that such person was then an officer authorized to take affidavits." The objection urged against the deed was that it had "never been recorded

according to law;" but the court held this was not such a defect in the title as would relieve the purchaser, it not appearing that any intervening rights of the third persons had resulted therefrom. In the present case, there is no pretense that the deed to the plaintiff from her husband did not pass title to her, or that, because of a failure to have it properly attested and put on record she lost her right to assert title as against some one not affected with notice of her title. She merely obligated herself to make a satisfactory showing as to title, not to so perfect the record of her title that the muniments of title turned over to the purchaser could at any time be introduced in evidence in a legal proceeding without proof of their execution, under the provisions of our statute which declares that a registered deed is admissible without any accompanying proof as to its genuineness. Counsel for the defendant in error cite a number of decisions of the New York courts. See *Fleming v. Burnham*, 100 N. Y. 1, 2 N. E. 905; *Irving v. Campbell*, 121 N. Y. 353, 24 N. E. 821, 8 L. R. A. 620; *McPherson v. Schade*, 149 N. Y. 16, 43 N. E. 527. The New York courts have declined to decree specific performance where there was a defect in the record title which could be supplied only by a resort to parol evidence, and there had not been an undisputed adverse possession for a sufficient time to give title thereby. The point raised is of the first impression in this state, and we decline to apply the New York rule in all its strictness. When the parties do not contract for a record title, we do not think that the title is to be rejected solely because a deed in the abstract of title, otherwise unobjectionable, is not attested so as to be recordable under the registry acts. The plaintiff in the present case is suing for damages for a breach of the contract. It was not necessary for her to show the court that the title deed objected to had been properly attested for record, nor are we called on to decide whether it was or was not. Notwithstanding the rejection of this deed and the evidence offered in connection with it, the plaintiff made out a prima facie case for a recovery, and a nonsuit should not have been granted. The rejection of the deed did not injuriously affect her case, as she was under no obligation to prove its execution; the defendant, by waiving all objections to it except that it did not appear to be entitled to record, conceded it was what it purported to be, a genuine conveyance duly executed, effective as a muniment of title.

3. As the case is to be tried again, it is proper to pass on the merits of the defendant's demurrer to the petition. It set forth a valid and binding contract, and alleged a breach thereof. Accordingly, the case should not have been dismissed on general demurrer, as nominal damages, at least, were recoverable for the breach. *Sutton v. Railway Co.* 101 Ga. 776, 29 S. E. 53. But by special demurrer to those paragraphs of the petition

in which the plaintiff set forth her claim to special damages, the defendant made the point that this claim did not present the proper measure of damages, and the particular items of damages claimed were not legally recoverable. This objection to the plaintiff's pleadings was properly raised by way of demurrer. *Ripley v. Eady*, 106 Ga. 423, 32 S. E. 343. If sustained, the result would be not to dismiss the plaintiff's action, but only to strike from her petition her claim for special damages. The special demurrer should have been sustained. The correct measure of damages was the difference between the price agreed to be paid for the land and the value of the land at the time of the alleged breach. *Irwin v. Askew*, 74 Ga. 582; *Brooks v. Miller*, 103 Ga. 713, 30 S. E. 630. When land is sold at public outcry under legal process; or by an administrator, executor, or guardian, and the purchaser declines to comply with his bid, the land may be sold at his risk, and he will be liable for any deficiency in price arising from his refusal to perform. Civil Code 1895, § 5466. Not so, however, when the purchaser of land under an executory contract of sale fails to comply therewith. Civil Code 1895, § 3551, providing for a resale of "goods" at the purchaser's risk, has no application to a case such as the present. In the case of *Ansley v. Green*, 82 Ga. 184, 7 S. E. 921; *Green v. Ansley*, 92 Ga. 647, 19 S. E. 53, 44 Am. St. Rep. 110, it appeared that land was sold at public auction, and this court held that there was no merit in a demurrer to the petition on the ground that "such suits can only be maintained against bidders at judicial sales." No point was made as to the proper measure of damages, and the case was decided upon the pleadings as they stood, attention being called to the conflict of authority upon the question whether the correct measure of damages was the loss arising from a resale of the land or the difference between the price bid at the first sale and the true market value of the land at the second sale. In *Gilbert v. Cherry*, 57 Ga. 130, it was expressly held that, for a breach of an executory contract of purchase at private sale, the purchaser was liable for the difference between the market value of the land and the price he had contracted to pay. This decision was in accord with the view taken in other jurisdictions that, "in order that a vendee may be made liable for the difference between the price he agreed to pay and that realized on a resale, his agreement to purchase must have been made on that condition, unless the purchase was made at an official sale." 2 Suth. Dam. (3d Ed.) § 570, p. 1613. The law, as embodied in our Civil Code, does not give to the vendor of land any right, under an executory contract not so conditioned, to resell at the vendee's risk, should he commit a breach of the contract, but this remedy is in terms restricted

to cases where a bidder at judicial or quasi-judicial public sale refuses to comply with his bid.

Judgment upon both the main and the cross bills of exceptions reversed. All the Justices concur.

FOSTER v. CASE.

(Supreme Court of Georgia. Nov. 12, 1906.)

1. INJUNCTION—PROSECUTION OF ACTION—DISCRETION OF COURT.

When a will has been probated in common form, and the sole heir at law, by petition to the court of ordinary, has called upon the executor to probate it in solemn form, and has filed a caveat, a suit by the executor against such heir at law to recover property devised in the will may, in a proper case, be enjoined until the issue of devisavit vel non has been determined. *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583. This, however, is not an arbitrary rule, but a matter resting in the sound discretion of the court under the facts of the particular case.

2. SAME—DISCRETION OF COURT.

In this case there was no abuse of discretion in refusing to grant the injunction as prayed, but, instead thereof, enjoining the executrix from paying out or otherwise disposing of any of the assets until further order.

3. ERROR, WRIT OF—FAST WRIT—WHEN ALLOWED.

Rulings on demurrer, or a motion to dismiss in the nature of a demurrer, to an answer to an equitable petition as a whole, and also certain parts thereof, are not reviewable on a "fast writ" of error. If, under the law and the evidence applicable to the case, there was no error in denying an injunction, no reversal can be had on the ground that the presiding judge refused on the hearing to strike certain parts of the answer, upon motion made therefor.

(Syllabus by the Court.)

Error from Superior Court, Baldwin County; H. G. Lewis, Judge.

Action by K. R. Foster against M. F. Case, executrix. Judgment for defendant, and plaintiff brings error. Affirmed.

Hines, & Vinson and Moore & Moore, for plaintiff in error. Allen & Pottle and C. F. Crawford, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

ASKEW et al. v. HOGANSVILLE COTTON OIL CO.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. APPEAL—TRANSCRIPTS OF RECORD.

Affidavits, documents, and records, introduced in evidence, but not incorporated in an approved brief of evidence, so as to become a part of the record, cannot be properly specified as parts of the record, so as to authorize transcripts thereof to be transmitted to this court. *Hancock v. McNatt*, 42 S. E. 525, 116 Ga. 297; *Sayer v. Brown*, 46 S. E. 649, 118 Ga. 539.

2. SAME—DOCUMENTARY EVIDENCE—DISMISSAL.

Affidavits, documents, and records submitted in evidence on the hearing should be in-

corporated in the bill of exceptions to review a refusal of an interlocutory injunction, or be attached thereto as exhibits, duly and properly identified, or be embodied in an approved brief of evidence and brought up as part of the record. Where none of these methods is adopted, but copies of such affidavits and documents are sent up as parts of the record, for the reason that the originals have marked thereon the word "Identified," followed by the signature of the trial judge, such affidavits and documents have not been brought to this court in the manner prescribed by law, and therefore they cannot be considered. *Eubank v. Eastman*, 48 S. E. 426, 120 Ga. 1048; *Roberts v. Heinsohn*, 51 S. E. 589, 123 Ga. 685.

(a) Applying the rules above announced to the present case, wherein the only question made by the assignment of error necessarily involves a consideration of the evidence, no adjudication therein can be had, and the writ of error must therefore be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 2607, 2956, 2957, 3126.]

(Syllabus by the Court.)

Error from Superior Court, Troup County; A. D. Freeman, Judge.

Action between J. F. Askew and others and the Hogansville Cotton Oil Company. From the judgment, Askew and others bring error. Dismissed.

Spencer R. Atkinson, H. A. Hall, and Isaac Jackson, for plaintiffs in error. Evins & Spence, for defendant in error.

PER CURIAM. Writ of error dismissed. All the Justices concur.

MAULDIN v. SOUTHERN SHORTHAND & BUSINESS UNIVERSITY

(Supreme Court of Georgia. Nov. 12, 1906.)

INFANTS—CONTRACTS—NECESSARIES.

In order to determine the question whether or not the contract of an infant for a course in stenography was a contract for necessities, in the sense in which the term "necessaries" is used to render the contract binding upon such infant, the evidence in the case should show the state, degree, and condition in life in which the infant is whose contract is under consideration; and it should also affirmatively appear that the parents or guardian of such infant failed or refused to furnish the alleged necessary. The evidence in this case, upon which this issue was submitted to the jury, failed to show these particular facts and circumstances. There being, therefore, nothing in the evidence submitted upon which the jury in the justice's court could predicate a verdict finding that the contract was for necessities, it was error for the superior court judge to deny the writ of certiorari.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 114.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Dora Mauldin against the Southern Shorthand & Business University. Judgment for defendant, and plaintiff brings error. Reversed.

Payne, Jones & Payne, for plaintiff in error. H. A. Etheridge and Etheridge, Boykin & Etheridge, for defendant in error.

BECK, J. Mauldin sued the Southern Shorthand & Business University in a justice's court for \$35 paid to the defendant under an alleged voidable contract. The case was appealed to a jury in the justice's court, and tried upon the following agreed statement of facts: On January 5, 1905, plaintiff, a minor, in pursuance of a contract made with defendant, entered upon a three months' course of stenography, for which defendant was paid by the plaintiff the sum of \$35, giving a receipt therefor to plaintiff in her own name. On January 10, 1905, plaintiff was compelled to abandon said course in stenography, and thereupon demanded the return of said \$35, which was refused. In addition to this agreed statement of facts, the defendant introduced a witness who testified that "said \$35 was paid by the uncle of plaintiff, and that the receipt was made out in her name, in accordance with the custom of the school." It was agreed by counsel for both parties to submit the cause to the jury upon the issue whether or not, under all the facts and circumstances in the case, the contract entered into between said parties was a contract for necessities, and that the verdict should depend upon the determination of said issue. The jury returned a verdict for the defendant. The plaintiff presented to the judge of the superior court her petition for the writ of certiorari. Sanction of the same was refused, and the plaintiff excepted.

This case was submitted to the jury in the justice's court upon an agreed statement of facts, and under an agreement still further limiting the jury in their field of investigation. The issue submitted to the jury was narrowed down to the question whether or not, under all the facts and circumstances in the case, the contract entered into between the parties for a course in stenography was a contract for necessities; the verdict depending upon the determination of said issue. Evidently the jury found that the question submitted should be answered in the affirmative, and returned a verdict for the defendant. Under our law, the contract was void, being a contract of an infant, unless it was one for necessities. What may be included in the term "necessaries" is a question upon which the authorities are not entirely harmonious. But certainly the term is not so limited as to include only what is necessary to the actual support of life, and it is usually held to be sufficiently extensive to include "articles fit to maintain a particular person in the state, station, and degree in life in which he is, so that things may be necessary for one person which would not be necessary for another in a different station in life." Clark on Contracts (2d Ed.) 156. "Necessaries" are defined by Mr. Green-

leaf to be "such things as are useful and suitable to the party's state and condition in life, and not merely such as are requisite for bare existence." *Rolfe v. Rolfe*, 15 Ga. 451; *Oliver v. McDuffie*, 28 Ga. 522. It has been held that a common-school education, but not a college education, was a necessary. *Middlebury College v. Chandler*, 16 Vt. 686, 42 Am. Dec. 537. The term has been extended to include a board bill contracted by an infant to enable him to attend school. *Kilgore v. Rich*, 83 Me. 305, 22 Atl. 176, 12 L. R. A. 859, 23 Am. St. Rep. 780. While, on the other hand, it has been held that a professional education was not a necessary. *Turner v. Gaither*, 83 N. C. 857, 35 Am. Rep. 574. But there are many branches of learning, in which instruction might be highly useful and advantageous, which are not included either in a college or professional education (which most authorities hold not to be a necessary), nor in a common-school education (which according to nearly all of the authorities is a necessary); and in those branches of learning, in most cases, it will be found that whether instruction is a necessary or not is a question depending upon the facts and circumstances of the particular case, which go to show the state, degree, and condition of life in which the infant is, the validity of whose contract may be under consideration. And such we consider the science or art of stenography. Whether a course in that branch of learning would be a necessary to a young lady 17 years of age would depend entirely upon that particular infant's condition in life, and the particular sphere in society or calling in life which her previous education and attainments had prepared and fitted her to occupy or fill. As was said by Warner, J., in the case of *Nicholson v. Spencer*, 11 Ga. 611: "It is made the duty of the parent or guardian, as we have already shown, to provide for the maintenance, protection, and education of their children and infant wards; and the presumption of law is that they have respectively done so, according to their circumstances and condition in life. The general rule of law is that, when a person is required to do a certain act, the omission of which would make him guilty of a culpable neglect of duty, it ought to be intended that he has performed it, unless the contrary be shown." So when this case was submitted to the jury, before the defendant could successfully overcome the presumption that the plaintiff's parents or guardian had cared for the plaintiff's instruction and teaching in those branches of education which might be necessary to her in her condition in life, it would have to appear, by evidence, that the course in stenography, to secure which the plaintiff had paid the defendant the sum of \$35, was necessary, under the facts and circumstances of the case, taking into consideration all those branches of education in which the plaintiff's parents or guardian

had provided for her instruction. In the absence of such evidence, neither a jury nor court would be authorized to find or hold that the parents or guardian had not fulfilled their obligation to the infant to have her properly instructed nor that the acquisition of this particular art or science—that is, the art or science of stenography—was a necessary. Without any evidence of the kind indicated, the jury in this case made their finding; and it must be set aside.

Judgment reversed. All the Justices concur.

NOVELTY HAT MFG. CO. v. WISEBERG. (Supreme Court of Georgia. Nov. 16, 1903.)

EVIDENCE—PAROL—AMBIGUITY OF WRITING.

The contract sued upon in this case was ambiguous, and the court erred in disallowing and striking defendant's pleadings, under the allegations of which oral testimony would have been admissible to explain the ambiguity, on the ground that the said contract was unambiguous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 2079, 2105.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by B. H. Wiseberg against the Novelty Hat Manufacturing Company. Judgment for plaintiff, and defendant brings error. Reversed.

In October, 1903, the Novelty Hat Manufacturing Company and Wiseberg entered into a contract which provided that "said Wiseberg agrees to work in the employ of the Novelty Hat Manufacturing Company, both in the house and on the road, as traveling salesman, for which he is to receive the sum of \$100 per month, provided his (counting only goods shipped as sales) sales average the amount of \$25,000 per annum; and it is also agreed that Wiseberg is to receive a commission of 5 per cent. on all sales over the above amount, although he is to get no credit for sales made to the wholesale houses in the city of Atlanta. Said Wiseberg agrees to call on the trade in the city of Atlanta whenever requested to do so." The contract was to continue for one year from November 1, 1903, "either party reserving the right to terminate this contract April 30, 1904, should either desire to do so." The contract was terminated April 30, 1904, and Wiseberg brought this suit to recover the remainder of his salary, computed at the rate of \$100 per month. The defendant admitted the execution of the contract, but insisted that the plaintiff was entitled to \$100 only on condition that his sales averaged the amount of \$25,000 per annum, which defendant alleged they did not. Defendant alleged that plaintiff was only entitled to a commission of 4.8 per cent. of the amount of his sales, which had been overpaid, and asked for a judgment against plaintiff for the balance. The plaintiff moved to strike the defendant's

answer, and invoked from the court a construction of the contract. Defendant then offered to amend his plea by alleging that the contract was ambiguous, and that parol evidence was necessary to explain the ambiguity, and to amend further by pleading certain breaches of the contract by plaintiff. The amendment was verified by the affidavit of defendant's attorney. The court held that the contract was not ambiguous, and interpreted it to impose upon the defendant the obligation to pay the plaintiff \$100 per month for his services. Defendant's amendment was disallowed, and the original plea stricken, and judgment was entered up in favor of plaintiff for the full amount of his claim. To these rulings the defendant excepted.

Jno. L. Hopkins & Sons, for plaintiff in error. Hirsch & Hass, for defendant in error.

BECK, J. (after stating the facts). The court erred in holding that the contract sued on was not ambiguous. Many definitions of the term "ambiguous" can be found in the reports, in law dictionaries, and in the various standard lexicons; and while these definitions vary among themselves, some being broader and some more restricted in scope, tested by any of them, the instrument immediately under consideration is, it seems to us, open to the criticism made upon it by counsel for plaintiff in error that it is ambiguous. "Ambiguity" is defined as duplicity; indistinctness; an uncertainty of meaning or expression used in a written instrument." *Nindle v. State Bank*, 13 Neb. 245, 13 N. W. 275, cited in 1 Words & Phrases, 367. "Ambiguity also signifies of doubtful or uncertain nature; wanting clearness or definiteness; difficult to comprehend or distinguish; of doubtful purport; open to various interpretations." *Cent. Dict.* A construction of a contract which imposes upon the defendant the unqualified obligation to pay the plaintiff \$100 per month for his salary in case the contract should be terminated before the end of a year seems entirely inconsistent with the use of the expression "provided his sales average the amount of \$25,000 per annum," which introduces a very material condition into the contract, and one which increases the ambiguity, when it is considered that the right to terminate the engagement between the parties at the expiration of six months from its formation was reserved to both. And, however ingenious the interpretation of the word "average" given by counsel for defendant in error, it also introduces an element of ambiguity, when we consider that the contract continued only over the period of one year, and that the "average" in regard to which the stipulation is made is a yearly average. How could there be an average amount of sales per annum, unless the period of employment covered a series of years, or at least a greater number of years than one? There are many

other elements of ambiguity in the paper containing the agreement between this plaintiff and the defendant; but, having held that it is ambiguous, that is sufficient, without attempting to point out the possible constructions to be placed upon it. The correct construction must depend at last upon the evidence which shall be introduced at the next trial, tending to shed light upon the understanding which the parties to this contract had of its terms at the time of its execution.

It appearing from the record and bill of exceptions that the presiding judge struck the answer and amendments thereto, and rendered judgment in favor of the plaintiff, on the ground that the contract was unambiguous, and such ruling being erroneous, the judgment is reversed. It is unnecessary for us to deal with other possible objections to the pleadings which might have been made, but which appear not to have been passed upon.

Judgment reversed. All the Justices concur.

WILCHER et al. v. NUNN et al.
(Supreme Court of Georgia. Nov. 16, 1906.)
CERTIORARI—REVIEW—CONFLICTING EVIDENCE—OVERRULING CERTIORARI.

It cannot be held by this court that a judge of the superior court abuses his discretion in overruling a certiorari from the ordinary's decision discontinuing a public road upon a proceeding instituted under Pol. Code, §§ 520, 524, when the evidence, though conflicting, was sufficient to support the decision of the ordinary, and no error of law is complained of by the losing party.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 9, *Certiorari*, §§ 205, 206.]

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Action between William Wilcher and others and J. M. Nunn and others. From the judgment, Wilcher and others bring error. Affirmed.

E. B. Rogers and E. L. Stephens, for plaintiffs in error. B. T. Walker, for defendants in error.

EVANS, J. Judgment affirmed. All the Justices concur.

PRIMUS v. MACON RY. & LIGHT CO.
(Supreme Court of Georgia. Nov. 10, 1906.)
CARRIERS—INJURY TO PASSENGER—PLEADING.

In an action against a street railway company, the petition, in substance, alleged that within a month prior to the filing of the suit, and at a stated place in the county of defendant's domicile, plaintiff's minor child was wantonly pushed from a moving car on defendant's line of road by a person who at the time was "in the employment and service of the defendant company on that car, thereby causing the child to fall upon defendant's track and the car to run over and crush his leg." The

child's life expectancy, and his earning capacity and the diminution thereof by reason of the injury, and the amount of damages sustained by the plaintiff, were alleged. *Held*, that a cause of action was set forth, and it was error to dismiss the petition on general demurrer. *Lindsay v. Railroad Co.*, 46 Ga. 448; *Central Railroad v. Smith*, 69 Ga. 268 (2); *Smith v. Railway Co.*, 27 S. E. 725, 100 Ga. 96; *Brunswick Railroad Co. v. Bostwick*, 27 S. E. 725, 100 Ga. 96; *Savannah Ry. Co. v. Godkin*, 30 S. E. 373, 104 Ga. 655 (1), 69 Am. St. Rep. 187.

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by I. L. Primus against the Macon Railway & Light Company. Judgment for defendant, and plaintiff brings error. Reversed.

Glawson & Fowler, for plaintiff in error. Roland Ellis, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

CAROLINA PORTLAND CEMENT CO. et al. v. TURPIN.

(Supreme Court of Georgia. Nov. 10, 1906.)

SALE—WARRANTY AS TO QUALITY—WAIVER OF DEFECT—DIRECTING VERDICT.

Where a manufacturer of bricks submits to his customers a number of bricks as samples, and stipulates to sell others as good in quality, such stipulation amounts to an express warranty that the bricks sold and to be delivered will be of as good quality as the samples submitted. (a) Where goods are sold under an express warranty as to quality, the vendee is not bound to inspect before acceptance, and if they afterwards be found to be defective, damages arising from such defect may be recovered against the vendor; but if they be defective, and the vendee knows of the defect, and with such knowledge accepts the goods, he will be deemed to have waived the defect, and, in a suit for the purchase price, will not be heard to recoup damages arising therefrom. (b) There was no issue for submission to the jury, and the court did not err in directing the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 769, 788, 818.]

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by W. C. Turpin against the Carolina Portland Cement Company and others. Judgment for plaintiff. Defendants bring error. Affirmed.

Lane & Park, for plaintiffs in error. Steed & Ryals, for defendant in error.

ATKINSON, J. In this case the record discloses that the plaintiff, being a brick manufacturer, contracted to sell to the defendant, a dealer in bricks, certain quantities of bricks of quality equal to samples which were exhibited. Bricks of the number contracted for were shipped by the plaintiff to the defendant. Upon receipt of the bricks they were inspected, and, the defendant contends, were deficient in quality. Knowing of the alleged

defects, the defendant paid the freight charges and accepted the bricks, making complaint as to quality, but nevertheless selling them to his customers—some at the market price, and others at a reduced price on account of the defective quality. When sued for the purchase price, the defendant pleaded the deficiency in quality, and sought to recover damages. Unless the defendant's claim for damages was meritorious, the evidence was such as to eliminate all issues and demand a verdict for the plaintiff for the full amount sued for. After hearing all the evidence, the judge decided that there was no merit in the defendant's claim for damages, and thereupon directed a verdict in favor of the plaintiff for the full amount alleged to be due. The defendant assigns error.

Under the facts enumerated, the warranty as to quality was express. That being true, there was no duty of inspection by the vendee; but having inspected before acceptance, and (according to the defendant's contention) having discovered the defects in the bricks about which complaint is made, it was the duty of the vendee then to have rejected them. In every barter and sale there ought to be some point at which the transaction on both sides should be closed. When both parties are competent to contract, and there is delivery by the vendor, intended for a compliance upon his part with the contract, and acceptance by the vendee, then is the last time at which the vendee should be heard to raise a complaint concerning any defect in the thing sold of which he has notice. By acceptance with full knowledge, the thing is his, and there is no reason in law or morals why that should not be the closing incident to the transaction. So that it may be said that acceptance with knowledge of the defect waives the defect, and the vendee cannot afterwards be heard to complain. Upon this point, the case is controlled by the rulings made in the cases of *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279, 55 S. E. 50, and *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321, 55 S. E. 53. The defendant having, by acceptance with full knowledge of the defect complained of, lost the right of recoupment, and there being no issue left for the submission to the jury, the court did not err in directing the verdict.

Judgment affirmed. All the Justices concur.

FOSTER v. TURNBULL.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW—OBJECTIONS.

Where an application has been made by a widow for the setting apart of a year's support from the estate of her deceased husband, and, after notice has been given to the legal representative of the estate, appraisers have been appointed and have made a return, and a citation has been published, objections may be made at or before the next term of the court

of ordinary. The matter, however, stands for final disposition at the first term, and, if objections are not made until such term, they should be made before final action is taken upon the application. If no objection is made until after the application has been finally acted on, it is then too late to file objections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 22, Executors and Administrators, §§ 711, 718.]

2. SAME—OPENING JUDGMENT.

No objections having been filed, and the ordinary, at the first term of the court, having passed an order that the return of the appraisers should be recorded, after regular application, notice to the administrator, citation, and publication, no abuse of discretion is made to appear in refusing to open the judgment at a later day during the term, and allow objections to be then filed.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Application of Louise H. Foster, a widow, for year's support. Application granted, and F. C. Foster, creditor, petitioned that the judgment be opened. Application denied, and judgment sustained on certiorari, and the creditor brings error. Affirmed.

A. W. Foster died, leaving as his widow Louise Hill Foster, who afterwards intermarried with Turnbull. On February 2, 1905, she filed an application for a year's support, to be set apart from the estate of Foster, deceased. On the same day the administrator of the decedent acknowledged service of notice upon him. Appraisers were appointed and made a return. Citation was issued on February 7th, and published. At the March term of the court of ordinary, which was the next term after the issuing of the citation, no objections having been filed, an order was passed that the return of the appraisers be recorded. It does not appear, except inferentially, when the actual recording took place. The March term of the court did not adjourn until March 29th. On March 16th, F. C. Foster, as a creditor of the estate, filed a petition that the judgment be opened, and that he be allowed to file objections. He alleged that he was a nonresident of the county, had no actual notice, and did not, in fact, know of the application or when it was returnable. The administrator joined in the petition. After hearing the application the ordinary declined to open the judgment and allow the caveat to be filed. The case was carried to the superior court by writ of certiorari. The presiding judge overruled the certiorari and sustained the judgment of the ordinary. To this judgment, a bill of exceptions was filed.

Bell, Pettigrew & Bell, for plaintiff in error. Arnold & Arnold and Williford & Middlebrooks, for defendant in error.

LUMPKIN, J. (after stating the above facts). 1. Where an application has been made by a widow for the setting apart of a

year's support from the estate of her deceased husband, notice is required to be given to the representative of the estate, if there is one, and, if there is none, no notice is required. Civ. Code 1895, § 3465. Here notice was given to the administrator. After appraisers have been appointed and made their return, the ordinary issues citation and publishes notice, "as required in the appointment of permanent administrators," citing all persons concerned to show cause why the year's support should not be granted. "If no objection is made after the publication of said notice for four weeks, or if made is disallowed, the ordinary shall record the return so made in a book to be kept for this purpose, if an appeal be taken, pending the appeal the family shall be furnished with necessities by the representative of the estate." Civ. Code 1895, § 3467. It is alleged in this case that there was a judgment at the first term, which appears to have been after notice, citation, and publication, as required by law. After that it was too late to file objections. In *Jackson v. Warthen*, 110 Ga. 812, 36 S. E. 234, citing *Parks v. Johnson*, 79 Ga. 567, 5 S. E. 243, it was held that exceptions must be filed at or before the first term of the court of ordinary, and were too late if filed after that time, although no action had been taken upon the application. It was not held, however, that as matter of law no action could be taken by the ordinary until the expiration of the first term. The language of section 3467, quoted above, indicates a right to act sooner. If the contention of the caveators be correct, the return must lie in the office unrecorded, and the widow and children, if any, must wait for their support until an entire term of court has elapsed in order to see if one wishes to object. Such is not the intention of the law. If this application, in respect to hearing as well as notice, is analogized to the appointment of a permanent administrator, such an application stands for disposition at the first term, unless regularly continued. Civ. Code 1895, § 3394; *Parks v. Johnson*, 79 Ga. 567, 5 S. E. 243. Objections may be filed at or before that term. If filed at the term, they should be filed before final action has been taken by the ordinary on the application. If the case stands for trial at the first term, where objections are filed, surely it does not have to wait till the term has expired, if no objections are filed.

2. The plaintiff in error could not have the judgment opened and file objections as matter of right, and, treated as matter of discretion, there was no abuse of discretion in refusing to allow this to be done. See, on this subject, *McCandless v. Conley*, 115 Ga. 50, 41 S. E. 256; *Black, Judg.* §§ 297, 305; *Harris v. Breed*, 38 Ga. 299; *Estes v. Ivey*, 53 Ga. 54.

Judgment affirmed. All the Justices concur.

A. LEFFLER & SONS v. UNION COMPRESS CO.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. JUDGMENT — MOTION IN ARREST — AMENDMENT.

While a motion in arrest of judgment must be made at the term at which the judgment is rendered, the motion may at a subsequent term be amended by adding new and distinct grounds of attack upon the judgment. To so amend the motion is not to introduce a new cause of action, but simply to amplify the pleadings of the movant by assigning additional reasons why the judgment should be arrested because not supported by the record.

2. GARNISHMENT — JUDGMENT — VARIANCE — PROCEEDINGS.

Judgment against a garnishee who fails to answer is a judicial sequence of the antecedent garnishment proceedings, and if such proceedings be void on their face, the judgment should be arrested. Where an affidavit for attachment alleged that W. O. Jones was indebted to the plaintiff, and the bond given by the plaintiff was payable to W. O. Jones, and recited that the plaintiff was seeking an attachment against W. O. Jones, and the writ of attachment (which was levied by service of summons of garnishment) issued against "Jones Bros.," the writ of attachment was void because of the variance between the individual described in the affidavit and bond and the firm against which the writ issued; and the judgment against the garnishee was also void.

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by A. Leffler & Sons against the Union Compress Company. Judgment for defendant, garnishee, and plaintiff brings error. Affirmed.

Lewis Brooks, Johnson & Young, and Jacob Gazan, for plaintiff in error. Wm. H. Fleming, for defendant in error.

EVANS, J. This case makes its appearance here for the third time. After service upon the Union Compress Company, a summons of garnishment issued upon an attachment affidavit and bond, and after a judgment by default had been entered against that company as garnishee, it duly made a motion in arrest of judgment, which was sustained by the superior court. Upon review of this decision, it was set aside by this court. *Leffler v. Union Compress Co.*, 121 Ga. 40, 48 S. E. 710. On the return of the remittitur, but before it was entered in the court below, the garnishee offered a written amendment to its motion in arrest of judgment. To the refusal of the judge to allow this amendment, exception was taken and this court held that the amendment should have been allowed. See 122 Ga. 640, 644, 50 S. E. 483. When the case subsequently came on to be heard in the trial court, *Leffler & Sons* presented objections to the allowance of the amendment, and also demurred thereto, insisting that the garnishee thereby sought to "add a new cause of action or new ground in arrest of judgment," and that the offer to amend not having been

made at the term at which the judgment assailed was rendered, the amendment came too late. The amendment was nevertheless allowed, whereupon the garnishee presented for the inspection of the court, in support of its amended motion, the original affidavit, bond, and writ of attachment, together with the judgment by default, as the record in the garnishment case. The plaintiff in attachment urged the objection that these papers did not constitute the entire record in that case, inasmuch as they did not include the original summons of garnishment, which was necessary to a decision on the motion as amended. The presiding judge then passed an order requiring the garnishee "to make the record complete by filing in court the original summons of garnishment served upon it in said case, or a copy thereof." To this order exception was taken by the plaintiff in attachment, on the ground that if the original summons could not be produced, the garnishee should be required to "establish" a copy of it, as in other cases of the loss of any part of a court record. The garnishee undertook to comply with the order of the court by tendering what was represented to be a correct copy of the original summons, together with an affidavit by its agent that the original had not been preserved, and that to the best of his recollection and belief the paper tendered was a true copy of the original summons of garnishment which had been served upon him as the superintendent of the Union Compress Company. Thereupon *Leffler & Sons* presented a traverse to the affidavit and proffered copy of the summons, supported by the affidavit of the magistrate who issued the original summons that the paper tendered was not a true copy of it, and announced ready to try the issue thus raised, if the judge would pass upon it without a jury. His honor declined to do so or to defer the matter to a time when a jury might be present, stating that even if the original summons was as the plaintiff claimed it to be, he would nevertheless sustain the amended motion in arrest of judgment. He entered up judgment accordingly in favor of the garnishee, and error thereon is assigned, as well as upon the various rulings made against the plaintiff in attachment pending the hearing.

1. The plaintiff in error is concluded upon the proposition that an amendment to a motion in arrest of judgment, setting forth additional reasons why the judgment should be arrested, may be made after the term at which the motion must be presented to the court. See 122 Ga. 640 (6), 643, 50 S. E. 483. The amendment was germane to the purposes of the original motion, which sought to set aside the judgment against the garnishee, and should have been allowed, although the "grounds of the original motion were bad." 122 Ga. 643, 50 S. E. 483. To add, by way of amendment, new and dis-

tinct grounds to a motion in arrest of judgment is not to introduce a different cause of action, but simply to amplify the movant's pleadings by setting forth with greater particularity wherein, as he contends, the record does not support the judgment. The garnishee alleged in its original motion that the judgment against it was void because the fact appeared on the face of the record that the judgment rendered against Jones Bros., as defendants in attachment, was void; by amendment to its motion in arrest, the garnishee insisted that the record disclosed that the summons of garnishment was void, because issued on an affidavit and bond in which W. O. Jones, as an individual, was stated to be the nonresident debtor of the plaintiff. Pleadings may be amended, as of right, "whether in matter of form or of substance, provided there is enough in the pleadings to amend by" (Civ. Code 1895, § 5097); and, under the test which our Code provides for determining whether or not there is enough to amend by (Id., § 5098), it seems apparent that if the amendment to the original motion in arrest of judgment had been offered at the same term at which the judgment was rendered, no objection to the proffered amendment could have been successfully urged. "It was in time, and should have been allowed." This much was distinctly ruled when the case was last before us (122 Ga. 641, 50 S. E. 483), though the plaintiff in attachment was left free to demur to the amendment on the ground that, as matter of law, the reasons therein assigned why the record did not authorize the entering up of judgment against the garnishee were insufficient.

2. The original motion in arrest of judgment was predicated solely on the ground that the judgment against the defendants in attachment was void, for the reasons set out in the motion. In the amendment which was allowed, the judgment against the garnishee was alleged to be void because of a variance between the defendant named in the affidavit and bond, and the defendant named in the attachment writ, and because the summons of garnishment called upon the garnishee to answer what it was indebted to the party named in the writ of attachment. The affidavit for attachment alleged that W. O. Jones was indebted to the plaintiffs, the bond given by the plaintiffs was made payable to W. O. Jones and recited that they were seeking an attachment against W. O. Jones, whereas the writ of attachment issued against the firm of Jones Bros. The attaching creditor must make the affidavit and give the bond as required by the statute. The officer issuing the attachment gets from this source his information as to the person against whom the writ is to be issued. In respect to the person named as defendant in the writ of attachment, there must be a coincidence with the debtor named in the affi-

davit. While a slight variance might be cured by amendment, yet, if the debtor named in the affidavit be entirely different from that named in the writ, the variance is fatal and the attachment is void. Although attachment proceedings may be amended as at common law, still we know of no authority which would allow an amendment that would have the effect of changing the parties defendant by a substitution of a different person for the one named in the affidavit as the debtor of the plaintiff in attachment. Thus, a suit against A. cannot be converted into a suit against B., or into a suit against a partnership of which the pleadings do not even disclose A. to be a member. The attachment writ issued against Jones Bros., and neither the writ nor the affidavit and bond showed any relation between W. O. Jones and Jones Bros.

As was held when the case was here the first time, the attachment, the summons of garnishment, and the answer of the garnishee (where one is made), and the judgment against the garnishee, constitute the record and pleadings in the garnishment proceedings. The affidavit, bond, and writ together constitute the attachment proceeding. An attachment can be levied either by a seizure of visible property or by garnishment. In attachment cases, the summons of garnishment can only issue after the writ of attachment, and the executing officer derives his power of serving the summons from the attachment writ. Civ. Code 1895, §§ 4549, 4529. Service of the summons of garnishment serves the purpose of a levy of the attachment on the funds or property in the hands of the garnishee. Civ. Code 1895, § 4534. If the attachment writ be void, then its levy would be of no legal effect, whether the levy be made in the one way or in the other. The judgment against the garnishee who fails to answer follows as a judicial sequence from the antecedent attachment proceedings; and, if such proceedings be void, the judgment based thereon is necessarily void. The amendment to the motion attacked the record in the garnishment proceedings as void for the reasons stated, and the truth of the allegations was made apparent by inspection of the record produced by the movant, and the court did not err in sustaining the motion in arrest of judgment.

Judgment affirmed. All the Justices concur.

W. T. HARBER & BRO. v. NASH et al.
(Supreme Court of Georgia. Nov. 14, 1906.)
EXECUTION—LEVY—PROPERTY SUBJECT.

An estate in land, created by will, held by a judgment debtor, which is determinable upon his ceasing for any reason to remain in possession of the land, is too intangible and fleeting in its nature to be the subject-matter of a

levy and judicial sale under an execution issued against such debtor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 77.]

(Syllabus by the Court.)

Error from Superior Court, Madison County; H. M. Holden, Judge.

Action by W. T. Harber & Bro. against Mary Nash and others. Judgment for plaintiffs on levy of execution, and Lettie J. Nash and Martha Nash filed a claim. Judgment for claimants, and plaintiffs bring error. Affirmed.

W. W. Stark, for plaintiffs in error. D. W. Meadow, B. T. Moseley, and Strickland & Green, for defendants in error.

EVANS, J. Harber & Bro. caused an execution in their favor against Mary Nash to be levied upon "the lifetime interest of Mary Nash" in a certain described tract of land, which was that referred to in the fourth item of the will of Gabriel Nash. This item reads as follows: "I give and bequeath the tract of land on which I now live, together with all the appurtenances thereto attached, to my three daughters, to wit, Mary Nash, Lettie J. Nash, and Martha Nash, as tenants in common, so long as they all three shall remain on the land. So soon as one of said daughters shall leave said land, either by marriage, death or otherwise, she shall then have no further interest in the land, and the remaining two daughters shall own it and possess it as tenants in common. When one of the two remaining daughters leave said land by marriage, death, or otherwise, then the remaining daughter shall have and possess it alone; and when she shall leave said land, either by marriage, death, or otherwise, then I give it to the children born and to be born and their heirs, forever, of the following of my children, to wit, Mary Nash, Lettie J. Nash, Martha Nash, Nancy Skinner, and Henry C. Nash, per stirpe; that is to say, the children of each of my children last named shall represent one share together in said land." At the time of the levy Mary Nash was unmarried and was living with her sisters, Lettie and Martha, upon the land described in this item of the will. Counsel for both parties agree that the controlling question is whether or not Mary Nash had a leviable interest in this land.

The estate devised to the defendant in *fi. fa.*, Mary Nash, was that of a tenant in common with her sisters, Lettie and Martha, during her life, determinable upon her death or upon her leaving the land during her lifetime. The intent of the testator is apparent. He contemplated that the estate devised to each life tenant should be determined upon the physical act of leaving the land or by death. The defendant in *fi. fa.* had no estate which she could sell, and, as a general proposition, if a defendant in *fi. fa.* has no such interest in land as he himself can sell, he has no interest which is leviable. In a sale by a sher-

iff under an execution, he acts as the agent of the defendant in execution by authority of the law, and can sell no greater interest in the property than the defendant in execution could convey. *Dosier v. McWhorter*, 113 Ga. 587, 89 S. E. 106. The moment the defendant in *fi. fa.* left the land, her interest therein would become forfeited; and if a purchaser at sheriff's sale could acquire nothing of value by an attempt to levy upon and sell her determinable estate in the land, then it would be idle to make a levy and go through the farce of conducting the sale. Mary Nash alone can, under the terms of the will creating the estate granted to her, enjoy the fruits of the testator's bounty. If she be evicted, and a purchaser be placed in possession of the land, he would immediately become, relatively to the two sisters of Mary Nash, a bare intruder and wrongdoer. An interest in land which would become at once extinguished by the very act of depriving a judgment debtor of his enjoyment thereof under legal process is altogether too intangible and fleeting in its nature to be the subject-matter of a levy and judicial sale. See *Hatcher v. Smith*, 103 Ga. 843, 31 S. E. 447.

Judgment affirmed. All the Justices concur.

DRAPER et al. v. CITY OF ATLANTA.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. MUNICIPAL CORPORATIONS—PAVING—OBJECTIONS BY ABUTTING OWNER.

The city of Atlanta is empowered by charter (Acts 1897, p. 145) to renew, by the use of any material that may be decided on, any pavement on its streets whenever in the judgment of the mayor and council the paving originally laid on a street or portion of a street is worn out to that extent that it is no longer useful as a good pavement. While an abutting property owner may complain before the improvement is made, by injunction suit or otherwise, that the discretion vested in the city authorities has been manifestly abused, to his oppression, yet, when it appears that, pursuant to law, the pavement has been laid, assessment made, and execution issued, it is too late for him to contest by illegality the discretionary power of the municipal authorities in deciding the propriety of substituting a new for an old pavement.

2. SAME—ASSESSMENT—ENFORCEMENT—SET-OFF.

The owner of land abutting on a street in the city of Atlanta, against whom an execution has issued to collect a paving assessment, may, by illegality, deny that the whole or any part of the amount for which the execution issued is due; but he cannot defeat the execution or delay the city in its collection by setting up a demand which he may have against the city.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Municipal Corporations, § 1257.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the city of Atlanta against Emma Draper and others to collect a street improvement assessment. On levy of *fi. fa.* H. L. McKee filed an affidavit of illegality. From a judgment overruling the same, McKee and others bring error. Affirmed.

A street improvement *fi. fa.* in favor of the city of Atlanta was issued against Emma Draper, Jessie McKee, and Anna E. Wright, as the owners of a certain house and lot in the city fronting on North Pryor street, to collect the sum of \$472.25, the amount assessed against the property as their proportionate share of the expense of paving that street with asphalt in pursuance of an ordinance adopted by the city council and approved by the mayor on November 7, 1903. To the levy of this *fi. fa.* H. L. McKee, as agent of the owners of the property, interposed an affidavit of illegality, based upon the following grounds: (1) Both the ordinance of November 7th, providing for the repavement of North Pryor street, and an ordinance approved July 8, 1904, assessing a portion of the cost against this property, were void and of no effect, because prior to their passage "North Pryor street, along the entire front of said property, * * * was paved with Belgian blocks, a far better and more suitable paving for a business street than sheet asphalt," and the Belgian block paving was in first-class condition, in no way worn out or useless, but was the best possible paving for that street, and for the purposes for which it was used—it being a business street, and the property levied on being used solely for business purposes; and this being so, the city of Atlanta had no legal right to take up the Belgian block paving and put instead thereof sheet-asphalt paving. (2) The action of the city was without authority of law, and amounted to an abuse of the discretion of its officers and was oppressive, in that prior to November 7, 1903, the property levied on had along its entire front a pavement of Belgian blocks which had been placed on the street by the city and the cost thereof assessed against the abutting property as provided by law and paid by the owners of the property, which pavement was in first-class condition, not worn out or useless, but the best and most available paving for that street, etc. (3) No notice of said ordinances or of the assessment thereunder was given or served upon the owners of the property levied on, as required by law. (4) The Belgian block paving in front of the property was taken up by the city and appropriated to its own use. It was of the value of \$472.25 "to said property and its owners," and no part of that amount has ever been paid to them by the city; so they are entitled to a credit on the execution for the value of this paving.

At the hearing of the case, counsel for the city moved to dismiss the illegality, whereupon the defendants in *fi. fa.* offered an amendment, in which the allegation was made that, when the city undertook to provide by ordinance for repaving the street with sheet asphalt from Alabama street to Peachtree, the entire street was paved with

Belgian blocks, a far better and more durable pavement than sheet asphalt; that no part of this paving was worn out or no longer useful as a good pavement, but, on the contrary, the same was in perfect condition and of more value as a paving than sheet asphalt; and that the ordinances adopted by the city (copies of which were attached) failed to comply with the law, in that they did not set out or affirmatively declare that the mayor and council exercised the judgment and discretion vested in them under the law, and did not declare that the paving originally put down on said street was worn out to the extent that it was no longer useful as a good pavement. The court declined to allow this amendment, and sustained the motion to dismiss the illegality. To the action of the court in thus disposing of the case exception is taken by the parties against whom the execution was issued.

C. W. Smith, for plaintiffs in error. J. L. Mayson and W. P. Hill, for defendant in error.

EVANS, J. (after stating the facts). 1. The city of Atlanta has power and authority to renew, by the use of any material that may be decided on, any pavement on its streets, whenever in the judgment of the mayor and general council the paving originally laid on a street or portion of a street is worn out to that extent that it is no longer useful as a good pavement. Acts 1890-91, p. 229; Acts 1897, p. 145; *Regenstein v. City of Atlanta*, 98 Ga. 167, 25 S. E. 428; *Burckhardt v. City of Atlanta*, 103 Ga. 302, 30 S. E. 32. In order for the city to exercise this authority, it is necessary for the owners of at least one-half of the property along the portion of the street to be paved to petition the mayor and council to make the improvement, which petition must have the approval of the city engineer and the commissioner of public works, who shall furnish a statement of the estimated cost. Upon the filing of the application, the mayor and council must cause a notice of the presentation of the petition and of the time and place when the same will come up for consideration and action, to be published in one of the daily papers of the city at least 10 days before any ordinance based on the petition shall be passed. At this hearing opportunity is to be given to all persons interested to advocate or oppose the granting of the petition. In all cases where the petition appears to have been signed by the owners of a sufficient frontage to authorize the passage of the ordinance, and the mayor and council shall so determine (which determination shall be evidenced by the passage of an ordinance), and the notice has been published as provided for and the work executed under the ordinance, the determination of the mayor and council as to the sufficiency of the petition is "final as to the rights and interests of all persons or corporations interested who

have not prevented the execution of the work by an injunction or other appropriate legal or equitable remedy before it is commenced." Acts 1897, p. 146.

The plaintiffs in error do not contend that the prerequisites of the ordinance, relating to a petition by a majority in frontage of the abutting property owners, and its approval by the city engineer and commissioners of public works, were not complied with; but in their affidavit of illegality they contend that the ordinance providing for the street improvement, and that making the assessment upon the abutting property owners, are void, because "no notice of said ordinances or the assessment thereunder was given or served upon [them] as required by law." This does not raise the issue that no notice of the presentation of the petition and of the time and place of the hearing thereon was duly published in one of the daily papers of the city at least 10 days before the passage of the ordinances based on the petition. Personal notice is not required to be given to or served upon an abutting property owner of either of the passage of the ordinance or of the assessment thereunder. Treating, then, this ground of the illegality as insufficient to raise an issue concerning the due publication of the notice required by the act of 1897, it is not alleged in any of the grounds of the illegality that the mayor and council were without jurisdiction to pass the ordinances and make the assessment thereunder.

When it appears that the city had jurisdiction of the subject-matter, that the pavement had been laid, and that execution had been issued pursuant to law, it is too late for an abutting property owner to contest the discretionary power of the municipal authorities in deciding the propriety of substituting a new for an old pavement. In cases where there is jurisdiction, the property owner will be estopped from questioning the validity of the proceedings of the mayor and council, if he stands by and permits the work to be done without interposing an objection. *Elliott on Roads & Streets*, § 589. The act of 1897 gives the abutting landowner an opportunity to appear before council and oppose the contemplated improvement; and, if he appears and the municipal decision is adverse to his contention that there is no necessity for the improvement, he may then apply to the courts to restrain further municipal action, provided he alleges and shows fraud or corruption on the part of the city authorities, or that the discretion vested in them is being manifestly abused to his oppression. *Hudspeth v. Hall*, 113 Ga. 7, 38 S. E. 353, 84 Am. St. Rep. 200.

2. The plaintiffs in error were not entitled to set off against the execution issued to collect the paving assessment any counterclaim which they may have against the city. They had the right, by affidavit of illegality, to deny that the whole or any part of the

amount for which the execution issued was due (Acts 1897, p. 146), but they could not defeat it or delay the city in its collection by setting up a demand which they have against the municipality.

Judgment affirmed. All the Justices concur.

GRAHAM v. WEST.

(Supreme Court of Georgia. Nov. 9, 1906.)

SALES—PROPERTY ATTACHED TO SOIL.

An agreement for the sale of property attached to the soil, which is to be severed therefrom and converted into personalty before the title to the property is to pass to the purchaser, is an executory sale of goods, and not of an interest in lands.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 21.]

(Syllabus by the Court.)

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by F. L. West against Luther Graham. Judgment for plaintiff. Defendant brings error. Affirmed.

An attachment for purchase money was sued out by F. L. West against Luther Graham, who was alleged to be indebted in the sum of \$30 for "a certain lot of wood," of which he was in possession. On the trial of the case in a justice's court, the plaintiff testified that he had sold the defendant the wood on a certain lot of land, the same being a part of a tract of land known as the "McDade Land," and the defendant owed him on the purchase the sum of money for which the attachment was proceeding; that he could not swear positively that the wood levied on was cut from this tract of land, but felt satisfied that it was, as he had seen Graham going to the woods with his wagons and coming from there with the cordwood on them, and knew the defendant had hands cutting this wood; that some one had hauled it from the land; and that defendant had no other wood to haul. Upon the conclusion of the plaintiff's testimony, counsel moved to dismiss the attachment, on the grounds (1) that the plaintiff had failed to identify the property, and (2) that the attachment was proceeding against realty and the justice's court was without jurisdiction in the premises. The motion to dismiss was overruled; the justice holding that, "when wood had been sold, cut, and hauled from land, it was detached from the realty and became personal property." On certiorari to the superior court, the judgment of the justice was upheld, and the plaintiff sued out a writ of error to this court.

F. W. Capers, for plaintiff in error. Henry S. Jones, for defendant in error.

EVANS, J. (after stating the facts). The sale of standing timber, where the contract contemplates that the growing trees are to remain in the soil for a fixed time or in-

definitely, at the pleasure of the vendee, concerns an interest in the land. *Moore v. Vickers* (Ga.) 54 S. E. 814. On the other hand, the prevailing rule seems to be that if the trees sold are to be immediately severed from the soil and carried away, and are not to be left to grow and attain additional strength from the soil, the sale is that of personal property, and not of an interest in land. *Benj. Sales* (Bennett's 7th Ed.) 133. The evidence reveals that the thing sold was "wood on a certain lot of land, said land known as the 'McDade Land.'" "Trees" and "wood" are not synonymous terms. The latter refers to the substance of the former when cut for use. The old maxim is: "Arbor dum crescit, lignum cum crescere nescit"—a tree while it grows, wood when it cannot grow; that is, when it is cut down. Clearly, from this description of the subject-matter of the sale, it was contemplated by the parties that the timber was to be cut or converted into wood; and, when so converted into the chattel state, title thereto was to pass to the purchaser. An agreement for the sale of property attached to the soil, but which is to be severed therefrom and converted into personalty before the property is to be transferred to the purchaser, is an executory sale of goods. *Smith v. Surman*, 9 B. & C. 561; *Clafin v. Carpenter*, 4 Metc. (Mass.) 580, 38 Am. Dec. 381. The thing sold under contract of sale was wood, was personalty, and the purchase price could be collected by means of an attachment for the purchase money, foreclosed in a justice's court; and this court has jurisdiction to try issues arising from the interposition of a defense to the attachment. The proof sufficiently identified the wood for which the purchase money was due as the property levied upon under the attachment. Judgment affirmed. All the Justices concur.

BRYANT v. RIDGWAY.

(Supreme Court of Georgia. Nov. 13, 1906.)

1. CERTIORARI—REVIEW.

The judge of a superior court, in hearing a certiorari, is restricted to the errors alleged to have been committed on the trial below, and has no authority to consider assignments of error relating to matters occurring since the trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, § 174.]

2. SAME—REVIEW—GRANT OF NEW TRIAL.

Where the evidence is conflicting, the discretion of the judge of the superior court in granting upon certiorari a first new trial will not be controlled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Certiorari, §§ 205, 206.]

(Syllabus by the Court.)

Error from Superior Court, Franklin County; R. B. Russell, Judge.

Action by G. T. Ridgway against B. E. Bryant. Judgment for plaintiff. From an order denying a certiorari, defendant brings error. Affirmed.

T. G. Dorrough, for plaintiff in error.
Worley Adams and J. A. Neese, for defendant in error.

COBB, P. J. The petition for certiorari set forth the proceedings in a trial in a justice's court, and recited that the jury had returned a verdict for the plaintiff in a named sum. This verdict was alleged to be erroneous for reasons, among them being that it was contrary to the law and evidence. There appears in the record, following the signature of counsel to the petition, an assignment of error which alleges that one of the jurors had a fixed opinion, and therefore was not qualified, and that this fact was unknown to petitioner or his counsel prior to the rendition of the verdict. This assignment of error was not signed, and immediately preceded the exhibits to the petition. Attached to the petition was also an affidavit to the effect that the juror had told the affiant that his mind was made up and he paid no attention to the evidence, and also an affidavit of the plaintiff in certiorari and his counsel that they did not know of this fact until after verdict. The bill of exceptions recites that this was the only ground insisted on at the hearing, and that only those portions of the petition and answer relating to this ground were read to the judge. There is also a recital that the other grounds of the petition were not formally abandoned. There are also in the bill of exceptions affidavits relating to the subject of the disqualification of the juror, which appear to have been read to the judge at the hearing, but which do not appear either in the petition or the answer. The judge, in a note to the bill of exceptions preceding his certificate, says that he read the petition and answer at his leisure, and that the hearing was informal, and that he did not consider anything except the petition and answer in making his judgment. The judge passed an order sustaining the certiorari, without specifying upon what ground the judgment was rendered.

It has been held that the judge of the superior court, in hearing a certiorari, is restricted to errors alleged to have been committed at the trial below, and cannot award a new trial on evidence discovered since that trial. *Marchman v. Todd*, 15 Ga. 26; *Laffitte v. State*, 105 Ga. 596, 31 S. E. 540. (3) As no objection was made to the juror at the trial, and no ruling made by the justice in reference to his alleged disqualification, the judge had no authority to pass upon this question in hearing the certiorari. A question of this character falls within the rule above referred to. But, so far as the record discloses, it does not appear that the judge sustained the certiorari solely upon this ground; and as there was an assignment of error that the verdict was contrary to the law and the evidence, and as this is the first grant of a new trial, the judgment will, under the repeated

decisions of this court, be affirmed. *Casey v. Crane*, 122 Ga. 818, 50 S. E. 92 (3).

Judgment affirmed. All the Justices concur.

BURTON et al. v. O'NEILL MFG. CO.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. VENDOR AND PURCHASER—CONTRACT—CONSTRUCTION.

Fairly construed, the contract involved in this case was entire, and for the sale of land at a stipulated price in money, and upon the condition that the timber thereon be sawed into lumber and delivered by the vendee to the vendor at a stipulated price.

2. EVIDENCE—PAROL EVIDENCE.

Such contract being in writing and unambiguous, it was not competent by parol evidence to vary the terms thereof by showing that the provisions of the contract for the manufacture and sale of lumber were only as security for the payment of the money specified to be paid for the land.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1778-1793.]

3. INJUNCTION — PLEADING — IRREPARABLE DAMAGES.

In an equitable petition praying for an injunction, it is not essential to the grant of the injunction upon the ground of irreparable damages that there should be in terms an allegation that the damages would be irreparable, if the averments of the petition taken as a whole are such as to demonstrate that such would be the result of the conduct complained of in the petition. *Huxford v. Southern Pine Co.*, 52 S. E. 439, 124 Ga. 181.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 232.]

4. SAME—EVIDENCE.

The contract shows in the vendor such interest in the timber as would support an action for a misappropriation thereof. There being sufficient pleadings and evidence to authorize the trial judge to hold that the timber was being disposed of by the vendee contrary to the provisions of the contract and to the irreparable injury of the plaintiff, it was not erroneous for him to interfere by injunction.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action by the O'Neill Manufacturing Company against W. E. Burton and others. Judgment for plaintiff. Defendants bring error. Affirmed.

M. B. Eubanks, for plaintiffs in error.
Denny & Harris and Dean & Dean, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

PULLMAN CO. v. SCHAFFNER.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. CARRIERS—LOSS OF BAGGAGE—LIABILITY OF SLEEPING CAR COMPANY.

In a suit against a sleeping car company by a passenger for loss of baggage, where it is proved that the plaintiff's baggage or articles of personal adornment were stolen while he was asleep, the burden of proof is shifted to the defendant company, and it is bound to show that

it exercised reasonable diligence to prevent the loss.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1593.]

2. NEGLIGENCE—EVIDENCE.

When one of the disputed issues is as to the observance of proper care on the part of the plaintiff, testimony that he may have been negligent in a previous isolated instance is irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 259, 263.]

3. CARRIERS — SLEEPING CAR COMPANIES — DUTIES—BAGGAGE.

It is the duty of a sleeping car company to exercise reasonable care to guard the personal effects of the passengers from theft, and if, through the want of that care, such personal effects as a passenger may properly carry with him on his journey be stolen, the company will be liable therefor. The personal effects which a passenger may carry with him on his journey may include articles of personal adornment, such as jewels. If a piece of jewelry, suitable to be worn for the personal adornment of the passenger, becomes injured or broken during his travels, so that he cannot use it in the usual way, it does not lose its character as an article which he may properly carry on his person, nor will the carrier be relieved of its duty to exercise reasonable diligence to protect the passenger in his possession of the same.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1583, 1584.]

4. APPEAL—HARMLESS ERROR.

A defendant against whom a verdict has been returned cannot complain that the verdict is for a less amount than that demanded by the evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4061.]

(Syllabus by the Court.)

Error from City Court of Atlanta; *H. M. Reid*, Judge.

Action by C. E. Schaffner against the Pullman Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Dorsey, Brewster, Howell & McDaniel, for plaintiff in error. Slayton & Phillips, for defendant in error.

EVANS, J. An action was brought against the Pullman Company by C. E. Schaffner, who set forth in his petition the following complaint: On the night of August 23, 1903, he took passage from Augusta to Atlanta on one of the sleeping cars of the defendant company. There was no conductor on the car, the company's only representative being a negro porter. Plaintiff went to bed in the berth assigned to him, about 11 o'clock, before leaving Augusta. When he awoke the next morning, he found that he had been robbed of a two-karat diamond worth \$300, a \$20 bill, \$3.65 in silver, and three razors worth \$6. The razors were taken from an alligator bag which plaintiff carried in his berth with him, and the money and the diamond were stolen from his pocketbook, which was in his clothes. The defendant company was negligent, plaintiff alleged, in not having a conductor on the car, as was customary, and in not maintaining a watch and exercising proper precautions to prevent his being

robbed while asleep. The defendant company filed an answer in which it made a general denial of the liability. The trial having resulted in a verdict for the plaintiff, the Pullman Company made a motion for a new trial, and, to the overruling of this motion, exception is taken.

1. At the conclusion of the plaintiff's testimony, the defendant moved for a nonsuit on the grounds: (1) That the plaintiff had not shown that the articles alleged to have been lost were in his possession at the time he became a passenger, or that they had ever come into the actual or constructive possession of the company; and (2) that the plaintiff had not established any fact from which negligence on the part of the company could be inferred by the jury, mere proof of loss being insufficient to create any presumption of negligence against the defendant. The court declined to grant the motion. From the plaintiff's evidence the jury could well find that, after the plaintiff had provided himself with transportation, and had boarded the defendant's sleeping car for the purpose of retiring, he had upon his person and in his hand baggage the valuables alleged to have been stolen. It is also inferable from his testimony that his valuables were taken while he slept. Where a loss to a passenger occurs while he is asleep in a sleeping car, and this fact is established, the burden of proof is shifted to the defendant company, and it is bound to show that it exercised reasonable diligence to prevent the loss. *Kates v. Pullman Co.*, 95 Ga. 814, 23 S. E. 187. This is a rule of evidence which, as was said in the case cited, "rests upon the general and well-recognized principle that, where it is peculiarly within the power of one of the parties to a case to produce evidence, he is under an obligation to do so."

2. Complaint is made that the court excluded from the testimony of the plaintiff the statement, brought out on cross-examination, that he had previously lost a diamond in Augusta, which had been found by a young lady, and that he had paid a reward for its recovery. The defendant contended that this testimony was admissible to show a habit of negligence on the part of the plaintiff. The excluded proof, even if admitted, would not have shown negligence on his part on any particular occasion, and certainly not that he was habitually negligent. Furthermore, when one of the disputed issues in a case is as to the observance of proper care on the part of the plaintiff, evidence of his general character for prudence or recklessness is inadmissible for the purpose of illustrating his conduct upon the occasion under investigation. *Atlanta & West Pt. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763. For a stronger reason, proof of the conduct of a person upon a single and isolated occasion is not admissible to establish his general character for prudence or recklessness.

3. In *Pullman Co. v. Hall*, 106 Ga. 765,

32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293, this court, after a full discussion of the authorities on the subject, held that the rule of liability of sleeping car companies to their patrons for the loss of hand baggage was neither that of an innkeeper nor that of a common carrier of personal effects of which the passenger retains possession, but that it is the duty of a sleeping car company to exercise reasonable care to guard the personal property of the passenger from theft, and if, through the want of such care, his personal effects, or some of them, be stolen, the company will be liable for such of the stolen valuables as the passenger might reasonably be expected to carry with him on his journey. This rule of liability was declared to be in accord with the weight of authority. It was earnestly contended by counsel for the plaintiff in error that, under the rule of liability just stated, the verdict was contrary to the evidence for the reason that no negligence on the part of the defendant company or of its employes was established. The evidence presented the issue whether or not reasonable diligence would require a sleeping car company, under the circumstances of the present case, to have supplied its car with a conductor or as well as a porter. The porter undertook to show that he maintained an unremitting watch over the passengers and their effects, but the fact appears from his testimony that he had duties to perform which took him to various parts of the car before he was at liberty to sit down and begin his lonely vigil; that, after the passengers retired, he remained outside the car till the train departed from Augusta; and that, early in the morning, after its arrival at Atlanta, his duty called him outside the car in order that he might assist passengers to safely alight with their baggage. The jury might well have found that, from personal considerations moving to the porter, this duty was conscientiously performed. Taken as a whole, the testimony of the porter warrants the conclusion that it was practically impossible for him to have maintained a constant watch down the aisle of the car from the time the plaintiff retired up to the time he was aroused from sleep in the morning. That his pants were found lying disarranged at the foot of the berth, with their pockets rifled, and that his satchel had been moved and some of its contents were found lying on the floor of the car, afforded physical evidence which strongly tended to discredit the porter's statement that he kept up a vigilant guard throughout the entire night, yet saw no one approach the plaintiff's berth and commit the theft. That a theft had been committed of at least some of the missing valuables was fully established by the testimony of the plaintiff, and no attempt was made to impeach him. The porter may in good faith have sworn to the belief that he did not, at any time during the night, fall asleep, yet the jury were not bound to accept his

statement without question, merely because it was not contradicted by any other witness, in view of the fact that the porter was accustomed to sleep between midnight and 8 in the morning, and in view of the further persuasive circumstance that no one could have committed the theft in the manner in which it was evidently accomplished, without being seen by the porter had he maintained the strict guard which he claimed he had kept up throughout the night.

Counsel for the company further contended that, even though it might be responsible for the money and razors, it was not accountable for the loss of the unset gem which the plaintiff carried in his pocketbook. The rule as to what baggage and other personal effects a sleeping car company may become liable for, when taken into one of its cars by a passenger and retained in his custody, is the same as that which applies to carriers in general with regard to baggage with the possession of which the passenger does not actually part. 6 Cyc. 680. The personal effects which a passenger may carry with him on his journey may include jewels and other articles of personal adornment, as well as articles intended for his comfort and convenience during the journey. Pullman Co. v. Martin, 95 Ga. 814, 22 S. E. 700, 29 L. R. A. 498. If a piece of jewelry, suitable to be worn for his personal adornment, becomes injured or broken during his travels, so that he cannot use it in the usual way, it does not lose its character as an article which he may properly carry on his person, nor will the carrier be relieved of its duty to exercise reasonable diligence to protect the passenger in his possession of the same. On the other hand, it is not the right of the passenger to take with him on his journey valuable jewels, set or unset, not intended to be worn for his personal adornment, but which he carries with him for the purpose of transport, in order to save the expense of transportation in the usual course of carriage. The test is: (1) Whether any particular article of value is such as the passenger may reasonably be expected to carry on his person or as part of his baggage for his comfort, convenience, or adornment; and (2) whether or not he is carrying it with him for some legitimate purpose connected with his relation to the carrier as a passenger and as an incident of the contract of carriage, and not for a purpose wholly disconnected with the journey he intends to take. If the article be such as he may with propriety take with him when he starts upon his travels, the mere fact that, before his journey is complete, it becomes unsuitable for the use intended, because of some unforeseen accident or misfortune, will not deprive him of the right to retain it in his possession while continuing the journey. The facts of the present case disclose that the diamond ring belonging to the plaintiff was one which he was accustomed to wear and might reasonably be expected

to take with him when he left his usual place of abode; that his itinerary embraced Augusta and a number of other southern cities; that when he discovered that the gem had become loosened from its setting, he made an unsuccessful effort to have it reset by a jeweler in Augusta, and within a few hours thereafter continued on his journey, taking the night train for Atlanta. He was under no duty to delay his journey another day in order that he might have the ring repaired before coming to Atlanta, nor to leave the ring behind in Augusta, so that the diamond might be reset and the ring forwarded to him to some point along his route.

The trial judge submitted to the jury the question whether or not, under the circumstances, the unset diamond could properly be included among the personal effects which the plaintiff was entitled to carry along with him on his journey, and the finding of the jury was in accord with the law and the evidence. A number of written requests to charge as to the liability of the company for the loss of the unset gem were submitted to the court by counsel for the defendant. In so far as these requests were pertinent, they were covered by the general charge, which correctly stated the law bearing upon this branch of the case.

4. The plaintiff alleged that the value of the valuables lost was \$329.65; the only evidence as to their value was that of the plaintiff himself, who testified they were worth fully the amount for which suit was brought; the jury returned a verdict for \$291.87. Complaint is made that the verdict is contrary to the evidence, because, if the plaintiff was entitled to recover at all, the evidence demanded a recovery for a larger sum than that for which the verdict was returned. As was said in Central R. Co. v. Trammell, 114 Ga. 315, 40 S. E. 261: "We know of no principle upon which a defendant can complain that a verdict for a less amount than that demanded by the evidence was returned against him."

Judgment affirmed. All the Justices concur, except COBB, P. J., and ATKINSON, J., disqualified.

COBB v. JOHNSON.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. TROVER—EVIDENCE.

Where a landlord entered into a written contract with his tenant, in which it was stipulated that the landlord should receive one-fourth of all the cotton, corn, and fodder raised on the place, as rent, "and at the expiration of five years, or when the said [tenant] shall leave the place, he is to leave the seed out of 16 bales of cotton on the place," and where the landlord sold the plantation and indorsed on the contract a transfer of "the within contract" to the purchaser, this transferred to such purchaser the right which the landlord had in respect to the seed of 16 bales of cotton. And where, during the continuance of the term of rental, the purchaser declined to allow certain cotton seed on the place to be taken possession of by the

former owner, with the assent of the tenant, as being the cotton seed referred to in the contract, such former owner had no right to recover them from his purchaser and transferee in an action of trover.

2. EVIDENCE—PAROL TO EXPLAIN WRITTEN CONTRACT.

The written contract and the transfer thereof, being plain and unambiguous, parol evidence conflicting with them was not admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 1756.]

(Syllabus by the Court.)

Error from City Court of Wrightsville; Wm. Faircloth, Judge.

Action by W. F. Johnson against A. T. Cobb. Judgment for plaintiff. Defendant brings error. Reversed.

Johnson rented a place to Dudley for five years. The contract, which was in writing, stipulated that he should receive as rent one-fourth of all the corn, cotton, and fodder raised; and at the expiration of five years, or when the said J. D. Dudley shall leave the place, he is to leave the seed out of 16 bales of cotton on the place." Johnson sold the plantation in December, 1903, to Cobb, the present defendant, and made him a warranty deed thereto. He also indorsed on the contract of rent with Dudley, and signed the following: "W. T. Johnson having sold said land to A. T. Cobb, I hereby transfer the within contract to him. Dec. 11, 1903." Johnson testified that in the fall of 1904, Dudley said that he was thinking of leaving the place, and would deliver the seed, though the contract of rental would not expire by its terms till 1908; that Dudley told him to come to the place and get the seed, which were there in the seedhouse, and said he (Dudley) would deliver them, if Johnson would go for them. When plaintiff went for them, however, they were locked up, and the defendant declined to let him have them. He brought an action of trover to recover them. After a verdict in his favor, defendant moved for a new trial on the following, among other, grounds: (1) Because the verdict was contrary to law and evidence, and without evidence to support it. (2) Because the court erred in allowing plaintiff to testify as follows: "I lent Dudley, when he started on the place, the seed out of 16 bales of cotton; and he was to leave an equal amount of seed on the place for me, if he should leave the place before the expiration of five years, or at the end of his rental term, five years, if he remained on the place so long." This was objected to because the contract was in writing, and could not be varied or explained by parol. (3) Because the court erred in allowing plaintiff to testify as follows: "In the fall of 1904 I saw Mr. Dudley here (Wrightsville), and talked with him about my seed. He said he had decided to return them to me then; said he was thinking of leaving the place; told me to come to his place and get them—that they were down there in the seedhouse. I asked him if he would deliver

them to me should I go for them. He said 'Yea.'" This was objected to because it was hearsay, not in defendant's presence, and irrelevant. (4) Because the court erred in allowing plaintiff to testify as follows: "Mr. Dudley had already delivered them to me by word of mouth before I went for them." This was objected to because no authority was shown in Dudley to make delivery of the seed, because "word of mouth" did not constitute any delivery, and because the evidence was hearsay and irrelevant. (5) Because the court erred in allowing plaintiff to testify as follows: "The seed were not conveyed to Mr. Cobb in the contract of rent, which I transferred to him after selling the place to him." This was objected to because the contract was in writing, and, being plain and unambiguous, could not be changed, contradicted, or explained by parol. The motion was overruled, and the defendant excepted.

Daley & Bussey, for plaintiff in error. J. L. Kent, for defendant in error.

LUMPKIN, J. (after stating the facts).

1. When the landlord sold and conveyed the plantation, and transferred to the purchaser the contract of lease or rent, without reservation, this included all of his rights under the contract, one of which was the right to have the seed from 16 bales of cotton left on the place at the expiration of the lease, or the removal of the tenant. As a part of the contract, the right to enforce this agreement passed to the purchaser under the assignment of the whole. Nothing was left the plaintiff to enforce; and no right to recover in trover existed in him. The transfer was plain and unambiguous. It needed no explanation, and was not subject to contradiction by parol evidence.

2. The right of Johnson, in respect to the cotton seed having passed to Cobb by the transfer, a conversation between Johnson and the tenant thereafter could not affect the rights of Cobb, the purchaser. Nor was it admissible against him to show that the tenant was willing to deliver the seed to Johnson, in the absence of Cobb, and without his consent. If Johnson did not intend to transfer to Cobb all his rights under the contract, he should have so stated in the writing. A man cannot convey all in writing and reserve some by parol. Having no right to the seed, it follows that the plaintiff had no right to recover them, or their value.

Judgment reversed. All the Justices concur.

NEAL v. CONWELL.

(Supreme Court of Georgia. Nov. 16, 1906.
On Rehearing, Dec. 21, 1906.)

1. APPEAL — SECOND APPEAL — LAW OF THE CASE.

The written contract involved in this case was construed when it was formerly before this court (41 S. E. 607, 115 Ga. 471), and it

was then held that the account against the defendant, on which the suit was based, was an asset in the hands of the receiver, within the meaning of that contract. The account due by the plaintiff to the firm, as the case was then presented, appeared to have arisen by purchase at the sale made by the agent in whose hands the property was placed by the parties. At a subsequent trial, evidence was introduced to show that in fact the account which the plaintiff owed did not so arise, but was a debt due to the firm. But this would not alter the decision as to the status, as assets, of the debt due by the defendant, as determined by the former decision of this court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Appeal and Error, §§ 4358-4368.]

2. SAME.

Under the former ruling of this court construing the written contract between the parties, and which is binding in this case, the account against the defendant was an asset, and it was not competent to prove by parol a previous agreement that it should not pass to the plaintiff with other assets, under the terms of the written contract.

3. SAME.

None of the other grounds of the motion for a new trial require a reversal.

(Syllabus by the Court.)

Error from City Court of Elberton; P. P. Proffitt, Judge.

Action by F. H. Neal against G. B. Conwell. Judgment for defendant, and plaintiff brings error. Reversed.

Jos. N. Worley, for plaintiff in error. Z. B. Roger and W. D. Tutt, Jr., for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

On Rehearing.

The headnotes sufficiently show the rulings made. An application has been made for a rehearing on the ground that the evidence introduced on the second hearing of the case was different from that on the first hearing, and therefore the former decision is not binding. It is true that on the former hearing only evidence for plaintiff was introduced, and the question was whether the grant of a nonsuit was correct. It is also true that some evidence was introduced on the second trial which was not before the court on the first trial. But when the case was formerly before this court the written contract between the parties was construed, and it was distinctly held that under it the account against Conwell was an asset which passed to Mrs. Neal when the debts were paid. It was then said: "In the contract of settlement it will be noticed that the assets in the hands of the receiver were to become the property of Mrs. Neal after the receiver had paid the debts of the firm. The counts against Mrs. Neal and Conwell were certainly assets of the firm. The accounts represented the property they had bought at the sale. Had it been necessary to pay the debts of the firm, the receiver could have collected these accounts out of the parties. Inasmuch as it appears not to have been necessary,

the accounts became the property of Mrs. Neal under the agreement, as much as the goods would have done had they not been sold by the agent. If the goods purchased at the agent's sale by Conwell had not been delivered to him and had remained in the hands of the receiver, then under the agreement they would have become the property of the plaintiff. Conwell received the goods, and his indebtedness therefor stood in their place. His account was an asset of the firm, and became the plaintiff's property. It was argued by counsel for the defendant in error that, even if this account was assets in the hands of the receiver, the subsequent clauses in the agreement were intended to settle and dispose of them. We think that these clauses, taking the agreement as a whole, did not mean that this account should be thereby settled."

On the second trial the evidence showed that the indebtedness of Mrs. Neal did not arise out of a purchase of goods from the common agent, but from a book account which she owed the firm. As to Conwell's account, it still appeared that it arose from a purchase from the common agent; that Conwell himself filed an equitable petition, and caused all the assets of the firm to be placed in the hands of the receiver before the property thus purchased had been delivered to him, and that such property was delivered to the receiver; that subsequently it was delivered by the receiver to Conwell; that the sales book, with this amount entered on it, as well as the store book, was delivered to the receiver; that he transcribed this account of Conwell onto the store book; that (in the language of the receiver as a witness) "these accounts of Neal and Conwell were turned over to me by Cason as assets of the firm of Neal & Conwell, and both accounts stood open against them on December 1, 1899, and when I was discharged in March, 1900. I never balanced these accounts, nor had I ever asked either of them to pay either of the accounts when I was discharged on March 17, 1900." He delivered to Mrs. Neal the money on hand and the books of account, and everything else he had of the firm of Neal & Conwell, under the orders of the court. It will thus be seen that the essential facts on which the former ruling constructing the written contract was based were not changed, unless the evidence next referred to was admissible. It was proposed to show, in effect, that there was a parol agreement between the parties, antedating the appointment of the receiver and the making of the written contract of settlement between them, to the effect that Conwell might buy enough property from the common agent to equalize the indebtedness of Mrs. Neal and that the two accounts should offset each other, and also that by reason of such agreement, the receiver testified that he did not consider either account an asset. This was admitted. It being unquestioned

that the goods which Conwell had previously agreed to purchase were placed in the hands of the receiver, under a petition filed by Conwell himself to have the assets so placed, and it not appearing that they were afterwards delivered to Conwell under any order of court, and this court having distinctly ruled that the account for such goods was covered by the written agreement, to permit parol evidence of a prior verbal agreement to the effect that they should not be so covered would be to contradict the written agreement as thus construed. It is not a question whether that construction be right or wrong. It is an adjudication of the Supreme Court in the same case, and must stand.

We deem it unnecessary to discuss the evidence as to whether or not the debts had been paid, and whether the assets passed to Mrs. Neal under the contract, or whether Conwell could set off payments afterwards made by him, if any.

Motion for rehearing denied. All the Justices concur.

QUAGLINO v. BENEDETTO.

(Supreme Court of Georgia. Nov. 9, 1906.)

JUSTICES OF THE PEACE—CERTIORARI—REFUSAL.

The uncontradicted evidence demanded the verdict rendered in the justice's court, and therefore it was not erroneous to overrule the petition for certiorari complaining of the rendition of the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 776.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Carlo Quaglino against F. Benedetto. Judgment for defendant before a justice. From an order refusing certiorari, plaintiff brings error. Affirmed.

John R. Cooper, for plaintiff in error. Nottingham & McClellan, for defendant in error.

COBB, P. J. Quaglino sued Benedetto in a justice's court for services as a laborer. The justice rendered judgment in favor of the defendant. Plaintiff entered an appeal to a jury, which returned a verdict in favor of the defendant. The plaintiff assigns error upon a judgment of the superior court overruling his petition for certiorari. It appears from the answer of the justice that the defendant was the proprietor of a fruit stand, that the plaintiff applied to him for work, and that the parties agreed to form a partnership and divide the profits of the fruit stand. The plaintiff testified that he became dissatisfied with the arrangement, and decided to work as a laborer for the defendant at \$1.50 per day; and the amount sued for had been earned at this rate. He, however, stated that he had never informed the defendant of this arrangement, which

he had made in his own mind. The defendant denied that he had ever employed the plaintiff as a laborer, but admitted that a partnership had been entered into between them, and testified that the profits amounted to only 53 cents, and that he had paid the plaintiff \$10 in cash and goods. Numerous errors were assigned in the petition for certiorari. The answer failed to verify many of these, if not all. The uncontradicted evidence demanded a finding that there had been no contract for services as a laborer entered into between the parties, and it was therefore not erroneous for the judge to overrule the certiorari.

Judgment affirmed. All the Justices concur.

GODFREE & DELLINGER v. BROOKS.

(Supreme Court of Georgia. Nov. 9, 1906.)

JUSTICES OF THE PEACE—JURISDICTION—ACTION ON NOTE—ATTORNEY'S FEES.

Since the adoption of the act of 1900 (Acts 1900, p. 53), where a plaintiff in a suit in a justice's court declares upon a promissory note, and, by the original summons, cites the defendant to answer the complaint "in an action upon a note, a copy of which said note is annexed to this summons," the copy of the note attached stipulating for the payment of \$100 as principal and 10 per cent. as attorney's fees, but the summons being silent as to giving the notice specified in the act, such summons is not to be construed as a suit for attorney's fees, and the justice's court has jurisdiction of the subject-matter.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by Godfree & Dellinger against W. S. Brooks. Judgment for plaintiffs before a justice, and, on appeal, suit dismissed, and plaintiffs bring error. Reversed.

A. W. Stokes and Clawson & Fowler for plaintiff in error. Malcolm D. Jones, for defendant in error.

ATKINSON, J. The plaintiffs instituted suit in a justice's court. In the original summons the defendant was commanded to be and appear, etc., "to answer the complaint of Godfree & Dellinger in an action upon a note, a copy of which said note is annexed to this summons." Copies of four notes for \$25 each, besides interest and attorney's fees, were attached. The notes were dated November 1, 1902. There was no other allegation in the summons referring to the amount sued for. If attorney's fees be added to the principal, the total sum would exceed \$100. After judgment in the justice's court, the case was appealed to the superior court. Upon the trial of the appeal case, the court, upon motion of counsel for the defendant, dismissed the original suit on the ground that the justice's court was without jurisdiction. The plaintiffs assign error on that ruling.

It is urged that the justice's court did have jurisdiction; that the attorney's fees provided for in the note were not, under the act of 1900 (Acts 1900, p. 53) collectible, except upon giving the notice provided in the act; that there was no allegation of any such notice having been given; and that no attorney's fees were claimed. Fairly construed, the original summons is a suit for all that, by law, was collectible under the note at the time of filing the suit. The law on the subject of contracts for attorney's fees, as expressed in the act of 1900, provides: "Obligations to pay attorney's fees upon any note or other evidence of indebtedness, in addition to the rate of interest specified therein, are void, and no court shall enforce such agreement to pay attorney's fees, unless the debtor shall fail to pay such debt on or before the return day of the court to which suit is brought for the collection of the same; provided, the holder of the obligation sued upon, his agent or attorney, notifies the defendant in writing ten days before suit is brought of his intention to bring suit, and also the term of the court to which suit will be brought." Under this law it is a condition precedent to the enforcement of a promise to pay attorney's fees that the notice referred to in the act be given. Such notice being a condition precedent, the attorney's fees, without the notice having been given, are not collectible at law. The law is to be regarded as a part of the contract, and, without the notice having been given, the stipulation for attorney's fees is void and may be treated as not in the note. It follows that the summons, failing to indicate that the notice had been given, cannot be treated as a suit for the attorney's fees. Without the condition precedent performed, there could be no recovery for them, and, as the suit was only for such money as, at the time of the institution of the suit, was collectible by law, it is clear that attorney's fees were not involved. As the principal sum claimed after the attorney's fees are eliminated was not in excess of \$100, it follows that the justice's court was not without jurisdiction. This case differs from *Hamilton v. Rogers* (Ga.) 54 S. E. 928, and *Peoples v. Strickland*, 101 Ga. 829, 29 S. E. 22, in that the notes sued upon in those cases were executed prior to the act of 1900, and at a time when the law did not impose, as a condition precedent to the enforcement of the promise to pay attorney's fees, the doing of a thing required to be done before the institution of the suit. In principle the ruling here made is supported by *De Lamater v. Martin*, 117 Ga. 139-141, 43 S. E. 549. In that case the question was as to the right of the plaintiff to amend by alleging an omission to give the notice, the court holding that, with the amendment in, the court had jurisdiction. We go one step further and hold that, because the condition was

precedent, the court had jurisdiction without amendment. If this were not true, the ruling in the *De Lamater* Case would not be sound, because the Civil Code 1895, § 4068, would not permit the plaintiff to write off a part of his demand for the purpose of giving the court jurisdiction. It has been long established that a creditor cannot bring his claim within the jurisdiction by entering a credit which had not, in fact, been paid. *Cox v. Stanton*, 58 Ga. 408.

Judgment reversed. All the Justices concur.

BANKS v. J. S. SCHOFIELD'S SONS CO.
(Supreme Court of Georgia. Nov. 10, 1906.)

MASTER AND SERVANT—INJURY TO SERVANT—DEFECTIVE TOOLS.

A master is not responsible in damages to his servant for injuries sustained by the latter while in the employment of the former, in consequence of defects in a tool furnished by the master, which the servant was using at the time of the injury, when the defects were such that they were known to the servant, or could have been known by the exercise of ordinary care on his part.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 84, Master and Servant, §§ 574-600.]

(Syllabus by the Court.)

Error from City Court of Macon; Robert Hodges, Judge.

Action by Jim Banks against J. S. Schofield's Sons Company. Judgment for defendants, and plaintiff brings error. Affirmed.

Jim Banks sued the J. S. Schofield's Sons Company, a corporation, for damages alleged to have been sustained by him by reason of personal injuries received while in the employment of the defendant, which were alleged to be due to its negligence. The defendant demurred to the petition on the ground that it set forth no cause of action. The demurrer was sustained, and the plaintiff excepted. Leaving out the allegations intended to show the extent of the plaintiff's injuries and the amount of his damages, the substance of the petition was as follows: The defendant employed the plaintiff, a man 38 years of age, to "dress off the rough edges of the iron on" the truck frame of an engine, and furnished him, for this purpose, with an iron chisel, which was old, worn, and much too short for the work. While the plaintiff was using this chisel "in dressing or chipping" the iron of such truck frame, "a piece of steel flew off from the end of said chisel and struck [him] in his left eye, destroying the sight of the same." The "defendant company was negligent in not furnishing petitioner with a safe tool with which to work; * * * said chisel was much too short for said work, being about six inches in length; and petitioner, in bending over to see the same and where to direct it, brought his eye in close proximity to the particles of metal that fly off from said chisel or from the engine frame on which petitioner was engaged at

work." He was "unskilled in said work, and did not know of the danger in bringing his eye so near flying pieces of metal," but the defendant "knew of the danger to petitioner in the use of said tool, but failed to warn him thereof." The chisel "was old and worn, and petitioner, on account of his unskillfulness, did not know of the danger of using the same in his work;" and deficiency in said tool, and its weakness, and its liability to break in its condition was "known to the [defendant], or could have been ascertained or discovered by the use of ordinary care on its part." At the time the plaintiff was injured he was "in the exercise of all ordinary care and diligence," and the injuries were "caused entirely by the negligence of the [defendant] in failing to furnish him with safe and sufficient tools with which to do the work required of him."

Glawson & Fowler, Jos. H. Hall, and Warren Roberts, for plaintiff in error. Harde-man & Jones, for defendant in error.

FISH, C. J. (after stating the facts). We have stated the substance of the averments of the petition, and from them it will be seen that, notwithstanding some allegations which tend somewhat to indicate a purpose on the part of the pleader to seek a recovery upon the ground that the work, unknown to the plaintiff, was extraordinarily hazardous, and the defendant failed to warn him of the dangers incident thereto, the real gist of the petition is that the defendant furnished the plaintiff, its servant, with a defective and dangerous chisel with which to do the work required of him, by the use of which he was injured. For instance, while the plaintiff made the surprising allegation that he, a man 38 years old, being unskilled in this particular work, did not know—what it seems any man of common sense ought to have known—that it was dangerous to bring his eyes in close proximity to flying particles of metal, this allegation, instead of being followed by an averment that the defendant failed to warn him of this danger, is simply followed by an allegation that the defendant knew of the danger to the plaintiff in the use of this particular tool, but failed to warn him of it. And, as if to more clearly indicate that the purpose of the pleader was to allege that defendant failed to warn plaintiff of danger ordinarily incident to work of this character, but to allege a failure to warn him of the danger of using this defective chisel in performing it, it is alleged that "said tool was old and worn, and petitioner, on account of his unskillfulness, did not know of the danger of using the same in his work, and that the deficiency of said tool, and its weakness, and its liability to break in its condition, was known to [defendant], or could have been ascertained or discovered by the use of ordinary care on its part." The construction which we have placed upon

the plaintiff's petition is exactly the same as that given to it by his counsel in the brief filed by them in this court, wherein the only cause of action claimed to be set up in the petition is the one which we have construed the petition as seeking to allege.

The law applicable to the case, as laid down by our Civil Code 1895, is as follows: The master is bound to exercise ordinary care "in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. If there are latent defects in machinery, or dangers incident to an employment unknown to the servant, of which the master knows, or ought to know, he must give the servant warning in respect thereto." Section 2611. "A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with" his above indicated duties to his servant, in order for the servant to recover, "it must appear that the master knew or ought to have known * * * of the defects or danger in the machinery supplied; and it must also appear that the servant injured did not know and had not equal means of knowing such fact, and by the exercise of ordinary care could not have known thereof." Section 2612. When we apply these legal principles to the facts alleged in the present case, it is obvious that the mere fact that the defendant was negligent in furnishing the plaintiff with the chisel described would not render it liable for the injury which the plaintiff sustained by its use. In order to render the master liable "it must also appear that the servant injured did not know" of the defective condition of the tool supplied. There is no allegation that the plaintiff did not know that the chisel was old, worn, and much too short for the work on which he was engaged, and, even if there were, the allegation would not be well pleaded, for these were clearly patent, not latent, defects, which, in the very nature of things, the man who was handling and using the instrument must have observed and known. Certainly in the absence of an averment that he did not know of them, the presumption is that he did, as he was a man of mature years and presumably of at least ordinary intelligence.

The decision of the case might well rest here, upon the failure of the petition to show that the plaintiff did not know of the condition of the chisel while engaged in using it, but the case which he states is further fatally defective in that it is apparent that his "means of knowing" that the chisel was old, worn, and much too short for the work were at least equal to those of the defendant, for he saw the tool, handled, and used it, and, from his observation of it while he was using it, is able to describe its then apparent condi-

tion. This being true, he could not recover upon the ground that the defendant furnished him with a tool which was in this condition, by the use of which he was injured. Besides, it is perfectly clear that the plaintiff, by the use of ordinary care, could have known, before his injuries resulted from the use of the chisel, that it was in the condition which he describes, and this fact alone is also sufficient to prevent him from holding the defendant liable for having furnished him with this particular tool with which to perform the work. The allegation that the plaintiff was "in the exercise of all ordinary care and diligence when injured" is a mere conclusion of the pleader, which is not supported by the facts alleged. If the master, by the use of ordinary care, could have discovered that this chisel, on account of its patent defects, was liable to break, if used in the work upon which the servant was engaged, the servant, by the use of the same degree of care, could have ascertained the same fact. Where danger is obvious, no warning is required. *Commercial Guano Co. v. Neather*, 114 Ga. 416, 40 S. E. 299; *Crown Cotton Mills v. McNally*, 123 Ga. 35, 51 S. E. 18, and citations. The allegation upon which counsel for plaintiff in error rely to break the force of the demurrer is "that the deficiency of said tool, and its weakness, and its liability to break in its condition was known to the [defendant], or could have been ascertained or discovered by the use of ordinary care on its part." They contend that this shows that the defect in the tool was latent. But this averment is by no means an allegation of a hidden defect in the tool. It simply amounts to a mere general and indirect allegation that the chisel was deficient, weak, and liable to break, and, standing alone, fails to indicate what defect, latent or patent, caused it to be deficient, weak, and liable to break. But construed, as it must be, in connection with the averments which point out the defects in the tool, it simply means that the deficiency, weakness, and liability to break referred to resulted from the chisel's being old, worn, and much too short for the work.

The plaintiff's petition is fatally defective in three particulars. It fails to show that he did not know of the condition of the chisel before he was injured by its use; it shows that his means of knowing its condition were as good as those of the defendant; and it is apparent that, by the use of ordinary care, he could have known its condition. The petition failed to set forth a cause of action, and the demurrer thereto was therefore properly sustained. *Baker v. Western & Atlantic R. Co.*, 68 Ga. 706; *Bell v. Western & Atlantic Railroad*, 70 Ga. 568; *Western & Atlantic R. Co. v. Bradford*, 113 Ga. 276, 38 S. E. 823; *Manchester Mfg. Co. v. Polk*, 115 Ga. 545, 41 S. E. 1015; *Stewart v. Seaboard Air Line Ry.*, 115 Ga. 624, 41 S. E. 981; *Western & Atlantic Railroad Co. v. Moran*, 116 Ga. 443,

42 S. E. 787; *Ballew v. Broach*, 121 Ga. 421, 49 S. E. 297.

Judgment affirmed. All the Justices concur.

HOWINGTON v. MADISON COUNTY.

(Supreme Court of Georgia. Nov. 12, 1906.)

1. BRIDGE—WHAT CONSTITUTES.

The term "bridge" includes all the appurtenances necessary to its proper use, and embraces its abutments and approaches. That which is necessary as an approach, to connect the bridge with the highway, is an essential part of the bridge itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, §§ 2, 3.]

2. SAME—DEFECTS—ACTION AGAINST COUNTY PLEADING.

An allegation in a petition brought against a county, to recover for damage caused by a defect in a bridge, that the road commissioners and overseers of roads in the district in which the bridge was located had notice of the defect, is an averment of notice to the county, which is good as against a general demurrer.

3. SAME.

It was error to sustain a general demurrer to the petition.

(Syllabus by the Court.)

Error from Superior Court, Madison County; H. M. Holden, Judge.

Action by A. M. Howington against Madison county. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. Howington brought her action against the county of Madison, laying damages in the sum of \$10,000. The petition alleged that on September 16, 1904, the minor son of plaintiff, six years of age, was killed by the negligence and carelessness of the defendant, such negligence consisting of a defect in a public bridge erected by the defendant since December 29, 1888; the bridge constituting a part of one of the established public roads of the county. The deceased and his father were traveling the road in a wagon, with an ordinary load of hay, and came to a short bridge which was erected over a gully and low place in the road. The defendant had allowed the gully under the bridge to fill up and pond the water and mud under the bridge and immediately beyond it, thus causing a sudden decline of at least 8 or 10 inches from the bridge to the dirt in the road adjacent thereto. While passing over the bridge, without fault on the part of either, the wagon suddenly dropped 8 or 10 inches in the bog which the defendant had negligently and carelessly left along side of the bridge, and threw the deceased and his father from the wagon to the ground; the skull of the deceased being crushed by the fall and death ensuing within six hours thereafter. It is alleged that the death of the plaintiff's son was caused by the negligence of the defendant in allowing "the immediate drop off of 8 or 10 inches from the side of said bridge down into a boggy hole, so that the said bridge was 8 or 10 higher than the

level or grade of the road immediately beyond said bridge." It was also alleged, that the defendant failed to keep the bridge and the approach thereto in repair, so that persons who traveled carrying ordinary loads could use the same with ease and safety, and that the attention of the defendant was called to the defect in the bridge, through the commissioners and overseers in the district in which the bridge was located. It was alleged that the deceased left no wife or child, and that the plaintiff was dependent upon him, and he contributed to her support. To this petition the defendant interposed a general demurrer, which, after argument, the court sustained. The plaintiff excepted.

W. W. Stark, for plaintiff in error. David W. Meadow, John B. Gordon, J. F. L. Bond, and Berry L. Moseley, for defendant in error.

COBB, P. J. (after stating the foregoing facts). A county is liable for injuries caused by defects in a county bridge constructed since the passage of the act of 1888. *Hackney v. Coweta County*, 117 Ga. 327, 43 S. E. 725. The petition alleges that the bridge in question was erected by the county since 1888, and that it is a public bridge of the county. "A bridge which constitutes a portion of a public road is necessarily a public bridge." *County of Tattnell v. Newton*, 112 Ga. 780, 38 S. E. 47. It is contended, though, that the injury did not result from a defect in the bridge, but from a defect in a public road leading to the bridge, and that there is no liability upon a county resulting from defects in a public road. Unless the defect complained of is a part of the bridge, the county is not liable, and the petition was properly dismissed. While the county is not liable for a defect in a public road, that part of a public road which constitutes the abutment to the bridge, and which is absolutely essential to the existence and use of the bridge, is a portion of the bridge itself, and the obligation to keep the same in repair and the liability resulting from the failure to discharge the duty of repairing, applies to it to the same extent as it does to that portion of the structure ordinarily called the bridge. The term "bridge" includes all the appurtenances necessary to its proper use, and embraces its abutments and approaches. 4 Ency. Law (2d Ed.) 919. The approach to a bridge constitutes a part of it, and a duty to repair the bridge includes a repair of its approaches. 2 *Shearm. & Redt. on Neg.* (5th Ed.) § 392. In *Daniels v. Athens*, 55 Ga. 609 (1), it was held that a continuous embankment necessary to make access to a bridge, so as to pass teams and wagons over it, was a part of the bridge. In the opinion, Judge Jackson said: "The bridge would be useless without access to it; and the good sense of the rule is supported by authority." See, also, 1 *Words & Phrases*,

869 et seq.; *City Council of Augusta v. Hudson*, 94 Ga. 135, 21 S. E. 289. In *Sav., Fla. & Wes. Ry. Co. v. Daniels*, 90 Ga. 608, 17 S. E. 647, 20 L. R. A. 416, Mr. Justice Simmons quotes with approval from *Elliott on Roads & Streets*, 25: "Whether a structure is or is not a bridge may sometimes be a question of fact. The structure may be of such a peculiar construction or so peculiarly located in the particular case, as to require its character to be determined by the jury of the particular instance. So it must sometimes be that what are parts of a bridge is a question to be determined as one of fact, and not of law. Generally, however, the question of what is or is not a bridge is for the court, and not the jury."

The averments in the present petition are that that part of the public road which connected the bridge with the highway was in a defective condition. The bridge would be useless unless connected with the highway, and, therefore, that which was necessary to connect it as an approach to the highway was an essential part of the bridge itself. Under these averments, it can be safely held, as matter of law, that the defect complained of was a defect in the bridge. Such being the case, the county authorities were under a duty to exercise ordinary care to keep the same in repair, and were liable to a traveler for any damage resulting from a failure to discharge this duty. *Warren County v. Evans*, 118 Ga. 200, 44 S. E. 986. It is incumbent upon the plaintiff to show that the county authorities knew of the defect, or that it had existed for such a length of time that knowledge of the same would be presumed. 4 Ency. Law, 944. It is alleged that the road commissioners knew of the defect, and the overseers of the road in that district had notice of the defect. As against a general demurrer this was a sufficient allegation of notice to the county. The law imposes upon the road commissioners of the district the duty of appointing road overseers, and upon these overseers the duty of seeing that the roads are kept in repair, and also imposes upon the road commissioners the further duty of inspecting the roads and observing if the bridges and ferries are in proper repair. The road commissioners have general supervision over the road overseers, and may fine them for neglect of duty. *Pol. Code* 1895, § 589 (1) (2) (8) (9). The law devolves upon the road commissioners of the district the duty of keeping the roads in repair through the instrumentality of the road overseers, and notice to these officers is notice to the county authorities whom they represent. *City of Columbus v. Ogletree*, 102 Ga. 294, 29 S. E. 749 (3).

As against a general demurrer the petition set forth a cause of action.

Judgment reversed. All the Justices concur.

PAULK et al. v. GREER. Ordinary.

(Supreme Court of Georgia. Nov. 12, 1906.)

APPEAL—REVIEW.

This case having been submitted to the presiding judge without a jury, and, upon consideration of both the evidence and the law, he having denied the mandamus absolute prayed for, upon a careful consideration of the evidence introduced by both sides and the law applicable thereto, this court cannot say that the judge erred in rendering such judgment.

(Syllabus by the Court.)

Error from Superior Court, Turner County; W. N. Spence, Judge.

Application by R. Paulk and others for writ of mandamus to W. A. Greer, ordinary. From a judgment denying the writ, plaintiffs bring error. Affirmed.

J. A. Comer, Fulwood & Murray, and Joseph H. Hall, for plaintiffs in error. W. A. Hawkins and Jno. B. Hutcheson, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

STRANGE v. FRANKLIN et al.

(Supreme Court of Georgia. Nov. 18, 1906.)

PAYMENT—RECOVERY—MISTAKE.

The plaintiff had been sued as a surety upon a forthcoming bond given to replevin property of the principal, which had been levied upon under an execution issued upon a void judgment, and, in the action upon the bond, judgment was rendered against himself and the principal. This latter judgment was also void, because rendered by a court which has no legal existence. But without attempting to resist the enforcement of the last-mentioned judgment, he voluntarily paid over the amount of the principal, interest, and costs to the plaintiff in the judgment, upon being informed by the clerk that, unless he did so, execution would be issued and levied upon his property. The demand upon which the first-mentioned judgment was based was a valid, subsisting debt due by the defendant in that judgment to the plaintiff therein. *Held*, that in an action for money had and received the evidence showing the foregoing facts, the judge, to whom the case was submitted without the intervention of a jury, did not err in rendering judgment for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 272, 273, 283–287.]

(Syllabus by the Court.)

Error from Superior Court, Washington County; T. A. Parker, Judge.

Action by H. M. Strange, administrator, against H. M. Franklin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

In February 1899, Franklin obtained a judgment against Larry in the county court of Washington county, and on the 5th day of September the *fi. fa.* was levied on property of said Larry. Larry filed a claim as the head of a family to the property so levied on by Franklin, and gave a forthcoming bond. Strange signed the bond as surety for Larry. The property not being produced on sale day,

the sheriff brought suit on the bond in the county court of Washington county, and in February, 1900, a judgment was rendered thereon against Larry as principal, and Strange as surety; and Strange paid the amount of the judgment before *fi. fa.* was issued, upon being informed by one "who claimed to be the clerk of said court that he intended to issue *fi. fa.* and turn the same over to the sheriff for levy." Subsequently the Supreme Court held that the county court of Washington county was not established in the manner prescribed by law, and hence was unconstitutional. *Murray v. State*, 112 Ga. 7, 37 S. E. 111. Strange seeks to recover back the money paid as above stated.

John C. Harman and Evans & Evans, for plaintiff in error. T. W. Hardwick and J. E. Hyman, for defendant in error.

BECK, J. (after stating the facts). There was no error in the judgment of the court below. The law and the facts in the case required the decision reached and rendered. The money paid by the plaintiff in error was not paid through any mistake of fact. The money was paid voluntarily on a bond which plaintiff in error, as surety, voluntarily signed. There is nothing in the agreed statement of facts to show that he was not fully apprised of all the facts and circumstances under which the principal had signed the bond. And nowhere in the pleadings is there anything to suggest that the facts constituting the alleged duress under which the principal was acting when he executed the bond were unknown to Strange at the time he affixed his signature as surety thereto. A surety upon a bond is presumed to have had knowledge of the circumstances surrounding the principal at the time he became surety. *Graham v. Marks*, 98 Ga. 67, 25 S. E. 931. And knowing, as he is presumed to have known, the circumstances under which his principal executed the bond, inasmuch as the *fi. fa.*, the levy of which caused his principal to replevin the property seized, was illegal and invalid, he could, after his principal's failure to meet the conditions of the replevin bond, by producing the property on the day of the sale, have prevented the rendition of a judgment against him by pleading and setting up, when sued as surety on said bond, the fact now urged, that the law establishing the county court of Washington county was unconstitutional and void. But he failed to do this, and a judgment was rendered against him in that court, and he afterwards voluntarily paid to the defendant in error the amount of the judgment and costs. We say voluntarily because the fact that he paid over the money upon being informed by one "who claimed to be the clerk of said court that he intended to issue *fi. fa.* and turn the same over to the sheriff for levy" did not prevent the payment from being voluntary. A payment made under the circumstances just stated cannot be deemed one

made under duress or coercion. "The rule allowing a party to recover money which he has once paid, on the ground that it was paid under compulsion, is intended only for the relief of those who are entrapped by sudden pressure into making such payments, and who have no other means of escaping an existing or imminent infringement of their rights of person or property. Where a party has had time and opportunity to relieve himself from his predicament without making such payment, by a resort to ordinary legal methods, but nevertheless pays the money, the payment will be deemed voluntary, and he cannot recover it. This is clearly shown in all the cases on this subject." Annotations to case of Mayor of Baltimore v. Lefferman, 45 Am. Dec. 153, citing numerous cases. "It seems, therefore, to be clearly settled that a payment is not made under compulsion or duress, but will be treated as voluntary unless the party making payment does so to prevent the immediate seizure of his goods or the arrest of his person." Hoke v. Atlanta, 107 Ga. 416, 33 S. E. 412; Williams v. Stewart, 115 Ga. 864, 42 S. E. 256. See, also, 22 Am. & Eng. Enc. L. 635.

The counsel for plaintiff in error, independently of the contention that the money was paid under such circumstances as would prevent its being a voluntary payment, insists that the payment was made under a mistake of law, and that defendants are in possession of money belonging to plaintiff "which, in equity and good conscience, they are not entitled to hold, and which can be recovered back in this action." But the proposition, in view of all the facts, lacks force, and is not supported by the authorities quoted. In the case of Logan v. Sumter, 28 Ga. 242, 73 Am. Dec. 755, cited by counsel for plaintiff, the party seeking to recover money back proved that the money had been paid over upon an execution on which he was clearly not liable, and it had been paid under a mistake of fact, and it was in view of these facts that the court ruled that "a defendant who has paid an execution on which he is not liable may recover back the money—he having paid it under the belief that he was liable." In the case of Stevens v. Nisbet, 88 Ga. 456, 14 S. E. 711, the plaintiff sought to recover court costs which had been illegally demanded and exacted of him, and which he paid under protest to the clerk, upon a peremptory order from the court either to pay said costs or be remanded to jail instantan. In the case of Culbreath v. Culbreath, 7 Ga. 64, 50 Am. Dec. 875, the money sought to be recovered back in an action for money had and received had been paid under a mistake of law, and in the case last cited a distinction is drawn between a mistake of law and ignorance of law, and it was there ruled that "money paid by a mistake of law may be recovered back in an action for money had and received, where there is a full knowledge of all the facts, provided that the mistake is clearly proven, and the

defendant cannot in good conscience retain it." But there is this marked difference between the Culbreath Case and the present case: In the former case, the money was paid under a mistake of law, to one who, in equity and good conscience, could not retain it; in the case which we have for consideration, the money was paid, we apprehend, through ignorance of law, and to one who in equity and good conscience can retain it. It is not denied that the principal in the bond upon which the plaintiff in error became the surety was not indebted to the defendant in error in the amount which the latter was seeking to recover in the proceedings which resulted in the giving of the bond under consideration. The defendant in error has received nothing from the plaintiff in error save an amount which the principal in that bond owed him, and a long period of time has been permitted to elapse since he received that sum in payment of a just debt. Possibly the period of time which has elapsed is such that an action upon the original debt against the principal debtor would now be barred. It seems to us that the defendant in the present action had and made a good legal defense, and his standing in equity is superior to that of the plaintiff.

Judgment affirmed. All the Justices concur.

RAYMOND v. GARDEN.

(Supreme Court of Georgia. Nov. 13, 1906.)

1. JUSTICES OF THE PEACE—CERTIORARI—VERIFICATION.

Points made in a petition for certiorari not verified by the answer of the magistrate furnish no ground for a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Justices of the Peace, § 793.]

2. SAME.

The answer of the magistrate in this case did not sufficiently verify the statements of the petition and the points made therein to show error in the judgment rendered by him, or in that rendered by the judge of the superior court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 81, Justices of the Peace, § 793.]

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by C. T. Garden against Emma Raymond. Judgment for plaintiff before a justice, and, from refusal of certiorari, defendant brings error. Affirmed.

Herman Brasch, for plaintiff in error. Glawson & Fowler, for defendant in error.

LUMPKIN, J. A petition for certiorari recited the bringing of a suit on an open account, not verified, in a justice's court, by a certain plaintiff against a certain defendant; that "the defendant filed a plea in said cause before said 3d day of June, by her attorney, Jerre Moore, having his name marked on the docket for the said defendant"; that

on the regular court day the case was set for a hearing, and notice was given to the attorney for the defendant; that on the day named the case was called, and the attorney for the defendant was not present, being absent from the county at the time; that the justice gave judgment by default in favor of the plaintiff against the defendant without having any evidence produced by the plaintiff as to the correctness of the account. Error was assigned upon the rendering of this judgment. The entire answer of the magistrate, after stating the case, was as follows: "That the statement is correct as to the statement made in the caption that said case was regularly assigned for hearing and called at the stated time and in due form, and upon formal notice being given to the attorney, who had consented to the assignment; that no defense was interposed, and judgment rendered by default in favor of the plaintiff against the defendant for the sum of \$26.75 and costs." If there was personal service and no defense whatever, a judgment by default was proper. *Peeples v. Sethness*, 119 Ga. 777, 47 S. E. 170. The plaintiff raised the point in her petition for certiorari that her attorney marked his name on the docket of the justice, and that this was equivalent to filing a plea. The answer of the justice does not verify this statement; and hence the point is not properly before the court. *Brown v. Gainesville*, 125 Ga. 238, 53 S. E. 1002; *Manning v. Gainesville*, 125 Ga. 239, 53 S. E. 1002.

Judgment affirmed. All the Justices concur.

SAVANNAH ELECTRIC CO. v. MULLIKIN.
(Supreme Court of Georgia. Nov. 13, 1906.)

1. APPEAL—HARMLESS ERROR.

When the court's charge respecting a certain issue involved in the case, is substantially correct, mere lack of verbal precision, which could not have misled the jury, is not ground for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 58.]

2. CARRIERS—INJURY TO PASSENGER—INSTRUCTIONS.

Whether the injuries to plaintiff were the result of his own negligence and failure to exercise due care and caution, or whether they were caused by alleged acts of negligence of the defendant company's servants, being a material subject of inquiry in the trial of the case, and there being a conflict in the testimony upon this issue, it was not error for the court to give the following charge to the jury: "If the plaintiff was a passenger upon a car of the defendant company, and you find that the plaintiff was then and there exercising ordinary care for his own safety, and that while so exercising such care he was preparing to alight from the car, and you find that such preparation to alight, under all the circumstances and in the manner shown by the evidence, was not negligence or carelessness on the part of the defendant [plaintiff], and you further find that the motorman suddenly stopped the car in such a manner that it then and there threw the plaintiff to the ground, and that such stopping of the car was negligence on the part of the

motorman, and the plaintiff was thereby injured as charged in his petition, and that the plaintiff was during all the time in the exercise of ordinary care and caution for his own safety, the defendant would be liable to the plaintiff."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 1332.]

3. TRIAL—INSTRUCTIONS.

It does not appear that the court in its general charge failed to give appropriate instructions as to the material issues of the case; and if fuller instructions were desired as to any particular theory or contention of the defendant, a written request therefor should have been made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 623, 643.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

Action by M. B. V. Mullikin against the Savannah Electric Company. Judgment for plaintiff, defendant brings error. Affirmed.

Mullikin brought this action against the electric company to recover damages for personal injuries, alleging that at the time of the injury he was a passenger on a car of defendant company; that while seated on said car, the overhead trolley wire parted, causing flashes of electricity to play around the car and to frighten the passengers thereon; that the motorman in charge of said car cried out for all persons to leave the car, and thereupon petitioner proceeded to the side of said car for the purpose of alighting, but just as he stepped upon the running board or step, the car came to a sudden and violent stop, and petitioner was thrown forward into the street, thereby sustaining various bodily injuries. Defendants denied the material allegations of the petition, and alleged that plaintiff's injuries were caused by his own negligence, and were not due to any negligence on the part of defendant. The jury found for the plaintiff the sum of \$300. And defendant moved for a new trial, and, the same having been denied, excepted, and assigns error upon the overruling of said motion.

Osborne & Lawrence, for plaintiff in error. Twiggs & Oliver, for defendant in error.

BECK, J. (after stating the facts). 1. The first ground of the amended motion is an attack upon the following portion of the court's charge to the jury: "Because the court charged the jury as follows: 'The plaintiff cannot recover if the company shall make it appear to the satisfaction of the jury that its employees exercised extraordinary care and diligence.'" The motion complains that this is error in that it required the company in order to defeat a recovery "to show to the satisfaction of the jury, instead of by a preponderance of evidence, that its employees exercised extraordinary care and diligence." But this exception fails to show any substantial error in that part of

the charge complained of. The instruction amounted to nothing more than informing the jury that the plaintiff could not recover if they should believe from the evidence that the company's employes had exercised the requisite care and diligence. *Car Coupling Co. v. League*, 26 Colo. 129, 54 Pac. 642; *Kenyon v. City of Mondovi*, 98 Wis. 50, 73 N. W. 314. And even if there be a lack of verbal precision in the use of the expression "to the satisfaction of the jury," it could have had no harmful effect upon their minds in view of the fact that the court had already said to the jury that their "finding upon the issue raised must be determined according to where you find the preponderance of the testimony lies." And had followed the part of the charge last quoted with a complete and correct definition of the expression "preponderance of testimony." One must indeed be on an eager quest for error to discover cause for granting a new trial on an instruction as nearly accurate as that part of the charge complained of in this ground of the motion.

2. The next ground of the motion contends that the trial judge erred in the following charge: "If the plaintiff was a passenger upon a car of the defendant company, and that you find that the plaintiff was then and there exercising ordinary care for his own safety, and that while so exercising such care was preparing to alight from the car, and you find that such preparation to alight under all the circumstances and in the manner shown by the evidence was not negligence or carelessness upon the part of the defendant, and you further find that the motorman suddenly stopped the car in such manner that it then and there threw the plaintiff to the ground, and that such stopping of the car was negligence on the part of the motorman, and the plaintiff was thereby injured as charged in his petition, and that the plaintiff was during all the time in the exercise of ordinary care and caution for his own safety, the defendant would be liable to the plaintiff." Nothing in the excerpt just quoted authorizes the criticism that it was error, because, in view of the fact that the car was not stopping at a place where passengers ordinarily alighted, and there were no special circumstances to put the motorman on notice that the plaintiff was going to alight, the sudden stopping of the car by the motorman could not be negligence, unless the motorman knew that the plaintiff was alighting; nor because it authorizes the plaintiff to recover, although he might have avoided the injury by the exercise of ordinary care; nor because the facts did not authorize such a charge. And if there were any doubt on our minds as to the correctness of the conclusions announced in regard to the charge just quoted, it would be removed upon considering that, in immediate connection therewith, the jury had been told that, in determining whether the

plaintiff and the motorman on the defendant's car had exercised appropriate care, they should decide the question in the light of the surroundings and circumstances which surrounded them at the time of the occurrence under consideration, "applying to the motorman and to the plaintiff the respective degrees of care about which the court had already charged you."

3. We are asked also to reverse the judgment of the court below, "because the court failed to charge the jury that in a case of emergency the conduct of the parties is not to be measured by the things which a man should do under ordinary circumstances, but is to be measured by the conduct of a very careful man acting under the pressure of an emergency." Even if the request contained a sound proposition of law, the court's failure to so charge the same, in the absence of a written request, is not error, especially as he had already cautioned the jury, as hereinbefore pointed out, that, in passing upon the question as to whether the motorman and the plaintiff had exercised the respective degrees of care appropriate to each, they should judge them in the light of the surroundings and circumstances as made to appear by the evidence to have existed at the time of the occurrence, which resulted in the injuries to plaintiff complained of in his suit.

Judgment affirmed. All the Justices concur.

IRVIN v. PORTERFIELD et al.

(Supreme Court of Georgia. Nov. 13, 1906.)

1. WILLS—CONSTRUCTION—DEVISE TO CLASS.

In a devise to children as a class, by way of remainder, children in esse at the death of the testator take vested interests. This rule applies to an executory devise as well as to a remainder. In case of an executory devise the class is fixed by the condition that existed at the death of the testator, and the interests of any that might die before the period of distribution vests in their heirs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, § 1502.]

2. APPEAL—REVIEW—ASSIGNMENTS OF ERROR.

Following the ruling in *Phillips v. Railway Co.*, 37 S. E. 418, 112 Ga. 197, alleged defects in a petition cannot be considered under an assignment of error that "the court erred in directing a verdict for plaintiffs for the recovery of the land."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3074.]

(Syllabus by the Court.)

Error from Superior Court, Wilkes County: H. M. Holden, Judge.

Action by L. A. Porterfield and others against C. E. Irvin. Judgment for plaintiffs, and defendant brings error. Affirmed.

Porterfield and others brought an action against Charles E. Irvin, as administrator of Barnett Irvin, to recover possession of a tract of land. The petition alleged that Seaborn Calloway died leaving a widow and

seven children surviving him, that the land in controversy was set apart to the widow as dower, and that the plaintiffs were the children of two of the children of Seaborn Calloway, who died after the death of their father, but before the death of their mother. It was alleged that, whether the widow be considered as doweress or as devisee under the will of Seaborn Calloway, she was entitled to a life estate in the land, with remainder to the children of Seaborn Calloway. The prayer was for the recovery of their several interests as set forth in the petition, and mesne profits. The abstract of title attached to the petition simply referred to the will of Seaborn Calloway. The defendant filed an answer in which he denied that any dower was legally set apart, admitted the averments as to the relationship of the plaintiffs to Seaborn Calloway, and set up title to the land under a series of conveyances originating with a deed executed February 5, 1867, from S. B. Calloway, the executor of Seaborn Calloway, to Samuel Barnett, and also pleaded title by prescription. The plaintiff, by amendment, attacked the title set up by the defendant, upon the ground that the decree upon which the deed of the executor was based was void, for the reason that it was rendered in vacation, and all parties at interest did not consent thereto. At the trial it was admitted that Seaborn Calloway died in 1861, owning 791 acres of land; that his widow, who afterwards intermarried with Bryant, had her dower set apart in the land in controversy; that the widow died December 2, 1898; that Seaborn Calloway left surviving him his widow and seven children; and that the plaintiffs are the children and heirs at law of two of these seven children who died before the commencement of the present suit. The third item of the will of Seaborn Calloway, which was in evidence, was as follows: "At the death of my wife I wish my property equally divided between my children." The defendant offered in evidence a transcript from the minutes of Wilkes superior court of the proceedings in vacation before the judge of the superior court, in which the executor represented to the judge that it was impossible to carry out the will of Seaborn Calloway, and that all persons interested in the estate who were of full age consented that a decree might be rendered in the case; and it was asked that guardians ad litem be appointed for the minors. A guardian ad litem was appointed for the minors interested, and a consent that a decree might be rendered in vacation was signed by the guardian ad litem, and by all the heirs except Martha L. Calloway. The consent was signed by her husband, Spratling. A decree was entered, authorizing the executor to sell all the lands of the estate except such as might be set apart as dower. It was admitted, when this document was offered in evidence, that Spratling had never, before or since the date of the proceeding,

reduced the interest of his wife in the estate to his possession, and that the plaintiffs had never received any of the money arising from the sale made by the executor, and that neither the plaintiffs nor their ancestor were present at the sale. The defendant also offered in evidence the deed from S. B. Calloway, as executor of Seaborn Calloway, to Samuel Barnett, to the reversionary interest in 311 acres of land, set apart as dower, this being the land in dispute. All of this evidence was rejected. There was no controversy as to the amount that should be recovered as mesne profits in the event the plaintiffs were entitled to recover an interest in the land. The court directed a verdict for the plaintiffs, and judgment was entered thereon. The assignments of error in the bill of exceptions are, in substance, as follows: (1) The court erred in rejecting the evidence of the decree above referred to; this was error because the executor had the legal authority to sell and convey the reversionary interest in the dower. (2) The court erred in rejecting the deed of the executor; this was error because the deed showed that the entire title for the land sued for passed under it to Samuel Barnett. (3) "The court erred in directing a verdict for plaintiffs for the recovery of the land." There was no motion for a new trial, and the case comes up by direct bill of exceptions, containing the assignments of error above referred to.

S. H. Hardeman, Wm. Wynne, F. H. Colley, and I. T. Irvin, Jr., for plaintiff in error. S. H. Sibley, for defendant in error.

COBB, P. J. (after stating the foregoing facts). The questions raised by the rejection of the decree and the deed of the executor are settled by the decision in *Calloway v. Irvin*, 123 Ga. 344, 51 S. E. 477 (2 and 3). Counsel for plaintiff in error appear to concede that this and other questions are settled in the case cited, and do not argue them in their brief. It is insisted, however, that the direction of the verdict was erroneous for the reason that, under the undisputed facts, the plaintiffs were not entitled to recover. It is said that, under the item of the will of Seaborn Calloway above quoted, which is the only portion of the will appearing in the record, the plaintiffs, being the grandchildren of Seaborn Calloway, whose parents died before the widow and life tenant died, cannot recover. It is contended, that, properly construed, this item of the will contains a devise to a class, consisting of the children of Seaborn Calloway; and that this class is to be ascertained, not at the death of the testator, but at the death of the life tenant. It appears, from the evidence and admissions, that Seaborn Calloway died in 1861, and that he left surviving him a widow and seven children, and that his widow died on December 14, 1898; that Eugenia, mother

of some of the plaintiffs, died in 1873, and that Jacob, father of the other plaintiffs, died on July 9, 1898. Each of their children died intestate. As a general rule, when there is a devise to a class the members of the class are to be ascertained upon the death of the testator, as the will takes effect on that date. In a devise to children as a class by way of remainder, children in esse at the death of the testator take vested interests. This rule applies to an executory devise, as well as to a remainder. The will under consideration was executed prior to the adoption of the Code, and the testator died before that time. Even if the gift would have failed under the rule of the common law, as a remainder, for the want of a particular estate to support it, it was still good at common law as an executory devise. Pritchard on Wills, § 173; Page on Wills, § 578. The devise was to a class of children of the testator. This class was fixed by the conditions that existed at the death of the testator. And the interest of any that might die before the period of distribution passed to their heirs. 30 Eng. Ency. (2d ed.) 719-721.

2. It is insisted that the direction of the verdict was erroneous for the reason that there was no allegation in the petition that there was no administration on the estate of the ancestors of the plaintiffs, or that the administrator had consented to the bringing of the suit, or that the executor had assented to the devise, and that there was no evidence on any of these points. In *Greenfield v. McIntyre*, 112 Ga. 691, 38 S. E. 44, it appears from the original record that there was an amendment to the petition, alleging no administration, and a nonsuit was granted in that case on the ground that the allegation was not sustained by the proof. In *Crummey v. Bentley*, 114 Ga. 740, 40 S. E. 765 (3), it was held that, in a suit by heirs to recover land, the failure to make the proper allegation with respect to the subject of administration could be properly presented at the trial by a request to charge. It is contended by counsel for defendant in error that the proper method of raising this question is either by special demurrer or plea in abatement, and he asks that the decision last cited be reviewed so far as it conflicts with this view. Under the view we are constrained to take in the present case, it is unnecessary to question the soundness of the decision last cited. There is no special assignment of error raising in terms the question as to the defect in the petition resulting from a failure to allege want of administration, or want of assent to the devise. There is an assignment of error that "the court erred in directing a verdict for plaintiffs for the recovery of the land." It is sought to raise this question under this assignment of error. In *Phillips v. Railway Co.*, 112 Ga. 197, 37 S. E. 418, it was held that a bill of ex-

ceptions which recited that the judge directed a verdict for the defendant, and that "plaintiffs excepted to said ruling of the court, and now excepts and assigns the same as error," raised only the question as to whether the evidence offered supported the allegation of the petition, and did not raise the question as to whether the plaintiff was, as matter of law, entitled to a recovery; that is, that, under such an assignment of error, it was for this court simply to ascertain whether the averments in the petition, without reference to their legal effect, were supported by the evidence—applying the rule in reference to nonsuits to the direction of a verdict. This decision was concurred in by six judges, has never been overruled, and is controlling in the present case. The soundness of this decision was questioned by the writer in *Kelly v. Strouse*, 116 Ga. 874, 43 S. E. 280 (10 c), 897. The writer is still inclined to the view there presented, but the decision has never been overruled, and must be followed.

Judgment affirmed. All the Justices concur.

WILLIAMS v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Nov. 12, 1906.)
RAILROADS—ACCIDENT AT CROSSING—QUESTION FOR JURY.

The evidence was of such a character as to require the submission to the jury of the issues raised therein, and it was error to grant a nonsuit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1152-1192.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Keinsey, Judge.

Action by Rachel Williams against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Arnold & Arnold, Harvey Hill, and J. C. Edwards, for plaintiff in error. John J. Strickland, for defendant in error.

ATKINSON, J. When it was shown by the evidence that the deceased came to his death by the running of the locomotive, cars, and other machinery by the agents and servants of the defendant engaged in the operation thereof, the statutory presumption specified in the Civil Code of 1895, § 2321, arose. Under the provisions of the statute just referred to, the liability of the railroad company, when once established by presumption, will remain, "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence." Under no view of the evidence could it be said that the defendant has shown its agents to have been in the exercise of all ordinary and reasonable care and diligence at the time of the commission of the

homicide. They were running through a town and over a public crossing where they had reason to anticipate the presence of persons. The deceased was where he had a right to be, in the street. The ground was mutual. The probability is that the whistle was blown only at the mile limit because that was the usual place for the engine to give the station signal, and it was running at the rate of 40 or 45 miles an hour, and the night operator, who was the agent for the defendant, testified that it was about a minute and a half from the time it blew until the train passed the depot. Without blowing another time, the servants of the defendant in charge of this train ran at this terrific rate of speed around a curve within about 300 yards from the depot and over the crossing where the deceased was struck, and not even the agent of the defendant seems to have heard the bell ring. Running at that high rate of speed, it would have been hardly possible for persons crossing the railroad track on the public crossing, in vehicles or otherwise, to escape injury from the train. The conditions were such that those operating the train did not even know that they had struck the deceased, until after the news had been telegraphed ahead by the night operator, although they were bound to anticipate his presence there. It is impossible to see how this could have happened if the servants of the defendant had been in the exercise of ordinary and reasonable care. The judgment of nonsuit could not have been awarded upon the theory that there was no negligence upon the part of the defendant.

It is insisted, however, that the plaintiff's husband, by the exercise of ordinary care and diligence upon his own part, could have avoided the consequences of the defendant's negligence, and for that reason the plaintiff could not recover. The burden of proof rests upon the defendant to establish this defense. Civ. Code 1895, § 5160; *Falkner v. Behr*, 75 Ga. 671; *City Council of Augusta v. Hudson*, 88 Ga. 599, 15 S. E. 678 (3); *Georgia Midland R. Co. v. Evans*, 87 Ga. 675, 13 S. E. 580. This, of course, may be accomplished by the plaintiff's evidence, if it so authorizes. But the rule applies only after the defendant's negligence begins, and its existence becomes apparent. *Brunswick R. Co. v. Gibson*, 97 Ga. 497, 25 S. E. 484; *Western & Atlantic R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; *Atlanta K. & N. Ry. Co. v. Gardner*, 122 Ga. 82, 49 S. E. 818 (4).

If, after the negligence of the defendant commenced, the deceased became aware thereof, or, by the exercise of ordinary care, should have become aware thereof, and then and thereafter failed to exercise ordinary and reasonable care and diligence for his own safety, there could be no recovery. The deceased's want of ordinary care is a question for the jury, concerning which they are exclusive judges, just as they are con-

cerning the negligence of the defendant. It was for the jury to say, under the particular circumstances of this case, at what time the negligence of the defendant began. When did the deceased know of it? Or when did its existence become apparent so that, under the particular attendant conditions, the deceased, by the exercise of ordinary care, should have known of its existence? The negligence could not be said to have commenced until after the train reached the blow post 400 yards from the crossing, and the engineer failed to begin slackening the speed. We are left to surmise as to when, if ever, its existence became known to the deceased, for he was never heard to say. Then we may ask: When did the negligence become so apparent that one standing where deceased was should, by the exercise of ordinary care, have known of its existence? This could only be answered by the jury.

Under the blow post law, the engineer, at a point 400 hundred yards before reaching the crossing, was bound to ring the bell, and to continue to slacken the speed of the train so as to avoid injury to persons on the crossing. Between the blow post and the crossing was a cut and a curve through which and around which the train ran. In coming through the cut, the headlight commenced to flash upon the houses, and did not straighten down the track until the curve was rounded. This point was about 700 feet from the crossing. Up to the time of rounding the curve, it could hardly be said that it was apparent to any reasonable person that the engineer did not intend to obey the blow post law by slackening the speed and keeping the engine under such control as to avoid injury to any one upon the crossing. At what time after rounding the curve it should have become apparent to one at or near the crossing that the engineer was violating the blow post law, it is difficult to ascertain. There was evidence to the effect that it was the custom of the train ordinarily not to stop at Mt. Airy. But the custom not to stop does not mean a custom not to observe the blow post law. Two of the witnesses for the plaintiff testified that in their opinion the deceased was obliged to know that the train was not going to stop, but that is a very different matter from testifying that it was apparent to the deceased that the blow post law would be disregarded by the engineer. After the train had rounded the curve and had been seen by the deceased, it may not even then have been apparent that the engineer was violating the blow post law. Before a nonsuit would have been authorized, it would be necessary for the evidence to have affirmatively shown that the negligence of the defendant was apparent, and that after it became apparent, the deceased was so wanting in ordinary care and diligence for his own safety as to permit his own negligence to become the proximate cause of the injury. The time at which

the defendant's negligence became apparent was entirely too indefinite to enable the court to hold, as matter of law, that after it did become apparent the deceased failed to exercise ordinary care and diligence for his own safety. The rule of diligence and the precaution necessary to be taken by the deceased in such a case is applied by Mr. Justice Cobb, in the case of *Western & Atlantic Railroad Co. v. Ferguson*, supra.

If it is to be said that before going on the track, it was the duty of the deceased to look for the approach of a train, that would not affect the case, because it does not affirmatively appear that he did not look; and, as already discussed, if he had looked, and had really seen the train, the evidence is too uncertain, as to when the negligence of the defendant became apparent, to show that he could then, by the exercise of ordinary care, have avoided the injury to himself. Again, there were several railroad tracks side by side which lay in his way, and which the defendant intended to cross. When he was first seen by the witnesses, and when the glare from the electric headlight first appeared upon the crossing, he was already upon one of the railroad tracks, proceeding to cross. It may be that as soon as the train rounded the curve he did see it, but such might not necessarily make it incumbent upon him to retrace his steps, or stand still. He was already in a place of danger, and it may be that diligence would have directed that he move on. He may have been more or less confused by the number of tracks and the dazzling brilliancy of the light, and he may have been more or less negligent in his movements about going on the track; but his negligence, under those conditions, might go to diminish the amount of the recovery, rather than to defeat the cause of action altogether. We are of the opinion that upon the theory of a want of ordinary care upon the part of the injured person, the evidence does not authorize a nonsuit; and the judgment of the court, being unauthorized upon either of the two theories upon which it is predicated, should be reversed.

Judgment reversed. All the Justices concur.

MOORE et al. v. MOORE et al.

(Supreme Court of Georgia. Nov. 13, 1906.)

1. EJECTMENT — ANSWER — DISCLAIMER — AMENDMENT.

Where the answer to an action for land denied possession in defendant, it was not error to refuse, at the trial term, to enter a disclaimer at the plaintiff's instance, and to allow the defendant to amend his answer by withdrawing such denial.

2. SAME—EVIDENCE—ALLOWANCE TO WIDOW.

Where, in such an action, plaintiff based his claim for the recovery upon the fact that his ancestor died in possession of the realty sued for, proof that it was set apart as a year's support to the widow of the ancestor,

and that plaintiff was not her heir, required a finding for defendant.

(a) "When a report of appraisers to set apart a year's support shows that they appraised the entire estate of the decedent, and designated the whole of it as the year's support to be allowed, failure to minutely describe in the report the realty belonging to the estate does not render the proceeding void."

(b) When a year's support is set apart out of homestead property, the homestead becomes extinguished.

(c) The fact that plaintiff's ancestor had a homestead set apart in the land sued for in no way strengthened his title thereto.

(Syllabus by the Court.)

Error from Superior Court, Banks County; R. B. Russell, Judge.

Action by W. F. Moore and others against Nancy Jane Moore and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

W. F. Moore, his five brothers, two sisters, and the children of a deceased sister, all as heirs at law of Eli Moore, deceased, brought an action to recover nine-tenths undivided interest in a described tract of land against Nancy Jane Moore and others. The sixth paragraph of the petition alleged that the defendants were in possession of the premises in question. All of the defendants answered at the appearance term. The answer of Nancy Jane Moore specifically denied the sixth paragraph of the petition, and the respective answers of all the other defendants denied generally all the paragraphs of the petition. At the trial term plaintiffs' counsel made a written motion requesting the court to grant an order to the effect that, as defendants had filed disclaimers to the land sued for, they were therefore discharged from the case, and were not entitled to defend the same except as to mesne profits. The court refused to grant such order, but permitted defendants to amend their several answers by striking therefrom all denials of paragraph 6 of the petition, which alleged that they were in possession of the premises. The case was, by consent, tried by the judge without the intervention of a jury. Judgment was rendered in favor of the defendants, and plaintiffs excepted to such judgment, and to various rulings made during the trial.

W. W. Stark, for plaintiffs in error. H. H. Perry, A. J. Griffin, and Oscar Brown, for defendants in error.

FISH, J. (after stating the facts). 1. The court did not abuse its discretion in refusing to grant the order requested by plaintiffs' counsel, as above set out, and in allowing defendants to amend their answers by withdrawing therefrom all denial of their possession of the premises. It is true that defendants were not entitled to defend the suit without admitting that they were in possession of the premises in dispute at the commencement of the action (Civ. Code 1885, § 5656), but no order has been previously taken in reference to a disclaimer, and when,

at the trial term, plaintiffs moved for such order, the court could allow defendants to amend their answers by withdrawing their denials of the allegation that they were in possession of the premises. All parties may, at any stage of the cause, as matter of right, amend their pleadings in all respects, whether in matter of form or of substance, provided there is enough in the pleadings to amend by (Civ. Code 1895, § 5097); and the court may, in its discretion, at the trial term permit a defendant to set up a new fact or defense by way of amendment, if the circumstances of the case, or substantial justice between the parties, require that such amendment be allowed. Acts 1897, p. 35. It follows that even if the withdrawal by defendants of that portion of their answers denying the allegation of the petition that they were in possession of the premises, in order that, under the pleading act (Civ. Code 1895, § 4961), such allegation might be taken as true, was tantamount to the setting up, by amendment, of a new fact or defense, it was in the discretion of the court to allow it, and the court did not abuse its discretion in doing so.

2. The plaintiffs relied for a recovery upon the admission by defendants, at the trial, that plaintiffs were all of the heirs of Eli Moore, except one; that Eli Moore died intestate, and there had never been any administration upon his estate; and upon proof that he had the land in dispute set apart as a homestead for the benefit of his wife, Nancy Moore, in 1868; that he died in possession of the premises in 1877, and that Nancy Moore died in 1903. The fact that plaintiff's ancestor had a homestead set apart in the premises in no way strengthened his title thereto, nor that of his heirs. *Latham v. Inman*, 88 Ga. 506, 15 S. E. 8 (1). It is well settled that in an action for land, brought by an heir, proof that his ancestor died intestate, seised and possessed of the premises sued for, and that there had been no administration upon his estate, makes a prima facie case for a recovery. The question, therefore, arises: Did the defendants overcome such a case in the trial under review? One of the defenses relied on by defendants was that after the death of plaintiffs' ancestor, Eli Moore, the land in dispute was set apart to his widow, Nancy Moore, as a year's support, and that, upon her death intestate, title to the same descended to her heirs, and that plaintiffs were not her heirs. The only matter involved in this defense about which there was any dispute was whether the land had been so set apart. Defendants offered in evidence the return of the appraisers appointed to set aside a year's support for Nancy Moore, made July 3, 1877, which, after reciting the fact of their appointment, etc., and that they might set apart the whole of the estate, if, upon a fair valuation, it did not amount to more than \$500, proceeded as follows: "In investigating the circumstances of said estate and family and the property

produced to us, there was 100 acres of land at \$400; one cow and calf, \$12; seven head of sheep, \$7; one sideboard and one cupboard, \$2; three chairs and one table, \$1.50; one wash pot and tub, \$1.25. Said estate upon a fair valuation made by us, and we were duly sworn before each other to make a true inventory or valuation of said estate, and we certify that the foregoing is a true and perfect inventory of all the estate of said Eli Moore, deceased, as was produced to us by Nancy Moore, widow of said deceased, and we hereby set apart the whole of said estate to Nancy Moore, widow of Eli Moore, deceased, for a twelvemonth's support." This return was admitted in evidence over the objection of the plaintiffs "that the same was void for uncertainty, as there was no description of the land purported to be set aside as a twelvemonth's support." An exception by plaintiffs to this ruling is one of the assignments of error presented for adjudication.

The record of the return of appraisers to set aside a year's support renders it the judgment of the ordinary (*Fulghum v. Fulghum*, 111 Ga. 637, 38 S. E. 602, and cit.), and where, by such a judgment, it appears, in general terms, that the whole of the property of the decedent was set apart as a year's support, the judgment is not void because of the want of a minute description therein of realty belonging to the estate, but the subject-matter of the judgment may be shown by any competent evidence. *Stringfellow v. Stringfellow*, 112 Ga. 494, 37 S. E. 767; *Allen v. Lindsey*, 113 Ga. 521, 38 S. E. 975. It will be seen from the return of the appraisers, now under consideration, that they, after stating that they were to set apart the whole of the estate, if it "did not upon a fair valuation amount to more than \$500," and after making an itemized inventory and valuation of the property of the estate, concluded the return by declaring, "and we hereby set apart the whole of said estate to Nancy Moore, widow of Eli Moore, deceased, for a twelvemonth's support." They valued each item of the property separately, and then found that the aggregate value did not exceed \$500, and in accordance with their duty, under such circumstances, set the whole of the estate apart as a year's support. The mere fact that the return shows that the widow pointed out to the appraisers the property of the estate which they inventoried, valued at less than \$500, and then set apart to her as the whole of the estate, does not invalidate the return, nor show that the property set apart is not described as being all of the estate. Our statute, in reference to the setting apart of a year's support, does not provide how or from whom the appraisers appointed for this purpose are to ascertain the facts necessary to an intelligent and proper discharge of the duty incumbent upon them. No formal procedure is prescribed by which they are

to be guided and governed in making their investigation, preliminary to deciding the question submitted to them, and making their return to the ordinary. They, as discreet men, are at liberty to get the requisite information from such sources as they may deem most trustworthy; and when they have obtained it, "if it shall appear upon a just appraisal of the estate that it does not exceed in value the sum of \$500, it shall be the duty of the appraisers to set apart the whole of said estate," etc. Civ. Code 1895, § 3465. If, in making their return, the appraisers have acted upon insufficient or misleading information as to the property owned by the decedent at the time of his death, or as to any other relevant fact upon which their return may in part be predicated, the law provides a remedy for any person whose legal rights may be injuriously affected thereby, by giving to such person the right to caveat the return; and, upon a trial of the issue thus raised before the ordinary, all the relevant facts may be developed by competent and legal evidence introduced for this purpose, and the return, if incorrect and improper, under the facts disclosed, may be corrected.

The finding or return of the appraisers is *prima facie* correct, whatever may have been the source of the information upon which they based it, unless it shows upon its face that they acted in reckless disregard of their duty. Hence, if they find that the schedule of the property which they set apart as a year's support embraces all the property of the estate, this is presumed to be true, until the return is legally set aside. It follows that if, as in the present case, their return shows that they found that the whole property of the estate consisted of a designated number of acres of land and certain designated and itemized articles of personal property, all of which they valued at less than \$500 and set aside as the year's support, the effect of the return, in so far as the question of the sufficiency of the description of the land is concerned, is to describe the land as being all the land belonging to the estate. The mere fact that the return may indicate that, in reaching the conclusion that the land which they examined, valued and set apart was all of the real estate which the decedent owned at the time of his death, they acted upon information derived from a given source, cannot affect the description of the land given in their return. It is still in effect described in the return as all of the land belonging to the estate. If the whole of the estate of Eli Moore was set apart to his widow as a year's support, as we think the return shows, then it follows that a judgment in favor of the defendants was demanded, because plaintiffs based their claim for a recovery on the presumption that the land sued for belonged to their ancestor, Eli Moore, by reason of the fact that he was in possession of the

same at the time of his death; and even granting that he did own it when he died, as all of his estate was set apart to his widow as a year's support, this land was necessarily included as a part thereof. This being true, title to this land vested in the widow (Civ. Code 1895, § 3468), the homestead being merged into the year's support (*Bardwell v. Edwards*, 117 Ga. 824, 45 S. E. 40, and *cit.*); and upon her death it descended to her heirs at law, and not to the plaintiffs, who are heirs of Eli Moore, but not of his widow, Nancy Moore, their stepmother. This ruling effectually disposes of the case, and it is, therefore, not necessary to deal with the other defenses relied on by defendants.

Judgment affirmed. All the Justices concur.

MILLER & CO. v. MCKENZIE.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. EVIDENCE—HEARSAY EVIDENCE.

Hearsay evidence has no probative value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 2430.]

2. SAME—DECLARATIONS OF AGENT.

The declarations of an agent, when not made *dum ferret opus*, or as a part of the res gestæ, are hearsay.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 887.]

3. APPEAL—REVIEW.

When the rules above laid down are applied in the present case, the verdict as to the contested issue was unauthorized by the evidence.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by George M. McKenzie against Miller & Co. Judgment for plaintiff, and defendants bring error. Reversed.

The plaintiff instituted by attachment an action of assumpsit against Miller & Co., a firm whose members were nonresidents of the state. The declaration is in part as follows: "(2) Petitioner shows that said defendants are indebted to him in the principal sum of \$1,882.57, besides interest, by reason of the following facts: On January 25, 1904, your petitioner bought of the defendants 10,000 bushels of wheat at 91½ cents per bushel, and defendants executed to petitioner on said date their contract for the same. Subsequent to said purchase, petitioner decided to sell said wheat, and, on the 16th day of February, 1904, he gave the defendants an order to sell the same, and the same was executed for him by defendants at 96½ cents per bushel, thereby netting to petitioner, after the payment of defendants' commissions, the sum of \$500. (3) On the 17th day of February, 1904, petitioner bought, through defendants, 10,000 bushels of wheat at 97½ cents per bushel. Subsequently petitioner decided to sell the

same, and placed with defendants his order for that purpose, and when the same was executed by the defendants at 104½ cents per bushel, thereby netting to petitioner after the payment of defendants' commissions, the sum of \$700. (4) In addition to the sums aforesaid, petitioner shows that he had with the defendants a balance on account, cash placed with them, of \$182.57, making a total of \$1,882.57." The defendants answered, denying the allegations contained in the above paragraphs. On the trial of the issues, the evidence for the plaintiff consisted of his own testimony in connection with certain exhibits, as follows: The item of \$182.57 in the account sued on was the balance due him on prior transactions according to a statement given him by the bookkeeper in the Atlanta office of the defendants. In reference to the other two items, the plaintiff introduced two letters from Miller & Co. to himself—one dated at New York, January 25, 1904, and the other at the same place, February 17, 1904, both beginning: "We have this day bought for your account and risk, subject in all respects to the rules, bylaws, and customs of the Chicago Board of Trade;" then followed a statement of the number of bushels, each letter, respectively, giving the numbers and prices as set out in the plaintiff's declaration. The plaintiff further testified that he had given orders for the sale of the wheat through the agents of the defendant in Atlanta, and later, upon inquiry, had been told by such agents that the two sales had been made at the respective figures set forth in the petition, and that he was due the respective amounts sued for. He further stated that he had a memorandum from Miller & Co. that they had sold the first quantity of wheat, and that it netted him the \$500 claimed therefor. He also introduced in evidence the order he had given for the sale of the second quantity. At this point the plaintiff's evidence closed, and the defendants introduced their agent in charge of the Atlanta office, who testified merely as to the second order to sell, admitting that it had been received by him from the plaintiff and transmitted to the home office of the defendants in New York, but stated that the order had not been executed by them. On this evidence, the judge charged the jury to find a verdict for the plaintiff for \$182.57 claimed as balance due from previous transactions, and for the \$500 claimed from the sale of the first quantity of wheat; but as to the \$700 claimed from the sale of the second quantity of wheat, he put the question to the jury as to whether or not the order for the sale given by the plaintiff had in fact been executed by the defendants and made the plaintiff's right to recover this amount dependent upon an affirmative answer to this question. The jury returned a verdict for the full amount sued for. The defendants made a motion for a new trial, some of the special grounds of which are in substance

as follows: (1) It was error to admit in evidence the letter of January 25 from the defendants to the plaintiff in reference to the purchase of the first quantity of wheat, because "the said contract introduced in evidence varied from the contract set out in plaintiff's declaration, in that the contract introduced in evidence was one by which the defendants purchased as agents for the plaintiff, while the contract set out in the pleadings was one by which the plaintiff purchased directly from defendants, as vendors." (2) It was error to admit in evidence the letter of February 17th from the defendants to the plaintiff in reference to the purchase of the second quantity of wheat, because "the contract offered in evidence varied from the contract set out in plaintiff's declaration in that the contract offered in evidence was one by which the plaintiff purchased directly from the defendants as vendors, while the contract set out in plaintiff's declaration is a contract by which the defendants acted as agents for the plaintiff." (4, 5) It was error to refuse to charge the jury that the plaintiff had not established his claim to the \$700, alleged to be due under the second transaction, and instead to leave the matter for their determination. The motion for new trial was overruled, and the defendants excepted.

Smith, Berner, Smith & Hastings, for plaintiffs in error. Clay & Blair and Tye & Bryan, for defendant in error.

ATKINSON, J. (after stating the facts).

1. Under the view we take of the matter, the question of variance between the averments and the proof as to the \$700 transaction becomes immaterial. Let the petition be construed as contended by counsel for defendant in error, and the verdict is still unauthorized by the evidence. It was necessary, under either construction of the petition, that the plaintiff should show that there had been a sale of the wheat in conformity to his order. He swore that he had given the order to sell. He did not know and did not pretend to know whether a sale had taken place. He was positive in his assertion that he had given the order to sell to the agents of the defendants at their place of business in Atlanta. This agent swore that the order had never been executed. It is said that this evidence is to be disregarded because it is palpably hearsay, as the agent was in Atlanta and the order was to be executed in Chicago, and what was or not done was manifestly beyond his knowledge, except as derived from information imparted by others. Let this evidence be treated as hearsay and the testimony of the agent entirely eliminated. The plaintiff contends that the sale is proved by the declarations of the agents in charge of the Atlanta office; one of whom admitted that the several amounts claimed were correct, and the other saying that he had in-

vestigated the matter, and was satisfied that the amounts were correct and ought to be paid, and that he would see that they were paid, or he would no longer remain in the employ of the defendants. The declarations in each instance were after the transaction was complete, and not in any sense made during its progress. They were not made dum ferveat opus. They were not a part of the res gestae. They were merely hearsay, and hence had no probative value. *Luquire v. Lee*, 121 Ga. 635, and citation, 49 S. E. 834; *Moultrie Lumber Co. v. Driver Lumber Co.*, 122 Ga. 26, and citation, 49 S. E. 729; *Central R. Co. v. Maltsby*, 90 Ga. 630 (4), 16 S. E. 953; *Claflin v. Ballance*, 91 Ga. 411 (2), 18 S. E. 309.

The judge should have granted a new trial on the ground that the verdict on the issue submitted was unauthorized by the evidence.

Judgment reversed. All the Justices concur.

OGLETREE v. OGLETREE et al.

(Supreme Court of Georgia. Nov. 13, 1906.)

1. APPEAL—REVIEW—JUDGMENT FAVORABLE IN PART.

When a demurrer embracing several grounds is sustained in part, and one of the parties, desiring a review of the ruling adverse to him, sues out a bill of exceptions, the correctness of so much of the judgment as is in his favor does not come under review; and where no cross-bill of exceptions is sued out by the adverse party, so much of the judgment on the demurrer as is not under review will be treated as correctly defining and applying the law of the particular case on the matters involved.

2. INSURANCE—CHANGE OF BENEFICIARY.

Where a policy of insurance named A. as beneficiary, and stipulated that there could be no change of the beneficiary without A.'s consent, and A. in writing subsequently released all her interest, present and prospective, to the insured, who then assigned the policy to B. on condition that he reserved the right to change the beneficiary (the insurance company assenting to this assignment), and afterwards the insured, with the consent of the insurance company, assigned the policy to C., who was the holder thereof at the death of the insured. *Held*, that B.'s interest in the policy by virtue of the written assignment was subject to the right of the insured, during his lifetime, to substitute another beneficiary in his stead, and that B.'s interest in the policy was defeated by the subsequent assignment by the insured of the policy to C.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 471-473, 483.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. L. Pendleton, Judge.

Action by Lowell C. and Wilber P. Ogletree, by their next friend, against the Home Life Insurance Company and Joshua P. Ogletree. Judgment for plaintiffs, and defendant Ogletree brings error. Reversed.

The petition of Lowell C. and Wilber P. Ogletree, suing by their next friend, Edna F. Ogletree, named the Home Life Insurance Company of New York and Joshua Pearce

Ogletree as defendants, and set forth the following allegations: Some seven years ago the father of petitioners, Quillian P. Ogletree, made application to the insurance company for a policy on his life, and a policy for \$1,000 was issued in which his wife, Edna F. Ogletree, was named as beneficiary. The policy was taken out at her instance and request, and up to 12 months ago she paid or furnished the money with which to pay the premiums thereon. Then realizing her inability to pay future premiums, she agreed to transfer her interest in the policy to her two children, the petitioners, upon the understanding and with the assurance of her husband that he would continue the policy in force by payment of the premiums, and that the policy should not be assigned nor the beneficiaries changed thereafter. Application was accordingly made to the insurance company on August 6, 1903, to make the desired change in the policy, and petitioners became the beneficiaries thereunder. About August 6th of the following year, Quillian P. Ogletree applied to the insurance company to again change the policy, so as to name his father, Joshua Pearce Ogletree, as the beneficiary, and, on August 18th, or thereabouts, the company complied with this request. Quillian P. Ogletree died on August 28, 1904. This last change of beneficiaries was made without the knowledge or consent of petitioners or of Edna F. Ogletree, was unlawful and fraudulent, and was done with intent to defeat the rights of petitioners. The defendant Joshua Pearce Ogletree was fully cognizant of all the facts in connection with the policy. He is now attempting to collect from the insurance company the amount due on the policy; and if successful, petitioner's rights will be defeated, and they will be without remedy, since he is wholly insolvent.

The prayers of the petition were that the insurance company be enjoined from paying out the proceeds of the policy, that a receiver be appointed to make proper proofs of death, and collect the amount due on the policy; that Joshua Pearce Ogletree be restrained from taking further steps to collect its proceeds, and the petitioners be decreed to be entitled to the fund. By consent of parties, the insurance company was allowed to pay the proceeds of the policy into court, and be thereupon dismissed as a party defendant. The other defendant demurred to the petition. Two of the special grounds of his demurrer were sustained, but the following grounds were overruled, viz.: (1) No cause of action is set forth; (2) no copy of the insurance policy is set forth or attached to the petition; and (3) it does not set forth "wherein said change was fraudulent, nor in what the alleged fraud consisted, nor in what respect the said change of beneficiary is unlawful; nor is any reason shown why the insured in said policy could not change the beneficiary at will." By amendment to his

demurrer, the defendant pointed out wherein the petition was in certain respects indefinite. The plaintiffs, by leave of the court, amended their petition by setting forth the following additional allegations: After the filing of the suit Edna F. Ogletree married J. O. Hutchinson. Upon the faith of her agreement with Quillian P. Ogletree, which was verbal, and being led by him to believe that he could not afterwards change the beneficiary or assign the policy even if he so desired, she released her rights under the policy, by a writing dated July 24, 1903, in order that petitioners might be therein named as beneficiaries, and on August 6, 1903, he made a written assignment of the policy to them. She did not know how the policy had been transferred, but was told by him that the change in beneficiaries thereunder had been made as agreed. On August 18, 1904, he attempted to further assign the policy to Joshua P. Ogletree, his father, who had seen the policy, knew the terms thereof, and further knew that petitioners were the rightful beneficiaries thereunder. The written assignment to them contained this clause: "Reserving the right of revocation by giving written notice to the Home Life Insurance Company, and returning the assignment for cancellation." It further recited that it was made subject to the terms and conditions expressed in the policy; but the insured, under the terms of the policy, did not reserve the right to change the beneficiary or to otherwise assign the policy without the consent of the beneficiary or assignee, as the case might be. The policy is in the possession of the defendant Ogletree, and for that reason petitioners cannot attach a copy to their petition. The above-quoted clause of the written assignment to them was "unlawful and invalid," because (1) it is at variance with the terms of the policy and directly opposed to the same; (2) it is uncertain, insufficient, and too indefinite to constitute a valid clause of reservation of power to revoke the assignment in law; and (3) is in violation of the agreement with the original beneficiary. Neither she nor the petitioners had any knowledge of this clause of the assignment, and that clause is void, for the further reason that it seeks to add to the terms of the original contract of insurance, is in violation of the agreement before mentioned, and in fraud of the rights of petitioners under the policy. This clause was inserted in the body of the assignment without the knowledge or consent of Quillian P. Ogletree; he was not aware that the assignment contained such a clause, and it was his intention to assign the policy to petitioners absolutely and without reservation, in order that they might become the sole beneficiaries thereof. If the insertion of this clause was not, as claimed, the result of a mistake, then it was fraudulently inserted by Quillian P. Ogletree, who had represented to Edna F. Ogletree that he would make peti-

tioners the beneficiaries under the policy, if she would release her rights therein. On August 3, 1904, he was appointed guardian of certain property of petitioners and qualified as such; the property referred to in his application to the ordinary being described as a policy of insurance on his life in the Home Life Insurance Company of New York.

Attached to the plaintiffs' amendment were copies of the written assignment made to them, together with the release signed by the original beneficiary, and the subsequent assignment of the policy to the defendant Ogletree. Plaintiffs prayed that should the court hold that the written transfer to them was not fully effective, they should be permitted to have it reformed and made absolute. The amendment was allowed over the objection of the defendant, who filed objections *pendente lite* to its allowance. The defendant also demurred to the petition as amended, on the grounds (1) that no cause of action was set forth; (2) because the contract sought to be enforced was not in writing; and (3) because that contract, being between Edna F. Ogletree and the insured, could not be enforced by the plaintiffs, neither of whom was a party thereto. Error is assigned upon the overruling of the defendant's demurrers, and upon the allowance of the amendment to the plaintiffs' petition.

W. H. Terrell, for plaintiff in error.
Payne, Jones & Jones, for defendants in error.

EVANS, J. (after stating the facts). The petition, as amended, presented two theories as a basis of recovery. The first is dependent upon the effect to be given to the assignment of the policy by the insured to the plaintiffs, wherein it is stipulated that the assignor reserves to himself "the right of revocation by giving written notice to the Home Life Insurance Company and returning the assignment for cancellation," and that "the assignment is made subject to all the terms and conditions expressed in said policy." It is contended that this reservation was inoperative and of no effect, because at variance with the express terms of the policy. The second theory relied on for a recovery was that the release executed to the insured by Mrs. Edna F. Ogletree of all of her rights under the policy was made upon the consideration that the policy of insurance should be unconditionally transferred to the plaintiffs, and that the insured, in fraud of the rights of the plaintiffs, subsequently transferred the policy to the defendant, who had notice of the fraud. The grounds of the demurrer which the court sustained related to the validity of the oral agreement between Mrs. Ogletree and the insured, relative to the assignment of the policy to the plaintiffs, and their right to invoke this agreement, to which they were not parties. There is no complaint as to

the correctness of the judgment sustaining these special grounds of the demurrer; the plaintiffs having acquiesced therein, instead of suing out a cross-bill of exceptions.

1. The order sustaining these grounds of the demurrer recites that "all reference to the contract or agreement mentioned is stricken." The contract or agreement referred to in the order is that between Mrs. Ogletree and her husband, by which she was to surrender her rights as to the nominated beneficiary in consideration that the plaintiffs be made the assignees of the policy. The fraud relied on by the plaintiffs was that this contract had been ignored, and the defendant had been fraudulently substituted as beneficiary. The effect of the ruling of the court, which is unexcepted to, was to eliminate from the plaintiffs' petition the second theory relied on by them for a recovery. When a demurrer embracing several grounds is sustained in part and overruled in part, and one of the parties, desiring a review of the ruling adverse to him, sues out a bill of exceptions, the correctness of so much of the judgment as is in his favor does not come under review; and, if the adverse party desires to bring the same under review, he must sue out a cross-bill of exceptions.

2. As the policy was not before the trial judge, he was bound to take as true the allegations of the plaintiffs that the policy, as originally issued, stipulated that there could be no change of the beneficiary therein named without her consent. But she did consent, and in writing released all her interest, present and prospective, to the insured. He thus became the sole and absolute owner and holder of the policy. The insured then assigned it to the plaintiffs on condition that he reserved the right to change the beneficiaries, and the company assented to this assignment. The contract may reserve to the insured the right to change the beneficiary at will, and when this is done the nominated beneficiary acquires no vested interest in the policy or its proceeds, and, until the death of the insured, has a mere expectancy. *Elliott on Ins.* § 355; *Nally v. Nally*, 74 Ga. 669, 58 Am. Rep. 458. Accordingly the plaintiffs, who acquired an interest in the policy only by virtue of the written assignment to them, took it subject to the right of the insured during his lifetime to substitute another beneficiary in their stead.

As the theory of fraud was eliminated from the case by the judgment sustaining two of the grounds of the demurrer, and as the plaintiffs, under the assignment to them, took no vested interest in the policy or its proceeds, the judgment overruling the general demurrer to their petition must be set aside.

Judgment reversed. All the Justices concur.

LOUDERMILK et al. v. STEPHENS.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. APPEAL—PRESUMPTIONS—CERTIORARI—ISSUE OF WRIT.

When, in the transcript of a record duly certified and transmitted to this court, there appear copies of the usual certiorari bond and certificate as to the payment of costs, but with no entry of filing thereon, each bearing a given date, and there also appears a copy of a writ of certiorari in the usual form, bearing a date subsequent to that of the papers first referred to, there will be a presumption that the clerk has performed his duty in accordance with the law, and that the writ was not issued until after the papers first referred to had been filed, and that such papers were filed in due time.

2. SAME—GRANT OF NEW TRIAL.

The second grant of a new trial, in a case on certiorari from a justice's court, will not be reversed, when the evidence in support of the verdict is weak and unsatisfactory, and the overwhelming preponderance of the evidence is against the verdict, and it is manifest that the interests of justice require another hearing.

[Ed. Note.—For cases in point, see *Cent. Dig.* vols. 9, Certiorari, § 206.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by T. A. Loudermilk and others against R. D. Stephens. Judgment for plaintiffs before a justice, and defendant brought certiorari. From an order refusing to dismiss the writ and granting a new trial, plaintiffs bring error. Affirmed.

J. C. Edwards, for plaintiffs in error. J. B. Jones and Robt. McMillan, for defendant in error.

COBB, P. J. The case was tried in a justice's court before a jury on July 25, 1903, and resulted in a verdict for the plaintiffs. The defendant applied for a writ of certiorari on August 21, 1903. The petition was sanctioned by the judge on August 29, 1903. The petition was filed in the office of the clerk of the superior court on September 16, 1903. There appear in the record immediately following the affidavit to the petition, and preceding the entry of filing by the clerk, a certiorari bond and a certificate as to the payment of costs; each dated October 13, 1903. The writ of certiorari was issued February 17, 1904. A motion was made to dismiss the certiorari upon the ground that it did not appear that either the certiorari bond or the certificate as to the payment of costs had been filed in the clerk's office. The date of each being subsequent to the date of filing entered upon the petition, it is apparent that they could not have been filed with the petition, if the dates appearing on the papers are correct. The writ of certiorari contained the usual recitals that the applicant "has complied with the requirements of the law in the case of application for certiorari."

The petition for certiorari must be presented within 30 days, but if presented within that time and sanctioned, it may be filed at

any time within three months from the date of the judgment complained of. *Carson v. Forsyth*, 97 Ga. 258, 22 S. E. 955. In the present case the petition seems to have been presented within 30 days, but it was not sanctioned until after the expiration of 30 days, but no question was raised as to whether both the presentation and the sanction must be within 30 days. The motion to dismiss was predicated solely upon the ground that the bond and the certificate as to costs had not been filed in the clerk's office. Unless the petition, the certiorari bond, and the certificate as to the costs are all filed with the clerk within three months after the date of the judgment complained of, the clerk has no authority to issue the writ, and, if he does so, it is void. While it does not appear at what time the certiorari bond and the certificate as to costs were filed, it does appear that these papers have reached the clerk's office, and they are certified by him as part of the record in this case. Having been thus shown to be in the clerk's office, the presumption is that the clerk has discharged his duty in reference to the case; that is, that he issued the writ after these papers were filed, and that they were filed in due time.

2. This was the second grant of a new trial on certiorari from the justice's court. There is some evidence to authorize the verdict, but it is weak and unsatisfactory. The overwhelming preponderance of evidence is against the verdict. Under such circumstances we will not reverse the judge for granting a second new trial.

Judgment affirmed. All the Justices concur.

GENERAL SUPPLY CO. v. HUNN et al.
(Supreme Court of Georgia. Nov. 9, 1906.)

1. MECHANIC'S LIEN—WHEN ACQUIRED—MATERIALS FURNISHED SUBCONTRACTOR.

A materialman who furnished material for the improvement of real estate to a subcontractor, who has no contractual relation with the owners of such realty, does not thereby acquire a lien upon the property so improved. The case of *Heard v. Holmes*, 38 S. E. 393, 113 Ga. 159, in so far as it conflicts in principle with this decision, is hereby overruled.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 141.]

2. SAME—PETITION—DEMURRER.

Consequently, where the petition to foreclose a materialman's lien upon certain real estate owned by the defendants alleged that the plaintiff had furnished material for improvements thereon to a subcontractor of the person employed by the defendants to make the improvements, the court did not err in sustaining the demurrer to the petition, on the ground that it set forth no cause of action.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mechanics' Liens, § 141.]

(Syllabus by the Court.)

Error from Superior Court, Fulton County;
J. T. Pendleton, Judge.

Action by the General Supply Company

against F. E. Hunn and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The General Supply Company brought an action against F. E. Hunn, Herman Seydel, and J. G. Smith to foreclose a materialman's lien, which it claimed against real estate of Hunn and Seydel, by reason of its having furnished plumbing material to Smith, which was used in improving the property. The second paragraph of the amended petition alleged "that said J. G. Smith was a subcontractor employed to do the aforesaid plumbing, and that said material was furnished to him as such;" that "the original contractor employed by said F. E. Hunn and Herman Seydel was B. A. Harris, doing business as the 'Co-operative Building & Construction Company,' and that the said B. A. Harris, doing business as aforesaid, employed the said J. G. Smith as a subcontractor to do the aforesaid plumbing, and that, as such subcontractor, the said material was furnished to J. G. Smith." Hunn and Seydel demurred to the petition on the ground, among others, that no cause of action was set forth as against them. The demurrer was sustained as to them, and the plaintiff excepted.

W. O. Wilson, for plaintiff in error. A. A. & E. L. Meyer and Rosser & Carter, for defendants in error.

ATKINSON, J. The plaintiff, under the Civil Code of 1895, § 2801, par. 2, as amended by the act of 1897 (Acts 1897, p. 30) and the act of 1899 (Acts 1899, p. 33), seeks to foreclose a lien for the value of certain material furnished by it which went toward the improvement of the property of the defendants. This court has construed this law as operating to give a lien only to materialmen who have furnished material for the improvement of real estate "to one who occupied the legal relation of a contractor, or to one who had some contractual relation with the true owner in connection with the improvements to be made." See *Pittsburgh Glass Co. v. Peters Co.*, 123 Ga. 726, 51 S. E. 725; *Prince v. Neal-Millard Co.*, 124 Ga. 884, 53 S. E. 461. In the present case the petition alleges that the material was furnished to one Smith, a subcontractor employed by one Harris, who was himself the "original contractor" engaged by the defendants to do the work. It is not pretended that Smith occupied the legal relation of contractor to the defendants, or that he was under any contractual relation whatsoever with them. On the contrary, it is evident from the petition that Smith's contract was with Harris, the principal contractor, only, and that the defendants were not parties to that contract nor bound in the slightest degree by it. The petition was therefore demurrable.

Leave was granted to review the case of *Heard v. Holmes*, 113 Ga. 159, 38 S. E. 393,

and, upon consideration, it is overruled in so far as it conflicts with the decision here made.

Judgment affirmed. All the Justices concur.

RAWLINS et al. v. MITCHELL, Judge.

(Supreme Court of Georgia. Nov. 28, 1906.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS—MANDAMUS—TO JUDGE.

Upon an application for mandamus to compel a judge to certify a bill of exceptions assigning error upon his refusal to entertain a motion to set aside a judgment in a criminal case, presented at a term subsequent to the term at which the judgment was rendered, and after an affirmance by the Supreme Court of a judgment overruling a motion for a new trial, the merits of the motion to set aside the judgment will be inquired into, and a mandamus nisi will not be granted when it appears that the motion to set aside the judgment is wholly without merit.

2. SAME—PRESENCE OF ACCUSED—ARREST OF JUDGMENT.

It has never been the practice in this state to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered, and when the sentence was pronounced, and from arraignment to sentence, or that the prisoner was asked, before sentence, whether there was any reason why sentence should not be pronounced upon him. The silence of the record as to such facts is therefore no cause for arresting the judgment or setting it aside.

(Syllabus by the Court.)

Application by J. S. Rawlins and others for writ of mandamus to R. K. Mitchell, Judge. Writ denied.

John R. Cooper, for applicants.

COBB, P. J. 1. When a case has been tried in the superior court and a verdict rendered therein, the losing party is entitled to make a motion for a new trial, and to bring to this court for review the decision of the judge overruling the motion, or in some cases, he is authorized to file a direct bill of exceptions, complaining of rulings pendente lite and of the final judgment in the case. When a bill of exceptions in such cases is tendered to the judge, and the averments therein are true, it is the duty of the judge to certify the same, in order that the case may be brought to this court, according to the usual practice governing such matters. When, in such a case, the judge refuses to certify the bill of exceptions, and an application for mandamus is made to this court to compel him to certify the same, the only question that will be determined on such application is whether the bill of exceptions is in due form, and it is shown by the petition for mandamus that the averments therein are true. The merits of the assignments of error therein will not be dealt with. In such cases it is immaterial whether the assignments of error are meritorious. The case must reach the Supreme Court in the ordinary way. *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917. While in the case just cited some

very broad language is used by Mr. Presiding Justice Lumpkin in the opinion, the case that he was then dealing with must be kept in mind, and it was a case where the first bill of exceptions after a trial and verdict was tendered to judge. It is worthy of remark, in passing, that it afterwards developed that the bill of exceptions presented a meritorious case, the judgment being reversed when the case was finally passed upon by this court. See *Taylor v. State*, 108 Ga. 384, 34 S. E. 2. It may be laid down, then, as a general rule, that it is the duty of the judge of the superior court to certify the first bill of exceptions that is tendered to him after a trial and verdict in the case, and that this court will not, on an application for mandamus to compel such judge to certify the bill of exceptions, inquire into the merits of the case. In *Cox v. Hillyer*, 65 Ga. 57, Mr. Chief Justice Warner said in the opinion: "The general rule undoubtedly is that when a motion for a new trial in a criminal case has been overruled in the court below and brought to this court on a bill of exceptions, and the judgment of the court below is affirmed, no second bill of exceptions in that case can be allowed or granted." The learned chief justice then remarked that the only exception to this rule is in a case of extraordinary motion for a new trial. This language is too broad; for there may be other exceptions to this general rule, as will be seen from what will hereafter be said. In the case of *Malone v. Hopkins*, 49 Ga. 221, the rule was laid down, that when a judge refuses to sign a bill of exceptions complaining of a ruling of the judge upon an extraordinary motion for a new trial, the Supreme Court will not by mandamus compel the judge to sign the bill of exceptions when it appeared that the grounds of the motion were without merit. This rule has been steadfastly adhered to. See *Harris v. Roan*, 119 Ga. 379, 46 S. E. 433 (6), and citations.

It will be seen that there are two classes of cases relating to the duty and authority of this court upon an application for a mandamus to compel the judge to certify to a bill of exceptions. If it is the first bill of exceptions after verdict, the merits of the case will not be considered upon the application for mandamus. If it is upon a ruling relating to an extraordinary motion for a new trial the merits of the motion will be inquired into, and the mandamus will not be granted unless the motion is based upon meritorious grounds. The case now under consideration is not a case of the first bill of exceptions after verdict; for two of the applicants have already prosecuted two writs of error to this court, and the other applicant has prosecuted one. Neither is this case one relating to an extraordinary motion for a new trial; but it is to a ruling relating to a motion to set aside a judgment made after the term at which the judgment was rendered, but within three years from the date of the judgment. Shall a case of this character be classed with

those which are embraced in the rule in *Taylor v. Reese*, supra, or shall it be classed with those embraced in the rule laid down in *Malone v. Hopkins*, supra, and the numerous cases following it? The reason at the foundation of the latter class of cases is undoubtedly that there must be a termination of a criminal case; and while no party will be deprived of a hearing on the merits of his case, no matter what may be its character, whether an extraordinary motion for a new trial, motion to set aside a judgment, or other proceedings after verdict, the judge of the superior court will not be compelled to certify a bill of exceptions in such proceedings unless it is made to appear to this court that the applicant has been denied some right guaranteed to him by law. While he is not given the right to be heard on a bill of exceptions coming to the Supreme Court in the ordinary way, he will be heard on the merits of his motion, whatever it may be, when the application for mandamus is made, and any rights guaranteed him under the law of the land will be vouchsafed by this court. But the case will not be prolonged by requiring the bill of exceptions to be certified, when it is apparent from the averments of the petition for mandamus and the bill of exceptions that an affirmance of the judgment complained of would in any event be the inevitable result. In such cases, if there is no merit whatever in the motion made, or in the proceedings instituted in the superior court, the judge will not be compelled to certify the bill of exceptions in order that the case may be brought to this court. If there is merit, the judge will be compelled to certify the bill of exceptions. No matter what may be the delay incident thereto, the party will be heard in the ordinary and usual way. When there is no merit the mandamus nisi will be refused. When there is merit the mandamus nisi will be issued. If the case presented by the application is close and doubtful, the court in its discretion may grant a mandamus nisi.

When these rules are applied, the defendant is not deprived of any right under the law, or of the privilege of being heard as to the existence of any right claimed. He may make his case in his application for mandamus, and if he fails to make a case which is meritorious, the refusal of the mandamus nisi is a judgment by the very court which would determine the question in the event the bill of exceptions was certified and the case brought up in the ordinary way. In passing upon the question of whether the mandamus nisi should issue in the present case, we think it our duty to inquire into the merits of the motion filed by the applicants in the superior court. There is nothing in the ruling now made which conflicts with the decision in *Sears v. Candler*, 112 Ga. 381, 37 S. E. 442. That was an application for an inquisition of insanity after sentence, and the judge was required by mandamus to sign

the bill of exceptions complaining of his refusal to entertain the application. Such an inquisition is no part of the trial of the accused, and has no connection with the same. See, in this connection, *Baughn v. State*, 100 Ga. 554, 28 S. E. 68, 38 L. R. A. 577 and citations; *Cribb v. Parker*, 119 Ga. 298, 46 S. E. 110. The ruling now made is in line with the view of the majority of the court in *Willis v. Felton*, 119 Ga. 634, 46 S. E. 857. The writer dissented in that case on the idea that the case of *Taylor v. Reese*, supra, was controlling; but, upon further reflection and investigation, he is of the opinion that that case did not go to the extent then contended for, and he is therefore prepared to concur in the view above set forth.

2. It is alleged in the motion to set aside the judgment that the judgment is invalid, for the reason that it does not appear upon the face of the record in the case, or upon the minutes of the court, that the defendants or their counsel were present in court at the time of the rendition of the verdict, or at the time of the imposition of sentence, or that they were present in court during every stage of the case from arraignment to sentence. The motion does not allege that the defendants or their counsel were absent at any time during the progress of the case from its inception to its conclusion. The contention is that the sentence is invalid unless it affirmatively appears from the record that the defendants and their counsel were present at every stage of the case. In *Smith v. State*, 60 Ga. 430, it was said: "It has never been the practice in this state to enter on the record the fact that the prisoner and his counsel were present when sentence was pronounced; and the silence of the record as to such fact is no cause for arresting judgment or setting it aside." The reason for this rule is said by Judge Bleckley to be that "whenever any act or proceeding is recorded as taking place in a criminal case, the presence of the prisoner and his counsel, though not noted expressly, is included in each entry by a kind of implication; or so is deemed, so long as the fact is not negatived by the record, or by some appropriate evidence allunde." In *Franks v. State*, 120 Ga. 495, 48 S. E. 148, the ruling in *Smith v. State*, supra, is followed, and it is there held that it is not necessary that the record should affirmatively show the presence of the accused, and the silence of the record is therefore no reason for arresting the judgment or setting it aside.

Another ground of the motion to set aside the judgment is that it does not affirmatively appear from the record that the defendants or their counsel were asked if they had anything to say why sentence should not be passed; the record failing to show that the defendants or their counsel at the time of the imposition of the sentence were permitted to urge any reason against the imposition of the same. There are undoubtedly early cases in which

it has been held that if judgment be passed on indictment without any demand of what the party had to say, it is erroneous. See English cases cited in *Grady v. State*, 11 Ga. 258. This is probably the rule in some jurisdictions in this country at this time. But it was held by this court in the case just cited that in minor felonies the omission of the demand would not be sufficient reason for reversing the judgment, if it appeared that the prisoner and his counsel were both in the court, and urged nothing in the arrest of the judgment or in mitigation of their guilt. In the case of *Sarah (a slave) v. State*, 28 Ga. 576, it was held that the omission of the court to ask the prisoner if she had anything to say why sentence should not be passed is not such an error as would entitle the accused to a new trial. The accused was charged with an attempt to poison, and such an offense was, when committed by a slave, punishable by death, unless the judge should see fit to inflict a milder punishment. In that case a milder punishment was in fact inflicted. It is not necessary to determine whether the case just cited was a capital case, or whether in a capital case the inquiry as to whether the accused had aught to say why sentence should not be pronounced is essential to the validity of the judgment. The record is silent as to whether this inquiry was made. If such inquiry was indispensable to the validity of the judgment, it will be assumed that the inquiry was made, until the contrary appears. The ruling in *Franks v. State*, supra, is directly in point on this question.

The motion to set aside the judgment is wholly without merit. The judge did not err in declining to entertain it, or in refusing to grant a rule nisi.

Mandamus nisi denied. All the Justices concur.

EVANS, LUMPKIN, and ATKINSON, JJ. (concurring). We concur in the ruling in this case, and the result reached. We think, however, that, while generally a first bill of exceptions which is true and duly prepared and presented in accordance with law, and which assigns error on a final judgment should be signed, yet it is not an arbitrary and invariable rule that this court will by mandamus compel the signing even of a first bill of exceptions, wholly regardless of what it contains. In *Taylor v. Reese*, 108 Ga. 379, 33 S. E. 917 (2), the point actually involved and decided was that when the refusal of a judge to certify a bill of exceptions, tendered to him in a criminal case in which no motion for a new trial has been made, was based solely upon the ground that, in his opinion, he had, in the absence of such a motion, no authority to certify the bill of exceptions, on the hearing of an application for mandamus, the merits of the questions presented by the bill of exceptions were not involved, and the mandamus absolute would be granted without inquiring into them.

SHAW v. GEORGIA R. R.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. RAILROADS—INJURY TO PERSON ON TRACK—QUESTION FOR JURY—INSTRUCTIONS.

Under the facts in this case, it should have been submitted to the jury to say whether that part of the railroad track which was the locus of the homicide was so frequently used by the public as a pathway, with the knowledge of the railroad company, as to require the servants of the defendant, engaged in the operation of trains thereon, to anticipate the presence of pedestrians. If the servants operating the train, in the exercise of ordinary care, should have anticipated the presence of pedestrians, then it was for the jury to say whether the servants were negligent in running the train over this particular place, under the attendant conditions, at such rate of speed as that it was impossible, after discovering the dangerous position of deceased, to stop before striking him. It was erroneous, therefore, for the court to charge: "I charge you it is not lack of ordinary care and diligence to fail to keep a lookout for persons on the track not on a public crossing." "I charge you, the duty to exercise all ordinary and reasonable care and diligence towards a person not on a public crossing arises when his presence becomes known to the employees in charge of the engine, and not before. A failure of such care and diligence after that time, and from which injury occurs, unless it could have been avoided by the use of ordinary care on the part of the person killed or injured, will render the company liable."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1374.]

2. SAME.

In view of the evidence, and under the charge as a whole, there are no other assignments of error which are so meritorious as to require a reversal of the judgment of the court below.

Fish, C. J., and Beck, J., dissenting.

(Syllabus by the Court.)

Error from Superior Court, Oglethorpe County; H. M. Holden, Judge.

Action by Winnie Shaw against the Georgia Railroad. Judgment for defendant, and plaintiff brings error. Reversed.

Paul Brown, W. M. Smith, and E. K. Lumpkin, for plaintiff in error. Jos. B. & Bryan Cumming and H. McWhorter, Jr., for defendant in error.

ATKINSON, J. 1. In view of the evidence in this case upon the question of frequent use of the railroad track, at the particular place of the homicide, by pedestrians as a pathway, known to the defendant company, we think, as a question of fact, it should have been submitted to the jury to say whether or not the use was shown to exist to such an extent as to require those operating the cars of the defendant to anticipate the presence of persons on the track. If the evidence was such as to require them to anticipate the presence of pedestrians on the track, then they were bound to use ordinary care to avoid injury to any one who might be on the track at that place. To do this would depend upon the particular conditions surrounding each case, but, among others, the condition of the machinery, the condition of the track, the capacity for stop-

ping within a given distance, and the capacity for discovering any one on the track within that distance, are matters which should be taken into consideration and observed by the engineer in approaching a part of the track where, from the publicity and frequency of its use by pedestrians, he has reason to apprehend the presence of one. In *Atlanta Ry. Co. v. Gravitt*, 98 Ga. 369, 20 S. E. 550, 28 L. R. A. 553, 44 Am. St. Rep. 145, this court held that, relatively to a person who, without license from the company, is walking upon a railroad track on a trestle, though such trestle be situated between a blowpost and a public crossing, the duty of the railway company to observe "all ordinary and reasonable care and diligence towards such person arises when his presence becomes known to the engineer, and not before." This is a broad statement and an examination of the opinion will show that the court did not have in mind a place on the track so frequented by pedestrians as to afford reason for the engineer to anticipate their presence. The law would not be so lax with human life as to allow the operation of such dangerous machinery as a railroad train over such places with utter disregard. So afterwards, in the case of *Georgia R. Co. v. Cromer*, 106 Ga. 296, 31 S. E. 759, this court emphasized the duty of a railroad company to observe care with reference to one not on a public crossing, but at a place so frequented by the public as to give reason to anticipate their presence. In that case the court held: "Where a railroad crossing is in a populous locality and is much used by the public, but the same is not within the limits of an incorporated city or town, and is not a part of a public road established pursuant to law, what rate of speed in approaching and running over such crossing would be negligence, and what signals ordinary care would require to be given, are matters to be determined by a jury according to the circumstances of each particular case." This case was referred to approvingly in *Bullard v. Southern Ry. Co.*, 116 Ga. 644, 43 S. E. 39, and there the court said: "Where a number of persons habitually, with the knowledge and without the disapproval of a railroad company, use a private passageway for the purpose of crossing the tracks of the company at a given point, the employees of the company in charge of one of its trains, who are aware of this custom, are bound, on a given occasion, to anticipate that persons may be upon the track at this point, and they are under a duty to take such precautions to prevent injury to such persons as would meet the requirements of ordinary care and diligence." While these cases refer particularly to localities where the custom was to cross, and not to go longitudinally along the track, the principle is just the same. The ruling was put upon the duty which arose, not upon the technical ground that it was a public crossing, but

upon the ground that, because of the frequency of the use, the presence of pedestrians was to be anticipated. Therefore it was that in *Bullard's Case* this court approvingly referred to *W. & A. R. Co. v. Meigs*, 74 Ga. 864, where it was said: "There was no error in admitting the testimony relating to the habit of the public in walking on defendant's tracks at or near the place where this injury happened. While this habit, even if acquiesced in by the railroad company, did not prevent the deceased from being a trespasser, it was a circumstance which the jury might properly consider in determining whether or not the persons in charge of the train showed proper diligence at the time the killing occurred. Railroad engineers should observe more caution in running at places where they know persons are likely to be on the track than elsewhere, even if those persons are trespassers, and especially is this true when the company has at least tacitly consented to this otherwise unauthorized use of its property by the public." In *Bullard's Case* this court also quotes approvingly from *Hopkins, Pera. Inj.* § 87, p. 142, as follows: "Where no permission is given but there is a habit on the part of individuals or the public of traveling over the track on foot, and nothing is done to prevent it, that does not modify or change the legal rights or obligations of either the public or the company. By such use the public are not tacitly licensed to go upon the track, and the consent of the company to the use is not implied, but the fact that they do go there enters into the situation as it is known to the company, and affects the caution and amount of care required in running the trains." The distinction already drawn between the case at bar and *Atlanta Ry. Co. v. Gravitt*, supra, was made in the well-considered case of *Crawford v. Southern Ry. Co.*, 106 Ga. 873, 33 S. E. 826, where Mr. Justice Fish, after citing numerous authorities, evolved the following rule: "Taking the locality where the train is running and all the surrounding circumstances, if those in control of the movement of the train have no reason to apprehend that there may likely be a human being on the track in front of the engine, they are under no duty to one who may, in fact, be there, until they have actually discovered that he is there. But if, from the locality or surrounding circumstances, there is reason to apprehend that the track in front of the locomotive may not be clear of human beings, then, it seems to us, it is the duty of the employees of the company to keep a lookout ahead of the train; most assuredly so unless they are performing some duty which prevents their looking out upon the track in the direction in which the train is moving." This rule is approved in *Ashworth v. Southern Ry. Co.*, 116 Ga. 635, 43 S. E. 36, 59 L. R. A. 592, and *Bullard v. Southern Ry. Co.*,

supra. In *Southern Ry. Co. v. Chatman*, 124 Ga. 1026, 58 S. E. 692, Mr. Justice Lumpkin, after reviewing a number of cases, text-books, and other authorities on the duty of a railroad company to a trespasser, states the law thus: "The general rule, that, as to a trespasser upon a railway track, the duty of observing ordinary care and diligence for his protection does not devolve upon the company's agents in charge of a train until his presence upon its track becomes known to them, does not relieve the company under all circumstances from anticipating the presence of a trespasser upon its track and from taking proper precautions to prevent injury to him. Where the circumstances are such that the employes of the company in charge of one of its trains are bound, on a given occasion, to anticipate that persons may be upon the track at a certain place, they are under a duty to take such precautions to prevent injury to such persons as would meet the requirements of ordinary care and diligence."

Assuming that the jury would have found that the place where the deceased was killed was so frequented by pedestrians as to afford reason for the engineer to anticipate their presence, what then did he do in the performance of his duty towards the deceased? There was evidence to the effect that the train was light, and, for that reason, not quick to stop. It was down grade and the track slick with dew. The speed was 50 miles an hour. From the evidence of the engineer, it appears that he saw the deceased as soon as, under surrounding conditions, it was possible to do so. He gave the danger signal, immediately saw that the deceased was not responsible, immediately applied the brakes, and did all that was possible to stop before reaching the deceased. Although his engine and equipments were in perfect condition, it struck the deceased and passed 150 to 200 yards beyond, before it was possible to come to a stop. Can it be said that, at this particular time and place, and under these particular conditions, with reference to the deceased, the engineer was in the exercise of all ordinary and reasonable care and diligence? Was he not, under those conditions, running at an unreasonable rate of speed, and was not his conduct in that respect negligence? These were questions for the jury, and it was erroneous for the court to charge: (1) "I charge you it is not lack of ordinary care and diligence to fail to keep a lookout for persons on the track not on a public crossing." (2) "I charge you the duty to exercise all ordinary and reasonable care and diligence towards a person not on a public crossing arises when his presence becomes known to the employes in charge of the engine, and not before. A failure of such care and diligence after that time, and from which the injury occurs, unless it could have been avoided by the use of ordinary care on the

part of the person killed or injured, will render the company liable."

2. In the light of the evidence and the charge of the court taken as a whole, there was no such error in any of the other grounds of the motion for new trial as would justify this court in reversing the judgment of the court below.

Judgment reversed. All the Justices concur, except FISH, C. J., and BECK, J., who dissent.

FISH, C. J., and BECK, J., dissenting. The evidence demanded the verdict rendered, and, without reference to the alleged errors in the charge of the court, the refusal of a new trial was proper.

MARTIN v. CRAVEN.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. APPEAL—ASSIGNMENT OF ERROR.

The assignment of error in the bill of exceptions was sufficiently specific.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2997.]

2. EXECUTION—ISSUANCE BY CLERK OF COURT.

Under the provisions of the act establishing the city court of Clarksville, authority was not conferred upon the clerk of the superior court of Habersham county to issue an execution on a judgment previously rendered in such city court.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kinsey, Judge.

Action by W. J. Craven against B. O. Martin. Judgment for plaintiff on levy of execution. Defendant filed an affidavit of illegality. From a judgment dismissing the illegality, defendant brings error. Reversed.

J. C. Edwards, for plaintiff in error. McMillan & Erwin, for defendant in error.

FISH, C. J. On May 12, 1902, a judgment was rendered in the city court of Clarksville in favor of W. J. Craven against B. O. Martin, for stated amounts of principal, interest, and costs. On July 27, 1903, the city court of Clarksville was abolished by an act of the Legislature. On June 17, 1904, the clerk of the superior court of Habersham county issued an execution on such judgment, returnable to the next term of the last-mentioned court, which was levied by the sheriff of the county on certain described realty as the property of the defendant, Martin. The defendant in execution thereupon filed an affidavit of illegality to the *fi. fa.*, upon various grounds, in one of which the facts as to the rendition of the judgment, the abolition of the city court, and the issuance of the execution by the clerk of the superior court, as above stated, were set forth, and the allegation made that the execution was void for the reason that the clerk of the superior court had no authority of law to issue it. The case thus made was, by consent, tried

before the judge of the superior court without a jury, on an agreed statement of facts, and he rendered judgment against the illegality and ordered that the execution proceed. In the defendant's bill of exceptions bringing the case up this language is used: "The court, after hearing and considering the case, rendered judgment dismissing said illegality and ordering the *fi. fa.* to proceed. * * * To which ruling and judgment the defendant in *fi. fa.* * * * then and there excepted and now excepts and assigns the same as error. * * * The defendant in *fi. fa.*, B. C. Martin, says the court erred in this, * * * that there is no authority of law for the clerk of the superior court of Habersham county, Ga., to issue a *fi. fa.* from the city court of Clarkesville, and that therefore the court erred in dismissing the illegality."

1. Counsel for defendant in error moved to dismiss the writ of error, on the ground that the bill of exceptions contains no assignment of error sufficiently specific to authorize the Supreme Court to determine whether or not error was committed by the trial judge. This motion is not meritorious. The assignment of error was not merely in general terms, as in *Neal Loan & Banking Co. v. Wright*, 116 Ga. 395, 42 S. E. 715, and cases there cited, but was plainly and distinctly set forth, as it specified a distinct reason why the judgment excepted to was erroneous, viz., that there was no authority of law for the clerk of the superior court to issue the execution in question.

2. The act establishing the city court of Clarkesville (Acts 1898, p. 299) was repealed, and the court abolished, by the act of July 27, 1903 (Acts 1903, p. 124). The only reference made by the repealing act to the disposition to be made of the records and papers pertaining to matters or cases in such city court is contained in the second section (page 125) thereof, which provides: "That immediately after the passage of this act the judge of said city court of Clarkesville shall transfer all pending cases now on the docket of the said city court of Clarkesville, together with the papers and records pertaining to the same, to the superior court of said county of Habersham, where they shall severally stand for trial as cases originally in said superior court." A case in which judgment had been rendered in the city court, and upon which judgment no execution had been issued prior to the passage of the act abolishing that court, was not a pending case on the docket of the city court at the time that court was abolished, and there was no reason for the late judge of the city court to transfer the papers and records pertaining to such case to the superior court of Habersham county, there to stand for trial as a case originating in such superior court, because the case had already been tried and judgment rendered therein. The next step in the mat-

ter was the issuance of execution on the judgment for the enforcement of the same. No execution was issued prior to the abolition of the court in which the judgment was rendered, and the abolishing act conferred no authority on the clerk of the superior court of Habersham county to issue execution on such judgment, and the execution issued by him was therefore void, and the court erred in not so holding.

Our attention was called by counsel for defendant in error to the cases of *Colquitt v. Oliver*, 49 Ga. 284, and *Brooks v. Mair*, 107 Ga. 738, 33 S. E. 650; but our decision in the present case is not at all in conflict with any ruling made in either of those cases, or in *Strickland v. Griffin*, 70 Ga. 541. In the first and the last of the cases just referred to, unfinished business of a county court abolished by the Constitution of 1868 was subsequently dealt with in a superior court. That Constitution provided that "the books, papers, and proceedings of the county courts, and the unfinished business thereof, shall be transferred to the superior courts, and the same shall be finished and performed by the said superior courts and the officers thereof," etc. Code 1873, § 5149. In *Brooks v. Mair*, supra, it was held that the city court of Griffin had jurisdiction and authority to deal with and dispose of all the unfinished business of the abolished city court of Spalding county. By a reference to the language of the act abolishing the one court, and to that of the act creating the other, which is quoted in the opinion rendered in that case, it is clear that jurisdiction and authority was given to the new court to deal with all the unfinished business of the old court; but it cannot be fairly said, from any language used in the act abolishing the city court of Clarkesville, that the intention of the General Assembly was to confer upon the superior court of Habersham county jurisdiction and authority to deal with all the unfinished business of the city court of Clarkesville.

Judgment reversed. All the Justices concur.

KESSLER v. PEARSON.

(Supreme Court of Georgia. Nov. 13, 1906.)

1. LANDLORD AND TENANT—ACTION FOR RENT—ILLEGAL USE OF PREMISES.

If a house be let with intent that it shall be used for the purposes of prostitution, the landlord cannot recover the rent. But, if the lease be for lawful uses, and the circumstances do not show the transaction to be colorable or a cloak to conceal the illegality of the contract, subsequent knowledge by the landlord of the immoral use to which the tenant has subjected the premises will not invalidate the lease or preclude the landlord from collecting the rent. If, however, the landlord, after he is made aware of the illegal use of his premises, does any affirmative act indicating his sanction of the illegal practices of his tenant, he becomes in

pari delicto with him, and the courts will not lend any aid in the collection of the rent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Landlord and Tenant, § 85.]

2. APPEAL—HARMLESS ERROR.

None of the errors complained of requires the grant of a new trial.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by L. G. Pearson against Henry Kessler. Judgment for plaintiff, and defendant brings error. Affirmed.

Steed & Ryals and Herman Brasch, for plaintiff in error. Hardeeman & Jones, for defendant in error.

EVANS, J. 1. The action was for the recovery of rent for a tenement, and the plea denied tenancy, and further averred that, if a contract of rent was proved, such contract was founded on an immoral consideration in that the house was rented to be used as a lewd house. The plaintiff's agent testified that he did not know that the tenant contemplated or intended its use as a brothel, and, as the jury found that issue in favor of the plaintiff, we will consider that, in making the contract of lease, the parties did not intend that the house should be used for an immoral purpose. On the trial the defendant requested an instruction to the effect that, if the plaintiff, subsequently to the time of renting, had knowledge that the house was being used for prostitution, and after such knowledge made no objection to this immoral use, he could not recover the rent accruing since his discovery of the illegal use to which his house was put by the tenant. This request to charge was refused and, on the other hand, the court charged the jury that the fact that subsequently to the alleged contract the defendant, by renting the house to lewd women, put the house to an immoral use would not prevent the plaintiff from collecting the rent. If a house be let with intent that it shall be used for the purpose of prostitution, the landlord cannot recover the rent; the bare knowledge that it may probably be so used will not defeat the action. *Ralston v. Boady*, 20 Ga. 449. Evidence of the acts and conduct of the parties to the contract, both before and after making the lease, should be allowed to go to the jury, so that they may determine the knowledge and intent of the parties in making the contract. *Bashinski v. State*, 122 Ga. 164; 50 S. E. 54; *Updike v. Campbell*, 4 E. D. Smith (N. Y.) 570. But, if the house is leased for a lawful purpose, the mere noninterference by the landlord with the subsequent illegal traffic of his tenant, after having become aware of it, does not involve him in the tenant's guilt. *Crocker v. State*, 49 Ark. 60, 4 S. W. 197; *Crofton v. State*, 25 Ohio St. 249; *Koester v. State*, 36 Kan. 27, 12 Pac. 330. Our Penal Code 1895, § 391, declares: "If any person shall maintain and keep a

lewd house, or place for the practice of fornication or adultery, either by himself or others, he shall be guilty of a misdemeanor." In *Kessler v. State*, 119 Ga. 303, 46 S. E. 408, it was said that this section was but a codification of the common law, and that to sustain an indictment thereunder it is necessary to show only that the accused contributed to, or aided, directly or indirectly, in maintaining and keeping a lewd house. In the headnote of this case it was stated that a landlord, who, "after having leased the house, knowingly permits the occupants to use it for the practice of fornication and adultery, maintains and keeps a lewd house." But this broad statement of the principle is not to be understood as a holding that mere knowledge of the landlord of the illegal use of the house by the tenant makes the landlord a joint participant in the tenant's guilty act. It is only when the landlord aids or abets the tenant in the unlawful enterprise, or by some affirmative act gives his consent and approbation to the tenant's maintaining a brothel, that he shares the tenant's guilt. This consent and sanction ought not to be inferred from the isolated fact of his noninterference with the conduct of his tenant, without some affirmative act or declaration on his part indicative of his sanction and consent. *State v. Williams*, 30 N. J. Law, 102. It is inconsistent with sound reason to say that a tenant, having entered into a contract of rent of a tenement for a lawful purpose, where the contract is innocent and does not contemplate any illegal purpose, could avoid the payment of rent or terminate the tenancy by converting the premises to an immoral use, and by showing that after such conversion the landlord acquired knowledge of his illegal act. There must be a quasi participation on the part of the lessor in such unlawful purpose; mere knowledge on his part, acquired after the execution of the lease, is insufficient to identify him with the lessee's guilt. 18 Am. & Eng. Enc. Law (2d Ed.) 317; *Jones, Land & Ten.* § 120; 1 *McAdam, Land & Ten.* 327.

2. Some of the assignments of error relate to the refusal of the court to allow certain questions to be propounded to plaintiff's agent, while testifying as a witness. In so far as these questions were material, it appears that they or others of similar import were answered by the witness in another part of his testimony, and, as the defendant got the benefit of the substance of the testimony sought to be elicited by these particular questions, the error, if any, in refusing to allow them to be put to the witness was harmless. *Bertody v. Ison*, 69 Ga. 317.

The remark of the trial judge assigning reasons for his ruling on the admissibility of certain evidence was not open to the criticism that it amounted to an expression of opinion on an issuable fact, nor was the particular charge complained of as holding the defendant up to ridicule open to that objection.

The verdict was warranted by the evidence, and there was no error in refusing a new trial.

Judgment affirmed. All the Justices concur.

KING v. SOUTHERN RY. CO.

(Supreme Court of Georgia. Nov. 15, 1906.)

1. PARENT AND CHILD—INJURY TO CHILD—RIGHT OF ACTION.

For a negligent injury to a minor, causing loss of services and entailing expenses for medicine and nursing, the right of action is in the father, if he be alive at the time of the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, §§ 86, 91.]

2. SAME.

If for such a tort a right of action accrued, it did so immediately upon the happening of the injury, and was in the father, although he may have been injured at the same time with the child, and may have lived only a short time thereafter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Parent and Child, § 86.]

3. ABATEMENT AND REVIVAL—WHAT ACTIONS SURVIVE.

In such a case, if a right of action arose to the father, and he died before any suit was brought, the cause of action did not survive to the mother of the child.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Abatement and Revival, §§ 256, 261.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by Josephine King against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Mrs. Josephine King brought suit against the Southern Railway Company, seeking to recover damages on account of a personal injury to her daughter, 14 years of age. It was alleged that the plaintiff, her husband, and her daughter were traveling on a public road in a buggy, and while crossing the railroad of the defendant they were struck and injured by its locomotive and cars; that the defendant's agents were negligent in running the train at a speed of from 40 to 60 miles an hour, in failing to blow the whistle of the locomotive at the blow-post, or between the post and the crossing, and in failing to check the speed of the train in approaching the crossing; that plaintiff's daughter was injured for life and rendered incapable of performing any service; and that plaintiff had been put to expense for medicine, attention, etc. In the original petition it was alleged that, at the time the daughter received the injury, plaintiff's husband was killed, and that at the time of the suit the plaintiff was a widow, and had the care and maintenance of her daughter, and was entitled to her services. By amendment the following allegation was made: "That petitioner is entitled to the services of her said daughter, and is largely dependent

upon her said daughter for a support, all of which petitioner has been deprived of by reason of said injuries to her said daughter; that petitioner's said husband lived about one hour after said accident; that since said time the care of her said daughter has devolved upon your petitioner." Defendant's counsel moved to dismiss the petition as amended, on the ground that it set out no cause of action, and that it showed that the father of the girl was in life at the time when she was injured, and for sometime thereafter. The motion was sustained, and the plaintiff excepted.

Reuben Arnold, W. S. Pickrell, and Howard Thompson, for plaintiff in error. J. J. Strickland, for defendant in error.

LUMPKIN, J. (after stating the facts). The exact question made is: Where a father, mother, and minor daughter were in a buggy passing over a railroad crossing, and the father and daughter were injured by the running of a train, and the father died about an hour afterwards, did the mother have a right of action against the railroad company on account of the injury to the minor daughter? The suit was not brought by the daughter for permanent injuries to herself, or by the mother as her next friend, but by the latter in her own behalf, based on loss of services and necessary expenses prior to the arrival of the daughter at the age of 21 years. The question stated may be divided into two others: First, at the time of the injury to the daughter, to whom did the cause of action arise? And, second, if to the father, upon his death in a short time thereafter, did the right survive to the mother?

The first of these questions is answered by Civ. Code 1895, § 3816, which reads as follows: "Every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant." This is only a codification of the pre-existing law, and the basis of the suit is loss of services and necessary expenses. *Shields v. Yonge*, 15 Ga. 349, 356, 60 Am. Dec. 698; *Central Railroad Co. v. Brinson*, 64 Ga. 476; Civ. Code 1895, § 2502. If a right of action accrues at all on account of a personal injury, it arises immediately upon the occurrence thereof. The damages may continue for years or be permanent in character, but the right to sue arises at once. This being so, and the father being in life at the time of the injury to his minor daughter, the right of action on account of the loss to him during her minority vested in him. It is said that, because he was hurt at the same time, and died about an hour later, the injury and the death should be treated as coincident. But we can find no authority for such a contention. He was actually alive for an hour after the occurrence. If *compos mentis*, he could have made a will or a deed, or could have settled with the railroad for

the damage accruing to him from the injury to his daughter. In that brief hour he might possibly have sued, or have been sued and served. If the daughter had been killed, and had left an estate, there can be no doubt that the father would have inherited along with brothers and sisters, if any, under Civ. Code 1895, § 3355, par. 6, which declares that: "The father, if living, inherits equally with brothers and sisters, and stands in the same degree. If there be no father, and the mother is alive, she shall inherit it in the same manner as the father would."

Can it be said that, because he lived only a short time, he could have been treated as not alive at all, and that, in the supposed case of the daughter's death before he himself died, the mother would have inherited instead? We are unable to hold a man who is actually alive, and has so many legal rights, to be dead in contemplation of the law, relatively to the particular right involved in this case. A person cannot at once be actually both alive and dead, and one who has been hurt by a railroad train cannot for that reason be treated as *civilitur mortuus*. Civ. Code 1895, § 2508, provides that: "Upon the death of the father, the mother is entitled to the possession of the child until his arrival at such age that his education requires the guardian to take possession of him." She takes the custody of the child, however, as she finds it at the death of the father, and this statute gives no right of action on account of a prior personal injury to the child. It may seem to be somewhat of a hardship that an injured child may be left with the mother, upon the death of the father, and that she cannot sue for the previous injury to it, and the shortness of the time during which the father lived may make this view more striking; but we cannot change the law on account of sympathy. If the fact that the father lived for an hour only would create a cause of action in the mother which did not otherwise exist, how would it be if he had lived for six hours, or a day, or a week, or a year, or, indeed, for any time less than that in which the child would become of age? In any of these supposed cases the same argument, that the mother was left in possession of an injured child (supposing the injury to be permanent, as alleged), would equally apply. The difference would be one only of degree, not of kind. It is also sought to bring the case within the rule that, where a wife is living separate from her husband, who had abandoned her and a minor child, and she has the entire care and custody of it, she is entitled to maintain an action for injuries negligently inflicted upon it. But it has been expressly held that this rule applies only to injuries inflicted upon the child after the separation took place, and by reason of which she is deprived of its services. *Savannah, F. & W. Ry. Co. v. Smith*, 93 Ga. 742,

21 S. E. 157; *Amos v. Atlanta R. Co.*, 104 Ga. 809, 31 S. E. 42; Civ. Code 1895, § 2475.

In England, under the common law, the general rule as to personal actions was expressed in the maxim, "*Actio personalis moritur cum persona*"; but actions on contracts expressed or implied survived. The maxim was considered as applying to actions in form *ex delicto* exclusively, but all actions founded in tort did not abate. By a series of statutes, beginning with St. 4 Edw. III, c. 7, in relation to personal property, and extending down to a late date (see St. 3 & 4 Wm. IV, c. 42 [2], in respect to personalty and realty), various actions arising from torts were made capable of surviving. Blackstone, in his Commentaries (volume 3, p. 302), states the rule thus: "In actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*, and it never shall be revived either by or against the executors or other representatives." In *Petts v. Leon*, 11 Ga. 151, 56 Am. Dec. 419, it was held that, where an action of trespass was brought for a direct and forcible injury to the property of the plaintiff, against the defendant, who died pending the suit, the action abated by his death, and could not be revived against his personal representatives. In *Brawner v. Sterdevant*, 9 Ga. 69, where the plaintiff brought his action for the seduction of his daughter, containing an allegation "*per quod servitium amisit*," and the defendant died pending the suit, it was held that such suits abated, and could not be revived by *scire facias*. See, also, *Neal v. Haygood*, 1 Ga. 514; *Thompson v. Central Railroad*, 60 Ga. 120, 122. The rule as declared by the common-law authorities and decisions in this state was thus codified in the original Code, which took effect in 1863 (section 2909): "No action for a tort shall abate by the death of either party where the wrongdoer received any benefit from the tort complained of." This was carried forward into the Code of 1882 (section 2967). It was held that the benefit to the wrongdoer which would cause an action of tort to survive the death of the plaintiff must be one flowing immediately from the tort. *Swift Specific Co. v. Davis*, 76 Ga. 787. In 1889 the Legislature amended that section by making an addition to it, in the following language: "Nor shall any action for the recovery of damages for homicide, injury to person or injury to property abate by the death of either party; but such cause of action, in case of death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff, and in case of the death of the defendant, shall survive against said defendant's personal representative." Acts 1889, p. 73. The original section, with this addition, is now embodied in Civ. Code 1895, § 3825. This amendatory act does not provide for a survival of the cause of action

to the matter. Moreover, it was construed in the case of *Frazier v. Georgia R. Co.*, 101 Ga. 77, 28 S. E. 962, in which it was held that: "Where a parent, entitled to bring an action of tort for the homicide of a son, dies without having instituted suit, the right of action does not survive to the administrator of such parent." It was said that "the intention was to save pending actions only, and not to give an additional right to the personal representative." This construction was repeated in the opinion delivered on behalf of the majority of the court by Chief Justice Simmons, in *Southern Bell Telephone Co. v. Cassin*, 111 Ga. 581, 36 S. E. 881, 50 L. R. A. 604. And, while Justices Cobb and Lewis dissented from the judgment rendered by the majority, the dissenting opinion was not based on this particular point. Similarly, under section 3828 of the Civil Code of 1895, which provides that the mother, or if no mother the father, may recover for the homicide of the child, it has been held that, if the mother is in life at the time of the homicide of the child, and dies before suit is brought, no right of action survives to the father, or is conferred upon him. *Frazier v. Georgia R. Co.*, 96 Ga. 785, 22 S. E. 936.

If, as we have endeavored to show, upon the happening of the injury to the minor child, the right of action arose in favor of the father, upon his death, though only an hour afterwards, the cause of action did not survive to the mother; and it follows that, where these facts appeared upon the face of the petition, there was no error in dismissing it on motion.

Judgment affirmed. All the Justices concur.

BRAND v. CITY OF LAWRENCEVILLE.

(Supreme Court of Georgia. Nov. 16, 1906.)

EXCEPTIONS, BILL OF—CERTIFICATION—AUTHORITY OF EX-JUDGE.

Neither under the provisions of section 5543 of the Civil Code of 1895, nor under any other provision of law in this state, is one who has been a trial judge given any authority to certify, after the judge goes out of office, by resignation or otherwise, a "fast" bill of exceptions. See, in this connection, *Grace v. Gordon*, 113 Ga. 88, 38 S. E. 404. It follows that, where a petition for injunction was heard before a judge of the superior court, who, after refusing the injunction, resigned his office, and after his resignation had gone into effect certified to this court a bill of exceptions assigning error upon his ruling refusing the injunction, this court did acquire jurisdiction, and the writ of error will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Exceptions, Bill of, § 39.]

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; R. B. Russell, Judge.

Action by E. M. Brand against the city of Lawrenceville. Judgment for defendant, and plaintiff brings error. Dismissed.

F. O. Foster and Peeples & Jordan, for plaintiff in error. N. L. Hutchins, Jr., for defendant in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

POSTAL TELEGRAPH-CABLE CO. v. KUHNEN.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. ERROR, WRIT OF—MOTION TO DISMISS—BRIEF OF EVIDENCE.

Where the order granting a rule nisi on a motion for a new trial provided that the movant should have until the hearing to prepare and present for approval a brief of the evidence, and, if it should not have been filed in the clerk's office before the date of the hearing, the movant should be allowed 10 days thereafter to file it, and where the bill of exceptions based on the overruling of the motion recited that "a brief of the evidence was approved and made part of the record by the court," and the brief of evidence specified and sent up as a part of the record had on it the words "Examined and approved," signed by the presiding judge, there being nothing to show that it was not duly filed, a motion to dismiss the bill of exceptions, on the ground that no brief of evidence was approved or ordered filed as such or so filed, is without merit, although the entry of filing is not in the transcript of the record.

2. TRESPASS—ENTRY ON LANDS—ACTS OF TELEGRAPH COMPANY.

If the defendant, over the objection and against the protest of the plaintiff, entered upon his land and dug holes and erected telegraph posts there without authority of law, in an action of tort, he would be entitled to at least nominal damages, if no special damages were shown. If a telegraph company desires to condemn land for its poles and wires, a mode of determining damages is prescribed by law. But if, without any authority of law, it enters upon and appropriates land without any condemnation and against the will of the owner, it becomes a mere trespasser, and is liable in damages, as such, for the violation of the owner's right of property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trespass, § 134.]

3. TRIAL—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

It was error for the court to charge that "the Postal Telegraph-Cable Company, when they lay off a right of way by condemnation proceedings, take it twenty feet wide. * * * They erect their posts, clear off the timber, so that it won't interfere with the right of way." There was no evidence to authorize such a charge, and the statement of what the company did under such proceedings was irrelevant to the present case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

4. TRESPASS—INSTRUCTIONS.

The defendant having denied that it appropriated any of the plaintiff's land, a charge which stated this, but added, "or if they have appropriated any of it, it is a very small amount," was erroneous, and was not corrected by adding that the defendant did not admit owing any damages. If the defendant admitted unlawfully appropriating even a small amount of the plaintiff's property, it would be liable, whether it admitted liability or not.

5. SAME.

A charge that if the defendant erected its line along the edge of the public highway, on

land already set apart for use as a public road, the plaintiff would have no right to recover, "unless the right of way that he talks of, twenty feet wide, would reach over and beyond the public road," was erroneous. This was calculated to lead the jury to believe that, even though the defendant did not enter on or take any of the land of plaintiff, yet if some "right of way" twenty feet wide, which "he talks of," extended over the road, there might be a recovery on that basis. The plaintiff is not excepting to this charge.

6. SAME.

A further charge that "it is for the jury to determine what the truth is, under the evidence, and as to whether the right of way of the telegraph company would reach out over and beyond the public highway," was erroneous for the same reason.

7. SAME.

A ground of objection to a portion of the charge that there was no evidence of any trespass on which to base a charge on that subject was not well taken.

8. SAME—DAMAGES.

The charge was somewhat general as to the measure of special damages, if any were shown, but this can be corrected on another trial.

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kimsey, Judge.

Action by M. Kuhn against the Postal Telegraph-Cable Company. Judgment for plaintiff. Defendant brings error. Reversed.

Felder, Rountree & Wilson and Howard Thompson, for plaintiff in error. J. C. Edwards, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur.

BLACKWELL v. RAMSEY-BRISBEN STONE CO.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. PLEADING—DEMURRER—EFFECT.

Where a judge sustained a special demurrer to a paragraph of a petition with leave to the plaintiff to amend in 10 days, if no amendment was offered within that time, the effect of the judgment was to eliminate the objectionable paragraph from the petition; and thereafter the petition stood as if no such paragraph were contained therein.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, § 568.]

2. PLEADING—AMENDMENT—NEGLIGENCE—MASTER AND SERVANT—INJURY TO SERVANT.

With the stricken paragraph omitted, it was alleged that the plaintiff was employed by the defendant as a laborer in the erection of

a building; that the master was bound to furnish him a safe place to work and reasonably safe appliances to carry on the work; and that while he was at work in this employment, without notice or warning to him, the wire rope used in connection with the derrick snapped, broke, fell, struck a platform under which plaintiff was working, and knocked down a portion of it so as to fall on the plaintiff, injuring him. In another of the remaining paragraphs it was alleged, that the plaintiff "was entirely free from fault in and about the manner of receiving such injuries which was caused by the negligence of the defendant company in having and using the defective, worn, strained, and broken rope in connection with the derrick for the purpose of raising heavy loads of stone and other building material from the ground, and to second and higher stories of said church building for use therein." *Held*, that there was in this last-mentioned paragraph a sufficient allegation of negligence on the part of the defendant to authorize an amendment amplifying such allegation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 693, 694.]

3. SAME.

Whether or not this paragraph as it originally stood was subject to the objection that it contained allegations both as to freedom from negligence on the part of the plaintiff and the existence of negligence on the part of the defendant, and, as not being an orderly and distinct paragraph, no such objection was made to it. As it stood, an amendment amplifying the statement of negligence on the part of the defendant was germane to such paragraph; and its rejection on the ground that it was not so germane, and a dismissal thereupon of the petition as insufficient, was error.

Beck, J., dissenting.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Robert Blackwell against the Ramsey-Brisben Stone Company. Judgment for defendant, and plaintiff brings error. Reversed.

Geo. Westmoreland and Henderson Hallman, for plaintiff in error. Smith, Hammond & Smith, for defendant in error.

LUMPKIN, J. Judgment reversed. All the Justices concur, except BECK, J., who dissents.

BECK, J. (dissenting). The amendment which was disallowed being germane only to the stricken paragraph, and not to the one to which it was proposed to add it, the judge properly repelled the same, and his doing so was not error.

LEDFORD v. EMERSON.

(Supreme Court of North Carolina. Dec. 22, 1906.)

1. CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT—BODY EXECUTION.

Const. art. 1, § 18, prohibiting imprisonment for debt, except in cases of fraud, should be construed to mean that there shall be no imprisonment to enforce payment of a debt under final process, unless it has been duly made on complaint and a corresponding issue found by the jury that defendant had been guilty of fraud.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 151½.]

2. EXECUTION — BODY EXECUTION — FRAUD — BURDEN OF PROOF.

Where an issue of fraud is raised by the pleadings, the plaintiff must sustain the burden of establishing the fact of fraud, before he can entitle himself to an execution against defendant's person.

3. SAME—STATUTES.

Revisal 1905, § 735, providing that a defendant arrested may at any time before judgment apply to vacate the order of arrest on an application denying that facts alleged in the affidavit for the order, and demand that the issue be submitted to a jury, etc., applies only to an order of arrest as a provisional remedy, and not to an arrest under a *capias ad satisfaciendum*.

4. HABEAS CORPUS—CAPIAS—DISCHARGE—APPEALABLE ORDER.

Where defendant, after arrest on a *capias ad satisfaciendum* was discharged on a writ of habeas corpus, from which plaintiff appealed, the writ might be treated as in the nature of a motion in the cause to recall the execution and to discharge the defendant; the denial of which is reviewable by appeal.

5. SAME—SCOPE OF WRIT.

Revisal 1905, § 1822, forbids the use of habeas corpus only where the person applying therefor has been committed or is detained by virtue of a final order, judgment, or decree, of a competent tribunal of civil or criminal jurisdiction, or of an execution issued thereon. *Held*, that habeas corpus will lie to obtain the discharge of the defendant from an execution against his person, where it appears from the judgment roll that the court had no jurisdiction to issue such execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 18.]

6. BAIL—DISCHARGE BY SURETIES.

Where defendant, who had been arrested on a body execution, was discharged on habeas corpus, he could not thereafter be held on a surrender by his sureties.

7. EXECUTION—SUPPLEMENTARY PROCEEDINGS — OTHER PROCEEDINGS PENDING.

A defendant cannot be ordered to appear before the clerk of the court and be examined in a supplementary proceeding, while there is another similar proceeding against him pending on appeal to the Supreme Court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 21, Execution, § 1098.]

Appeal from Superior Court, Cherokee County; W. R. Allen, Judge.

Petition for habeas corpus by A. S. Emerson, to obtain his discharge from arrest on an execution against the person in an action brought against him by John T. Ledford. From a judgment directing petitioner's discharge, plaintiff, Ledford, appeals. *Affirmed*.

55 S.E.—61½

This is a petition for a habeas corpus by the defendant, in which he asks to be discharged from an arrest made by the sheriff, under an execution against his person issued in the above-entitled case. The matter was heard before Judge W. R. Allen, at chambers, on August 6, 1906, and the defendant was discharged. It is alleged that the parties were equal partners in a transaction by which in 1900 and 1901 they secured options for the purchase of certain land situated in the state of Georgia, which defendant took in his own name for their joint use and benefit, and which were renewed from time to time. The defendant sold the options for \$10,000 in 1903, concealed the real amount of the proceeds of the sale, and paid the plaintiff only \$250, falsely stating to him at the time that the said sum represented his share of the said proceeds; and, upon the faith of that statement, the plaintiff accepted the \$250, and gave his receipt for the same in full satisfaction of his share. A much larger amount was due, and this action was brought to recover the balance. The plaintiff filed an affidavit, alleging the above facts, and obtained an order of arrest under which the defendant was taken in custody. He moved to vacate the order, and his motion was allowed by Judge Neal, October 28, 1906. An appeal was taken to this court by the plaintiff, and at Fall term, 1905, the ruling was reversed, and the case remanded. 140 N. C., at page 288, 52 S. E. 641, to which we refer for greater certainty. The case was before us on a prior appeal (138 N. C. 502, 51 S. E. 42), and again before us at the last term (141 N. C. 596, 54 S. E. 438), but not upon matters specially germane to the questions now involved. The issue submitted to the jury and the answer thereto were as follows: "In what amount, if any, is the defendant indebted to the plaintiff by reason of the matters alleged in the complaint? Ans. \$4,225, with interest from May 1, 1903." The court adjudged simply that the plaintiff recover of the defendant the said sum and his costs, to be taxed by the clerk. The execution on this judgment against the property of the defendant having been returned unsatisfied, the clerk, without any order from the court, issued an execution against the person of the defendant under which he was arrested and afterwards discharged by Judge Allen as above stated. From the order discharging him, the plaintiff appealed.

E. B. Norvell, Busbee & Busbee, and Axley & Axley, for appellant. Thos. A. Jones, Dillard & Bell, J. C. Martin, and Ben Posey, for appellee.

WALKER, J. (after stating the case). The plaintiff alleges that the defendant collected the proceeds of the sale of the options which amounted to \$10,000 and that his share was one-half or \$5,000, from which was to be deducted the sum of \$600 due by the plaintiff

on the settlement, leaving \$4,400, the clear balance coming to the plaintiff as his share of the profits. So far the complaint shows only an indebtedness by the defendant to the plaintiff arising out of contract. But he further alleges that while he consented that the options might be taken in the defendant's name, upon the assurance of the latter that it would facilitate the sale of the land and would not affect the stipulation as to the equal division of the profits, yet he now believes that all this was done with the intent to cheat and defraud him, and that the sale of the options by the defendant without the knowledge of the plaintiff, and without disclosing the fact to him was made with a like intent, and, further, that the false representation by which he procured the receipt for \$250 was also fraudulent, and made in furtherance of the original and continuing intent to deprive the plaintiff of his just and equitable share of the profits, the plaintiff being at the time the defendant got the receipt, an illiterate man. The plaintiff took a judgment for the amount due him as his share of the profits and interest from May 1, 1903, the time they were received by the defendant, upon an issue which finds that the defendant is "indebted" to him in that amount, "by reason of the matters alleged in the complaint." We have already held (140 N. C. 288, 52 S. E. 641), that the defendant could be arrested under an ancillary order and committed unless he should give an undertaking conditioned, as provided by the statute, to render himself amenable to the process of the court, during the pendency of the action and to such as may be issued to enforce the judgment. But this is quite a different thing from imprisoning him under final process until he pays the debt or otherwise discharges himself from custody. The only provisions of the law relating to arrest and bail which can have any possible bearing on this case are substantially as follows: A defendant may be arrested where, as factor, agent, broker, or fiduciary he receives money or property, and embezzles or fraudulently misapplies it, or where he is guilty of fraud in contracting the debt or incurring the obligation for which he has been sued or when the action is brought to recover damages for fraud or deceit. Revisal 1905, § 727. It is provided that an execution against the person of the judgment debtor shall not be issued, unless an order of arrest has been served, as provided by law, or unless the complaint contains a statement of facts showing one or more of the causes of arrest enumerated in the statute, "whether such statement of facts be necessary to the cause of action or not." Revisal 1905, § 625.

The Constitution provides that "there shall be no imprisonment for debt in this state, except in cases of fraud." Article 1, § 18. This, we think, clearly means that there shall at least be no imprisonment to enforce the payment of a debt under final process, un-

less it has been adjudged upon an allegation duly made in the complaint and a corresponding issue found by a jury that there has been fraud. Whether the fraud to which that section refers is one that is committed in contracting the debt, or extends to one that is collateral to it, such as the fraudulent concealment or disposition of property to evade the payment of the debt, is a question we need not now consider, though discussed by counsel. Whatever may be the nature of the fraud, it must be alleged and proved as any other issuable fact, and it is safer and better that, when it is found by the jury to exist, it should be recited in the judgment, with a proper order or direction as to the issuing of executions to enforce the latter. The defendant is entitled in any event to have a finding by the jury upon this important allegation, before there can be any judgment that will warrant the issuing of an execution against his person. In regard to this question, we adopt the view taken by the court in *Davis v. Robinson*, 10 Cal. 411, where Judge Field (since a Justice of the United States Supreme Court) said: "There is no doubt as to the correctness of the position that the execution must be warranted by the judgment. It rests upon and must follow the judgment; if it exceeds the judgment, it has no validity. To authorize, therefore, an arrest on execution, the fraud must be stated in the judgment, for the writ issues, in the language of the statute in the 'enforcement' of the 'judgment.' Nor do we entertain any doubt that the question of fraud must be submitted to the jury, except so far as may be necessary to authorize the arrest pending the action. To justify execution against the person, which may be followed by imprisonment, an issue must be framed and be determined like issues of fact raised upon the pleadings. Fraud is an offense involving moral turpitude, and is followed by imprisonment, not merely as a means of enforcing payment, but also as a punishment; and it would indeed be strange if, on a mere question of indebtedness, the right to a trial by jury should be held sacred and inviolate, and yet such trial be denied upon a question involving a possible loss of character and liberty. We should hesitate long before we held that this latter question could be tried upon affidavits where the accuser is also a witness, where the affiants are not present, and no cross-examination of witnesses is allowed. We are aware of decisions in other states holding a different view, but we do not find sufficient reasons advanced in them to induce us to deny what we cannot but regard as the clear right of the party accused." And again: "The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment; and in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment." It is also said:

"By requiring the charges to be stated in the complaint, the rights of the defendant will be fully guarded. He can then meet the charges, and have a fair opportunity of defending himself by a trial before a jury."

There was no appropriate issue submitted in this case upon the alleged fraudulent conduct of the defendant, and we cannot hold that the general issue submitted embraced the matters relating to it. As soon as the money was paid by the purchaser of the options to the defendant, he immediately became indebted to the plaintiff for the amount of his share, and his subsequent conduct did not add one penny to that indebtedness, nor did it in law increase, in the slightest degree, the obligation to pay it. The debt has continued the same to this time, notwithstanding any of the alleged dishonest acts and practices of the defendant. So that, when the jury found that he was indebted to the plaintiff "by reason of the matters alleged in the complaint," they referred, or at least must be presumed to have referred, of course, to those matters only which were necessary to constitute a cause of action for the recovery of the debt, and they were the transactions between the parties prior to the payment of the money and the receipt of the money by the defendant for the plaintiff's use. This was fully sufficient to raise the implied promise to pay to the plaintiff his part of the proceeds if there was not already an express one to do so. The allegations of fraud were therefore extrinsic to the cause of action, and it should not be supposed that the jury, under an issue so framed, passed upon the alleged fraud; and they not having made any special finding of fraud, a personal execution should not have issued upon the judgment. *Clafin v. Underwood*, 75 N. C. 485; *Preiss v. Cohen*, 117 N. C. 54, 23 S. E. 162. There should be a separate and distinct issue submitted to the jury as to any fraud alleged, unless the cause of action is of such a nature that the questions of debt and fraud can be tried in one issue, so as to have a clear and intelligible finding as to each of them. Such a case will rarely if ever be presented, but we do not at the present undertake to say that an issue in that form would not be proper. It is better practice, though, to have the fraud found as a fact, under an issue by itself, or separate from that as to the debt. We think the dictum in *Peebles v. Foote*, 83 N. C. 102, that if there is an allegation of fraud in the complaint and a judgment for the debt, it will authorize an execution against the person if the complaint is duly verified, without any finding of fraud, and judgment thereon was virtually disapproved in *Stewart v. Bryan*, 121 N. C. at page 50, 28 S. E. at page 20, where *Furchea, J.*, for the court, says: "It will not do to carry the doctrine of *Peebles v. Foote*, under section 447 of the Code, as amended by Acts 1891, p. 595, c. 541, to the extent contended for in the argument of

plaintiff, that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the Constitution." That case seems to sustain the view we have taken herein, that the Constitution requires that there shall be no imprisonment for the enforcement of a debt, unless where the fraud has been adjudged upon an issue properly submitted to the jury. It was there held that a mere allegation of fraud, in a verified complaint, was not sufficient, where the judgment was simply for a debt. The cases cited by the plaintiff's counsel are not in point. *Kinney v. Langhenour*, 97 N. C. 325, 2 S. E. 43, did not involve a question of fraud, but a different cause of action for which an arrest could be made. An order of arrest had been served before judgment, and the jury found the necessary facts to authorize an execution against the person to issue upon the judgment. The cases of *Pasour v. Lineberger*, 90 N. C. 159, and *Wingo v. Hooper*, 98 N. C. 482, 4 S. E. 453, merely decide that, at that time, the defendant was not entitled to a jury trial upon the questions of fact raised by the affidavits upon which the orders of arrest issued, and that the denial of a motion to vacate, if not reversed, is *res judicata*.

The constitutional right of trial by jury shields the defendant from arrest under an execution against his person unless, in actions of debt, an issue of fraud has been found against him, and a judgment entered in conformity therewith. We so hold, and must refuse to follow *Patton v. Gash*, 99 N. C. 280, 6 S. E. 193, if in conflict with our views or any expressions to the contrary, if there are such, in prior cases. If this right of trial by jury exists where his property, however small its value may be, is involved, with much greater reason is it guaranteed where the liberty of the citizen is imperilled. The provision of Revisal 1905, § 735, does not bear on the case, as it applies only to an issue, so called, which is raised by a denial of the facts stated in the affidavit, upon which the order of arrest is based and which is ancillary to the principal cause of action. In such a case the defendant may demand a jury trial; but where the issue of fraud is raised by the pleadings, the plaintiff must take the burden and he must establish the fact of fraud before he can be entitled to an execution against the person of the defendant. We conclude this branch of the case with the language of Chief Justice Pearson, in *Clafin v. Underwood*, 75 N. C. 486: "We concur with his honor in the conclusion that the defendant could not lawfully be arrested and imprisoned under a writ of *capias ad satisfaciendum*, for the reason that the issue of fraud had not been tried. By the Constitution no person can be imprisoned for debt

except in cases of fraud. No case of fraud had been proved against the petitioner." We, also, refer to *Merritt v. Wilcox*, 52 Cal. 288, and *Payne v. Elliott*, 54 Cal. 389, 35 Am. Rep. 80, where the subject is discussed, and the conclusion we have reached is fully vindicated.

As our opinion is against the plaintiff in this appeal, it is not imperative that we should decide the question, whether an appeal is the proper remedy for the review of the judge's decision upon the habeas corpus, or whether the matter should have been brought before us by a certiorari. The question was not much pressed upon our attention, and we advert to it merely for the purpose of suggesting that a careful amendment of the statute relating to proceedings in habeas corpus with a view of affording a speedy and effective method of reviewing such proceedings in this court would tend often to promote justice by simplifying the remedy and facilitating its use. It should of course be done cautiously so as not to defeat the object of the law in other respects, or to delay its administration in the courts. For the purpose of reaching the merits of the case and deciding upon them, we may at least treat this proceeding as in the nature of a motion in the cause to recall the execution and to discharge the defendant; the denial of which motion would be reviewable by appeal. Such a motion was made and entertained in *Houston v. Walsh*, 79 N. C. 36, and the procedure recommended as an appropriate one. The plaintiff surely has no reason to object to this view being taken of the matter, as it is done for his benefit, and so that he may be heard, if his appeal was improper. It would seem that habeas corpus will lie where it appears from the judgment roll that the court had no jurisdiction to issue an execution against the person. 17 Cyc. 1520; 21 Cyc. 324; *Clafin v. Underwood*, 75 N. C. 485; *Houston v. Walsh*, 79 N. C., at page 41. The statute forbids the use of the writ only where the person applying for it has been committed or is detained by virtue of the final order, judgment or decree of a competent tribunal of civil or criminal jurisdiction, or of an execution issued thereon. *Revisal*, 1905, § 1822. We see therefore that it must be a competent court, and it must have had jurisdiction to proceed against the person committed.

This disposes of the plaintiff's appeal in this case adversely to his contention.

No error.

Plaintiff's Appeal.

After the defendant had been discharged upon habeas corpus by Judge Allen, his sureties surrendered him, and he sued out another writ before the same judge, and was again discharged. It may be doubtful if the sureties could surrender their principal after he had once been discharged upon the ground that he was not amenable

to arrest and imprisonment under an execution issued against him in the same cause. But however this may be, our ruling in the other appeal is decisive of this one. If the defendant was not originally liable to arrest, he surely cannot be held even upon a surrender of him by his sureties.

No error.

Plaintiff's Appeal.

The defendant was ordered to appear before the clerk and be examined in a supplementary proceeding. He moved to dismiss the proceeding as another of a like kind, and instituted for the same purpose before the judge, was then pending on appeal to this court. The clerk refused to dismiss and the defendant excepted and prayed an appeal which was also refused. He then obtained an order from Judge Allen to the clerk, requiring him to certify the record to the superior court in order that the matter might be reviewed by him as upon appeal, and to stay all action until it could be heard. The record was accordingly certified and the case came on to be heard by Judge Allen, who was of the opinion that the plea of former proceeding for the same cause pending and undetermined, was a valid objection to the examination of the defendant, as full relief could be had in that proceeding. The judge held that the ruling of the clerk was erroneous, and ordered that the proceeding be dismissed. The plaintiff excepted and appealed to this court. We do not understand why this decision was not correct. If it was not, then it follows that the defendant might be vexed by any number of proceedings of the same kind, when one would fully and completely answer the purpose of the plaintiff. This is not a question as to the competency of testimony or the qualification of a witness, but it involves the right of the clerk to proceed at all, under the circumstances. The cases relied on by the plaintiff's counsel are not in point. In *Bruce v. Crabtree*, 116 N. C. 528, 21 S. E. 194, which is more like this case than any other cited, the appeal was taken not by the defendant, Crabtree, but by the witness Hartsfield, who had no interest in the cause. It is true the judge who delivered the opinion, said that the order of the clerk was interlocutory, and not appealable; it not being like a final judgment—citing *Clement v. Foster*, 99 N. C. 255, 6 S. E. 186—which it will be found does not sustain the view expressed by him. There the plaintiff moved for judgment upon the answer, which he alleged was insufficient. The motion was refused, and he appealed. It was properly held that the appeal was premature, because he should have noted his exception, and appealed from the final judgment in the case. But there is no final judgment in this proceeding, and no stage of it at which an appeal can be taken, in order to preserve and protect the defendant's rights, unless it is that at which this appeal

was taken. When the clerk was properly informed that a similar proceeding was then pending before the judge, he should have refused to proceed, and failing so to do, the judge had the power to order that he desist from further action. If the course suggested by the plaintiff should be pursued, great wrong and oppression might result to the defendant. The other cases cited are equally inapplicable. This case is governed by *Bank v. Burns*, 107 N. C. 465, 12 S. E. 252, in which an appeal was held to lie to the judge under circumstances similar to those which appear in this case, and both cases are distinguishable from *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731, as in that case there was a defect in the process which could be remedied easily by amendment, while in this case and in that of *Bank v. Burns*, "the objection affects the very existence of the proceedings," as said by *Merrimon, C. J.*, in the latter case.

We think Judge Allen proceeded regularly, and his ruling meets with our concurrence. It is unnecessary to notice the defendant's second ground of objection to the proceeding which he assigned before the clerk, and afterwards before the judge.

No error.

Defendant's Appeal.

When Judge Allen dismissed the proceeding then pending before the clerk, he required the defendant to give an undertaking in the sum of \$1,000 to appear at a time designated for the purpose of being examined, should his order dismissing the proceeding be reversed, the said undertaking to take the place of the one on file which was ordered to be canceled. If there was danger of the defendant leaving the state, and it appeared that he had property which he had unjustly refused to apply to the satisfaction of the judgment, the judge had the power to require him to give security for his appearance, and this is all he did. *Revisal 1905, § 671*. What effect our decision in the plaintiff's appeal from the order dismissing the supplementary proceeding will have upon the undertaking, as a security to the plaintiff, we need not now determine.

No error.

WALTER A. WOOD MOWING & REAPING
CO. v. GREENWOOD HARDWARE CO.
(Supreme Court of South Carolina. Nov. 21,
1906.)

1. MONOPOLIES—WHAT CONSTITUTES.

A contract whereby plaintiff agrees to sell exclusively to defendant and defendant to buy exclusively of the plaintiff certain farm machinery to be sold in a certain territory is not injurious to the public as tending to create a monopoly, or a violation of *Civ. Code 1902, § 2845*, as lessening full and free competition to an unreasonable extent.

[Ed. Note.—For cases in point, see *Cent. Dig. vol. 35 Monopolies, § 13.*]

2. CONTRACTS—RESTRAINT OF TRADE.

The test to determine whether a contract in partial restraint of trade is reasonable is whether it affords only a fair protection to the interests of the parties in whose favor it is made without being so large in its operations as to interfere with the interests of the public.

Gary, A. J., dissenting.

Appeal from Common Pleas Circuit Court of Greenwood County; Memminger, Judge.

Action by Walter A. Wood Mowing & Reaping Company against Greenwood Hardware Company. From an order sustaining demurrer to part of answer, defendant appeals. Affirmed.

Sheppards, Grier & Park, for appellant.
Ellis G. Graydon, for respondent.

JONES, J. This appeal is from an order of Judge Memminger sustaining a demurrer to one of the defenses set up in the answer to plaintiff's first and third causes of action. The first cause of action was for certain mowers, hayrakes, and sickle grinders sold and delivered to defendant January 26, 1904, under a written contract at prices aggregating \$767.93, and the third cause of action was for mowers and rakes sold to defendant on September 12 and 19, 1904, on its order, aggregating \$94. The answer alleges that the contract of sale was illegal and void, under section 2845, vol. 1, Code of Laws, prohibiting trusts and combinations in restraint of trade. In order that the facts admitted by the demurrer may accurately appear, we set out in full that part of the answer under consideration, as follows:

"(a) That heretofore, to wit, on the 26th day of January, 1904, defendant and plaintiff entered into a written contract which was not to be complete until approved by the sales manager of the plaintiff, and which was approved by said sales manager on February 10, 1904, as will appear by reference to the said contract.

"(b) That the said contract, among other things, contained the following provisions, to wit, that the plaintiff was to manufacture and sell unto defendant certain mowers, hayrakes and sickle grinders specified in the said contract, and provides that, in case additional machines and parts of machines were subsequently ordered, same to be under the terms of the said contract and subject thereto, all to be imported into this state from the state of New York.

"(c) The said contract also, among other things, contained the following provisions, as follows, to wit: 'Said first party agrees to use reasonable diligence to prevent other agents than said second party from interfering or making sales of machines covered by this agreement in said territory, but in no instance will said first party pay or allow any commission on a machine sold, other than to the party making the sale.' 'And the party of the second part agrees that we will canvass said territory thoroughly for purchasers of said machines and that we will

not accept the agency for, or sell, any other mower, hayrake, tedder, reaper, harvester, and binder, corn binder, or sickle grinder during the term of this contract."

"(d) And the said contract also further provides that all machines furnished under this contract shall be sold by the second party for use only in the territory named below, and, in case of violation of these conditions, the party of the first part shall have the right to refuse machines not delivered and named as the territory 'Greenwood and vicinity'; that the defendant herein is the party of the second part and plaintiff the party of the first part in said contract.

"(5) That the goods alleged to be sold and shipped to this defendant by the plaintiff in the first and third causes of action herein were under the terms and provisions of this said contract, to which said contract reference is craved for a fuller statement of its said terms and conditions, and were imported into this state from the state of New York.

"(6) That the said contract entered into by and between the plaintiff and defendant herein, and under which the plaintiff agreed to sell and deliver to the defendant the goods which it alleges to have sold and delivered in the first and third causes of action of its said complaint, was made with a view to lessen full and free competition in the sale of articles imported into this state, the said articles having been imported into this state from the state of New York, and said contract so entered into was designed and tends to control the price of the said articles to the consumer of the same and affects the full and free competition in the sale of the said articles and in the price thereof, and the said contract is in direct violation of section 2845, vol. 1, Code of Laws of South Carolina, and is against public policy, unlawful and void, as declared by said statute.

"(7) That all goods received by this defendant and which were sold and delivered to it by the said plaintiff, mentioned in the first and third causes of action in the complaint herein, were sold under, and by virtue of, the terms of the said contract as hereinabove alleged, and as will more fully appear by reference to the said contract, which said contract is void as being in conflict with the provisions of the statute above mentioned, and the defendant alleges that plaintiff cannot maintain this action for the purchase price thereof."

We concur with the circuit court in holding that the contract is not obnoxious to section 2845. That section reads as follows: "All arrangements, contracts, agreements, trusts or combinations between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tends to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic

raw material, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer, of any such product or article, and all arrangements, contracts, trusts, syndicates, associations or combinations between two or more persons as individuals, firms, corporations, syndicates or associations, that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premium or prices, or seeks to control in any way or manner such tariffs, rates, tolls, premiums or prices in any branch of trade, business or commerce, are hereby declared to be against public policy, unlawful and void."

In the case of *State v. Chemical Co.*, 71 S. C. 544, 51 S. E. 455, this court held that the statute must be construed as intending that the contract, etc., therein mentioned were unlawful and against public policy only when made with a view to lessen, or which tend to lessen, full and free competition to an unreasonable extent. We are asked to review that case, and, after careful consideration, we adhere to the principle announced. A construction of the statute which would make obnoxious every contract which tends in any measure to affect the cost or price of articles to the producer or consumer, or to lessen in any degree full and free competition, would probably render the statute liable to the objection that it unnecessarily and unreasonably abridges the freedom of the contract guaranteed by the state and federal Constitutions. It is true the right to make contracts is not absolute and unlimited, but is subject to valid police regulations having reasonable relation to the public welfare, but otherwise the right of contract must be unfettered. The construction adopted gives the statute valid operation, having due regard, on one hand to the right of contract, and on the other to the police power. The legislative purpose was not to destroy the right to make those contracts in partial restraint of trade which the just and equitable principles of the common law had long upheld, but it was to destroy trusts and combinations designed, or having natural tendency, or potentiality, to create a virtual monopoly. The title of the original act of 1897 (22 St. at Large, p. 434) and amendatory act of 1898 (22 St. at Large, p. 782) shows that its purpose was "to prohibit trusts and combinations and to provide penalties." No doubt the act was passed in pursuance of section 13, art. 9, of the Constitution, which provides that "the General Assembly shall enact laws to prevent all trusts, combinations, contracts and agreements against the public welfare, etc."

A monopoly, as now understood, "embraces any combination the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public." 20 Ency. of Law, 846.

"A trust has been defined as a contract, combination, confederation, or understanding, express or implied, between two or more persons to control the price of a commodity or service for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly. More accurately, perhaps it is, the entity resulting from the contract, etc., just described." 20 Ency. Law, 846. These are the contracts, trusts, and combinations, monopolistic in purpose, tendency or potentiality, which the statute seeks to prohibit under penalties. In determining whether a particular contract falls within the inhibition of the statute, the court must necessarily consider the tendency or power of the contract to injure the public, either considered in itself or as part of a scheme to destroy or impede competition and control supply and prices. A contract may be lawful in itself as an isolated matter but yet be unlawful as a part of a scheme to create a virtual monopoly. The immediate effect of a trust or combination may be really beneficial to the public in improving the quality of the goods or service and reducing the price, yet, if it has inherent capability or natural tendency to injure the public, then competition is stifled and control of supply and prices secured, it is obnoxious to the statute. Every case, however, alleged to fall within the statute must be controlled by its own peculiar facts and circumstances, and we will not attempt to state any hard and fast rule by which every case must be governed. The main general test should be whether the contract, trust, or combination is monopolistic in purpose or natural tendency. If so, it unreasonably affects competition and prices to the detriment of the public and is obnoxious to the statute.

Before applying this principle to the case in hand, we eliminate from consideration whether the relation between plaintiff and defendant under the contract was one of principal and agent, for, while the entire contract is not set out in the record for our consideration, the admitted allegations describing the contract characterize it as a contract of sale and purchase and not as an agency for sale on commission, and we so trust it in this consideration. We are led to make this observation because of the statement in subdivision "c," in paragraph 4, of the answer, which refers to "agents," "agency," and "commissions." The rule is that contracts containing stipulations like those alleged to be illegal in this case, but which merely create an agency to sell on commission, are not in violation of law or anti-trust statutes. We further eliminate from consideration the effect of such a contract as applied to an article under patent or copyright, as to which the government has already given a kind of monopoly, to secure the fruits of which such contracts may be entirely lawful. From the facts stated we cannot assume that the plaintiff has patent

rights with respect to the mowers, rakes and sickle grinders in question. The demurrer admits that the contract was between the plaintiff, a New York corporation, and the defendant, a South Carolina corporation, with respect to the sale of articles imported into this state, and that, by the terms, defendant bound itself to sell the articles for use only in Greenwood vicinity, to canvass the territory named for purchasers, and not to accept the agency for or sell other similar articles during the term of the contract, and the plaintiff bound itself to manufacture and sell said articles to defendant and to use reasonable diligence to prevent other agents from making sales of such machines in said territory. If we concede that the effect of this was an agreement by plaintiff to sell exclusively to defendant and by defendant to buy exclusively of plaintiff the articles in question in the territory of Greenwood and vicinity during the term of the contract, it is one of those minors contracts in partial restraint of plaintiff's right to freely sell and defendant's right to freely buy which the common law would hold to be reasonable as a fair protection of the mutual interests of the parties, and not injurious to the public as tending to create a monopoly. There is, in this contract, no combination among manufacturers of mowers, rakes, and grinders to control the supply and prices of such machinery and no combination among dealers in such machinery to affect competition or prices, but it is the agreement of a single independent manufacturer and a single independent dealer and not monopolistic in its tendency. The contract leaves room for the keenest competition in that community by the manufacturers and dealers of similar implements. There is nothing in the complaint to show that defendant is the sole dealer in that kind of implement in that community, or that the needs of the public could not be reasonably met by other dealers in similar implements.

But it is alleged in the answer that the contract was made with a view to lessen competition and designed to control the price and cost of said articles to the consumer. The demurrer admits this allegation as to the purpose of the contract, and this, at first blush, presents a difficulty in sustaining the demurrer. But, as shown in *State v. Chemical Co.*, *supra*, an intent to affect competition and prices to a reasonable extent is not within the prohibition of the statute, and there is no allegation of fact in the answer to show that competition and prices were intended to be affected to an unreasonable extent.

Having reached the conclusion that the contract in question is not violative of the statute, we should, perhaps, consider whether it is illegal under the common law, and will do so briefly. Under the common law contracts in general restraint of trade are void, but contracts in partial restraint of

trade are valid if reasonable and founded upon a valuable consideration. *Carroll v. Giles*, 30 S. C. 412, 19 S. E. 422, 4 L. R. A. 154. The test usually laid down by which to determine whether a contract in partial restraint of trade is reasonable is "whether it affords only a fair protection to the interests of the party in whose favor it is made, without being so large in its operations as to interfere with the interests of the public." *McCurry v. Gibson* (Ala.) 18 South. 808, 54 Am. St. Rep. 180; *Pacific Factor Co. v. Adler* (Cal.) 27 Pac. 36, 25 Am. St. Rep. 102; *Trentman v. Wahrenburg* (Ind. App.) 65 N. E. 1060. Applying this test, the contract is unquestionably valid under the common law.

Having reached the conclusion that the contract set up in the answer is not void, it becomes necessary to consider whether, if the contract be illegal, it is so divisible as that the legal may be separated from the illegal to enable plaintiff to recover the value of the goods sold and delivered to defendant thereunder, as held in *Packard v. Byrd*, 73 S. C. 1, 51 S. E. 678, in reference to a similar contract, nor is it necessary to consider whether the doctrine of estoppel has any application against ascertaining the invalidity of a contract void as against public policy.

The judgment of the circuit court is affirmed.

GARY, A. J. (dissenting). The following are the reasons why I do not concur in the opinion of Mr. Justice JONES:

The plaintiff agreed (1) to manufacture and sell to the defendant, certain machines at prices specified in the contract; (2) that it would use reasonable diligence to prevent other agents from interfering or making sales of machines covered by the contract, in the territory named as Greenwood and vicinity. The defendant agreed (1) to canvass said territory thoroughly, for purchasers of said property; (2) that it would not accept the agency for, or sell any other machines during the term of the contract; (3) that it would sell the said machines for use only in said territory. The contract further provided that, in case of the violation of said conditions, the plaintiff should have the right to refuse to furnish machines not delivered.

Section 2845 of the Code of Laws provides that "all arrangements, contracts, agreements, trusts, or combinations between two or more persons as individuals, firms, or corporations, made with a view to lessen, or which tend to lessen, full and free competition, in the importation or sale of articles imported into this state * * * and all arrangements, contracts, trusts, syndicates, associations, or combinations between two or more persons as individuals, firms, corporations, syndicates, or associations, that may lessen or affect, in any manner, the full and free competition, in any prices, etc., or seek to control, or in any way or manner, prices, etc., in any branch of trade, business, or

commerce, are hereby declared to be against public policy, unlawful and void." The statute came before the court for construction, in the case of *State v. Chemical Co.*, 71 S. C. 544, 51 S. E. 455, and it was decided that it must be interpreted as intending that the contracts therein mentioned are unlawful and against public policy only, when made with a view to lessen, or which tend to lessen, full and free competition to an unreasonable extent. In logical order the first question for consideration is whether the contract herein was made with such a view. The fact that the plaintiff agreed to use reasonable diligence to prevent other persons from selling machines in said territory; that the defendant agreed to canvass the territory thoroughly for purchasers of said articles; that it would not sell any other machines than those purchased from the plaintiff during the term of the contract; and that it would sell the machines for use only in said territory, not only shows that the parties entered into the contract, with a view to lessen full and free competition to an unreasonable extent, but that it naturally tended to bring about such a result. "Where a contract belongs to a class which is reprobated by public policy, it will be declared illegal, though, in that particular instance, no actual injury may have resulted to the public, as the test is the evil tendency, and not its actual results." 15 Enc. of Law, 934.

Having reached the conclusion that the contract is obnoxious to section 2845 of the Code of Laws, the next question for consideration is whether this case comes within the exception to the general rule, recognized in *Packard v. Byrd*, 73 S. C. 1, 51 S. E. 678: "Where the party complaining can exhibit his case, without relying upon the illegal transaction." The policy of this state in regard to illegal contracts will be seen by reference to the following cases: *Lowry v. Pinson*, 2 Bailey, 324, 23 Am. Dec. 140; *Mordcaul v. Dawkins*, 9 Rich. Law, 262; *Willis v. Hockaday*, 1 Spears, 379, 40 Am. Dec. 606; *Harvin v. Weeks*, 11 Rich. Law, 601; *Wallace v. Lark*, 12 S. C. 578, 32 Am. Rep. 516; *McConnell v. Kitchens*, 20 S. C. 430, 47 Am. Rep. 845; *Gist v. Tel. Co.*, 45 S. C. 363, 23 S. E. 143, 55 Am. St. Rep. 763; *Lanahan v. Bailey*, 53 S. C. 498, 31 S. E. 332, 42 L. R. A. 297, 69 Am. St. Rep. 884; *Garvin v. Garvin*, 55 S. C. 360, 33 S. E. 458; *Pierson v. Green*, 69 S. C. 559, 48 S. E. 624; *State v. Robinson*, 70 S. C. 468, 50 S. E. 192. These cases announce the general principles that the court will not lend its aid in the enforcement of an illegal contract, nor, when the contract is tainted with illegality, will it undertake to separate that which otherwise would be valid from the part which is contrary to law, nor will it suffer a recovery for the value of goods delivered in pursuance of a contract infected with illegality, nor permit a recovery for goods sold by a person who not only knew that they were to be used in furtherance of

an unlawful scheme, but who actively participated in bringing about the contemplated result. It thus appears that public policy demands that the exception to the general rule, laid down in the case of *Packard v. Byrd*, 73 S. C. 1, 51 S. E. 678, should not be extended.

"Where a contract which is entire contains a stipulation or agreement which is illegal, and which, therefore, is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored, and the other provisions of the contract enforced; the illegal stipulation or agreement in such a case penetrates and corrupts the whole contract, and violates it as an entirety." 15 Enc. of Law, 988. "If a promise to do several things or several distinct promises, although they be founded on a legal consideration, are indivisible, and one or more of the promises are illegal, the legal promise or promises cannot be enforced, but the whole agreement is void." 9 Cyc. 565, 566. "A contract may be said to be entire, when by its term, nature, and purposes, it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. A divisible contract is one in its nature and purposes susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor intended by the parties to be so." 15 Enc. of Law, 988. In the case of *Packard v. Byrd*, 73 S. C. 1, 51 S. E. 678, the court said: "The parties, by their course of dealing with each other, give some evidence of their intention that payment for each bill of shoes sold and delivered was not conditioned or dependent upon the performance by plaintiffs of their agreement to give the defendant exclusive right to handle plaintiff's line of shoes in Greenwood, S. C."

In the case under consideration, there was no such evidence; on the contrary, it appears upon the face of the contract that "it contemplates and intends that each and all of its parts, material provisions, and the consideration, are common to each other, and interdependent." This fact clearly appears from that portion of the contract which provides that, in case of violation of its conditions, the plaintiff should have the right to refuse to furnish machines. In other words, the furnishing of machines from time to time was conditioned and dependent upon the performance by the defendant of its part of the contract, and its promises were not made solely in consideration of the agreement on the part of the plaintiff to furnish the machines, but upon the further agreement that it would use reasonable diligence to prevent other persons from interfering, or making sales of machines in said territory.

Under these circumstances the contract was not severable, and his honor, the circuit judge, erred in sustaining the demurrer.

STATE v. ROSS.

(Supreme Court of South Carolina. Dec. 18, 1906.)

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

On trial for murder, an instruction on the issue of self-defense that a person as a rule is not justified in using a deadly weapon to repel an attack with the naked hand, but, if he reasonably apprehends death or great bodily harm, he may use such weapon if the other elements of self-defense are present, with the further statement that the rule is that, if a man of ordinary prudence and reason standing where accused then stood would apprehend and did honestly apprehend death or great bodily harm, and his apprehensions were reasonable, he would have the right to resort to a deadly weapon, is correct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 616-621.]

2. SAME.

An instruction on the issue of self-defense that the ordinary requirement to sustain a plea that defendant must make it appear that it was necessary to take the life of deceased to protect his own life or to prevent serious bodily harm cannot be insisted upon by the state, unless, from the character of the weapon used, the presumption of intended natural consequences of the act, or positive testimony, the jury may conclude that defendant intended to take the life of deceased, was properly excluded as covered by the charge given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 616-621.]

Appeal from General Sessions Circuit Court of Greenville County; Prince, Judge.

Thomas E. Ross was convicted of murder, and appeals. Affirmed.

So much of the charge as is pertinent to the questions raised here is as follows:

"Whether or not the defendant killed the deceased, as charged in this indictment, and whether or not he assaulted the deceased with a deadly weapon, are questions of fact for you. My charge is that, if the defendant intentionally assaulted the deceased with a deadly instrument, an instrument calculated to produce death, and what I mean, intentionally assaulted the deceased with that, the law would imply malice, unless he has satisfied you from the greater weight of the testimony in this case that he was acting in self-defense. You will remember that I told you that every killing in malice, whether express or implied, is murder. Now, gentlemen, if, in your consideration of this case, you should entertain a reasonable doubt as to whether or not the defendant, in slaying the deceased, if he slew him, is guilty of murder, as I have defined it to you, then you will proceed in your consideration of the facts of the case with regard to the question as to whether or not he be guilty of manslaughter. Manslaughter, as I have told you, is the unlawful killing of another without malice. If you were in a crowded courtroom like this, and should carelessly handle a deadly weapon, such as a pistol or gun, and carelessly snap it, without regard for what might be the consequences, and when the hammer falls upon the cap of a cartridge and the

gun or pistol goes off and kills some one in the crowd, that would be manslaughter, if the jury should believe your conduct on that occasion was reckless and you were guilty of criminal negligence. That would, however, be involuntary manslaughter, because, in handling the pistol carelessly, you didn't intend to shoot anybody. If you would take the pistol and deliberately fire it into that crowd, with no intention of killing any particular man, but recklessly shot into that crowd and killed some one, that would be murder, but manslaughter is either voluntary or involuntary. Voluntary manslaughter is the killing of a human being in sudden heat and passion upon a sufficient legal provocation. Now, that means sudden heat and passion. This sudden heat and passion aroused upon a sufficient legal provocation would reduce a killing, which would otherwise be murder, from murder to manslaughter. Now, in order to do this, the killing must have been the result of the sudden heat and passion, and that sudden heat and passion must have been aroused upon a sufficient legal provocation. It is not every killing in sudden heat and passion that would be manslaughter; unless it be aroused upon a sufficient legal provocation, it would be murder; the law would imply malice. For instance, I would curse you and apply to you or members of your family, reflecting upon either your or their character, epithets which would be calculated to arouse to frenzy the ordinary man, and that was all I did, use words and nothing else, and you slay me, even if you would slay me in anger, in sudden heat and passion, yet it would be murder, for words will not justify an assault, much less a killing. It must be upon a sufficient legal provocation, and the law does not recognize words as provocation; it takes something more—it takes aggression to your person or property, or to the person or property of one under your protection, such as a wife or child, or some other member of your family, your father or your mother. As counsel told you, if I were to meet you on the street and apply vile epithets to you, and at the same time tweak your nose or put my hands upon you in a rude manner, in such a way as to show my contempt for your manhood, and you strike me dead, the law would not excuse you, but the law would say that it was manslaughter, because you did it upon a legal provocation, yet you resorted to more force than was necessary, and you did so because of your passion and not for the purpose of protecting your person. You could not make self-defense out of that, because you had used upon me a deadly instrument, one calculated to inflict death, and you had used it in heat and not in malice, but the law says it is manslaughter, not self-defense. It says it would be unlawful for you to kill me in that way, but it would not be murder. The law, in its tender compassion for the frailty of human nature, reduces that killing from mur-

der to manslaughter. Counsel told you that every case of intentional killing or the intentional use upon another of a deadly instrument does not necessarily mean murder. It will be a homicide; it may be an unlawful homicide, perhaps, or it may be manslaughter, or it may not even be that; it may be lawful; it may be used in self-defense. So, if you decide this is not a case of murder, or that the state has failed to satisfy you beyond a reasonable doubt that this is a case of murder, and that the defendant is the guilty party, then you would inquire whether or not it is a case of voluntary manslaughter or involuntary, and, if you should conclude that you are not satisfied beyond a reasonable doubt that the defendant is guilty of manslaughter, acquit him.

"As I have told you, there are only two cases of unlawful killing, either murder or manslaughter, and every unlawful killing belongs to one or the other of these classes and it is unlawful unless it is either justifiable or excusable. You need not consider the case justifiable homicide here; there are no facts to which that law would be applicable here in this case. There are no facts to which you could apply the law of justifiable homicide. Then you will inquire if it is an excusable homicide, by way of self-defense. When one comes into court and pleads self-defense, that he slew the deceased in the defense of his person, the burden of proving, of establishing, that plea is upon him, but he is not required to prove that with the same degree of certainty the state is required to prove its case. The state is bound to prove its case beyond every reasonable doubt, but the law requires of the defendant to establish his special plea by merely the greater weight of the evidence, the preponderance of the evidence, just as you would decide in a civil case. Now, self-defense is a perfect defense, when it is worth anything at all. It is a God-given right, and it is a man-given right to use it. In order for a defendant to avail himself of that plea, he must satisfy the jury of four elements by entering that plea, and he must establish each of the elements by the greater weight of the evidence, and, if he fails to satisfy the jury by the greater weight of the evidence on any one of them, the plea as to self-defense fails. Now, you will naturally inquire, what are elements? In the first place, he must be without fault in bringing about the difficulty. The plea of self-defense is a plea of necessity. One kills in self-defense because it is necessary to kill. That does not mean absolutely necessary, but apparently necessary. He must be without fault in bringing about that necessity to kill, in bringing about the difficulty. If he has satisfied you as to that element by the greater weight of the evidence in the case, all of the evidence in the case—that is, by the greater weight of the evidence in the whole case—if he has satisfied you as to that ele-

ment as to his being without fault in bringing on the difficulty, then one element which would entitle him to the plea of self-defense would be made out. That would not make good the plea, unless he goes further, and establishes the other three elements; and the next is, he must have believed himself in immediate danger of receiving death or serious bodily harm at the hands of his antagonist, and that it was necessary for him to strike in order to save himself from this threatened danger. He must satisfy you by the preponderance of the proof in this case that he did so believe, and, if he fails to do that, his plea would fail. You must be satisfied from the greater weight of the evidence that the defendant in this case, that the defendant did honestly believe himself in danger of receiving serious bodily harm or death at the hands of his antagonist, and that he believed it was necessary for him to strike in order to save himself from the threatened danger—that he did honestly believe that. If he has satisfied you on that, that goes to that extent in making out his plea; but that is not enough, because a coward may think it is necessary to strike when there is no danger, and a man of ordinary prudence and reason would not think it necessary to strike and would not have believed himself in danger. The law does not allow a man to come and simply believe himself in danger and take the life of another, but he must not only satisfy you by the preponderance of the evidence that he believed himself in danger, but he must satisfy you by the greater weight of the evidence that a man of ordinary courage and prudence, standing where he then stood and viewing the circumstances as he viewed the threatened danger, would have come to a like conclusion, would have thought himself in danger, and would have thought it was necessary to strike to save himself from serious bodily harm or death. While the law makes him temporary judge, so jealous it is of human life, it requires him, after he has acted upon his own judgment, to satisfy a jury of his country that a man of ordinary courage and firmness, reason and prudence, would have come to the same conclusion, if he had been circumstanced as he was then circumstanced. Now, if the defendant has satisfied you that he was not only without fault in bringing on the difficulty, but that he did actually and honestly believe himself in danger, and that it was necessary to save himself from serious bodily harm or death, it was necessary to strike to save himself, and that a man of ordinary courage and firmness, reason and prudence, standing where he then stood, and being threatened as he was then threatened, would have come to a like conclusion, then he has made out three elements that would entitle him to his plea.

"But that is not enough still. So jealous

is the law of human life, and so exacting in its requirement of him who has taken human life, that it requires him to go yet a step further, and he must show that there was no other reasonably safe way of escape. Now, that is like judging from the appearances as to the necessity; that does not mean in this case absolutely safe way of escape, or that there was no other way of escape, but it means that there was apparently no other reasonably safe way of escape, and that to a man of ordinary courage, firmness, reason, and prudence, would have so appeared. Now, he is not required to show that there was no other possible means of escape. All that he is required to do is to satisfy you by the greater weight of the evidence, if he has made good the other three elements, that there was no other reasonably safe way of escape apparent to him, and that it would not have been apparent to a man of ordinary courage, firmness, reason, and prudence, just as in the case of making out one of the elements as to believing himself in danger of receiving serious bodily harm or death, so here the law, while it casts the point or question of deciding upon him, it requires him to satisfy a jury of his country that a person of ordinary courage, reason, prudence, and firmness, would have come to a like conclusion that there was no other reasonably safe means of escape to him; and that, to another person of ordinary reason, firmness, prudence, and courage, situated as he was, circumstanced as he was then circumstanced, there would have been apparently no reasonably safe way of escape, because, if there was a reasonably safe way of escape, or other ways, it would allow a coward to take counsel of his fears and act, when there was no necessity for acting. So, the law says you must act upon appearances, and you must judge, but you must not judge rashly. You must render judgment and act upon your own responsibility, but you must be prepared to satisfy a jury of your country, by the greater weight of the evidence, that a man of ordinary firmness, courage, and prudence would have believed himself to have had no other means of escape.

"If the defendant has satisfied you on all four of the elements by the greater weight of the testimony, he has made good his plea of self-defense, and it would be your duty to acquit him. This is an affirmative plea, and it is the defendant's affirmative plea, and he is only required to prove it, and each element of it, by the greater weight of the evidence, by the preponderance of the evidence, just as we would do in a civil case. Then, gentlemen, if the defendant has made good his plea by the greater weight of the evidence, has proven each element necessary to entitle him to it by the greater weight of the evidence, by the preponderance of the proof, then he has made good his plea, and it would be your

duty to acquit him, and you would write a verdict of not guilty. * * *

"The defendant's counsel have requested me to charge you the following:

"(1) If A., being without fault in bringing on the difficulty, is assaulted by B., and, using only necessary force in repelling the assault, accidentally kills B., the killing is excusable.' Well, gentlemen, that is, provided the other elements of self-defense have been established to the satisfaction of the jury, that would be true. If A., being without fault in bringing on the difficulty, is assaulted by B., and, using only necessary force in repelling the assault, accidentally kills B., the killing is excusable. You see those words are very wisely chosen, 'only using necessary force.' If a man uses more force than is necessary in repelling an assault, more than would be justifiable—using more force than would be necessary—he would be responsible if he kills a man. In other words, you have a right to defend your person from serious bodily harm or death, and from the attack or assault of any one, but in doing so you must, in some degree, proportion the force used in your defense to the force used by the other party. You would not be justified in using excessive force in defending your person from some slight assault. So, with that understanding, as I understand the law I gave you, read in this request, it is perfectly correct. If he was without fault in bringing on the difficulty, and is assaulted by another, and he, using only necessary force in repelling the assault, accidentally kills his assailant, the killing is excusable, because that would be self-defense. I charge you that.

"(2) As a general rule, a person is not justified in using a deadly weapon to repel an attack with the naked hand. But, even in such cases, if the person thus assailed reasonably apprehends death or great bodily harm, he may make use of such a weapon, provided the other elements of self-defense, as I have explained to you, are present.' I charge you that, but I want you to notice it. When you read this very carefully, it sounds correct, but, if you don't read it carefully, it doesn't sound right. At first glance, I didn't think that was a correct proposition of law. It is very carefully drawn. I want to call your attention to it. 'But, even in such cases, if a person thus assailed reasonably apprehends death or great bodily harm, he may make use of such a weapon;' that is, if a man of ordinary prudence and reason, standing where he then stood, would have apprehended it, and that he did honestly apprehend it, and that his honest apprehensions were reasonable under the circumstances, then he would have the right to resort to any deadly weapon. Suppose a very stout man would strike a very helpless man, assault him with his fist, a muscular man assault a helpless man, an invalid, with his fist, that invalid would be justified in using a weapon which he

would not be otherwise justified in using. Because, if he was not in a physical condition to defend himself with his fist, he may resort to the use of a weapon, but, in doing so, he must not do anything more than is necessary for his defense. When I say that he must not do anything more than is necessary for his defense, I don't mean that he can put down a tape line or make a calculation that he is required to do that, and that he didn't use a fraction of an ounce more than was necessary. He must satisfy you that it would have appeared necessary to a man of ordinary prudence and firmness, placed where he was placed, to have done whatever he did. That law is correct, and the request as formulated is correct, with the proviso added in. I am not going to charge you the third request, and I will not read it to you.

"If you find the defendant guilty of murder, and don't see your way clear to recommend him to the mercy of the court, write your verdict 'guilty' and sign your name as foreman, and that means guilty of murder. If you find him guilty of murder, and for any reason think he should be recommended to the mercy of the court, do so, and write your verdict 'guilty, with recommendation to the mercy of the court.' If you do not find him guilty of murder, you would next inquire whether or not he is guilty of manslaughter, and if you should so conclude—conclude that it was an unlawful killing without malice, and that it is, therefore, manslaughter—you would write a verdict 'guilty of manslaughter,' and, in that case, if you see fit, you can recommend the defendant to the mercy of the court, and, if you find him not guilty, say 'not guilty.'"

Cothran, Dean & Cothran, for appellant.
J. E. Boggs, for the State.

POPE, O. J. The defendant, Thomas E. Ross, was indicted for the murder of Thomas Austin, on the 2d of April, 1905. He was tried at the special term of court of general sessions of Greenville, 1905. The verdict of the jury was, "Guilty of manslaughter, with a recommendation to mercy," and the defendant was duly sentenced to imprisonment for two years in the state penitentiary. From this judgment, he now appeals.

The Following is a brief summary of the testimony at the trial: The defendant, Thos. E. Ross, and the deceased, Thos. Austin, among others, were lying on a pile of sawdust in a stable of one Tanner, conversing. Austin finally sat on top of Ross, and said, "Get up, frog," and then rubbed his face with sawdust. One of the parties present said, "Tanner, look here, had you not better stop that?" Thereupon Tanner pulled the said Austin off of the said Ross; Austin then saying, "I'm going to whip him," advancing toward the said Ross; but Tanner got in between the two men and pushed the said Austin back. Austin was without any weapon whatever,

and had only used his fists against Ross. While Austin was trying to get to Ross, being separated from him by Tanner, Ross seized a rake, the handle of which was six feet in length, and, striking across Tanner, struck Austin a blow on the head, from which Austin fell, and never recovered, dying in a short while afterwards. In the trial, those facts appeared in evidence, the defendant offering no testimony of himself or any witnesses. The circuit judge made the charge to the jury, herewith reported.

The following requests to charge were made by the defendant: "(1) If A., being without fault in bringing on the difficulty, is assaulted by B., and, using only necessary force in repelling the assault, accidentally kills B., the killing is excusable. 1 Bishop, § 801. (2) As a general rule, a person is not justified in using a deadly weapon to repel an attack with the naked hand. But, even in such cases, if the person thus assailed reasonably apprehends death or great bodily harm, he may make use of such a weapon, provided the other elements of self-defense as I have explained to you are present. 25 A. & E. Enc. L. 264. (3) The ordinary requirement to sustain the plea of self-defense, that the defendant must make it appear that it was necessary to take the life of the deceased in order to protect his own life or to protect his person from serious bodily harm, cannot be insisted upon by the state except in cases where, from the character of the weapon used, the presumption of intending the natural consequences of his act, or positive testimony to that effect, the jury may conclude that the defendant intended to take the life of the deceased."

The grounds of appeal are as follows: "The presiding judge erred in modifying the defendant's first request to charge, which was as follows: 'If A., being without fault in bringing on the difficulty, is assaulted by B., and, using only necessary force in repelling the assault, accidentally kills B., the killing is excusable.' Modification was as follows: 'Provided the other elements of self-defense have been established to the satisfaction of the jury, that would be true.' Specifications: The request did not purport to present the law of self-defense; a man has a right to repel any assault, whether he believes himself in danger of death or serious bodily harm or not. The request was intended to present the law that, if a man is assaulted by another, he himself, being without fault in bringing on the difficulty, has a right to repel such assault, using such force as is reasonably necessary, and if, in so doing, he accidentally kills his assailant, he is excusable, irrespective of that element of self-defense, which he ordinarily must establish to

make the plea good, that he thought he was in danger of death or serious bodily harm, and that a reasonably prudent person, situated as he was, would have so thought. (2) The presiding judge erred in refusing the defendant's third request to charge, which was as follows: 'The ordinary requirement to sustain the plea of self-defense, that the defendant must make it appear that it was necessary to take the life of the deceased in order to protect his own life or to protect his person from serious bodily harm, cannot be insisted upon by the state, except in cases where, from the character of the weapon used, the presumption of intending the natural consequences of his act, or positive testimony to that effect, the jury may conclude that the defendant intended to take the life of the deceased.' Specification: The same presented a correct proposition of law applicable to the case, and should have been charged."

1. It seems to us, in disposing of these grounds of appeal, that the charge of the circuit judge covers the same most thoroughly.

2. It is true that, in disposing of them in his charge, the circuit judge is very thorough, and, while not adopting the requests to charge as outlined by the defendant, he has substantially disposed of every feature thereof. It is sometimes necessary, in order that a jury may thoroughly comprehend the law governing the trial of a cause, that the circuit judge take up the law systematically and logically. We think the circuit judge has done this in the present case; that in so doing he has violated no law of this state. The defendant could and should only claim that his propositions of law as submitted should be passed upon by the circuit judge. The order in which the same shall be done must be left to the wise discretion of the circuit judge, who is responsible to the people of the state, including the defendant, that our criminal law shall be upheld.

The exceptions are overruled, and it is the judgment of this court that the judgment of the circuit court be, and the same is hereby, affirmed.

GARY, JONES, and WOODS, JJ., concur in the result.

PER CURIAM. No question of law or fact which would affect the conclusion of the court was overlooked in the opinion. It was erroneously and inadvertently stated in the opinion that the defendant struck Austin in the face with his fist, and this error has been corrected by order of the court. The petition is dismissed, and the order staying the remittitur revoked.

WHEELING ICE & STORAGE CO. v. CONNER et al.(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)**1. EQUITY — PLEADING — BILL — MULTIFARI-
GIOUSNESS.**

Conner purchased in his own name the tangible property of Crystal Manufactured Ice Company for \$10,300, and paid in cash from the funds of Wheeling Ice & Storage Company, a corporation of which said Conner was secretary, and made his eight negotiable notes of \$1,000 each and one note of \$1,300 for the residue of purchase money payable to the order of John W. Walter, who indorsed the same. Conner then indorsed on said notes the name "Wheeling Ice & Storage Co. by C. W. Conner, Secretary" and delivered the notes to McKinley and Bowles who negotiated some of them and retained some. Wheeling Ice & Storage Company filed its bill against all the parties interested, alleging that McKinley and Bowles fraudulently and unlawfully conspired with Conner to sell to him, said Conner, said property at the said sum of \$10,300 to be paid for by the plaintiff company, without the authority of its board of directors and without the knowledge or consent of any member of the board except said Conner, and praying a cancellation of said fraudulent indorsement of said notes, and that McKinley, Bowles, Crystal Manufactured Ice Company, and C. W. Conner be required to repay to it the \$1,000 paid in cash and interest. Upon demurrer to the bill, the court overruled the demurrer. *Held*, bill not multifarious, and court did not err in overruling the demurrer.

**2. CORPORATIONS—AUTHORITY OF SECRETARY—
ACCOMMODATION INDORSEMENT.**

It cannot be presumed that Conner had the power, by reason of his official position, to bind his corporation as an accommodation indorser of his own promissory notes. Such a transaction would not be within the scope of his general powers, and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 1640, 1643.]

**3. BILLS AND NOTES—BONA FIDE PURCHASER
—PRESUMPTIONS.**

There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement and is sufficient to put him on his guard. And, if he fails to avail himself of the notice and obtain the information thus suggested to him it is his own fault, and, as against an innocent party, he must bear the loss.

4. SAME.

Tower v. Whip, 44 S. E. 179, 53 W. Va. 158, Syl. pt. 3, 63 L. R. A. 937, and Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 50, Syl., approved.

(Syllabus by the Court.)

Appeal from Circuit Court, Ohio County.

Bill by the Wheeling Ice & Storage Company against C. W. Conner and others. Decree for complainant, and defendants J. C. McKinley and others appeal. Affirmed.

Henry M. Russell and Hubbard & Hubbard, for appellants. Erskine & Allison, for appellee.

MCWHORTER, P. The Wheeling Ice & Storage Company, a corporation, for a number of years was conducting in the city of

Wheeling the business of manufacturing and selling ice. It seems there were but few stockholders in the corporation and the business was conducted and managed principally by one C. W. Conner, who was secretary and the manager of the concern and seemed to be the general superintendent. The Crystal Manufactured Ice Company, Nick Kuhn Ice Company and the Martin's Ferry Ice & Supply Company were other small corporations doing a like business. The said Crystal Company having its principal place of business in the city of Wheeling and the other two in towns opposite the city of Wheeling, but both of them doing business within the city. J. C. McKinley, being interested in the Crystal Manufactured Ice Company, together with H. G. Bowles undertook to get control of the said Nick Kuhn Ice Company and the Martin's Ferry Ice & Supply Company for the purpose of consolidating the three companies and to remove the competition which existed in the business. A plan was suggested by which said three companies should sell out their business and property to the Wheeling Ice & Storage Company, giving it the control of the trade of all four companies. On the 26th of August, 1902, the Crystal Manufactured Ice Company sold and assigned all of its tangible property to C. W. Conner, at the same time McKinley and Bowles transferred to Conner a sufficient amount of the stock of the Nick Kuhn Ice Company and Martin's Ferry Ice & Supply Company to give him the controlling interest in said two companies. In consideration of these transfers Conner gave to McKinley and Bowles, some to each of them, nine notes, eight of them being for \$1,000 each and the one for \$1,300, and, in order to secure the notes, he obtained the indorsement of John W. Walter as an accommodation indorser, and in addition said Conner indorsed the name of Wheeling Ice & Storage Company upon all of the notes. The notes were negotiable and signed by C. W. Conner as maker, made payable to John W. Walter, and indorsed by him, and then by the Wheeling Ice & Storage Company, by C. W. Conner, secretary. In addition to these notes aggregating \$9,300 \$1,000 was to be paid in cash which was paid to McKinley by Conner out of the money of the Wheeling Ice & Storage Company on the 22d of September, 1902. At the time of making the notes Conner executed to Nelson C. Hubbard, trustee, a deed of trust on all the property transferred by the Crystal Manufactured Ice Company to the said Conner enumerating all the property, horses, ice wagons, supply wagons, harness, ice books, etc., and a contract made by the said party with McKinley by which the said Conner received all the rights of McKinley accruing under an agreement made by him with the Schmulbach Brewing Company on the 6th day of November, 1901, which said agreement provided for the furnishing of ice by said brewing company to McKinley; also

80 shares of the capital stock of the Nick Kuhn Ice Company of the par value of \$100 per share fully paid up and 15 shares of the capital stock of the Martin's Ferry Ice & Supply Company of the par value of \$100 per share on each of which shares the sum of \$50 remained unpaid; in trust to secure the holders of the said several notes of \$9,300 with their interest and any renewal or extension of said indebtedness in whole or in part. While four of the notes for \$1,000 each were made payable on or before 60 days from their date, the others of like amount and the one of \$1,300 were payable on or before one year from date. It was provided in the deed of trust that, upon default being made upon the payment of any one of said notes, all of said indebtedness remaining unpaid should be taken and deemed to be due, and the holder of any of said notes should require the trustee to proceed to sell the property so conveyed for one-third of the purchase money or so much more as the purchaser might elect to pay in cash on the day of sale, and the residue in two equal payments in one and two months from the day of sale with interest.

At the March rules, 1903, the Wheeling Ice & Storage Company filed its bill in the circuit court of Ohio county against C. W. Conner, J. C. McKinley, H. G. Bowles, Crystal Manufactured Ice Company, Nick Kuhn Ice Company, Martin's Ferry Ice & Supply Company, Wheeling Title & Trust Company, L. F. Stifel, trustee, W. C. Stifel and L. F. Stifel, executors of the will of O. E. Stifel, deceased, John W. Walter, and Nelson C. Hubbard alleging that on or before August 26, 1902, the defendant J. C. McKinley, acting with due authority for himself and his then partner, the said H. G. Bowles, and also for the Crystal Manufactured Ice Company, fraudulently and unlawfully conspired to and with the defendant C. W. Conner to sell to him, the said Conner, said property named in the bill for the price of \$10,300 to be paid for by the said Wheeling Ice & Storage Company without the authority or consent of any member of the board except the said Conner; that, in pursuance of such conspiracy, the said Crystal Manufactured Ice Company on the 26th day of August, 1902, executed and delivered to said Conner a bill of sale of all its physical assets, and, in furtherance of said conspiracy, the said McKinley assigned and transferred to said Conner the said ice contract with Schmulbach Brewing Company; and, in further pursuance of said conspiracy, the said Bowles on the same day executed a blank assignment of a certificate for 40 shares of the capital stock of the Nick Kuhn Ice Company that had been issued to him and delivered the same to the said Conner and the said McKinley executed a blank assignment of a certificate for 40 shares of the capital stock of the said last-named ice company that had been issued to him and delivered the same to Conner, which 80 shares

of stock constituted a majority of the capital stock of that company, and on the same day said McKinley and Bowles each assigned in blank and delivered to the said Conner his certificate for five shares of the capital stock of the defendant Martin's Ferry Ice & Supply Company, and they also then caused to be signed in blank and delivered to said Conner a third similar certificate of five shares, which three certificates were issued by that company on that date, on account of each of which shares of the last-mentioned capital stock \$50 remained unpaid, the par value thereof being \$100 per share; and in further pursuance of said conspiracy the said Conner on the said 26th of August executed and delivered to said McKinley and Bowles the said nine negotiable notes payable to Walter and indorsed by him, and before delivery of said notes to the said McKinley and Bowles the said Conner, without authority of the board of directors or of the plaintiff, fraudulently and unlawfully indorsed the name of the plaintiff corporation on each of said negotiable notes, intending thereby to pledge the credit of plaintiff as indorser of each of said notes, but that indorsements of the plaintiff's name thereon by its terms purported only to have been made by the said Conner as secretary of plaintiff; and further, in pursuance of said conspiracy, the said Conner executed the said deed of trust; and that, in further pursuance of said conspiracy, the said McKinley, on the 26th of August, 1902, acting as aforesaid with due authority for himself and the said Bowles and Crystal Manufactured Ice Company, agreed with the said Conner that the said deed of trust should not be recorded promptly; and that, before the existence of the said deed of trust should come to the knowledge of the plaintiff or its board of directors, arrangements should be made by which the plaintiff should sell its property to the Crystal Manufactured Ice Company, subject to the payment by the Crystal Manufactured Ice Company of the debts of plaintiff and that provision should be made for the payment of the said notes out of the proceeds realized from the sale of bonds to be issued by said Crystal Manufactured Ice Company; that at the time that McKinley and Bowles received the notes said McKinley well knew that said Conner had no authority from plaintiff or its board of directors to pledge the credit of plaintiff as indorser thereon and that said Bowles was bound by that knowledge of his then partner, said McKinley, and that he ought to have known that fact as a matter of law and had knowledge at least of such facts as put him on inquiry as to whether or not said Conner had authority; and alleging that the indorsements of the plaintiff's name on the nine notes was a fraud on the rights of plaintiff; and that plaintiff should not be held liable on account of such indorsements; and praying that the indorsements of plaintiff's name on said nine notes

be held to be fraudulent and void; that the defendants McKinley, Bowles, Wheeling Title & Trust Company, L. F. Stifel, trustee, and W. C. Stifel and L. F. Stifel, executors of C. E. Stifel, deceased, and each of them, be enjoined from disposing of any of the nine notes that they still hold without first canceling thereon the indorsement of the name of the plaintiff; and that, upon a final hearing of the cause, such injunction be made perpetual; and that such of the defendants as were holders of the said notes and their assigns be enjoined from in any manner proceeding to collect any and all of said notes from plaintiff; and that defendants McKinley, Bowles, Crystal Manufactured Ice Company and Conner be required to repay the plaintiff the \$1,000 of plaintiff's money that was paid by Conner to McKinley on September 22, 1902, with interest, and be also required to indemnify and save harmless the plaintiff from all damages arising from such fraudulent indorsements of plaintiff's name as well as that arising from their concealment of the giving of such notes and the deed of trust to secure the same from the plaintiff and its board of directors; and that wherein the bill alleged that certain defendants should make discovery as to certain facts those defendants be required to make full discovery as to those facts under oath; and for general relief.

The defendants McKinley, Savings & Trust Company, L. F. Stifel, trustee, W. C. and L. F. Stifel, executors, H. G. Bowles, and C. W. Conner severally filed their demurrers to plaintiff's bill, and the same defendants filed their several separate answers denying the material allegations of the bill, to which answers general replications were entered. Defendant John W. Walter also filed his answer and cross-bill, to which plaintiff replied generally. Depositions were taken and filed in the cause on behalf of the plaintiff and of defendants. The court overruled the demurrers to plaintiff's bill, and the cause came on to be heard on the 22d day of December, 1904, when the court held, and decreed accordingly, that the nine several notes, aggregating some \$9,300, signed by C. W. Conner and payable to the order of John W. Walter as payee, and by him indorsed and then having the name of plaintiff company indorsed thereon by C. W. Conner, Secretary, that none of those indorsements of complainant's name on said notes was authorized by the complainant:

"And all of them were made fraudulently by the said C. W. Conner. That on or about August 26, 1902, the defendants J. C. McKinley and H. G. Bowles took these nine notes to L. F. Stifel, who then purchased five of those notes for the following named defendants, viz.: One for the defendant Dollar Savings & Trust Company (then Wheeling Title & Trust Company), one for W. C. Stifel and L. F. Stifel, executors of the will of C. E. Stifel, deceased, and three for the defendant,

L. F. Stifel, trustee. That each of those holders had at the time he (or it) became such holder, knowledge of such facts as put him (or it) on inquiry as to the authority of the said C. W. Conner, as secretary of the complainant, to so indorse the complainant's name on those notes. That each of the said notes being, on its face, the note of C. W. Conner individually, and the indorsement thereon of the complainant's name appearing to have been made by the said C. W. Conner as such secretary, the court is of the opinion that the prima facie legal presumption is that he, as such secretary, had no authority to indorse complainant's name on any of those notes; and it further appearing to the court that there has been no valid ratification by the complainant of those indorsements of its name on those notes, and it now being stated by Henry M. Russell, solicitor for part of the defendants, that since the Dollar Savings & Trust Company filed its answer herein the defendant, J. C. McKinley, has lifted, or taken up, the note which its answer herein sets forth was deposited with it as collateral security, and it now being agreed by Nelson C. Hubbard, solicitor for the said J. C. McKinley, that this decree may find that the said J. C. McKinley now holds four of the said notes amounting to \$4,000, the ownership and possession of one of said notes being undetermined and uncertain, it appears to the court that the said nine notes are held by the following named defendants, viz.: One for \$1,000, payable one year after its date, by H. G. Bowles; one for \$1,000, payable one year after its date, by W. C. Stifel and L. F. Stifel, executors of the will of C. E. Stifel, deceased; three by L. F. Stifel, trustee, one of them being for \$1,000 payable sixty days after its date, another being for \$1,000, payable one year after its date, and the third being for \$1,800 payable one year after its date; and the remaining four of those notes, each for \$1,000, by J. C. McKinley.—It is therefore by the court adjudged, ordered, and decreed that the defendants J. C. McKinley, H. G. Bowles, L. F. Stifel, trustee, and W. C. Stifel and L. F. Stifel, executors of the will of C. E. Stifel, deceased, and their agents and assigns, be, and each of them is, hereby enjoined and restrained from attempting (by suit or otherwise) to collect any of the said notes from complainant, and they are, and each of them is, also hereby enjoined and restrained from selling, transferring, or assigning any of those notes to any person or persons without first canceling thereon the indorsement of the complainant's name.

"And it further appearing to the court therefrom that the said C. W. Conner, as secretary of the complainant, fraudulently and without authority from the complainant, paid to the defendant J. C. McKinley, on September 22, 1902, \$1,000 of money belonging

to the complainant, it is, by the court, adjudged, ordered, and decreed that the complainant do recover of the defendant, J. C. McKinley, the said sum of \$1,000, with interest thereon from September 22, 1902, until paid, at the rate of 6 per centum per annum. And the court having indicated its opinion that the defendant C. W. Conner was also liable to the complainant for this \$1,000, the complainant suggested that since the complainant's testimony was taken in this suit, the said C. W. Conner had died insolvent at Philadelphia, Pa., and it appearing to the court, from the evidence herein, that the said C. W. Conner was insolvent, and it not being suggested by any of the parties hereto that he left any estate within the jurisdiction of the court or that a personal representative of his estate has been appointed in West Virginia, the court deems it unnecessary to have such personal representative appointed and to have this suit revived against him, especially as none of the parties hereto asks that that be done.

"It is further adjudged, ordered, and decreed by the said court that the complainant recover of the defendants H. G. Bowles, J. C. McKinley, Dollar Savings & Trust Company, Louis F. Stifel, trustee, and W. C. Stifel and L. F. Stifel, executors of the will of C. E. Stifel, deceased, its costs incurred in this suit.

"It further appearing to the court that the defendant Nelson C. Hubbard, trustee, has in his hands \$2,020.28 (evidenced by interest-bearing certificates of deposit duly issued to him) as the net proceeds realized from the disposition of the property described in the deed of trust of C. W. Conner to him, dated August 28, 1902, and filed herein on September 6, 1904, and it further appearing to the court that certain agreements of parties hereto (copies of which are made exhibits numbered 10 and 13 of the bill) contemplated that that \$2,020.28 and the interest thereon might be distributed by decree in this suit, it is by the court further adjudged, ordered, and decreed that the said Nelson C. Hubbard, trustee, do distribute that \$2,020.28 and the interest that has accrued thereon as follows, viz.: To to the complainant $\frac{40}{100}$ thereof, on account of the said debt of \$1,000 and interest owing by the said J. C. McKinley to the complainant; to H. G. Bowles $\frac{10}{100}$ thereof, on account of the said note held by him; to W. C. Stifel and L. F. Stifel, executors of the will of C. E. Stifel, deceased, $\frac{10}{100}$ thereof, on account of the said note held by them; and to L. F. Stifel, trustee, $\frac{22}{100}$ thereof, on account of the three notes held by him, as aforesaid.

"It further appearing to the court that the defendant J. C. McKinley was interested with the defendant C. W. Conner in the plan for the reorganization of the ice business, and that he well knew that what the said

C. W. Conner did in the way of purchasing the property of the defendant Crystal Manufactured Ice Company and in the making of the said nine notes dated August 28, 1902, was without authority of the complainant and fraudulent, and that the said J. C. McKinley was actively interested in forwarding that fraud, the court is of the opinion that the said J. C. McKinley cannot in equity and good conscience insist upon his right to recover from the defendant John W. Walter upon any of those notes, and that in his hands they are all tainted with fraud, whether the indorsement of the said John W. Walter was secured by fair or false representations. It is, therefore, by the court, further adjudged, ordered, and decreed that the said J. C. McKinley be, and he is, hereby enjoined and restrained from disposing of any of the said nine notes which he holds without first canceling thereon the indorsement of the name of the said John W. Walter. It is further adjudged, ordered, and decreed that the indorsements of the said John W. Walter upon the said notes held respectively by the said H. G. Bowles, and by the said W. C. Stifel and L. F. Stifel, trustee, are valid and binding upon the said John W. Walter, and that the said H. G. Bowles, W. C. Stifel, and L. F. Stifel, executors as aforesaid, and L. F. Stifel, trustee, are not, or is either of them, enjoined or restrained from enforcing the last-mentioned notes, or any or either of them, or from disposing of the same without canceling the said indorsements of John W. Walter, excepting, however, that if any of the last-mentioned notes shall at any time pass into the possession and ownership of the said J. C. McKinley, said McKinley shall not dispose of the same without first canceling the indorsement of the said John W. Walter, nor have the right to enforce the collection thereof against said Walter."

From which decree, the defendants McKinley, Bowles, and the Stifels appealed, and say that the court erred in overruling the demurrers to the bill and in decreeing that the plaintiff was not liable as indorser upon the notes held by McKinley and by Bowles and by W. C. Stifel and L. F. Stifel, executors, and by L. F. Stifel, trustee, and in decreeing in favor of plaintiff the \$1,000 and interest against J. C. McKinley, and further in decreeing that John W. Walter was not liable as indorser upon those of the said notes held by the said McKinley. None of the appellants, in the briefs of counsel, rely upon the assignment of error because of the overruling of the demurrers. The demurrers set out two grounds, viz.: That no ground of equitable jurisdiction appears in the bill; and that the bill is multifarious. First, the bill sets up a clear case of conspiracy on the part of McKinley, Conner, and Bowles to defraud the plaintiff, and the manner of their carrying out such

conspiracy. "When fraud is sufficiently alleged, with proper parties to a bill, a demurrer will not lie." *Christlip v. Teter*, 43 W. Va. 356, 27 S. E. 288. The questions involved in this suit can be submitted and adjudicated more conveniently in this suit than in any other way. In *School Board v. Farish* (Va.) 23 S. E. 221, where a county treasurer who had occupied the office for 20 years and had collected money for school and other purposes, failed to account for the same, and had given a large number of surety bonds and died, leaving insufficient personal property to pay his debts, the bill asked that his administrator and sureties on his bonds be made parties defendant, and prayed that said treasurer's estate be settled under order of court, that proper accounts be taken, and that a decree be rendered against said estate and the several sureties for the amount due by them, the bill was held to be not multifarious. In the opinion in that case it is said: "Courts, in dealing with this question, look particularly to convenience in the administration of justice, and, if this is accomplished by the mode of proceeding adopted, the objection of multifariousness will not lie, unless the course pursued is so injurious to one party as to make it inequitable to accomplish the general convenience at his expense. So that, when we look to see if a bill is multifarious, the first question to be determined is, does the bill propose to reach the end aimed at in a convenient way for all concerned? And, if the mode adopted does accomplish the end of convenience, then the question arises, is any one hurt by it, or so injured as to make it unjust for the suit to be maintained in that form?" *Dillard v. Dillard*, 97 Va. 434, 34 S. E. 60; *Hill v. Hill*, 79 Va. 592; *Almond v. Wilson*, 75 Va. 623; *Nulton v. Isaacs*, 30 Grat. 726.

The main question at issue in this cause is whether the alleged acts of C. W. Conner were fraudulent. And the interests of the defendants being common, centered in the point at issue, the bill is not multifarious. *Curran v. Camplon*, 85 Fed. 87, 29 C. C. A. 26; *Sheldon v. Armstead*, 7 Grat. 284; *Shaffer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298; *Arnold v. Arnold*, 11 W. Va. 449. It is alleged in the bill in the case at bar that all the holders of the negotiable notes had notice at the time they purchased, of such facts as would put them on inquiry as to Conner's authority to indorse the plaintiff's name; that some of the notes were not yet due and might be transferred to innocent holders before maturity, and discovery was necessary as to who held the unmatured notes; and that a proper injunction was also necessary to prevent such notes from being transferred to innocent holders. We conclude that the demurrers were properly overruled. As to the several assignments of error on the merits of the case Judge Hervey filed an opinion in

the case which, in the main, I approve and adopt as part of my opinion. He says:

"The plaintiff in its bill asks for the following relief: That the indorsement of the name of the plaintiff on the notes of August 26, 1902, be held fraudulent and void; that the holders of the notes be enjoined from disposing of any of them without first cancelling the indorsement thereon of plaintiff's name; that said holders be enjoined from collecting the notes; and that the defendants McKinley, Bowles, Crystal Ice Company and Conner be required to repay to plaintiff the \$1,000 paid to McKinley on September 22, 1902. The evidence clearly establishes the fact that these notes were indorsed by Conner with the name of the Wheeling Ice & Storage Company, without authority from the company.

"It was suggested that while the directors of the company did not expressly give Conner the power to indorse these notes, yet it may be fairly implied from the manner in which the business of the company was conducted that Conner had authority to borrow money and execute notes therefor. I do not think that such a conclusion can be drawn from the evidence. Conner borrowed money and gave the company's notes therefor, but it does not appear that he ever did that in any case in which he was not directed to do so. His position as secretary, treasurer, or manager did not give him the power to issue the company's notes. While it is true that the bona fide holder for value of negotiable paper not due, who has acquired it without notice of the facts, is not affected by facts which make the note invalid between the original parties, this rule does not protect such holder when he takes a note issued without authority. In cases of negotiable instruments, as well as others, one contracting with an agent must inquire into his authority, and a corporation is bound only when an agent acts within the apparent scope of his authority. *Silliman v. Railroad Co.*, 27 Grat. 119; *Stainback v. Bank*, 11 Grat. 269. The holder of negotiable paper takes it at his peril in reference to the authority to make it. *Chemical Nat. Bank v. Wagner*, 93 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 201. This being the law, it devolves upon the defendants who hold these notes to show that they were issued by the authority of the plaintiff company. Even if it expressly appeared that Conner had been granted the power to make and issue notes in the name of the company in the usual conduct of its business that showing would not make these notes good against the company, for these notes were not made by the company, but by Conner personally and by him indorsed with the company's name. This indorsement appeared on the notes when they were first negotiated, and all persons who became interested in them were advised that the notes had not passed into the hands of the company in the

usual course of business from Walter, the payee, but that the indorsement of the name of the company was put there before it was negotiated or passed out of the hands of the maker. Under such circumstances, authority given Conner to make notes for the company would not confer upon him the power to make the company an indorser. And these facts being known to all the holders of this paper they had notice that the company was not bound by Conner's indorsement of its name. *Farrington v. Railroad Co.*, 150 Mass. 406, 23 N. E. 109, 5 L. R. A. 849, 15 Am. St. Rep. 222.

"But there is a still stronger reason why these notes do not bind the company. They were signed by Conner personally, and therefore he was the person who was obligated to pay. The name of the company as security for this obligation was indorsed by Conner. It therefore appears from the face of the paper, together with the fact known to all holders, that the indorsement was made before the notes were negotiated, that Conner sought to make the company responsible for his note. By his act of indorsement the agent of the corporation sought to make his principal responsible for his individual contract. General authority to conduct the business and issue notes of a corporation is authority to do these acts for corporate purposes and in the interest of the corporation only. It does not include the power to do them for the exclusive benefit of others, to the detriment of the corporation. And, while a promissory note issued by an agent or officer having such authority in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes and under lawful authority, a note issued by such an agent payable to himself is accompanied by no such presumption, but is, of itself, notice that it is without the scope of his general authority, and that it does not bind his principal unless its execution was specially authorized by the corporation. Such a note is a danger signal which the discounteer disregards at his peril. To the general rule that the acts and contracts of a general agent within the scope of his authority are presumed to be lawfully done and made there is a universal exception. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely upon it without proof that the agent was expressly and specially authorized to make that contract. An officer of a corporation cannot, by virtue of his general powers as agent, bind the corporation in a contract made by himself, as such agent with himself, unless the authority is expressly given. And, if he undertakes to bind the corporation by negotiable paper

which apparently is issued for his own use and benefit, the notice of want of authority is in the instrument itself. *Park Hotel Co. v. Bank*, 86 Fed. 744, and authorities cited on page 745, 80 C. C. A. 409, 412; *Porter v. W. & D. Grain Co.*, 78 Minn. 210, 80 N. W. 965; *Clafin v. Bank*, 25 N. Y. 293; *Western Nat. Bank v. Armstrong*, 152 U. S. 348, 14 Sup. Ct. 572, 38 L. Ed. 470; *Garrard v. Railroad Co.*, 29 Pa. 154; *Davis v. Rockingham Invest. Co.*, 89 Va. 290, 15 S. E. 547. One who receives notes or securities of a corporation from an officer of that corporation in payment of or as security for a personal debt of such officer does so at his peril, for, prima facie, the act is unlawful. *Wilson v. M. E. R. Co.*, 120 N. Y. 150, 24 N. E. 384, 17 Am. St. Rep. 625. And evidence that the officer executed and delivered notes for the corporation has no tendency to show authority in him to execute a note for his own accommodation. *Porter v. Grain Co.*, 78 Minn. 210, 80 N. W. 965. The plaintiff company is entitled to have its indorsement on the notes made by Conner canceled and the transfer of the notes in their present shape restrained.

"The bill also asks that the \$1,000 paid by Conner out of the funds of the plaintiff for the property of the Crystal Ice Company be repaid to it by McKinley, Bowles, Conner, and the Crystal Ice Company. It is not necessary to say that Conner had no authority to make the purchase he attempted for the Wheeling Ice & Storage Co. I do not think that, at the time he made it, he intended it to be for the plaintiff company, but that his object was to purchase the property for himself, hold it until the new company he projected was organized, and then turn it in to the new company. When circumstances interfered with his carrying out his project he attempted to throw the purchase upon the Wheeling Ice & Storage Company. McKinley must have known of Conner's scheme, and the circumstances convince me that he was a party to it. But it matters not whether that is so or not. McKinley ought to have known of Conner's want of authority to make the purchase of the Crystal Ice Company's property and he took no trouble to inform himself upon that point. The \$1,000 was not paid at the time the sale was made and the notes given, nor was it authorized by the company. Afterward, when Conner, by representation as to his ability to make a sale satisfactory to the stockholders owning a majority of stock, had gained control of the board of directors, and the affairs of the company were in the hands of himself and McKinley, a check was ordered to be drawn in favor of McKinley for the \$1,000. Neither Conner nor McKinley as directors had a right to vote upon this matter. Both were interested—Conner as one who had bound himself to pay for the property and McKinley as the vendor of the property. Their

fraudulent effort to bind the company by a contract they had made with each other cannot be allowed to protect them from the consequences of their unfaithfulness as officers of the corporation. There is no evidence to show that Bowles or any person other than Conner and McKinley was a party to the unlawful appropriation of this \$1,000, and only those two can be held responsible for it. A decree against them for the amount with interest is allowed.

"Another question arises upon the answer and cross-bill of John W. Walter. He avers that his indorsement upon the notes was secured by fraud. His evidence upon that point in view of Conner's death must be received with caution. And, when his claim is urged against bona fide holders of notes, without notice of the fraud, it cannot be allowed. Notwithstanding his declaration to the contrary it seems clear to me that McKinley was interested with Conner in the plan for the reorganization of the Ice business, and that he well knew that what Conner did in the way of purchasing the Crystal Ice Company property and the making of the notes therefor was without authority of the plaintiff. As one who was actively interested in forwarding this fraud McKinley cannot, in equity and good conscience, insist upon his right to recover from Walter upon any of these notes. In his hands they are all tainted with fraud, and this is so whether the indorsement of Walter was secured by fair or false representations. As to such notes, therefore, as are held by McKinley, the court will grant the relief prayed for in his answer and cross-bill."

In *Walker v. Christain*, 21 Grat. 291, at page 295, President Moncure, in delivering the opinion of the court, says: "Where a promissory note is made, or bill of exchange drawn, in the name of the agent, without showing the name of the principal on the face of the instrument, as a general rule the agent only, and not the principal, is liable. The intention of the parties in such case is too plainly expressed to admit of any doubt, or to require any aid from the light of surrounding circumstances."

As to C. W. Conner's authority to indorse the name of plaintiff on the notes as accommodation indorser. In *Purdy's Beach on Private Corporations*, § 852, it is said: "The general rule is that the accommodation and indorsement, or guaranty of the corporation, is ultra vires and nonenforceable, but the theory that a corporation has only such powers as are expressly granted, or necessarily implied, is no longer applied to a strictly private corporation. Where its business is private, and it is solvent, a private corporation, with the assent of all the shareholders, may become accommodation indorser of negotiable paper." 1 *Morse on Banks and Banking*, § 65. And 1 *Clark and Marshall's Private Corporations*, § 182: "It is well settled that a corporation has no implied power

to issue or indorse bills or notes in which it has no interest for the mere accommodation of another, for such a transaction is ordinarily foreign to the objects for which corporations are created, and it can make no difference that the corporation will be incidentally benefited by such a transaction, or is paid a consideration, or that the transaction is consented to, or ratified by, all the stockholders." In 10 Cyc. 1109, it is stated: "With the exception of those corporations, such as trust and guaranty companies, which are organized for the express purpose of becoming sureties for other persons or corporations, and with other exceptions elsewhere stated, it may be laid down as a general rule that no corporation has the power, by any form of contract or indorsement, to become a guarantor or surety or otherwise to lend its credit to another person or corporation." Bowles claims that he took the notes which were transferred to him in perfect good faith, that he had no knowledge whatever of the details of the transaction between McKinley and Conner which resulted in the giving of these notes. In his answer he denies that he executed the assignment of his 40 shares of Nick Kuhn Ice Company stock and the assignment of his five shares of the Martin's Ferry Ice & Supply Company stock on August 26, 1902, and denied that he delivered them to Conner and claims in his sworn answer that he assigned them to McKinley long before that day, and that at the time he did so he "had no knowledge or information with respect to what said McKinley intended or expected to do with these certificates, and knew nothing about any sale to the said Conner such as is mentioned in the plaintiff's bill, and had nothing to do with the making or carrying out of the last-mentioned sale, and did not have any knowledge or information until long after the time when the said certificates are alleged in the said bill to have been delivered to the said Conner that any such delivery had taken place." And yet, N. C. Hubbard, the trustee in the deed of trust made on the 26th day of August, 1902, says that the stock of H. G. Bowles was assigned at the office of the Wheeling Ice & Storage Company on the 28th of August, 1902, and that a number of papers were executed at that time; that Conner, McKinley, Bowles, and himself, and probably one or two others, were present, but that he had no reason to think that any others than Conner, McKinley, Bowles, and himself were attending to the business that they were transacting; "that that meeting was had for the purpose of closing up the transactions between McKinley, Bowles, and Conner, * * * but that Mr. Bowles signed no paper used in that settlement until the meeting actually took place." Mr. McKinley also testified that Mr. Bowles indorsed the certificates and offered them to him to carry down to the meeting, but he told him that he had better go down and deliver them himself, which he did and deliver-

ed them to Conner. And yet it is claimed by counsel for Bowles that he had no knowledge of any facts which should have put him on inquiry as to the authority of Conner to sign the notes on behalf of the company. The holders of the notes rely upon the ratification of the indorsement by Conner of said notes by the directors of the plaintiff company, viz., McKinley, Bayha, and Conner, at their meeting held on the 19th of September, 1902. The minutes of the meeting show that "Mr. J. C. McKinley being an interested party in the above resolutions retired from the room while the same was being discussed and voted upon. The same was passed unanimously. On motion. The Secretary be instructed to draw a check for \$1,000 on account of this purchase. Passed." Minutes were signed, J. C. McKinley, President, C. W. Conner, Secretary. Conner was as directly interested in the ratification as McKinley, the only director at the meeting not interested individually was W. F. Bayha. It appears from the evidence of L. F. Stifel, who was acting in the transaction for himself, as trustee, and as executor and for his coexecutor W. C. Stifel; that he had knowledge, some time before the 26th of August, of the negotiations going on between McKinley and Conner, he does not know whether it was a few days or a few weeks before the transaction was consummated, but he says before the matter was arranged "Mr. McKinley had a long conversation with me, and I think I also had one with Mr. Nelson Hubbard and the whole matter was pretty well gone over, but I really can't recall now just the information I had as to the transfer of the stock referred to." He stated he had been informed of the deed of trust, but couldn't say whether, at the time of the making the notes or afterwards, and that when he did learn of it he said it ought to be put on record and so told McKinley; said he didn't understand there was an arrangement not to put it on record. It will be borne in mind that these notes were upon their face the individual notes of C. W. Conner and indorsed with the name of the plaintiff company by C. W. Conner, secretary, and the indorsement would clearly indicate that the plaintiff company was an accommodation indorser. In *Savings Bank v. Parmelee*, 95 U. S. 557, 24 L. Ed. 490, was an action on an individual note of Parmelee, cashier of the Shawnee County Bank for \$3,000, payable to the order of the West St. Louis Savings Bank, indorsed "G. F. Parmelee, Cashier." Suit was against the bank as indorser of the note. Chief Justice Chase, in delivering the opinion of the court in speaking of the power of the cashier to rediscunt paper says: "But certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers, and one who accepts an indorsement of that char-

acter, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss." *Park Hotel v. Fourth National Bank of St. Louis*, 86 Fed. 742, 30 C. C. A. 409. In *Smith v. Lawson*, 18 W. Va. 212, 41 Am. Rep. 688, it is held: "The holder of a negotiable note, to whom it has been transferred for value by the president of a bank, who had not been authorized to transfer it, is not a bona fide holder of the note, and the maker of the note may dispute his title to it, when he brings a suit upon it." 1 *Cook on Corporations*, § 298: "It is well established that a person dealing with an officer of a corporation in a matter in which the officer is personally interested is not a bona fide holder of corporate securities received by him from the officer in that transaction. He is bound to inquire into the legality of any stock or corporate note which such officer issues or transfers to him in the officer's personal business, and is chargeable with notice of illegalities in the issue." And 3 *Clark and Marshall on Private Corporations*, § 711b: "Where an officer of a corporation is dealing for himself to the knowledge of the other party, and also assumes to act for and bind his corporation, such fact is sufficient to put the other party upon inquiry as to his power to act for the corporation, and, as a general rule, if the other party deals with the officer without making inquiry as to his authority to bind the corporation, he does so at his peril." *Tiedeman on Bills and Notes*, § 111. In *Bank v. Wagner*, 93 Ky. 525, 20 S. W. 535, 40 Am. St. Rep. 206, it is held: "Notes issued in the name of a corporation, which show upon their face that they were issued by the payee as agent of the corporation, are prima facie void at the option of the corporation, and holders cannot recover upon them unless they can show that the company, by its superior officer, authorized so to do, or by the board of directors with like authority, authorized the agent to thus issue the notes." And in *Stainback v. Bank*, 11 Grat. 269: "A party dealing with the agent, with knowledge or means of knowledge that, under such a power, he is indorsing the name of his principal for his own benefit, is not entitled to recover from the principal." *Davis v. Investment Co.*, 89 Va. 290, 15 S. E. 547: "Where a person deals with an agent, it is his duty to ascertain the extent of the agency. He deals with him at his own risk. The law presumes him to know the extent of the agent's power, and, if the agent exceeds his authority, the contract will not bind the principal, but will bind the agent." *Rosendorf v. Pol-*

ing, 48 W. Va. 621, 37 S. E. 555; Dyer v. Duffy, 39 W. Va. 149, 19 S. E. 540, 24 L. R. A. 339; Curry v. Hiale, 15 W. Va. 867; Wells v. Insurance Co., 41 W. Va. 131, 23 S. E. 527.

Counsel for the Stifels and Bowles cites several cases to support his contention that the act of Conner was ratified, which cases do not measure up to the purpose intended. The case of Bank v. Laboring Man's Mercantile & Manufacturing Co. (decided by this court) 49 S. E. 544, holds "that the failure of the defendant to return to the bank the money so received by it, when its receipt had become known to its directors, was a ratification of the execution and use of the note by Murphy who made it." As stated in 10 Cyc. 1072: "It is a general principle which applies without regard to the mode of ratification that a voidable engagement cannot be ratified in part so far as it is beneficial to the corporation, and repudiated so far as it is deleterious." The ratification in case cited was based on the fact that the corporation did not return the money that it received for the unauthorized note, which act of holding the money was held equivalent to a ratification. The next case cited is Bank v. Gas Co., 159 Mass. 505, 34 N. E. 1063, 38 Am. St. Rep. 453. In quoting from the opinion in this case counsel quotes that part, being only a part of a sentence, which, taken alone, might be somewhat to his advantage, although in case at bar Conner was not authorized generally to give notes in behalf of the company. The part quoted by counsel is: "If the note were signed by an officer authorized generally to give notes in its behalf, the defendant corporation would be liable, although the agent in signing this particular note exceeded his authority or the powers of the corporation." That which the court said preceding the extract quoted and the first part of the same sentence is as follows: "As the plaintiff discounted this note before maturity 'in the usual course of its business, without notice or knowledge of any defect or infirmity,' and as its good faith is not questioned." These words very materially qualify the latter part of the sentence quoted by counsel and destroy any application that it could have to this case, even if the partial quotation could have any application without the qualification. Counsel also cite in that behalf Wilson v. Railway Co., 120 N. Y. 145, 24 N. E. 384, 17 Am. St. Rep. 625. That was a suit upon a note executed in the name of defendant corporation by its president and countersigned by him and made payable to its order and indorsed by him as president and individually, and transferred by him to plaintiff, who discounted the same paying the proceeds to him. It was there held that the act was prima facie unlawful, and that, unless actually authorized, the purchaser would be deemed to have taken the note with knowledge of the rights of the corporation, but it appeared that the note was issued and delivered to the president in pursuance of a resolution of the

defendant's board of directors which recited an indebtedness on its part to him for salary for the amount of the note. The other four West Virginia cases cited, viz., Bank v. Furniture Co., 50 S. E. 880, 70 L. R. A. 312, Tower v. Whip, 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937, Hotchkiss v. Plaster Co., 41 W. Va. 357, 23 S. E. 576, and Bank v. Johns, 22 W. Va. 520, 46 Am. Rep. 506, and, also, Hotchkiss v. Bank, 21 Wall. (U. S.) 354, 22 L. Ed. 645, were all cases where the signatures of the makers and indorsers of the paper involved were all genuine and valid, and the fraud charged was in transferring the title, and those cases cannot be applicable to a case where such signatures to notes were unauthorized. In the first case above, Bank v. Furniture Co., it is held that "a principal is not bound by any act of his agent which is not within the scope of the authority of the latter." But the cases cited do apply and support the decree of the circuit court in the case of John W. Walter, payee and first indorser on the notes in question.

A brief is filed in behalf of McKinley discussing the facts in the case, but the evidence fully sustains the view of the circuit court "that McKinley was interested with Conner in the plan for the reorganization of the Ice business, and that he well knew that what Conner did in the way of purchasing the Crystal Ice Company property and making the notes therefor was without authority of the plaintiff."

Counsel for Walter cites authority to the effect that discharge of the principal debtor operates as a discharge of the surety. His law is good when applicable but not in this case, the plaintiff company was not the principal debtor.

For the reasons stated, there is no error in the decree, and it will be affirmed.

WELLS v. SIMMONS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)

EQUITY—PLEADING—DEMURRER.

A bill avers that the plaintiff had been appointed, by a clerk of the county court, guardian of an infant, and files an order made by the clerk. Even though the order, taken alone, may not fully prove the appointment, yet if it does not contradict such averment of the bill, that averment is taken for true on demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 494.]

(Syllabus by the Court.)

Appeal from Circuit Court, Roane County.

Bill by H. B. Wells, guardian, against Minnie B. Simmons and others. Decree for defendants, and plaintiff appeals. Reversed.

Pendleton & Boggess, for appellant. Warren Miller and J. M. Harper, for appellees.

BRANNON, J. H. B. Wells, as guardian of Earl Simmons, filed in the circuit court of Roane county his petition under Code 1899, c. 83, § 12 [Code 1906, § 3239], seeking au-

thority to sell a certain interest of the infant in oil and gas in a tract of land, which petition was dismissed on demurrer, and Wells appealed.

The first matter we meet is a motion made by the guardian ad litem, Minnie B. Simmons, to dismiss the appeal. This motion is based on these facts. J. M. Simmons, father of the infant, left a will appointing his widow, Minnie, testamentary guardian for his three children, Earl being one of them. Six years after the probate of the will and five after the appointment of Wells as guardian of Earl Simmons, Minnie B. Simmons went before the clerk of the county court and accepted the testamentary guardianship under said will, and then, as guardian, filed in said court a petition seeking authority to lease the same oil and gas interest of Earl Simmons as the proceeding of Wells sought to sell, and obtained a decree authorizing her to lease said oil and gas interest, and she did lease, and the lease was confirmed. The petition of Minnie B. Simmons was filed after that of Wells. Minnie B. Simmons claims that her proceeding to lease has the effect to render the proceeding of Wells useless, as it has disposed of the interest of the infant, and left nothing to be decided on the appeal of Wells, and therefore that appeal must be dismissed as if involving a moot question. We cannot accede to this position. The proceeding of Minnie B. Simmons as guardian is in her name, that of Wells in his name as guardian, and Wells is no party as guardian to her suit. It is another suit. Nor is she a party as guardian to his suit, but only as widow, except she is guardian ad litem. Their respective rights as guardian are not involved in either suit. And can we review the record of the Minnie B. Simmons suit, which is not before us on appeal, so as to say that it has effect to leave no question to decide on the appeal? We think not. It is not a part of the appeal record. And again, the Wells suit sought to sell outright the fee in the oil and gas, the other sought only to lease different objects, the second suit not covering the whole ground of the first. The lease made under the decree was for ten years, when it might end, would end, if oil should not be found in paying quantity. So, we cannot dismiss the appeal.

Next is the question: Did the court err in sustaining the demurrer to the petition of Wells? The only matter here relied on to sustain the demurrer is that the order appointing Wells as guardian does not show that the infant resided in Roane county or had notice. Now, the petition distinctly avers that Wells had been appointed guardian, and was his legal guardian. The demurrer admits this. True, the order of appointment alone does not show these facts; but does not contradict the allegations that he had been appointed and was lawful guardian. The petition does not say or import that there was no other paper in the appointment proceeding

empowering Wells. The petition does not appeal to that order as the only evidence of appointment. As the order filed does not contradict the allegation that Wells had been appointed, that allegation must be taken for true. As to the suggestion that there was a testamentary guardian, and Wells could not be appointed, it does not appear on demurrer, the will not being exhibited.

Therefore we reverse the decree, overrule the demurrer, and remand the case to the circuit court that it may allow answer, and for further proceedings proper in the case.

TALLMAN v. SIMMONS et al.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)

Appeal from Circuit Court, Roane County. Bill by P. A. Tallman against Minnie B. Simmons and others. Decree for defendants, and plaintiff appeals. Reversed.

Pendleton & Boggess, for appellant. J. M. Harper and Warren Miller, for appellees.

BRANNON, J. P. A. Tallman, as guardian of Susan and Lula Simmons, infant children of J. M. Simmons, filed his petition in the circuit court of Roane county to sell oil 'nterests of his wards, and it was dismissed on demurrer.

The case is like that of Wells v. Simmons (W. Va., decided this day) 55 S. E. 990, and the principles of decision in that case apply to this, with like result.

CHENOWITH et al. v. KEENAN.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)

JUSTICES OF THE PEACE—APPEAL—DISMISSAL.

Action before a justice for recovery of possession of land, judgment of recovery for plaintiff, and appeal by defendant. On motion of the plaintiff, the defendant is called, and not appearing, his appeal is dismissed, and judgment entered affirming the justice's judgment. This is error, the burden of proving his case being on the plaintiff. The defendant is under no duty to prosecute the case.

(Syllabus by the Court.)

Error to Circuit Court, Randolph County.

Action by L. D. and Florida Chenowith against L. H. Keenan. Judgment for plaintiffs, and defendant brings error. Reversed.

C. H. Scott, for plaintiffs in error. Bent & Spears, for defendant in error.

BRANNON, J. L. D. and Florida Chenowith brought an action of unlawful entry and detainer against L. H. Keenan before a justice in Randolph county to recover possession of some real property. The defendant appeared and got a continuance. At a subsequent time the justice's record shows that, the defendant failing to appear, judgment was rendered for the plaintiffs for the

possession of the property and damages for detention. The case was taken by Keenan to the circuit court by appeal, where, as the record shows, the plaintiff appeared and the defendant was called but did not appear, and, on motion of the plaintiffs, the court dismissed the appeal and affirmed the judgment of the justice, and proceeded in terms to render full judgment of recovery of the premises against Keenan and damages and costs before the justice. Keenan sued out a writ of error from this court.

Keenan's first assignment of error is that there is error in dismissing the appeal and affirming the judgment of the justice upon motion, without trial, and without requiring the plaintiffs to prove their case. This involves questions somewhat perplexing in different phases. What is the judgment, when an appeal from a justice is dismissed, proper to be rendered by the circuit court? When a writ of error is taken from a circuit court to the Supreme Court, and it is simply dismissed, without hearing, the circuit court judgment still stands without action by the Supreme Court affirming it, because it takes reversal to affect it, the writ of error resting on error in the record, and is not a new trial. But an appeal from a justice's judgment vacates the judgment and calls for a new trial, on which evidence and pleadings, though not before the justice, will be received. *Evans v. Taylor*, 28 W. Va. 184; *Hopkins v. Railroad*, 42 W. Va. 537, 28 S. E. 187. Where the party taking the appeal dismisses it of his own motion, what is the effect? If the plaintiff is the appellant, it seems to me that his dismissal dismisses not merely his appeal, but his suit. The appeal is not the suit that is tried. Its only function is to transfer the case from the justice's court to the circuit court for a new trial. It has brought up the action, and, if abandoned, the action goes with it, and the judgment for the defendant stands revived, as it were. There is no longer any complaint against it. If the defendant took the appeal and he dismisses it, the judgment in favor of the plaintiff stands good, because he has ceased to complain of it. What judgment should the circuit court render in such cases? Two lines of thought here present themselves. One is that the appeal has annulled the judgment and translated or transferred the action from the justice's court into the circuit court for full trial, and only performs the function of the common law *certiorari* (not the appellate one) of transferring the case, before trial, from an inferior to a superior court for trial, and therefore, if the appeal is dismissed, simply, the judgment of the justice does not revive, but the case must be tried and proven in the appellate court, and the judgment does not silently revive, nor can the circuit court affirm it without a new trial. The other line of thought is that, whilst it is true that the appeal vacates the judgment and transfers the action to the

circuit court for a new trial, if one be had, yet if it is not had, if the appeal is dismissed without trial, it leaves things as if no appeal had been taken, restores the status quo. The only complaint against the judgment—that is, the appeal—has gone by the board, and the judgment is good. The argument is: Why should the owner of the judgment, if plaintiff, prove his case again, when it is no longer complained of? If he is defendant, why should he be called on to reprove his defense, the plaintiff, who complained of it by his appeal, having given up his case by dismissing it? But what should be the judgment of the court, simply dismissal, or should it render a similar judgment to that of the justice? The disposition made of the cases involved in *Hubbard v. Yocum*, 30 W. Va. 740, 5 S. E. 867, and *Evans v. Taylor*, 28 W. Va. 184, tends to show that it was the opinion of the court that there should be simple dismissal, though the point is not in words decided. I have always inclined to the opinion that, as the case has left the justice's court, and his judgment been vacated, when the appeal is voluntarily abandoned, the court should enter a judgment of its own reiterating the judgment of the justice with its costs and costs of appeal. There is no remand to the justice, and, it seems to me, the court ought to render a judgment of its own and that execution should issue from the circuit court. At any rate a judgment of affirmance would, even if unnecessary, do no harm. But the matters above stated are not stated as matters of decision by this court. They do not involve precisely the question involved in this case, though matters of interest and often arising.

The question in this case is this: Did the court err in allowing the plaintiffs to have the defendant, Keenan, called, and, he not appearing, dismiss his appeal, and render judgment for the plaintiffs affirming and repeating the judgment of the justice? We think it is very plain that the court erred herein. From authority given above, Keenan's appeal simply brought the case for a new trial into the circuit court. The appeal worked that result. The plaintiffs were still under obligations to prove their case. *Simpkins v. White*, 43 W. Va. 130, 27 S. E. 361; Code, c. 50, §§ 68, 218 [Code 1906, §§ 2019, 2169]. When a defendant in an ordinary action gets a new trial, does not the burden still rest on the plaintiff to prove his case on the new trial? What is the difference in the two cases? Keenan complained of the judgment and got a new trial, but he was not called on to take a step until the plaintiffs took up the action for trial and proved their case so as to call for a defense from him. Keenan was in no default. He did not have to prosecute the appeal. I suppose that, where the plaintiff appeals, he may be called and non-suit entered, carrying his suit out of court,

but not so where the defendant appeals from a judgment against him.

Another error is very plain. The next day after the judgment Keenan filed his affidavit stating that he was a necessary and material witness in his own behalf, and "had been very sick for several days, and not able to attend to business during this entire term of court," and that, on the day when said judgment was rendered against him, he "was so sick that he was confined to his room and in bed, unable to attend the court." His attending physician, Dr. A. M. Fredlock, filed an affidavit fully sustaining Keenan's affidavit. On these affidavits Keenan asked that the dismissal of his appeal and the judgment against him be set aside. There was no showing on the part of the plaintiffs against these affidavits. We think it very plain that the court erred in refusing to set aside the judgment and reinstate the appeal.

Judgment reversed, the appeal reinstated, and case remanded.

POLING et al. v. POLING et al.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)

1. INFANTS—SUIT TO SET ASIDE DECREE.

Infant defendants to a suit in chancery may, before attaining the age of 21 years, maintain an original bill by next friend, showing such error, fraud, or surprise as entitles them to a reversal of the decree in such suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 314.]

2. SAME—GROUNDS.

In order to avail the infant parties, the cause for reversing the decree must have existed at the time of the entry of the decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Infants, § 314.]

3. JUDGMENT—EQUITABLE RELIEF—SUIT BY ADULTS.

Section 7 of chapter 132 of the Code of 1906, does not give additional rights or remedies to adult parties to a suit to show cause against a decree therein, or extend the time in which they may do so by any procedure available to them.

4. LOST INSTRUMENTS—RESTORATION OF DEED.

If it appears from the record of a suit to restore a lost deed that the deed was void on its face, it is error to decree its restoration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Lost Instruments, § 6.]

5. QUIETING TITLE—POSSESSION.

It is the general and well-settled rule that a bill in chancery, for the purpose of removing a cloud upon the legal title to land, cannot be maintained by one out of possession.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Quieting Title, §§ 8-11.]

6. EQUITY—JURISDICTION—ADDITIONAL RELIEF.

Where, upon an original bill by infant parties, a decree restoring a lost deed for land pronounced in another suit is reversed, the court cannot proceed upon the bill of the infants to adjudicate the question of title to the land between them and a purchaser under a decree in a suit subsequent to the suit restoring the deed, and between different parties, when the decree restoring the deed did not adjudicate the title to, or otherwise dispose of, the land,

and when the bill of the infants cannot be maintained for the purpose of removing a cloud upon the title to the land.

(Syllabus by the Court.)

Appeal from Circuit Court, Barbour County.

Bill by Wesley Poling and others against A. J. Poling and others. Decree for defendants, and plaintiffs appeal. Reversed in part.

Bent & Spears, for appellants. Ice & Ice, for appellees.

COX, J. From the allegations of the bill and other parts of the record, the following facts appear: Mary E. Poling, wife of A. J. Poling, died intestate in Barbour county in July, 1894, survived by her husband and a number of children. Shortly previous to her death, being the owner of a tract of land (mentioned in the record as 68 acres) in said county, and while living with her husband, she made a deed for the land to him. At September rules, 1895, the husband, A. J. Poling, filed his bill in equity against the children and heirs of his deceased wife, substantially, for the purpose of restoring the said deed made by her to him, alleging that the deed had been lost or destroyed without being recorded. That suit resulted in a decree in effect, restoring the deed, by adjudicating that the decree stand in the place of the deed, and, as the evidence of title of said A. J. Poling to the 68 acres of land, and that a copy of the decree be recorded in the office of the clerk of the county court of Barbour county in the proper deed book, etc. Afterwards, a lien-creditors' suit was instituted in the circuit court of said county by Crislip, for the use of Chesapeake Guano Co., against A. J. Poling, to subject the 68 acres of land to the satisfaction of lien debts against him. In that suit a decree was entered confirming a sale of the land to John F. Woodruff at the price of \$675, and directing a deed to him by a special commissioner. The decree confirming the sale was entered on the 1st day of June, 1898. Afterwards, the nine children and heirs at law of the wife, Mary E. Poling, instituted this suit in chancery in the circuit court of said county, and filed their bill therein at July rules, 1901, against A. J. Poling and John F. Woodruff to set aside the decree restoring the lost deed, and also to set aside the sale of the land to Woodruff. This suit resulted in a decree wholly dismissing the plaintiffs' bill, from which the plaintiffs, the children and heirs at law of Mary E. Poling, appeal.

It is alleged in the bill in this cause that four of the plaintiffs, namely, Wesley, Earnest, Edna, and Nina Poling, are infants, and they sue by their next friend. It is also alleged in the bill that Dennis Poling, another of the plaintiffs, was over 14 and under 21 years of age when the suit to restore the lost deed was instituted; and that Charles Poling, another of the plaintiffs, was at that time over 15 and under 21 years of age; but their

ages at the time of the filing of this bill are not set forth. Three of the plaintiffs, namely, Anza Kelley, Suma Payne, and L. C. Poling, were adults at the time the decree restoring the deed was entered. The bill does not show that the plaintiffs are in possession of the 68 acres of land; on the contrary, the facts shown indicate that they are not in possession. The records of the suit to restore the lost deed and of the lien-creditors' suit are made parts of the bill in this suit, but only a portion of those records were brought here and printed. For the purpose of determining the questions arising, we find it necessary to classify the plaintiffs as follows: (1) The four infant plaintiffs, who were infant defendants in the suit to restore the deed; (2) the three plaintiffs, who were adults at the time of the decree restoring the deed; (3) the two plaintiffs, who were infants at the time of the decree restoring the deed, and were adults at the time of the institution of this suit. The rights of each class will be considered in the order named:

(1) The rights of the four infant plaintiffs, who were defendants in the suit to restore the deed. The statutory right given to infants under section 7, c. 132, Code 1906, to show cause against an order or decree at any time during their minority, and within six months thereafter, is undoubted and unquestioned. Infants during their minority may do so by next friend. Within six months after attaining their majority, they may do so in their own names. The law is liberal in the form of procedure which they may adopt. They may show cause against the decree by original bill, bill of review, supplemental bill in the nature of a bill of review, petition, or answer, and perhaps by other forms of procedure. They may show error of law in the record of the suit in which the decree was pronounced, and the whole record will be examined for the purpose of determining whether or not there is error therein; or they may show fraud or surprise. *Lafferty v. Lafferty*, 42 W. Va. 733, 26 S. E. 262; *Ewing v. Winters*, 39 W. Va. 489, 20 S. E. 572; *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223; and other cases. By the bill in this cause, the plaintiffs point out that the deed restored by the decree complained of was void, because made by a wife to her husband while they were living together, and in which he did not join; and that the decree is erroneous, because it in effect restored such void deed. A deed of conveyance for land, made by a wife to her husband while they are living together, in which he did not join, is void. *Smith v. Vineyard*, 58 W. Va. 98, 51 S. E. 871; *Mullins v. Shrewsbury*, 55 S. E. 736, recently decided by this court, and not yet officially reported. The deed being void, was the decree restoring it erroneous for that reason? An argument would seem unnecessary to sustain the position that a decree restoring a deed void on its face is erroneous. A party invoking the power of the court must have some real cause

to maintain and some right to protect. It seems almost axiomatic that a party cannot come into court to protect or restore a mere nullity—an instrument void on its face. If it clearly appears upon the face of the record that the instrument to be restored was absolutely void, no decree of restoration should be made. 19 Am. & Eng. Enc. Law, 558; *Vail v. Iglehart*, 69 Ill. 332. Considering the decree to be erroneous, was it to the prejudice of the infant plaintiffs? Upon principles now settled in this state, we have little trouble in determining that such decree was to the prejudice of the infant plaintiffs. The decree restored a void muniment of title, purported to complete the chain of title of the husband, adverse to the interests of the infants. Although this muniment of title was void on its face, it might have been removed and canceled as a cloud upon the legal title of the infant plaintiffs, in equity in a proper case, if they had such legal title, and had been in possession of the land. This is true, notwithstanding the fact that the deed or decree might be held void in an action of ejectment, or in any other proceeding at law in which they came in question. *Whitehouse v. Jones* (recently decided by this court and not yet reported), 55 S. E. 730. The fact that equity has jurisdiction to remove a void instrument as a cloud upon the legal title to real estate in a proper case, is sufficient to show that such deed was prejudicial, and that a decree restoring it is likewise prejudicial. This view entitles the infant plaintiffs to a reversal of the decree restoring the deed.

The bill in this cause also prays that the sale to Woodruff in the lien-creditors' suit be set aside. The bill alleges, and the answer does not substantially deny, that the plaintiffs were not parties to the lien-creditors' suit, and did not have notice thereof. If they were not parties to the lien-creditors' suit, they could not appeal from a decree in that suit, and could not maintain a bill to reverse such decree for error appearing from the record. *Yeager v. Carpenter*, 8 Leigh (Va.) 454, 31 Am. Dec. 665; *Conrad v. County Court*, 10 W. Va. 789; *Lance v. McCoy*, 34 W. Va. 419, 12 S. E. 728; *Williamson v. Hays*, 25 W. Va. 609; *Miller v. Rose*, 21 W. Va. 291. Having determined that the decree restoring the lost deed should be reversed as to the infant plaintiffs, should the court go further and determine the question of title to the land between them and Woodruff, the purchaser in the lien-creditors' suit? In other words, can the suit be converted into an ejectment in equity, upon the principle that equity, having jurisdiction for one purpose, will give full relief? The privilege given by the statute to infant parties to show cause against a decree is special to them, and does not extend to adult parties. The privilege is limited to showing cause against a decree, and that cause must have existed at the time of the entry of the decree. Upon the reversal of the decree,

the aggrieved parties are entitled to be placed in statu quo, under the doctrine of restitution. *Stewart v. Tennant*, supra; 22 Cyc. 708. We cannot see that the doctrine of restitution would justify the court, upon reversal of the decree, in determining the question of title to the land, because the decree restoring the lost deed did not take the land away from the infant plaintiffs, and give it to the adverse party, and did not adjudicate the title to, or in any way dispose of, the land. The decree simply restored a muniment of title, without determining its legal effect. Consequently, when the decree is reversed as to the infant plaintiffs, there is nothing which the adverse party received under the decree to be restored. In this respect, this case is wholly unlike the case of *Stewart v. Tennant*. There, Tennant purchased and took an interest in land under the erroneous decree. It may be argued that this bill, in addition to being a bill to show cause against the decree restoring the deed, is also a bill to remove a cloud upon the legal title of the infant plaintiffs to an interest in the land, and, therefore, that an adjudication of the title to the land is proper. If the bill could be so treated (which we do not now decide), it could not be maintained by the plaintiffs, for the reason that they do not show that they are in possession of the land. It is the general and well-settled rule that a bill in equity, for the purpose of removing a cloud upon the legal title to land, cannot be maintained by one out of possession. *Carberry v. Railroad Co.*, 44 W. Va. 260, 28 S. E. 694; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682; *Christian v. Vance*, 41 W. Va. 754, 24 S. E. 596; *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353; *Davis v. Settle*, 43 W. Va. 17, 26 S. E. 557; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 59 L. R. A. 556, 94 Am. St. Rep. 895; *Sansom v. Blankenship*, 53 W. Va. 411, 44 S. E. 408; *Mills v. Henry Oil Co.*, 57 W. Va. 255, 50 S. E. 157; *Logan v. Ward*, 58 W. Va. 366, 52 S. E. 398; *Whitehouse v. Jones*, supra. The case of *De Camp v. Carnahan*, 26 W. Va. 839, would seem to hold the opposite doctrine; but, on that point, that case is practically overruled by *Moore v. McNutt*, supra. There is one exception to the general rule above stated, and that is, that a bill to set aside a tax deed or a tax sale may be maintained by one out of possession. It is clear to us that, after reversing the decree restoring the lost deed as to the infant plaintiffs, we cannot go farther, and determine the question of title between them and the purchaser in the liencreditors' suit.

(2) The rights of the three plaintiffs, who were adults when the decree restor-

ing the deed was entered. It will be observed that this suit was instituted nearly six years after the decree restoring the deed was entered. Section 7, c. 132, Code 1906, does not give additional rights or remedies to adult parties to a suit to show cause against a decree therein, or extend the time in which they may do so by any procedure available to them. Adult parties, who have waited until the time has passed for any other remedy given them by law to obtain a reversal of a decree for error appearing in the record are not entitled to join with infant parties in an original bill to reverse the decree for an error appearing in the record. These three adult parties cannot maintain the bill to remove a cloud upon the legal title to the land, because they also are not in possession. It is not perceived that there is any other ground upon which these three adult plaintiffs can maintain this bill, under the pleadings and proofs.

(3) The rights of the two plaintiffs, who were adults when this suit was instituted, and were infants when the decree restoring the deed was entered. It does not appear that this suit was instituted within six months after these two plaintiffs became 21 years of age. There is no averment in the bill to that effect. The bill must show their right to show cause against the decree, and must place them within the terms of the statute. *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953. Therefore, under the allegations of the bill, these two plaintiffs are in no better situation than the three adult plaintiffs, who were adults at the time the decree restoring the deed was entered.

We have not considered the demurrer to the bill separately. No point was made in argument on the demurrer, and our disposition of the merits likewise disposes of the questions arising on demurrer. The bill seems entirely sufficient as to the infant plaintiffs, for the purpose of showing error in the decree restoring the deed.

Our conclusion is that the final decree in this suit must be reversed as to the infant plaintiffs, and affirmed as to the adult plaintiffs; and that the decree entered at October term, 1895, in the cause of A. J. Poling against L. C. Poling and others, in effect, restoring the deed made by Mary E. Poling to her husband, A. J. Poling, and adjudicating that the decree stand in place of the deed as the evidence of title of said A. J. Poling, and that the decree be recorded, etc., be reversed, set aside, and annulled as to the infant plaintiffs in this suit. This decision is without prejudice to any remedy at law to which the plaintiffs are entitled, for the purpose of adjudicating the question of title to the land.

McCLUNG v. PRICE et al.
(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)

1. JUSTICES OF THE PEACE—APPEAL—DISMISSAL.

An appeal from a judgment of a justice of the peace, granted under the provisions of section 174 of chapter 50 of the Code [Code 1906, § 2125] after the expiration of 10 days from the date of the judgment, for causes which could not have injured or prejudiced the petitioner if he had been reasonably careful and diligent in attending to his interests, is properly dismissed as having been improvidently awarded.

2. SAME—TIME OF TAKING APPEAL.

That the justice, after the trial, but before rendition of his judgment, expressed to an attorney, who had represented the petitioner in the trial, his intention to render judgment for the petitioner, but had later given judgment against him; that petitioner had heard, through his attorneys, that the judgment was in his favor; and that he had not ascertained what had actually been done, until after the expiration of the 10-day period—do not constitute good cause for not having obtained the appeal within said period.

(Syllabus by the Court.)

Error to Circuit Court, Greenbrier County. Action by C. L. McClung against J. D. Price and others. Judgment for defendants before a justice, and, from an order dismissing his appeal, plaintiff brings error. Affirmed.

Williams & Dice, for plaintiff in error.
Preston & Wallace, for defendants in error.

POFFENBARGER, J. Chas. L. McClung obtained a writ of error to a judgment of the circuit court of Greenbrier county dismissing his appeal from a judgment rendered against him by a justice of the peace, in favor of J. D. Price, granted by the judge of said court after the expiration of 10 days from the date of the judgment, on the ground that the justice had misled him into the belief that he would render, or had rendered, judgment in his favor. After the granting of the appeal, the term of the judge who allowed it expired, and his successor, deeming the cause stated in the petition for his not having taken the appeal within 10 days insufficient, dismissed it on motion. The petition states that the action was tried on the 5th day of July, 1904, and judgment rendered on the next day; that, on the day after the trial, the justice, responding to a request of one of petitioner's attorneys as to whether he had rendered judgment, said he had not entered it, but he intended to render judgment in petitioner's favor for \$50 at least, and perhaps more; that, while on his way home, on said 6th day of July, the day after the trial, he was indirectly informed by another one of his attorneys, by means of a telephone message to a third party for delivery to him, that judgment had been rendered in his favor for the sum of \$250; that the justice, instead of giving judgment for him in any sum, rendered a judgment against him for costs; and that he had no knowledge of this fact until after

the lapse of more than 10 days from the date of the judgment.

We do not think the facts stated show good cause for failure to take an appeal within 10 days. It must amount to fraud, mistake, surprise, or adventitious circumstances over which the party had no control. No representation or agreement, prejudicial to the plaintiff in error, was made by the opposite party, and the justice did not represent that any judgment had been rendered. If he expressed an intention to render a certain judgment, it imposed no duty upon him to do so, and the attorney to whom he made the statement, as well as his client, was bound to know that he might finally come to a different conclusion. What he said in no way obstructed or interfered with the right of McClung to ascertain what the judgment was after it had been rendered. It in no sense put the matter beyond his control. Viewing his situation in the most favorable light, he was injured by relying upon a representation made by the justice, not fraudulent, not within the duty of the justice, and not such in character as tended to preclude him from ascertaining and insisting upon his rights in the premises. Thus the case appears to fall clearly within the principle applied in *Powell v. Miller*, 41 W. Va. 371, 23 S. E. 557. In that case, the appellant had relied upon the promise of the justice to prepare an appeal bond for him within the 10-day period, and his failure to do so was held not to be sufficient cause for allowing an appeal after the end of that period. The petition disclosed a want of diligence. Relief on the ground of surprise cannot be allowed to one whose own negligence or lack of diligence constitutes the real cause of the injury of which he complains.

Seeing no error in the judgment complained of, we affirm it.

Affirmed.

STUCKEY v. MIDDLE STATES LOAN, BLDG. & CONST. CO.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906. Rehearing Denied Jan. 10, 1907.)

USURY—ASSUMPTION OF USURIOUS DEBT.

One who purchases land which is subject to an usurious trust debt, and assumes the payment of such debt as part of the consideration for his purchase, cannot be relieved from the usury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Usury, §§ 142, 143.]

(Syllabus by the Court.)

Appeal from Circuit Court, Tucker County. Bill by B. A. Stuckey against the Middle States Loan, Building & Construction Company. Decree for plaintiff, and defendant appeals. Reversed, and bill dismissed in part.

C. O. Strieby, for appellant. R. D. Heironimus, for appellee.

COX, J. In March, 1893, H. J. Wagoner obtained from the Middle States Loan, Building & Construction Company, a corporation under the laws of Maryland, a loan of \$600 on stock of said corporation then held by him. For this loan Wagoner executed to the corporation his bond in the penalty of \$1,200, dated the 11th day of March, 1893, conditioned for the payment of the loan and interest thereon, together with all dues and premiums, until the maturity of the said stock upon which the loan was obtained in accordance with the by-laws of the corporation. To secure the payment of the loan and the performance of the conditions of the bond, Wagoner and wife executed a deed of trust, also dated the 11th day of March, 1893, conveying to Alexander Neil and O. O. Strieby, trustees, a lot of land in the town of Davis. By deed dated the 1st day of April, 1893, Wagoner and wife conveyed the lot to the plaintiff, Benjamin A. Stuckey, the deed reciting that the consideration therefor is \$1,000 in hand paid. At February rules, 1901, the plaintiff, Stuckey, filed his bill in the circuit court of Tucker county against the corporation, Wagoner and the trustees, alleging that, as part of the consideration for the purchase of the lot, the plaintiff assumed the debt owing by Wagoner to the corporation; that thereafter the corporation looked to him for, and collected from him, the monthly installments on said debt until the month of March, 1900, when he refused longer to pay; that up to the time of the conveyance of the lot to him, Wagoner had paid the monthly installments on the debt, and that the payments by Wagoner and plaintiff were more than sufficient to pay the debt, and that the contract whereby Wagoner obtained the loan was usurious, and praying an accounting as to the debt, a release of the deed of trust, and for general and special relief. The answer of the corporation admits the allegation of the bill to the effect that the plaintiff assumed the debt owing by Wagoner to the corporation as a part of consideration for the purchase of the lot. Wagoner filed an answer in which he did not make the defense of usury or authorize the plaintiff to do so. The case was referred to a commissioner to state the account and for other purposes. On the 26th of November, 1904, counsel for all the parties appeared in court and waived the order of reference and agreed that, if the contract in controversy be held usurious, then, upon calculation by partial payments at 6 per cent. interest, there would be due to the plaintiff from the corporation the sum of \$269.78, with interest from the 15th day of November, 1904, and that, if the contract be held not usurious, there would be due to the corporation from the plaintiff the sum of \$498.56, with interest from said date. Thereupon the court held that the contract was usurious and that the plaintiff was entitled to be relieved from the usury, and entered a final decree in favor

of the plaintiff against the corporation for the sum of \$269.78 with interest and costs, and directed a release of the deed of trust. From this decree, the corporation obtained an appeal.

Assuming that the debt is usurious, which we do not decide, the vital question in this case is: Can the plaintiff, under the circumstances stated, be relieved from the usury? The contract whereby Wagoner obtained the loan from the corporation was a building and loan association contract, providing for the monthly payment of interest, dues, and premiums until the maturity of the stock upon which the loan was obtained. Whether the contract was usurious or not, the plaintiff assumed the payment of the debt thereby created. It is not claimed that the plaintiff's contract with Wagoner was usurious. If the plaintiff is compelled to pay the usurious debt he does nothing more than he agreed with Wagoner to do in the purchase of the lot. If the plaintiff should be relieved from the payment of usury, he would pay less for the lot than he agreed to pay. The principles governing this case are well settled in this state. The defense of usury is personal to the debtor. One who purchases land which is charged with a usurious debt, and, as part of the consideration for his purchase, assumes the payment of the debt, cannot be relieved from the usury. *Spengler v. Snapp*, 5 Leigh (Va.) 478; *Crenshaw's Adm'r v. Clark*, 5 Leigh (Va.) 65; *Smith v. McMillan*, 46 W. Va. 577, 43 S. E. 283; *Lee v. Feamster*, 21 W. Va. 108, 45 Am. Rep. 549; *Snyder v. Construction Co.*, 52 W. Va. 655, 44 S. E. 250; *Harper v. Building Ass'n*, 55 W. Va. 149, 48 S. E. 817; *Chenoweth v. Building Ass'n* (W. Va.) 58 S. E. 559. In *Harper v. Building Ass'n*, the property on which the usurious debt was charged had been twice conveyed after being so charged. The original debtor, as well as both alienees, made the defense of usury, and that was held sufficient to raise the question of usury. In that case it was also held that a purchaser of real estate charged with an usurious debt cannot defend against the usury, unless the debtor unites with him in the defense, or his acquiescence and consent to such defense appear in the record. In this case the original debtor, Wagoner, neither made the defense of usury himself nor joined with the plaintiff in so doing, nor in any way acquiesced and consented in such defense by the plaintiff. The principles stated leave the plaintiff without right in this case to be relieved from the usury, if the contract be usurious; and they are conclusive of the case in the absence of novation. In *Chenoweth v. Building Ass'n*, novation is defined to be the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished. In order to make a novation, there must be an extinguishment of the old debt, which implies the release of the original debtor. This

record does not disclose such a state of facts. The plaintiff does allege in the bill that the shares of stock in the corporation were transferred to him by Wagoner, and there is exhibited with the bill a passbook purporting to show payments by Stuckey to the corporation. These payments were entered on the passbook in the name, or initials, of H. J. Wagoner as collector for the corporation, except two which were entered in the name of Smith as such collector. In the case of *Chenoweth v. Building Ass'n*, supra, which involved a building and loan association contract, there had been a transfer of the stock and a new account opened by the building and loan association with the purchaser of the property upon which the debt was charged, but, as in this case, there had been no extinguishment of the old debt and no release of the original debtor. The court properly held that there was not a novation and we so hold in this case.

The Middle States Loan, Building & Construction Company by its answer does not pray affirmative relief either by way of decree against the plaintiff or enforcement of the trust, but the plaintiff, having come into equity for an accounting and for relief against an alleged usurious debt, we think it is proper to adjudicate in this suit the amount of the debt in accordance with the agreement of record of the parties.

For the reasons stated, the decree complained of is reversed, and the amount of the trust debt mentioned in the bill and exhibits and evidenced by the bond of the defendant Wagoner to the corporation, dated the 11th day of March, 1893, is ascertained to be \$496.56, with interest from the 15th day of November, 1904, until paid and, as to all other relief prayed for in the plaintiff's bill, the bill is dismissed. This decision is without prejudice to any right, remedy, or proceeding on the part of the defendant corporation for the collection of the debt, the amount of which is here ascertained, or for the enforcement of the trust securing the same.

WAMSLEY v. WARD.

(Supreme Court of Appeals of West Virginia.
Dec. 11, 1906.)

1. ASSIGNMENTS — ORDER ON PARTICULAR FUND—ACTION ON ORDER—ACCEPTANCE.

Where an order is drawn for a certain sum to be paid out of a particular fund, and the amount of the order is not equal to the entire fund, no action at law can be maintained thereon by the payee against the drawee if he has not consented to or accepted the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 99.]

2. SAME—EQUITABLE ASSIGNMENT—ENFORCEMENT IN EQUITY.

Such an order operates as an equitable assignment of such fund or debt pro tanto, and, while a court of law will not so recognize it by permitting an action to be maintained there-

on, yet a court of equity will recognize and enforce it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assignments, § 99.]

(Syllabus by the Court.)

Error to Circuit Court, Randolph County.

Action by E. D. Wamsley against Lina A. Ward. Judgment for defendant, and plaintiff brings error. Reversed, and judgment rendered for plaintiff.

W. B. Maxwell, for plaintiff in error. Talbott & Hoover, for defendant in error.

SANDERS, J. This is a writ of error to a judgment of the circuit court of Randolph county, rendered in an action wherein E. D. Wamsley was plaintiff and Lina A. Ward was defendant. The plaintiff filed with his declaration an affidavit, claiming the sum of \$352.11 to be due to him from the defendant. The defendant, over the objection of the plaintiff, was permitted to plead an offset of \$380, which plea was verified by affidavit, and upon which issue was joined. On the trial, after all the testimony had been introduced, the plaintiff demurred to the evidence. Thereupon the jury returned an alternative verdict, finding the sum of \$376 for the plaintiff if the law upon the demurrer be for him, and, if not, then finding for the defendant in the sum of \$40.80. The judgment upon the demurrer was for the defendant.

The plaintiff assigns two grounds for reversal: First, because Minerva Wamsley, as administratrix of the estate of J. S. Wamsley, deceased, had no right to assign the assets in her hands to be administered; and second, because the plaintiff was indebted by open account to the said Minerva Wamsley as such personal representative in an amount largely in excess of the amount of the order hereinafter referred to, and that an assignment of a part only of such fund, without his consent, or acceptance of the order, could not be enforced in a court of law. We will not dispose of the first ground assigned. It is unnecessary to do so, because a disposition of the second assignment is conclusive of the case. It appears from the pleadings, and also from the evidence, that the set-off relied upon is an order drawn by Minerva Wamsley, administratrix, on the plaintiff, and in favor of the defendant, for the sum of \$380, and that the plaintiff, at the time of the giving of the order, and filing of the plea, was indebted to Minerva Wamsley, administratrix, in a sum largely in excess of the amount of the order. It does not appear that the plaintiff assented to the giving of the order, nor does it appear that there was ever any acceptance of it by him. It will be seen that the order was drawn for a part only of the indebtedness owing from the plaintiff to Minerva Wamsley, administratrix, and, this being so, the question arises as to whether or not an action at law can be maintained for the recovery of a partial assignment of a debt. The order referred to operated as an equi-

table assignment of the fund pro tanto, not only as regards the drawer and payee, but also as regards the drawee, though the order be not assented to, or accepted by, him. While it is universally held that an order given to a party directing the payment of the whole of a particular fund operates as an equitable assignment thereof, and that the payee may maintain an action at law thereon, yet, if the order is given for a part of a particular fund, and while it operates as an equitable assignment, it is equally as well settled that it cannot form the basis of an action at law. Some courts hold that, when an order is given for a part of a fund only, it does not even operate as an equitable assignment pro tanto, and, if not accepted or assented to, is entirely inoperative. This, however, is contrary to the rule which prevails in this state. Our courts hold that, while courts of law will in no manner recognize such partial assignments or orders as equitable assignments, yet a court of equity will recognize and enforce them. The case of *First National Bank v. Kimberlands*, 16 W. Va. 588, is absolutely controlling of the case here. That case is well considered, and lays down the rule which we have applied with clearness and precision, and cites numerous authorities for its support.

The judgment of the circuit court is reversed, and judgment entered for the plaintiff, but without prejudice to the right of the defendant to institute such proceeding as she may be advised is proper for the recovery of her claim relied upon as an offset in this action.

CHAMBERS et al. v. CLINE et al.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1908. Rehearing Denied Jan. 10, 1907.)

1. COUNTIES—REMOVAL OF COUNTY SEAT—SPECIAL ELECTION.

Where a vote upon the question of the removal of the county seat of a county has been taken at a general election, under the provisions of section 15, c. 39, Code 1906, Annotated (section 1217), and the election on such question has been, upon the hearing of a contest as to the result of such vote, by the county court held to be "not legally held and returned, and was invalid and void," it is competent, while such final decision and judgment remain valid and unquestioned by legal proceedings to review the same, for the county court, upon receiving the petition of the requisite number of legal voters of their county asking therefor, to order the holding of a special election for said purpose in a subsequent year in which no general election is held as provided in said section.

2. BONDS—PRESUMPTIONS.

In the absence of anything showing a different intention in the giving of a statutory bond, it will be presumed that the intention of the parties was to execute such a bond as the law required.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, §§ 35-40½.]

3. SAME—CONSTRUCTION.

So, where a bond is given under the authority of a statute, that which is not ex-

pressed but should have been incorporated is included in the bond, while that which is not required by the statute is excluded, if it is sufficiently clear from the bond itself that the intention of the parties was to comply with the law in its execution.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bonds, §§ 35-40½.]

4. SAME.

Reed v. Hedges, 16 W. Va. 167, Syl. Point 4; *Furniture Co. v. McGuire*, 33 S. E. 313, 46 W. Va. 323, Syl. Points 2, 3, and 5, 76 Am. St. Rep. 822; and *State v. Wotring*, 49 S. E. 365, 56 W. Va. 394, Syl. Point 2, approved and applied.

5. COUNTIES—REMOVAL OF COUNTY SEAT—PETITION.

When the citizens of a county desire the relocation of their county seat and file with the county court their petition under the provisions of said section 15, c. 39, Code 1906, Annotated (section 1217) and said petition is signed on several separate papers all to the same effect and naming the same place to be voted for as the place at which the relocation shall be made, such several separate papers, without regard to the number thereof, constitute together one petition only.

(Syllabus by the Court.)

Error from Circuit Court, Wyoming County.

Action by A. L. Chambers and others against H. M. Cline and others. Judgment for defendants, and petitioners bring error. Affirmed.

Chilton, MacCorkle & Chilton, John M. Blake, James H. Gilmore, and R. R. Smith, for plaintiffs in error. John M. McGrath, J. Lewis Bumgardner, M. F. Matheny, D. E. French, and J. J. Swope, for defendants in error.

McWHORTER, P. On the 8th day of June, 1905, Jasper N. Cook and 1,183 others, citizens and legal voters of Wyoming county filed in open court in the county court of Wyoming county their petition praying the said court to make an order directing a special election to be held in said county for the purpose of voting upon the question of the relocation of the county seat of said county at Pineville at a time to be fixed by said court as required by section 15, c. 39, Code 1906, Annotated, to which petition was annexed the affidavits of Jasper N. Cook and H. M. Cline that said signers of the petition were legal voters in said county, and the said Cline, as principal with W. G. Sparks, Jasper N. Cook and A. B. Shannon sureties filed their bond in the penalty of \$5,000, which bond was received and approved by the said county court under the said section 15, when the county court ordered a special election to be held in said county in pursuance of said petition on Tuesday, the 29th day of August, 1905, and made due provision in said order for the holding of said election by giving the necessary notices and appointing commissioners for each of the several voting precincts in said county. It afterwards being suggested to the court that said bond filed with the petition might be defective in the conditions thereof, the said court called a special term to be held at the

courthouse of said county on the 1st day of July, 1905, for the purposes, among other things, of providing for the registration of voters of the county prior to the special election aforesaid, and "to take any new or amended bond which might be offered or tendered concerning the special election to be held on the 29th day of August, 1905." At said special session, so called, on the 1st day of July, 1905, after reciting that it appeared to the court from statement of counsel that there might be some question as to the legality of the bond in the penalty of \$5,000 which was executed by said Cline and others on the 8th day of June, 1905, in compliance with the statute requiring a bond to be filed conditioned to pay the costs of the special election, so called, "On motion of H. M. Cline he is allowed to execute another and supplemental bond in like penalty in this cause with R. L. Bower, Joseph Mace, Isaac Lambert, Phillip Lambert, and Eli Moran as sureties and conditioned according to law, which is accordingly done and accepted and ordered to be filed and recorded with the records of this court." The county court met in special session on the 31st day of August, 1905, for the purpose of canvassing the votes and declaring the result of said special election at which time, and before the result was ascertained and declared, a recount of said votes was demanded which recount was refused by the commissioners. On the application of A. L. Chambers and others to the circuit court of said county an alternative writ of mandamus was awarded requiring the said county court to meet at the courthouse in special session on the 9th day of October, 1905, to permit the petitioners to contest said special election held on the 29th day of August, 1905, and commanding said county court to make, sign, and seal all proper and legal bills of exceptions which might be necessary to complete a record in the proceedings in said contest or to show cause why it should not do so. Said county court made its return to said writ, denying that said court had declined and refused to recount said votes by reason of what was termed in said writ as the arbitrary and illegal acts of respondent, but because the court was of opinion that the parties failed to make such demand at the time and in the manner required by law; that they were not advised as to whether any illegal votes were cast at said election in favor of the relocation of the county seat or otherwise, and therefore made no admission or denial in regard thereto; did not admit that there was any irregularity in the proceedings of the said special session of August 31, 1905, or that they acted arbitrarily or illegally, and expressed a willingness to acquiesce in the issuance by the circuit court of a peremptory writ of mandamus commanding the court to meet at the courthouse on a day to be fixed in said writ for the purpose of recanvassing and recounting the votes cast at said special election and of permitting the petitioners or any proper

party to demand a recount or of contesting the said election should they so desire. Thereupon, on the 18th of September, 1905, the circuit court made said alternative writ peremptory, requiring the said county court to meet at their courthouse on the 9th day of October, 1905, and providing that "at said meeting they shall permit said petitioners to contest said election as to any legal matters presented to them and especially to permit a recount of the ballots cast at said special election and do and perform all things required of them by the peremptory writ of mandamus herein provided for."

In pursuance of said peremptory mandamus the court met on the 9th day of October, 1905, in special session, after due notice calling such session, when the contestants by their attorneys moved the court to declare said election void for the reason that an election had been held in said county upon the same question and between the same places on the 8th day of November, 1904, and a contest thereof had been instituted and was undetermined on the 8th day of June, 1905, when said election on that day was ordered to be held, and in support of said motion introduced a certified copy of the record in the certiorari proceedings lately pending in the circuit court of said county and dismissed by final order of said court entered on the _____ day of September, 1905, which motion was resisted by the attorneys for the contestees and overruled by the court, to which ruling of the court the contestants at the time excepted, and contestants moved the said election of August 29, 1905, be declared void for the reason that no proper petition was presented to the court asking for said election; that the required number of legal voters in Wyoming county did not sign the petition which was filed, and for other reasons apparent upon the face of said petition, and tendered in support of said motion certified copies of the petition and affidavits, which motion was overruled, and the contestants excepted. Contestants moved the court to declare the said election void because the bond executed on the 8th day of June, 1905, at the time said election was ordered was void for the lack of legal conditions, and tendered in evidence a certified copy of said bond, which motion was resisted by contestees who tendered a certified copy of a bond executed on the 1st day of July, 1905, to which last bond the contestants objected as evidence, but the court overruled the objection and permitted said bond of July 1, 1905, to be filed, and the court, having considered both of said bonds in evidence, refused to declare the election void, to which ruling of the court the contestants excepted and tendered their three several bills of exceptions marked 1, 2, and 3 respectively, which bills were signed and sealed and made a part of the record. The clerk of the county court then laid before the court the certificates of the result of said special election upon the

question of the relocation of the county seat of the county at Pineville or the town of Castle Rock in said county held on the 29th day of August, 1905, and, it appearing to the court that the various notices of the said election were published and posted as required by law, the court proceeded to ascertain and declare the result, when it was ascertained that the total number of votes cast at said election was 1,779 of which 1,119 votes were cast for the relocation at Pineville and 660 were cast against relocation. The contestants then, by their counsel, moved and demanded that the court open the sealed packages of ballots cast at said election at certain precincts named and to recount the same, to which motion contestees, by counsel, objected, which objection was overruled and the contestees excepted, and the court proceeded to open said packages and found that the votes cast at said election at said precincts corresponded in all respects both as to the number which were cast and the result thereof with the certificates of the result certified by the commissioners of the election theretofore ascertained and declared by the court, save and except one ballot at Barker's Ridge district, precinct No. 1, was found, upon which the poll clerks had not written their names on the back thereof as required by law, which the court threw out and rejected as an improper and illegal ballot and proceeded to declare the result of the election so held on the 29th day of August, 1905, to be as follows: Total number of votes cast in the county, 1,778, of which 1,118 votes were cast in favor of the relocation of the county seat of said county at Pineville or the town of Castle Rock and of which 660 votes were cast against such relocation "from which it appeared to the court, and the court so decided, that fifty-one and three-fifths (51 $\frac{3}{5}$) more than three-fifths of the total votes cast at the said election were cast in favor of the relocation of the county seat of this county at Pineville, or the town of Castle Rock this county, the said last-named place to-wit: Pineville or the town of Castle Rock in this county is hereby declared to be the county seat of Wyoming county, West Virginia, from and after this date"—and ordered that the result of the election in detail be entered in the record book. The contestants, by their counsel, excepted to the ruling of the court in ascertaining and declaring the result for the reasons set forth in their said bills of exceptions numbered 1, 2 and 3. On the 15th day of November, 1905, A. L. Chambers and others procured from the judge of the circuit court of Wyoming county, in vacation, a writ of certiorari against the county court of Wyoming county to review the judgment entered on the 9th day of October, 1905, respecting said election relocating the county seat. On the 25th day of January, 1906, the petitioners, by counsel, moved the circuit court of Wyoming county to docket the said cause, and, it appearing that the said

writ of certiorari was duly served, was on that day entered as of the first day of the term. The defendants made return to said writ of certiorari and filed with said return a certified copy of the record of the proceedings in the matter of the contested election before the county court of Wyoming county on the 9th day of October, 1905. The contestees moved the court to quash the petition and said writ of certiorari, and to dismiss the same as improvidently awarded, and moved the court to confirm the action and judgment complained of in the case rendered on the 9th day of October, 1905, on the ground and for the reason that there was not shown by the record and proceedings of the county court of Wyoming county any such error in the judgment complained of as entitled the contestants to a reversal thereof, and the court, having heard the arguments of counsel on said motion and inspected and examined the record and the proceedings in the cause, was of opinion and decided that the judgment of the county court of Wyoming county ought to be sustained, and entered its judgment accordingly and gave judgment in favor of the contestees against the contestants A. L. Chambers and others for costs. To which judgment the contestants obtained from this court a writ of error and supersedeas.

It is insisted by the contestants that the court erred in holding the order entered by the county court on the 8th day of June, 1905, calling the special election to be held on the 29th day of August, 1905, valid, when an election for the same purpose and object had been held on the 8th day of November, 1904, and which last-named election, having been contested, was undetermined and was pending in said circuit court on a writ of certiorari awarded by the circuit court at the time of the calling and holding of said special election. It appeared from the record that the contest of the first election was decided on the 24th day of December, 1904, by the county court of Wyoming county when it was "considered, determined, and ordered by the court that the election held on the 8th day of November, 1904, on the question of the relocation of the county seat of Wyoming county was not legally held and returned, and is invalid and void." Nothing further was done in regard to said election, but it stood on the final judgment of the county court until the 28th day of June, 1905, when a petition was filed for a writ of certiorari which was then awarded. It further appears from the record that on the 19th day of September, 1905, in the matter of the application for writ of certiorari to the county court of Wyoming county the plaintiffs in error in this cause, by their attorneys, moved the circuit court to quash the petition and to dismiss the writ of certiorari therein as improvidently awarded, which motion was resisted by the plaintiffs in said writ, when the motion was sustained by the court, the petition was quashed, and the writ dismissed as improvidently awarded,

and judgment rendered for these plaintiffs in error here, Chambers, Cook, and others; hence it clearly appears from the record that, at the time of the calling of the special election of August 29, 1905, there was no matter pending in the circuit court of Wyoming county in relation to the said election held November 8, 1904, nor was it pending at the time of the canvassing of the result of the special election on the 9th day of October, 1905, in obedience to the peremptory writ of mandamus. It is conceded that the cause which rendered the election of 1905 void was the failure of the commissioners of election at each place of voting to make out and sign a separate certificate of the result of the said election and deliver the same to the clerk of the county court, who should lay the same before the county court at its next session thereafter as provided in section 15, c. 39, Code 1906, Annotated, which is held in *Welch v. County Court*, 29 W. Va. 63, 1 S. E. 337, to be mandatory and not directory. Under the rulings of this court, especially in the case just cited, by such failure on the part of the commissioners of election to return in a separate certificate the result of the said election of November 8, 1904, upon the question of the relocation of the county seat at Wyoming county, the said election of November 8, 1904, was a nullity, and could in nowise affect another and subsequent election properly called and conducted. See *Glasser v. Hackett*, 37 Fla. 358, 20 South. 532.

It is contended by the contestants that the court erred in overruling their objection to the bond attempted to be given on the 8th day of June, 1905, and the amended bond given July 1, 1905, and sustaining the judgment of the county court and holding that said bonds or either of them were sufficient to authorize the county court to call the special election for the relocation of the county seat and for holding the order calling said special election and the election held in pursuance of said order valid and legal when no bond had been given as required by the statute in case of a special election held for the purpose of voting upon the relocation of a county seat. The bond dated June 8, 1905, given by the petitioners for the special election was in the penalty prescribed by the statute, and was given by the obligors and accepted by the county court in good faith and recites in a proper manner the purpose for which it was given. The condition of the bond is not in the exact language of the statute, which provides that such bond shall be "conditioned to pay the legal costs of holding said election" while the bond in question was conditioned to "pay the expenses of said election if said county seat be not removed by said election." The real difference in the condition of the bond laid down in the statute and that contained in the bond in question, excluding from the latter the words "if said county seat be not removed by said election," if there is any material difference

in that particular, is in the words "costs" in the statute and "expenses" in this bond. Here is a condition to pay the expenses of the election which must mean the legal, necessary expenses. In *Appeal of Jane*, 87 Pa. 428-430, "costs" are defined as "expenses which are incurred either at law or equity, consisting of fees of attorneys, solicitors, or other officers of court, and such disbursements are allowed by law." See *Words & Phrases*, 1034. It is contended that the further condition "if said county seat be not removed by said election" vitiates the bond. This further condition is not warranted by the law, the parties are executing a bond under the provisions of a statute, they have bound themselves to pay the expenses of said election. Is not that equivalent to a promise or agreement to pay the legal costs of the election? In *Furniture Co. v. McGuire*, 46 W. Va. 328, 33 S. E. 313, 76 Am. St. Rep. 822, Syl. Pt. 3, it is held: "Where the condition of an official bond contains some valid provisions, and others not valid or warranted by law, the bad ones, if separable from the good, will be ignored." And also point 2: "The law in force at the time of the execution of a public bond is part of it, and the effect of it, in law, must be held to be known to its makers, as if in words incorporated therein." And, in same case, point 5, it is held: "Where a court or officer has authority to take a bond, and makes a mistake by omitting some condition prescribed by law, or inserting a condition not authorized or illegal, unless the statute, by express words or necessary implication, makes it wholly void, the bond is not void; the good shall not be vitiated by the bad, and the bond may be sued on, so far as the conditions are good, as a statutory bond." And in *State v. Wotring*, 56 W. Va. 394, 49 S. E. 365, Syl. Pt. 2, it is held: "A bond given under a statute must be construed, as to the scope of its obligation, to cover the objects of the statute in requiring it, if its words will at all allow such construction, and the statute is to be regarded a part of it." And, as held in *Reed v. Hedges*, 16 W. Va. 167, Syl. Pt. 4: "Where a court or officer has capacity to take a bond, and makes a mistake by omitting some condition prescribed, or inserting some condition not authorized or illegal, unless the statute by express words or necessary implication makes it wholly void, the bond is not void; the good shall not be vitiated by the bad, and the bond may be sued on, so far as the conditions are good, as a statutory bond." The bond is not void because it does not conform exactly to the provisions of the statute. *Pratt v. Wright*, 13 Grat. (Va.) 175, 67 Am. Dec. 767. *Johnston v. Meriwether*, 3 Call (Va.) 523. In 5 Cyc. 751, it is said: "If a bond is given under a statutory requirement, it is not a necessary requisite to its validity that it should be conditioned in the precise language of the statute. So, where a bond is not in the language of the statute yet contains the

substance of the statute the rest may be regarded as mere redundancy. But, in the absence of anything showing a different intention in the giving of a statutory bond, it will be presumed that the intention of the parties was to execute such a bond as the law required, and, although its terms may bear broader construction, the liability of the sureties will be confined to the liability contemplated by the law in requiring such bond." And authorities there cited. And in 5 Cyc. 754, under the subdivision "d": "If a bond is given under the authority of the law, that which is not expressed but should have been incorporated is included in the bond, while that which is not required by the law is excluded. So a bond given under a Code provision incorporates a condition of such Code herein as fully as if it were made expressly a part thereof, for, when an agreement is silent, or obscure as to a particular subject, the law and usage become a portion of it, constitute a supplement to it, and interpret it, and this applies to a Code provision which constitutes a limitation upon a surety's liability." And authorities cited. As we have seen "unless the statute by express words or necessary implication makes it wholly void, the bond is not void; the good shall not be vitiated by the bad." After the county court had issued the call, and almost two months before the time appointed for holding the special election, the petitioners tendered, and the county court accepted, approved, and filed a bond dated July 1, 1905, which is sufficient in every particular in form and conditions, the only question as to its validity being that it was not tendered and filed at the proper time. Contestants, by their counsel, contend that the recital in the last-named bond that the special election was "on the 8th day of June, 1905, ordered and directed," etc., to be held on the 29th day of August, 1905, makes said bond "void upon its face." The statute does not provide that the bond shall be tendered or filed with or at the same time the petition is filed praying for the calling of a special election, but that at the same time the bond should be entered into and acknowledged. This bond was given and executed in violation of the bond given the 8th day of June, 1905, which did not conform in its conditions with the exact language of the statute, but which bond, under the authorities cited and is held by this court, was not absolutely void, and, not being a void bond, even if the giving of the bond was jurisdictional, the order calling the special election was not thereby rendered invalid or void. The object of the bond is to insure the public against the costs of the election. The last bond, being a voluntary bond of the obligors made on valuable consideration and not in violation of public policy or contravening any statute, is not void. In *Bunneman v. Wagner*, 16 Or. 433, 18 Pac. 841, 8 Am. St. Rep. 306, it is held: "Bonds intended to be given in compliance with statutes, although not so given,

if entered into voluntarily, and founded upon a valuable consideration, and not in violation of public policy or contravening any statute, will be enforced by common-law remedies." In *Munter v. Reese*, 61 Ala. 395, it is held: "Bonds executed to civil officers, in the course of judicial proceedings, whether authorized by statute or not, if entered into voluntarily, supported by valuable consideration, and not in contravention of public policy or offensive to law, will be enforced by common-law remedies." See, also, *Palmer v. Vance*, 13 Cal. 553; 1 *Wade on Attachments*, § 187; *Bank v. Wells*, 28 La. Ann. 736, 26 Am. Rep. 107. However, the question of the liability of the obligors in the last bond does not here arise.

The petition for the special election of August 29, 1905, was prepared on several papers, all to the same effect and for the same purpose, and signed by the petitioners praying for the election to be called on a certain day, and all filed at the same term and treated as one petition. Now, it is contended by the contestants that each paper was a separate petition and a bond should have been given by the petitioners, or some one for them, and on behalf of the petitioners on each paper. These several petitions all praying for a vote to be taken for a relocation of the county seat at the same place, and asking for the election to be fixed at the same time constitute but one petition. The provision of the statute that "the petitioners signing each of said petitions, if there be more than one, or some one for them," etc., means when there are petitions mentioning separate and distinct places to be voted for, for the relocation of the county seat. All the petitioners signing the petition for the particular location mentioned in their petition constitute one petition, and those signing for another location constitute another petition, and it is only where there is more than one location sought to be nominated and voted for that there may be said to be two or more petitions, and in such case there would be a bond for each of said places. So it follows that the court committed no error in requiring of the petitioners but one bond, all the papers signed mentioning the same place for the relocation constitute but one petition. There was no question raised as to the fairness of the election held on the 29th day of August, 1905, or as to any other irregularity than the fact that the bond given on the 8th day of June, 1905, was void because it did not contain the condition in the exact words used by the statute. In recounting the votes there was but one ballot found that was irregular, and that was only because the clerks had not subscribed their names on the back of it, and that ballot was rejected. There is not the slightest intimation of fraud, corruption, or improper conduct in ascertaining the will of the voters on the question submitted. There is no question but there has been a free and fair expression of the voters of Wyoming

county on the subject of the removal of their county seat on two separate occasions in two consecutive years, 1904 and 1905, and in both instances by a decided three-fifths vote they have expressed their desire to relocate the county seat at Pineville, and there should be good and valid reasons for overthrowing that will so expressed at the polls before that will should be set aside.

For the reasons herein given the judgment of the circuit court of Wyoming county is affirmed.

KINSEY v. CARR et al.

(Supreme Court of Appeals of West Virginia.
Nov. 20, 1906. Rehearing Denied Jan. 10, 1907.)

1. APPEAL—TRIAL BY COURT—REVIEW.

When a case is tried by a court in lieu of a jury, its finding will not be disturbed by this court unless it is against the plain and decided preponderance of the evidence, or wholly without evidence to support it.

2. PAYMENT—EVIDENCE.

The plea of payment is sustained by the evidence, and the court committed no error in finding for the defendants.

Poffenbarger, J., dissenting.
(Syllabus by the Court.)

Error from Circuit Court, Wood County.

Action by T. S. Kinsey against W. M. Carr and others. Judgment for defendants, and plaintiff brings error. Affirmed.

H. P. Camden and W. G. Peterkin, for plaintiff in error. Smith D. Turner, for defendants in error.

SANDERS, J. The plaintiff, T. S. Kinsey, brought an action of assumpsit in the circuit court of Wood county against W. M. Carr, A. S. Carr, Percy H. Carr, Wm. B. Farris and others, partners as the Carr Oil Company. By consent of the parties, the action was abated as to all of the defendants except the three Carrs, who plead the general issue, and payment. The case was, upon the joint motion of the plaintiff and defendants, referred to a commissioner to take and state an account between the parties. Under the order of reference the commissioner reported adversely to the plaintiff, to which report he excepted, but the court overruled the exceptions and entered judgment for the defendants, and this judgment is now here for review on writ of error.

The commissioner finds and reports from the evidence that the plaintiff is estopped to recover the amount claimed by him, and it is argued by counsel for the plaintiff that the commissioner had no right to pass upon the question as to whether or not the correct balance found by him was due or not due to plaintiff, because of the estoppel set up by the defendants, but that the sole purpose of the reference was to take and state an account between the parties. As to whether or not this contention is tenable, we find

that it is unnecessary to decide, because, by agreement of parties, the case was submitted to the court in lieu of a jury, upon the commissioner's report, the exceptions of the plaintiff thereto, upon the pleadings in the case, and the evidence returned by the commissioner in support of his report. Therefore, granting that the commissioner did not file such report as was required by the order of reference, and by section 10 of chapter 129 of the Code of 1899 [Ann. Code 1906, § 3921], yet if the evidence filed with the report, and upon which the case was heard, is sufficient to support the judgment, we could not reverse, because the commissioner passed upon this evidence, and found that the plaintiff was estopped. The evidence taken by the commissioner, and upon which he bases his report, was returned and filed with his report, and was, by agreement, considered by the court. The report of the commissioner as to such matters properly referred to him, and upon which he could properly report, is only prima facie correct. It may be overthrown by evidence, and when all the evidence is in, it is for the court to determine whether or not it is correct. When a commissioner does not report in obedience to the order of reference, or as provided by the statute, not deciding, however, that the commissioner has not done so, the court could recommit the case to him. But where it is not recommitted, but submitted on the report, and the evidence returned with it, the court will look to the evidence, together with the report, and decide the right of the case therefrom. And, again, the plaintiff did not except to the report on the ground that the commissioner did not obey the order, or that he reported conclusions of law and passed upon conflicting evidence, but seeks to raise this question here for the first time. This brings us to the question as to whether or not the judgment is supported by the evidence. The evidence is somewhat conflicting, but it will not be necessary to point out wherein this is so, because we are, upon a review of the judgment, under the rules of law, required to disregard all the evidence which is in conflict with that which goes to establish the contention of the defendants, unless such conflicting evidence clearly and plainly preponderates. The same rule applies here as that by which a demurrer to the evidence is tested. Before we can reverse the finding of the lower court, the judgment must be without sufficient evidence to support it, or plainly and manifestly against the decided weight and preponderance of the evidence. Therefore, if we find there is sufficient evidence to support the judgment, and that the material conflicting evidence does not plainly preponderate, we must sustain the court's findings. *Buck v. Newberry*, 55 W. Va. 681, 47 S. E. 889; *Barrett v. Raleigh C. & C. Co.*, 55 W. Va. 395, 47 S. E. 154; *State v. Sullivan*, 55 W. Va. 597, 47

S. E. 267; *Fulton v. Crosby & Beckley Co.*, 57 W. Va. 91, 49 S. E. 1012. Numerous other cases might be cited to the same effect, but it is deemed unnecessary to do so.

We will give briefly the material facts which the court below could have found from the evidence: During the years 1897 and 1898 the Carr Oil Company, owning and operating certain leaseholds for oil and gas near Cornwallis, in Ritchie county, engaged T. S. Kinsey to drill for it certain oil wells. Kinsey, at the same time, had a contract with Stuart & Young, of Chicago, for drilling on the Wells farm, in Ritchie county. Stuart & Young had a contract with the Carr Oil Company by which they were to finance that company, so that, for all the work which Kinsey did under these two contracts, which were separate and distinct, he was paid by Stuart & Young, and they paid him for all the work done by him upon the Wells farm. Stuart & Young owned a three-eighths interest in the Carr Oil Company. In 1898 Kinsey finished his work at Cornwallis, at which time the Carr Oil Company was indebted to him, on account of work done at that point, between \$12,000 and \$13,000. In July of that year Kinsey entered into a contract with A. S. and W. M. Carr, by which he was to drill certain oil wells at Sugar Grove, Ohio. This contract was later assumed by Stuart & Young, who were to pay Kinsey for the work done under it. At this time Kinsey had outstanding two notes for \$500 each, payable to Ireland & Hughes, of Pittsburg, Pa.; one due July 25, and the other August 25, 1898. Prior to the time of leaving Cornwallis, Kinsey had spoken to W. M. Carr relative to these notes, saying that the Carr Oil Company must take care of them. He also told Carr that he must have \$1,000. Carr told him to write to the company in Chicago, and that, doubtless, the matter would be attended to. Kinsey did as he was directed, and, on September 2d, received from Stuart & Young a check for \$1,000; also, on the same date, he received from them a letter, stating that the two notes had been taken care of. In this letter no direction was given as to how the money should be applied. Kinsey entered a credit on his books to the Carr Oil Company for the first \$500 note, but made no entry as to the other note or the \$1,000 cash item. He says he intended that the whole amount should be entered as a credit to the Carr Oil Company, and he thought this had been done. Early in the month of September, Kinsey told W. M. Carr that the Carr Oil Company had taken care of the two notes, and had also paid him \$1,000 cash. On the 28th day of September, 1898, Stuart & Young, Wm. B. Farris, and A. S. and W. M. Carr entered into a contract by which the Carrs and Farris bought the interest of Stuart & Young in the Carr Oil Company, subject to the debts of said company, and, for themselves and their associates, released Stuart & Young of all

claims which they had against them. On September 30th, following, Kinsey received a letter from Stuart & Young, stating that the \$2,000—\$1,000 paid to Ireland & Hughes and the \$1,000 cash—were to be credited to their account. Thereupon Kinsey erased the \$500 credit which he had given to the Carr Oil Company, and later informed the Carrs that he had received directions from Stuart & Young as to how the \$2,000 should be applied, and that the amount was not a credit on the Carr Oil Company's account. The direction of Stuart & Young made to Kinsey on September 30th was to apply the \$2,000 as a credit on the work done at Sugar Grove. By the terms of the contract with Kinsey, they were not required to pay for wells until they were completed. At the time that Stuart & Young paid these amounts, early in September, there were no wells completed on the Sugar Grove work—hence no money was really due Kinsey on that work at that time. It is the custom among oil people that wells are never paid for until completed. A dispute arose as to whether or not the \$2,000 had been credited by Kinsey upon the Carr Oil Company's account. In 1901, by virtue of a settlement between them, the Carrs paid to Kinsey all that was found due to him from the Carr Oil Company, with the exception that no agreement was reached as to the item of \$2,000; and, the parties not coming to any conclusion in regard to it, this action was instituted for its recovery. While the court overruled the exceptions of the plaintiff to the commissioner's report, which found that the plaintiff was estopped, yet it does not appear upon what ground the court predicated its decision—whether upon the ground of estoppel or upon some other ground. Nor is it material what reasons it gave for its decision, if the judgment is supported by the evidence. The court may have given the wrong reason, still, if the plaintiff, from all the evidence, was not entitled to recover, the judgment will not be reversed, simply because the decision was put upon the ground of estoppel when it appears there was no estoppel, when there is another sufficient reason upon which the judgment can be sustained. *Lee v. Patton*, 50 W. Va. 20, 40 S. E. 353; *Ballard v. Chewing*, 49 W. Va. 508, 39 S. E. 170.

We do not think the evidence supports the view of the commissioner, wherein he reports that the plaintiff is estopped, because the facts show payment; and, if so, there can be no estoppel. The work on the Wells farm had been completed and paid for, and the wells at Sugar Grove had not been completed; and, according to the understanding and agreement between the parties, they were not to be paid for until completed. Therefore, at the time Stuart & Young sent Kinsey the \$1,000, and notified him that the Ireland & Hughes notes had been taken care of, there was nothing due from them to Kinsey; and, in fact, nothing was due to Kinsey on account of any of the

work except the work at Cornwallis. There being nothing due from Stuart & Young to the plaintiff at that time, it certainly does not seem reasonable that they would advance to him this sum without being requested to do so. If it is said that there was such request, it cannot be sustained from the evidence. The plaintiff, before that time, called upon W. M. Carr, and stated that he wanted the Ireland & Hughes notes taken care of, and that he wanted \$1,000. Carr requested him to write to the Carr Oil Company, in Chicago, and stated that no doubt it would take care of the notes, and pay him the desired sum of money. Following up this conversation, Kinsey did write to the Carr Oil Company, requesting it to take care of the notes and to send him \$1,000; and, in obedience to this request, Stuart & Young, who received the letter written to the Carr Oil Company, sent the \$1,000, and notified Kinsey that the notes had been taken care of. It is true the check was signed by Stuart & Young, but this is not significant, because the agreement between the Carr Oil Company and Stuart & Young was that Stuart & Young were to receive the output of the wells operated by that company, and to pay all of its bills. So, whether they sent their individual check, or the check of the Carr Oil Company, is immaterial, because at this time they owed the plaintiff nothing, and the request was not made to them to advance any sum of money on account of the Sugar Grove wells, but the request was directed to the Carr Oil Company, which, at that time, owed the plaintiff. In their letter to Kinsey, Stuart & Young did not claim, nor did they in any way intimate, that they were advancing this money on their individual account, and, inasmuch as the request was to the Carr Oil Company, we certainly cannot assume that this was on account of an individual transaction between them and Kinsey, but it is perfectly patent that it was on account of the transaction between the Carr Oil Company and Kinsey.

This request having been made, the money having been sent, the notes having been taken care of in compliance with the request, and Kinsey having applied it to the credit of the Carr Oil Company, as he said it was his intention to do when he made the request, is strong evidence of payment. During the course of Kinsey's examination as a witness, it developed that he had only actually entered upon his books to the Carr Oil Company's credit, one of the \$500 notes; but he told the Carrs that he had credited the entire amount to their account. And it was not until after the Carr Oil Company bought the interest of Stuart & Young in that company, subject to its debts, and released Stuart & Young from all liability on account of any of the transactions, that the Carr Oil Company found that Kinsey was claiming anything on account of this indebtedness. Stuart & Young said nothing as to where this money should be applied

until after the consummation of the agreement aforesaid, and they then notified Kinsey that it should be applied upon the Sugar Grove wells, and it was after this that the plaintiff claimed that he changed the credit from the Carr Oil Company to Stuart & Young. This he could not do. As we have seen, the payment of the Ireland & Hughes notes and of this sum of money by Stuart & Young, for the Carr Oil Company, upon the request of Kinsey, constituted a complete payment, and a discharge of the obligation of the Carr Oil Company to the plaintiff. It is said that there is nothing to show that the money was that of the Carr Oil Company. Whose money was it? Application was made to the Carr Oil Company to pay it, and it was paid by the parties who had been appointed to do so, and there is nothing to show that it was the money of any other person. And, even though there is no positive proof that it was the money of the Carr Oil Company, we should presume it to be so. But, suppose it was the money of Stuart & Young; they agreed to pay the bills of the Carr Oil Company, and they, upon request, applied this money to the payment of the debt due from the Carr Oil Company to Kinsey, which thereby discharged the obligation.

The defendants cross-assign error, and insist that the lower court, instead of merely finding against the plaintiff, should have given them judgment against the plaintiff for the amount of the set-offs. A sufficient answer to this assignment is that the evidence abundantly shows that all the matters between the parties had been settled, except the sum sought to be recovered in this action.

For the foregoing reasons, the judgment of the circuit court is affirmed.

POFFENBARGER, J. (dissenting). For the following reasons, I am unable to concur in the conclusion to which my associates have come: The original indebtedness undisputed, the burden of proof, on the issue of payment, rests upon the defendant, the Carr Oil Company. Three members of that firm have testified in the case, without even indicating, with any degree of certainty, that the company furnished a dollar of the \$2,000 which they claim to have paid. They do not swear, or show, that either of the two \$500 notes in question was paid with their money by Stuart & Young as their agents, nor that the \$1,000 check was drawn upon, or paid out of, Carr Oil Company funds. The defense of payment and the decision of this court proceed upon the assumption of a relation of agency between the Carr Oil Company as principal and Stuart & Young as agents. If the latter paid said sum of \$2,000, as such agents, the act of payment was the act of the principal, and the documentary evidence of that act—the two notes and the check—are in the custody of the defendant. If they are not in their actual possession, they must be

in the possession of their agents, which, in law, amounts to the same thing. Hence there is no reason, nor is any excuse set up, for their nonproduction. They afford the best evidence of payment, and if they had been introduced, along with the oral testimony in this case, they would make it conclusive in favor of the defendant; for no court could permit a finding contrary to that. The most that is claimed for the evidence without them is that it makes a doubtful case; one that would warrant a finding either way. This might sustain the finding of the circuit court, if it were not disclosed that this documentary evidence, if it exists, as it must, if this judgment is right, were not in the possession of the defendant. Their failure to produce it, without any excuse for so doing, raises a strong presumption that they do not have it, and, therefore, that they did not make the payment. They do not go so far in their testimony as to say that they have, or ever had, any of these papers. They do not assert that the two notes were ever delivered to Kinsey. Kinsey says, in substance, that he never had them, but only that he had been informed that they had been paid. Of course he has not the check, for that was returned to the drawer thereof. Can it be assumed that the Carr Oil Company would risk a case involving \$2,000 on remote circumstantial, equivocal, and inconclusive evidence, if they had in their possession the written evidence of these payments? This court has several times decided that failure of a party to produce, in a case in which the evidence is doubtful, conclusive evidence in its favor, when he has it, or claims to have it, within his power, conclusively establishes the fact that it will not prove what he says it will, or that he does not have it. *Webb v. Bailey*, 41 W. Va. 463, 23 S. E. 644; *Union Trust Co. v. McClellan*, 40 W. Va. 405, 21 S. E. 1025; *Bindley v. Martin*, 28 W. Va. 775; *Heflebower v. Detrick*, 27 W. Va. 16; *Knight v. Capito*, 23 W. Va. 639; *Wheeling v. Hawley*, 18 W. Va. 472.

It seems to me that, if the doctrine of these cases is sound, the principle they enunciate ought to be applied and enforced here; for, of all the cases that have come under my observation, this is one of the most inconclusive as regards the evidence upon which the judgment stands. The witnesses are allowed to stand off and testify at long range and introduce testimony to mere circumstances, for the purpose of establishing a thing, which, if it exists, is within their personal knowledge. They must know whether their money paid that \$2,000, and yet they do not swear that it did, and the court excuses them from doing so. For aught that they have said in this case, they might go on the witness stand, in an action brought by Kinsey against Stuart & Young, and testify that Stuart & Young paid the money on account of their own debt, and not on account of the Carr Oil Company debt. If they should do that, there would

not be the slightest contradiction in terms between their testimony in the two cases. It does seem to me that the court ought to withhold a decision in their favor, at least until they put their oaths behind their claim. That they have not done in any direct or positive manner. For my part, if they had done so, I should compel them to go further and produce the documentary evidence which must be in their possession, if their claim is well founded. They say Stuart & Young were their agents, and, as such, paid the money out of their funds. Stuart & Young took the product of their wells, sold the oil, and applied the proceeds in the discharge of their obligations. Is it conceivable that in handling these large amounts of money, Stuart & Young, acting as agents, knowing they would be called upon for a settlement in which they would be charged with all the oil received and sold, and credited with the amount disbursed on account of the debts of their principal, did not preserve the written evidence of their disbursement, and that a settlement was made between them and their principal without surrendering such instruments as the two notes which it was said were thus taken up? They do not say these instruments have been lost or destroyed, nor that their agents failed or refused to deliver them over to them on the settlement, nor do they produce their books and show that they were charged with these notes, or gave credit for them to Stuart & Young in their settlement with them. They do not even swear that their books show any such fact. Furthermore, they do not produce Stuart & Young, or either of them, the men who made the payment, and who must know out of whose funds they were made, to prove the claim of payment, nor show that the testimony of these men cannot be had. Their failure to produce them is, under our decisions, conclusive evidence that they would testify against them. See cases above cited. In this way, the court has before it the equivalent of the direct and positive evidence of Stuart & Young, to the effect that these payments were not made out of the funds of the Carr Oil Company, as against mere remote circumstances, from which the court is asked to infer a thing which the parties will not swear to as a fact. The worthlessness of such testimony was declared by this court only a short time ago in *Stout v. Sands*, 56 W. Va. 663, 669, 670, 49 S. E. 423.

The circumstance which is regarded as the strongest pillar of this decision is that there was nothing actually due from Stuart & Young at the time these payments were made to which they could have been applied. This, the court makes virtually conclusive against Kinsey. In doing so, I think it ignores some other very important circumstances disclosed by the evidence. At that time, the Carr Oil Company owed Kinsey, according to his statement, about \$13,000, certainly not less than \$9,000 or

\$10,000, and he had completed all the work that he had contracted to do for the Carr Oil Company. The work was completed and the money all paid due and bearing interest. The claim of payment proceeds upon the theory that the Carr Oil Company had funds in the hands of Stuart & Young with which to pay that indebtedness, or, at least, \$2,000 of it, and that it was paid out of those funds. It is very improbable that, with ample funds at their command, belonging to their principal, Stuart & Young would allow this indebtedness to climb up to \$13,000, and pay interest on it, or that the Carr Oil Company would have permitted any such thing. Suddenly Kinsey made a demand for \$2,000. He was then engaged on an extensive contract for Stuart & Young, at Sugar Grove, Ohio. Although nothing was technically due him on that work, he had two wells almost completed; one of which came in on the 8th day of September, and the other on the 15th. It was very important to Stuart & Young that this work go on, and it would not be a violent presumption to say that, in order to save Kinsey from embarrassment, and enable him to proceed with their work, they advanced the \$2,000 on account of their own work; the Carr Oil Company not having sufficient funds to pay that amount. Certain it is that they paid the two notes and sent the check without informing Kinsey as to whose money it was, and also that the check sent was prima facie not drawn upon the Carr Oil Company funds. It was Stuart & Young's check. Supposing it was the Carr Oil Company's, Kinsey told one of the Carrs that he had placed it to the credit of that company. Later, Stuart & Young sent Kinsey a statement, crediting him with some \$3,800 for drilling two wells, and, charging him with the \$2,000 in controversy here, inclosed a check for the balance, and asked Kinsey to sign and return the voucher, which he did, retaining the check. Kinsey had no means of knowing whose money he had received. Nor could he have known that the Carr Oil Company had funds in the hands of Stuart & Young to pay the amount sent him, nor was he bound to presume that it was not the money of Stuart & Young, merely because nothing was then actually and technically due him from them. Hence, the circumstance is not conclusive, nor is it, in my opinion, entitled to the weight given it.

It has been suggested that because Stuart & Young were agents of the Carr Oil Company, and Kinsey had knowledge of that fact, the application which the latter made of the \$2,000 payment could not be changed by their joint act; for the change was in the personal interest of the agents, and against the interest of their principal. This position would be tenable, if it appeared that Kinsey knew the money which he had received was the money of the Carr Oil Company. He was bound to know that an agent could not appropriate to his own use the funds of

his principal, or pay his own debt with them, and that he could not participate in any such transaction. But he did not know, nor did he have any means of knowing, that the fund in question was the property of the principal. For aught that he knew or could know, that money was the property of the agents themselves, with which they could do what they pleased. They had not been parties to the credit given to the Carr Oil Company; nor does it appear that they knew it had been given. Their letter did not ask Kinsey to change any credit, and there was nothing inconsistent on their part, in taking credit for that payment themselves, so far as Kinsey knew, or so far as the evidence in this case discloses. They dealt with him in two capacities, as contractors with him, and as agents for the Carr Oil Company, with whom he had another contract. He did not know they had sold out to the Carrs, and terminated the agency. As to him, the relation of agency continued. Clark & Skyles, Agency, pp. 414-417, § 173b. In which capacity they had sent the money, he did not know, and they had authority to bind their principal. If the \$2,000 was the money of Stuart & Young, and not the money of the Carr Oil Company, then it is clear that they did nothing inconsistent, and that Kinsey could consent to the change of credit. If no relation of agency existed, then the title to the fund was indisputably in Stuart & Young, and they could direct the application of the payment. Kinsey could not apply it on anybody's debt except that of Stuart & Young, without their direction; and, as he had applied it without any direction, he could not have resisted the demand for an alteration thereof. He was bound to accede to the demand that it be credited on Stuart & Young's debt.

The finding of the commissioner and the decision of the circuit court in favor of the Carr Oil Company seem to have been based upon the theory of an estoppel. Enough of the evidence has been stated to indicate that there is no estoppel. It is true that the Carrs bought from Stuart & Young, on the 28th day of September, 1898, their interest in that copartnership, and probably true that, prior to that time, Kinsey had told one of the Carrs that he had given the Carr Oil Company credit for the \$2,000. They claim that he thereby misled them into the purchase of the Stuart & Young interest. In other words, they say that, if they had not supposed this \$2,000 had been paid on the indebtedness of the Carr Oil Company to Kinsey, they would not, or might not, have bought the interest of Stuart & Young. But there is not a word of testimony to the effect that Kinsey knew, had any reason to know or suspect, or could have known, that the Carrs intended to buy out Stuart & Young. Therefore, he made the representation without any intention to mislead the Carrs to their injury and without any rea-

son to suspect, or means of knowing, that it would so mislead them. Moreover, as has already been shown, he did not know, and could not have known, whether the money he had received was properly credited, or could be properly credited, to the Carr Oil Company. Furthermore, the representation could not have injured the Carrs, if they had exercised the most ordinary prudence and care in effecting their deal with Stuart & Young. The means of knowledge was right at their hands. If it had been paid, their own books must have shown the fact, and if it had not been paid, their books and their papers, in the hands of their agents, Stuart & Young, showed that fact. Therefore, practically all of the essential elements and ingredients of an estoppel are lacking. "In order to constitute an equitable estoppel, there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." 16 Cyc. 728. "Negligent, as distinguished from intentionally fraudulent, misrepresentations, may operate as an estoppel. On the other hand, ordinary, casual declarations or admissions, not made for the purpose of inducing any specific action, and on the faith of which no one has been misled, are not conclusive in their character, and are entitled to have only such weight attached to them as, under all the circumstances, they may fairly deserve." Id. 728.

I admit that, in order to overthrow the decision of the court below on the issue of payment, we must be able to see that it is contrary to a decided preponderance of evidence; and I am convinced, for reasons stated, that it is not only against such preponderance, but almost wholly without evidence to sustain it. Men ought not to be allowed to establish, by mere inference, from remote and isolated circumstances, claims of title which they are unwilling to assert upon their oaths, when the court can clearly see that the truth or falsity of that claim is within their personal knowledge, and documentary evidence thereof within their control, but withheld.

TALBOTT v. SOUTHERN OIL CO.

(Supreme Court of Appeals of West Virginia.
Oct. 30, 1906. Rehearing Denied Jan. 10,
1907.)

1. PROCESS—RETURN—CONTRADICTION—WHEN PERMISSIBLE.

If a return of service of a summons commencing a suit is sufficient on its face, such facts stated therein as it was the duty of the

officer to set forth in it cannot be put in issue by either a plea in abatement or a motion to set aside a judgment by default. For reasons of public policy, contradiction of such returns is not permitted in any form, except upon allegations of fraud or collusion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, §§ 189–193.]

2. ERROR, WRIT OF—OBJECTIONS NOT RAISED BELOW.

On a writ of error to a judgment by default, after an unsuccessful motion to set it aside, made pursuant to section 5 of chapter 134 of the Code of 1899 [Code 1906, § 4036], without in any way challenging the sufficiency of the declaration, insufficiency thereof cannot be assigned as ground of error if the matter therein set up be such as if well pleaded would constitute a cause of action cognizable by the court when sitting as a court of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1226–1240.]

3. MINES AND MINERALS—LEASES—RIGHTS AND LIABILITIES.

For injury to land caused by the escape of natural gas from a well thereon, drilled and abandoned by a lessee of the land for oil and gas purposes, the lessor has a right of action for damages against the lessee.

(Syllabus by the Court.)

Error to Circuit Court, Gilmer County.

Action by E. M. Talbott against the Southern Oil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. D. Hanes, Chas. N. Kimball, and Jas. H. Gilmore, for plaintiff in error. R. G. Linn, for defendant in error.

POFFENBARGER, J. The Southern Oil Company, a corporation, against which E. M. Talbott obtained a judgment by default for the sum of \$2,000 in an action of trespass on the case in the circuit court of Gilmer county, for damages occasioned by failure on the part of the defendant to plug, as required by statute, an abandoned gas well, drilled by the defendant on lands of the plaintiff under a lease authorizing such drilling, complains of the action of said court in refusing to quash the return of service on its motion made in a special appearance for the purpose, and in refusing to set aside the judgment on its motion, made pursuant to notice thereof. The return of the sheriff reads as follows: "Executed the within writ on the within named, the Southern Oil Company, a corporation, by delivering a copy thereof to E. L. Buttrick, as its statutory attorneys in Kanawha county, wherein the said Buttrick resides, on the 31st day of March, 1904. J. A. Jarrett, Sheriff of Kanawha county, W. Va." On the special appearance aforesaid, the defendant asked leave to file an affidavit of D. Robertson, its secretary and treasurer, showing the authority of E. L. Buttrick, as its attorney in fact, appointed in conformity with the statute (section 24, c. 54, Code 1906), to have been revoked before the institution of this action, which leave was granted, and the affidavit filed over the objection of the plaintiff, but the motion to quash, supported by the affi-

davit, was overruled. No further appearance having been made, judgment was rendered on a subsequent day of the same term, June 8, 1904. The motion to vacate the judgment was made in vacation at the county seat of Jackson county, on the 1st day of August, 1904, and in support thereof the defendant tendered certified copies from the records of the clerk's office of the county court of Kanawha county, in which the power of attorney had been recorded, and of the office of the Secretary of State, showing that the instrument revoking said power of attorney had been recorded in said offices in the month of October, 1903. Leave being granted, they were filed, but, on objection sustained, the judge refused to read or consider them, and overruled the motion to set aside the judgment.

The law of this state, as settled by the decisions of this court, seems to forbid any relief upon either of the motions made by the defendant. *Stewart v. Stewart*, 27 W. Va. 167, holds that the facts stated in the return of a sheriff, showing service of the summons commencing a suit, cannot be contradicted for the purpose of setting aside a decree upon a bill taken for confessed. If this rule is sound, it must apply to judgments by default as well as to such decrees. There can be no difference in principle. Relief in such cases is by motion, in the nature of a writ of error. Section 5, c. 134, Code 1899 [Code 1906, § 4036]. To be available on such a motion, the error must appear upon the face of the record. Here the matter relied upon for relief is one which does not appear upon the face of this record, and cannot be shown without contradicting a fact stated in the return.

If the matter relied upon were such as could have been made available at common law, upon a writ of error coram nobis for error in fact, relief might be had by motion, under section 1 of chapter 134 of the Code. *Carlson's Adm'r v. Ruffner*, 12 W. Va. 297, 299, 310; *King v. Burdett*, 28 W. Va. 601, 57 Am. Rep. 687; *Evans v. Spurgin*, 6 Grat. 107, 52 Am. Dec. 105; *Gunn v. Turner's Adm'r*, 21 Grat. (Va.) 382. But our decisions hold that the return of the sheriff cannot be contradicted under any circumstances, nor overthrown by any kind of proceeding. *Rader v. Adamson*, 37 W. Va. 582, 16 S. E. 808, 812, holds that it cannot be done by plea in abatement. At page 595 of said volume, Judge English, speaking for this court, said: "The statute requires a plea of this kind to be verified by affidavit, but does not authorize such a plea to be sworn to by any person other than the defendant, and for several reasons we must regard said plea as bad; but, if it was ever so formal and free from defects, we think the court acted properly in striking it out, as this court has held in the case of *Bowyer v. Knapp*, 15 W. Va. 299: 'The law seems to be well settled that an official return, duly made upon process emanat-

ing from the court or its officers, by a sworn officer in relation to facts which it is his legal duty to state in it, is, as between the parties and privies to the suit, and others whose rights are necessarily dependent upon it, conclusive of the facts therein stated.'" No plea or proceeding for putting in issue such a matter could be more positive, direct, and free from embarrassment by the principles of waiver than a plea in abatement. If the proof of the facts stated in the return cannot be inquired into upon such a plea, it is impossible to conceive, for any reason, why it should be allowable upon a mere motion.

In coming to a conclusion in *Rader v. Adamson*, the court seems to have disregarded the following protestations: "But we do not mean to decide whether, under our statute, the return of a sheriff upon process may or may not be contradicted by plea in abatement." *Bowyer v. Knapp*, 15 W. Va. 277, 291. "As we said in *Bowyer v. Knapp*, 15 W. Va. 291, we do not mean to decide whether, under our statute, the return of the sheriff on process may not be contradicted by plea in abatement filed in the suit at the proper time." *Stewart v. Stewart*, 27 W. Va. 167, 182. However, if we could say the ruling in *Rader v. Adamson* appears to have been inadvertent, there is much authority to sustain it. In *Ramsburg v. Kline*, 96 Va. 465, 31 S. E. 608, cited with approval by this court in *McClung v. McWhorter*, 47 W. Va. 150, 152, 34 S. E. 740, 81 Am. St. Rep. 785, the court held as follows: "The return of an officer showing that a summons to commence a suit has been duly executed cannot be contradicted by a defendant, unless it can be shown that the plaintiff procured or induced the return, or was in some way connected with the deception. It is immaterial whether the objection to the return be made at law or in equity, the rule is the same." No doubt the rule is capable of working great hardship, but it would not have done so in this instance had the defendant recognized and obeyed it. There was notice in point of fact. It appeared, and attempted to take advantage of the mistake of the officer. The hardship results, not so much from the officer's mistake, as from the failure of the defendant to submit to the rule of law which forbids contradiction of the return. It is rare that a court can relieve a party from self-imposed burdens, though he is not always bound by his mistakes.

No objection to the declaration is specified in the notice of the motion to set aside the judgment nor in the motion itself. Had defects in it which would render it bad on demurrer been specified in either, it may be that such defects would be available here now for reversing the action of the court below. Whether the declaration would be good on demurrer, we are not, for this reason, called upon to say. It suffices that it purports to set up matter which, if well pleaded,

would constitute a good cause of action. It charges injury and damage to the land of the plaintiff by the escape of gas from an abandoned well. Whether the liability arises under the statute, referred to in the declaration, or the common law, is immaterial. If not a good statutory cause of action, the injury is actionable at common law. Waste, injury to the freehold by a tenant for life or years, is actionable at common law, whether it result from affirmative wrongful acts or mere omission to perform duty. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Taylor, Landlord & Tenant*, §§ 345, 346, 347, 348, 349. If an oil lease may be said to confer only a license, the licensee is liable for all injury resulting from the negligent exercise of the powers conferred upon him. *Lyford v. Putnam*, 35 N. H. 563; *Norton v. Craig*, 68 Me. 275; *Dean v. McLean*, 48 Vt. 412, 21 Am. Rep. 130; *Selden v. Delaware, etc., Co.*, 29 N. Y. 634.

Seeing no error in the judgment, we affirm it, with costs and damages to the defendant in error, according to law.

WILLIAMS & DAVISSON CO. v. FERGUSON CONTRACTING CO.

(Supreme Court of Appeals of West Virginia.
Oct. 30, 1906. Rehearing Denied Jan.
10, 1907.)

1. APPEAL—REVIEW—BILL OF EXCEPTIONS.

Where an exception was saved to the ruling of the court, in a general bill of exceptions certifying all the evidence, admitting evidence claimed to be inadmissible, but is not made the subject of a special bill of exceptions, being saved in that way and insisted upon in his brief by the objecting party, it is proper to be reviewed and considered by the appellate court.

2. SAME—OBJECTIONS WAIVED.

Where, after the plaintiff has introduced all his evidence, a motion of the defendant to exclude from the jury all the plaintiff's evidence has been overruled, and defendant proceeds to introduce his evidence in defense, the appellate court will disregard said motion as having been waived by the defendant, notwithstanding the exception to such ruling is made the subject of a separate bill of exceptions, and will not reverse the judgment for that cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 8614.]

(Syllabus by the Court.)

Error to Circuit Court, Braxton County.

Action by the Williams & Davisson Company against the Ferguson Contracting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Haymond & Fox, for plaintiff in error.
Hines & Kelly and Hall Bros., for defendant in error.

McWHORTER, P. This was an action of assumpsit, brought in the circuit court of Braxton county by the Williams & Davisson Company, a corporation, against the Fergu-

son Contracting Company, a corporation, for the price of a consignment of powder and dynamite alleged to have been furnished by plaintiff to defendant, of the value of \$1,100. The defendant entered its plea of non assumpsit, to which plaintiff replied generally. A jury was impaneled and sworn to try the issue, and, having heard the evidence and arguments of counsel, returned a verdict in favor of plaintiff for \$1,145.47 damages. The defendant moved the court to set aside the verdict of the jury, because it was contrary to the law and the evidence, which motion the court overruled and entered judgment upon said verdict. The defendant was a contractor for the construction of certain sections of the Coal & Coke Railway and subcontracted to Wm. M. Powell & Co. a certain part of its said work. In the prosecution of the work contracted to be done by said Powell & Co. they purchased from plaintiff the powder and dynamite sued for. The dynamite was shipped by plaintiff about February 27, 1904, to Cogar Station, in Braxton county, consigned to the shipper, to be used by Powell & Co. in their work and to be paid for as used. Powell & Co. failed to complete their work, and under the provisions of their contract with the defendant company the latter took charge of the work and used the material on hand in the construction of the work, and the action was to recover the value of the dynamite from the defendant, claiming that the sale to Powell & Co. of the dynamite was not completed by delivery, and, the same having been taken and used by the defendant, it became liable, either by express or implied promise to pay for it. In the course of the trial the defendant took six several bills of exceptions to certain rulings of the court, and defendant procured from this court a writ of error and supersedeas.

The first bill of exceptions is as to the admission of the evidence of Charles Wyckoff to prove the declarations of H. E. Manderville, a member of the firm of Wm. M. Powell & Co. The witness was testifying in relation to a conversation he had with Manderville in relation to the claim of plaintiff for the dynamite, when he was asked by plaintiff's counsel, "What did Mr. Manderville say?" to which question defendant objected, which objection was overruled, and the witness answered, "Mr. Manderville told me that he wanted to get the matter adjusted, when I talked to him about the matter, and then he called me over the phone, and said to charge it to the Ferguson Contracting Company, H. E. Manderville, Superintendent, and he also told me in person that he was superintendent of the works over there." To which action of the court in overruling its objection to said question and permitting said witness to answer as aforesaid defendant excepted, and then moved the court to exclude from the jury the said statement of said Wyckoff, when the court said, "I think

I will exclude what he said about being superintendent of that particular work," but refused to exclude the statement. There is a similar exception taken to the ruling of the court in overruling the objection made by the defendant to the testimony of Robert Pollard, where he is asked: "What, if anything, did Mr. Manderville say to you about this dynamite having been used on the work after he had taken charge for Ferguson? A. He said that Ferguson had taken charge of the work, and said he was going to complete it, and he was superintendent, and said he took charge of it in a deed of trust; and I made a remark about what they had secured, and about some horses and carts, and several things, and he said they had taken charge of a car of dynamite, which Powell had originally bought from the Williams & Davisson people, and I asked him where it was, and he said it was in the magazine, and I asked him if he was going to ship it back, and he said, 'No,' that arrangements had been made for Ferguson to use it." An exception was saved to this ruling in the general bill of exceptions No. 6, which certifies all the evidence, but is not made the subject of a special bill of exceptions; but, being saved in that way and insisted upon by the plaintiff in error in his brief, it is proper to be reviewed and considered by the appellate court. See *Snyder v. Railway Co.*, 11 W. Va. 15, 32; *McDodrill v. Lumber Co.*, 40 W. Va. 564, 570, 21 S. E. 878. The testimony so excepted to related to the agency of Manderville as manager in charge of the work for Ferguson Company and his authority in the premises. The conversation narrated by witness Pollard, he states, was after Walker, the chief engineer and general manager of defendant company, had told him that Manderville was superintendent for defendant company, and the testimony of witness Williams hereinafter set out, where he gives a conversation between J. B. Walker, chief engineer and manager of defendant company, Mr. Manderville, and himself, and which testimony is not objected or excepted to, touching such agency of Manderville, was sufficient to render the evidence admissible.

Bill of exceptions No. 2 is to the overruling by the court of the motion of the defendant to exclude from the jury all the plaintiff's evidence, after the plaintiff had introduced all its evidence in chief, and before the defendant had introduced any evidence. After the overruling of defendant's motion to exclude plaintiff's evidence, the defendant proceeded to introduce its evidence in the case. It has been frequently held by this court that when a motion has been made to exclude the plaintiff's evidence for insufficiency, and the motion overruled, the defendant, by proceeding with its defense and introducing its evidence, shall be taken to have waived its exception to the ruling of the court in refusing to exclude the evidence. *Trump v. Tidewater Co.*, 46 W. Va. 238, 32 S. E. 1035;

Core v. Railroad Co., 38 W. Va. 456, 18 S. E. 596; *Billingsley v. Stutler*, 52 W. Va. 92, 43 S. E. 96.

Bill of exceptions No. 3 goes to the admission of the testimony of Charles Wyckoff over the objection of the defendant, where he is permitted to testify that he had sold goods to Cole, one of the superintendents of the defendant company, without a requisition from Mr. Walker, chief engineer, or the Burnville office. It is claimed that this evidence was admissible to show the manner of doing business by the defendant company, and for the purpose of contradicting the witness Walker, chief engineer, who had stated that the defendant's superintendents were not authorized to buy supplies without a requisition from the office at Burnsville. For the purpose indicated the testimony was admissible.

Bill of exceptions No. 4 goes to the giving of instructions, on behalf of the plaintiff, Nos. 1, 2, 3, 5, and 6; and bill of exceptions No. 5, to the ruling of the court in refusing to give on behalf of the defendant instruction No. 2. Plaintiff's instructions, given by the court, complained of, are as follows: "(1) The court instructs the jury that if they believe from the evidence that the dynamite in question was consigned to the Williams & Davisson Company, and that the title to the said dynamite remained in the Williams & Davisson Company until received or accepted by Wm. M. Powell & Co., and if they further believe from the evidence that said dynamite was not received or accepted by Wm. M. Powell & Co., but was taken and used by the Ferguson Contracting Company, then they should find for the plaintiff the value of said dynamite. (2) The court instructs the jury that if they believe from the evidence that the dynamite in controversy was consigned to the Williams & Davisson Company, with the understanding that Wm. M. Powell & Co. were to have it, if they further believe from the evidence that, before said dynamite was received or accepted by the said Powell & Co., the Ferguson Contracting Company had taken charge of the work of the said Wm. M. Powell & Co., and that the said dynamite was not received or used by the said Wm. M. Powell & Co., then, if they further believe from the evidence that said dynamite was taken and used by the said Ferguson Contracting Company, they should find for the plaintiff the value of said dynamite as shown by the evidence. (3) The court instructs the jury that even if they believe from the evidence that the said Manderville was not authorized to purchase dynamite for the use of the said Ferguson Contracting Company, and that he was not authorized to agree that the Ferguson Contracting Company would pay for the same, yet if they further believe from the evidence that the dynamite in question was consigned to the Williams & Davisson Company with the understanding that the said

Wm. M. Powell & Co. was to have the same, but that said dynamite was not received by the said Wm. M. Powell & Co., but belonged to plaintiffs, and was taken and used by the said Ferguson Contracting Company, they should find for the plaintiffs whatever amount they believe from the evidence the said dynamite was reasonably worth. * * *

(5) The court instructs the jury that if they believe from the evidence that the dynamite mentioned in this case was shipped by the plaintiff to Wm. M. Powell & Co., on consignment, but was not received by Wm. M. Powell & Co., that after it arrived at its destination the defendant, the Ferguson Contracting Company, took charge of the railroad work then being done by said Wm. M. Powell & Co., and received, consumed, and used said dynamite on said work for their own benefit, then they should find for the plaintiff such sum as they believe from the evidence the dynamite so used by said Ferguson Contracting Company was reasonably worth. (6) The court instructs the jury that, if one consumes or converts to his own use property of another, the law implies an agreement on the part of the person so consuming or converting such property to pay to the owner the reasonable worth of said property."

Instruction No. 1 is objected to because it leaves to the jury the question of determining whether the plaintiff retained title to the dynamite, and in that it is in direct opposition to the bill rendered by plaintiff to Powell & Co., and directs the jury that, if it finds that the Ferguson Company took and used the dynamite, then it should find for the plaintiff. It is claimed that this is clearly erroneous, because under the evidence it could not be a question for the jury to determine whether Powell & Co. received or accepted the dynamite; that unquestionably, under the testimony, the defendant did not receive it from the car. As to whether the defendant did receive it from the car is one of the principal questions for the jury. It is shown that it was taken from the car on the 28th or 29th of March, and it is further shown by the bill of sale of all the personal property of the Powell Company to the Ferguson Contracting Company, made on the 26th of March, 1904, that the Powell Company sold and transferred to the Ferguson Contracting Company all of its property then located on the Coal & Coke Railway on Copen Run, Braxton county, W. Va., known as "Section 105" of the Coal & Coke Railway, and afterwards in a chancery attachment proceeding in the circuit court of Braxton county against the said Powell Company the Ferguson Company filed its answer setting up the contract between it and the Powell Company, and showing that under said contract it was "compelled to take charge of the work of completing the said contract, and the said Wm. M. Powell & Co. then sold and delivered to this respondent

absolutely all of the said plant, and all of their personal property and effects of every kind and character used by them in connection with the said work, and this respondent was, at the time of the suing out of the attachment aforesaid, in the actual, exclusive possession of all of the said property, and was and still is the owner thereof, and was then and still is proceeding to complete the work undertaken by the said Wm. M. Powell & Co. in accordance with the provisions of the contract between respondent and said Wm. M. Powell & Co." The answer, continuing, further says: "Respondent denies the allegations in the said bill that the said Wm. M. Powell & Co. were in possession of the property at the time of the institution of this suit, or at any time since, and denies that they have had any use or control thereof whatever at any time since the 1st day of April, 1904, at which time the said Wm. M. Powell & Co. declared their inability to complete the contract, and delivered to the respondent all of the plant, horses, scrapers, carts, commissary, and all personal effects they had in connection with the said work; and respondent says that it has had the absolute possession and control of said property all of the time since the 1st day of April, 1904, and is, by virtue of the contract between it and the said Wm. M. Powell & Co. at the time of the delivery of the said property to it, the absolute owner of said property; and respondent avers that the plaintiff did not acquire any lien on the said property, or any part thereof, by reason of the suing out and levying the attachment in the bill and proceeding mentioned and set out." This answer was in evidence and read to the jury, as appears from a written agreement signed by the parties to this cause and filed by them, to be considered as part of the record as if brought up by certiorari. Here we have the solemn declaration in writing of the defendant company that by virtue of the bill of sale of March 26, 1904, it owned and possessed all the property of every kind and character of the said Powell & Co., and yet in said bill of sale there is no mention of the dynamite, an item of the value of \$1,100. After particularizing the items of property going to make up the property owned by the Powell Company and assigned and transferred by them, mentioning all other things of value, even down to the "cook outfit and commissary stores," worth in the aggregate probably an insignificant sum. Is it at all probable that, if the dynamite had been received by the Powell Company at the time of making the transfer, an item of such great value would have been omitted from the list of property assigned?

It is insisted by counsel for plaintiff in error that there could be no reservation of title by plaintiff company, "unless there had been a reservation of title such as prescribed

by the statute, and that recorded, or at least actual notice to parties affected." This is true only as to creditors of, and purchasers with notice from, the buyer. As to such, reservation of title is void, unless recorded as provided by section 3101 of Code of 1906 (section 3, c. 74). It is insisted, also, that the letter of plaintiff company of April 16, 1904, to defendant company, stating that they had received instructions from H. E. Manderville, formerly of the firm of Wm. M. Powell & Co., to charge a consignment of dynamite amounting to 10,000 pounds to the account of Ferguson Contracting Company, Burnsville, as he had made arrangements with you to that effect, and stating, further, that they understood that a good portion of the powder had been hauled over on the work, and that the balance was in storage in the defendant company's magazine at Cogar, could only mean that the plaintiff knew that the dynamite had been delivered to Powell & Co., represented by Manderville. This letter was written some two weeks after Manderville had been put in charge of the work by and for the defendant company as its superintendent, if he had in fact been so employed; and whether he had or not was a question for the jury from the evidence, as was also the question of the delivering of the dynamite to Wm. M. Powell & Co., and the authority of Manderville to direct the same to be charged to the defendant company who used it on their work. The dynamite was not hauled to the work until after the work was taken charge of by the defendant company, as it was not removed from the car until the 28th and 29th of March, two days after the sale or assignment by Powell & Co. to defendant company. There is no dispute about the fact that defendant company used all the dynamite after the Powell Company had turned its property over to it. The evidence shows that the dynamite was unloaded from the car two or three days after the transfer of this property to the Ferguson Company, and there is evidence tending to show that Manderville, who had been in charge of the work for Powell & Co., was continued in the superintendency of the work in the employment of the Ferguson Company, although it is denied by the Ferguson Company. While the evidence on this point is somewhat conflicting, the great preponderance is with the contention of the plaintiff that Manderville was acting for defendant company. The plaintiff introduced some letters written by it to the Ferguson Company concerning the proposition or suggestion of Manderville to bill the 10,000 pounds of dynamite to the defendant and charge same to its account, and as late as the 16th of April, 1904, wrote Ferguson Company asking it whether it would "confirm this order. We will take pleasure in billing same to you at 11c. per lb., f. o. b. Cogar Station. We understand a good portion of this powder

has been hauled over on the work, and the balance is in storage in your magazine at Cogar. We will be glad to have any information you can give us regarding the arrangements you have made with Mr. Manderville with reference to handling his work, and the accounts due for material furnished him on his original contract." And on the 7th day of May, 1904, the Williams & Davisson Company addressed the following letter to the Ferguson Company: "Will you kindly advise whether the arrangements suggested by Wm. M. Powell & Co. to charge 10,000 lbs. dynamite to your firm, which was turned over to you by Wm. M. Powell & Co., being that amount of our stock which they held on consignment, will be satisfactory to your firm. We are quite anxious to have this matter closed, and before making entry on our books would like confirmation of this order from your firm." This letter, describing the dynamite as "being that amount of our stock which they held on consignment," taken together with the letter of April 16th, would show that plaintiff company was still claiming title to the dynamite, and that the Powell Company had not received the dynamite, but that it was still held on consignment. If, as claimed by defendant's counsel, it was beyond all question shown that the dynamite had been delivered to and accepted by Powell & Co., the instruction would be bad; but, this being an open question of fact, it was for the jury, and the plaintiff was entitled to the instruction.

The second instruction is claimed to be subject to the same objection as the first, and the additional objection that the jury is told by it that if it should believe that the defendant had taken charge of the work of Powell & Co., and that Powell & Co. had not received or used the dynamite, and that it was taken and used by the defendant, it should find for the plaintiff the value of the dynamite. It is claimed that this instruction does not contain any of the essential elements showing any obligation on the part of defendant to account to plaintiff for the dynamite. If this dynamite had never become the property of Powell & Co., and the defendant company had notice by the contract made with Powell & Co. that it would not belong to it, as it took a transfer of all of the property of Powell & Co. and the dynamite was not included in said transfer, and if the defendant company took and used the dynamite, knowing that it did not belong to the Powell Company, it would be liable for the value of the dynamite to the owner; and that part of the instruction would be good on the same theory that instruction No. 6 is good, as an abstract proposition of law that, where one consumes or converts to his own use property of another, the law implies an agreement on the part of the person so consuming or convert-

ing such property to pay the owner the reasonable worth of such property.

It is contended that the first part of instruction No. 3, given for plaintiff, relative to the authority or want of authority on the part of Manderville to purchase dynamite for the use of defendant company, or to authorize plaintiff to charge defendant with the dynamite furnished to Powell & Co., was, in effect, to tell the jury that it had the right to consider in its finding, if it believed from the evidence, that Manderville was authorized to purchase dynamite for the use of the defendant, or that he was authorized to agree that the defendant should pay for the same. There was evidence tending to prove that Manderville was acting as superintendent for the Ferguson Company after it took charge of the work of Powell & Co., and that "he did buy such things as he needed for the work without having to consult any higher authority." This was stated very positively and emphatically by witness Robert Pollard, and the jury seemed to take that view of the case. Mr. Pollard is corroborated largely by Mr. Williams in his interview with Mr. Walker, the accredited manager of defendant company, who raised no objection to paying for the powder, according to Mr. Williams' statement, or denied liability of defendant company for the same, because they had received it as the property of Powell Company. The last part of the instruction is proper. The same ground is covered by instructions Nos. 1 and 2, which were proper to be given in view of the testimony of J. W. Williams, a member of the plaintiff company, in his account of his conversation with J. B. Walker, the chief engineer and manager of defendant company. Williams, in his testimony, was asked, "Did Mr. Manderville say, in the presence of Mr. Walker, to you, that they had used the powder?" and answered, "When I told, or rather asked, him about the powder, Mr. Walker turned around and said, 'Did we use this powder?' and Manderville said, 'That's the powder we have been using on this work, since I took charge of the work.' Then Mr. Walker said, 'Is it all gone?' and he said, 'Yes, it has all been used.' Q. Did Mr. Walker deny their liability for the powder? A. No, sir; he led me to believe always that the matter would be amicably and satisfactorily settled. Q. Did Mr. Manderville state, in the presence of Mr. Walker, that he had charge of the work for the Ferguson people? A. Yes, sir. Q. Did Mr. Walker deny that? A. None whatever. Q. They were discussing the work there? A. Yes, sir. Q. I believe you stated that Mr. Manderville said that he had used the powder on the work after he had taken charge, after that? A. Yes, sir; every pound of it after he had taken charge of the work as superintendent for the Ferguson Contracting Company. Q. Mr. Manderville [meaning Mr.

Walker] didn't deny but that Manderville was superintendent? A. He did not." Mr. Walker, in his testimony, gives his version of this conversation and what took place in the presence of Mr. Manderville, which is somewhat different from that of Mr. Williams. Mr. Walker was asked: "State what occurred, and what notes you have of it, if any? A. Well, Mr. Manderville and I had been up at Mr. C—— on this day, and started down to his camp. I had to stop for some purpose, and he got ahead of me. Mr. Williams was going up towards Mr. C——, I think, and met Mr. Williams, or anyhow, when I got down to his camp, they had both been there some few minutes, Mr. Williams and Mr. Manderville. Mr. Williams wanted to know something about the adjustment of this powder business, and I told him that I had gotten his letter of April 16th, but that it had been addressed to Copen, instead of Burnsville, and had been delayed, and had only reached me about the 8th or 9th of May, which was the first intimation that this company had that they had ever bought a pound of powder of Williams & Davison Company. As I told Mr. Williams, I wrote Mr. Richmond, our auditor and purchasing agent, and told him the facts in the case, and I would make no decision until I heard from him, and that I hoped everything would be satisfactorily adjusted. That's about the substance of our conversation. That might not be the words used, but it is the substance of the conversation." Further in his testimony he denied that Manderville had ever been agent for his company. There was much other testimony on the part of Williams, as well as Walker. Williams states that, when they were talking about the Ferguson Company becoming responsible for the payment of the debt, it never was contended by Walker, or any of the Ferguson Company, that they refused to assume it or pay it because they had got it from Powell & Co., or that it belonged to the Powell Company. Having held instructions Nos. 1 and 2 good, it follows that No. 5 was also proper, as the only difference in it and the first mentioned is that it adds after the words "use of the dynamite" the words "for its own benefit." This would certainly not make it the less liable because it used it for its own benefit.

Instruction No. 2, asked for by the defendant and refused, as set out in bill of exceptions No. 5, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff shipped to it, at Cogar Station, the powder for the price of which recovery is sought in this suit, under contract or agreement with Wm. M. Powell & Co.; that said power was for said company, or was so shipped on the order of said Wm. M. Powell & Co., and that said Wm. M. Powell & Co. took charge of the same, unloading it from the car and taking it into their possession; that said Wm. M. Powell

& Co. was engaged in construction work on railroad under contract with the defendant, read in evidence, at the time said powder was so shipped and taken into possession by Wm. M. Powell & Co.; and that the defendant, under provision of said contract between it and the said Wm. M. Powell & Co., took charge of said construction work and continued the same thereunder, and that said powder was used on said work contracted to Wm. M. Powell & Co. by defendant—then there is no right in plaintiff to recover against the defendant for the price of said powder, unless it shall have been proven that the defendant expressly agreed to pay the plaintiff therefor." It is insisted by plaintiff's counsel that this instruction was improper, because it assumes that the dynamite was used by the defendant company on the Powell Company work, while there is no evidence tending to show that fact. This is not the case, according to the evidence of Williams himself. Mr. Walker elicited from Manderville, by appealing to him as to whether they (the Ferguson Company) had used this powder, the statement, "That's the powder we have been using on this work, since I took charge of the work," and that it had all been used. However, instruction No. 7, given for the defendant, does cover this same ground, where the jury is told, if they "believe from the evidence that said Wm. M. Powell & Co. did so fail, and the defendant did take charge of said work and proceed therewith, and is still proceeding therewith, keeping an account of the expense of said work, charging the expense thereof against the said company, and crediting to said company the monthly estimates contemplated by the contract, and that in the course of such work the defendant did use thereon the powder sold by plaintiff to Wm. M. Powell & Co. without any notice or knowledge of reservation of title by plaintiff, and acquiring the said powder from said Wm. M. Powell & Co. without any contract or agreement to pay plaintiff therefor, such use alone does not render the defendant liable to the plaintiff for the price of said powder." And in instructions Nos. 3 and 4, given for defendant, the jury were instructed that such taking of the powder by the defendant and its use without knowledge of plaintiff's claim, defendant could not be held responsible to the plaintiff for the price of the powder, in the absence of any agreement with plaintiff in relation thereto, in No. 3, and in No. 4, "unless they further believe from the evidence that the defendant expressly agreed to pay for same." The instructions given for defendant so thoroughly covered the defendant's theory of the case that it could not be prejudiced by the refusal to give No. 2.

For the reasons herein stated, the judgment is affirmed.

ASHLEY v. KANAWHA VALLEY TRACTION CO.

(Supreme Court of Appeals of West Virginia. Oct. 23, 1906. Rehearing Denied Jan. 10, 1907.)

1. STREET RAILROADS—USE OF STREETS—SUPERIOR RIGHTS.

A street railroad company has an equal right with the public to the use of streets at street crossings. Neither has a superior right to the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 193.]

2. SAME—NEGLIGENCE—EXCESSIVE SPEED.

It is negligence for a street car company to operate its cars at such a rate of speed as not to have them under control and to be able to stop them readily as they approach intersecting streets, in case it may be necessary, to avoid a collision or prevent an accident.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 174-176, 190-192.]

3. SAME—SIGNALS.

A street car company should give proper warning of the approach of its cars at street crossings. For a failure to do so it will be guilty of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 174-176, 190-192, 197-200.]

4. SAME—STREET INTERSECTIONS—DUE DILIGENCE.

More care is required in operating street cars at street intersections than at other points, and, if a street car company at such intersections runs its cars at an excessive and unusual rate of speed, it will be guilty of negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 172-176, 195-199.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence for one to attempt to cross a street railway track in front of an approaching car, if, in doing so, he exercises that judgment and care which a reasonably prudent and careful person would have exercised under like circumstances.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 207, 208.]

6. SAME—REGULATION OF SPEED—ORDINANCES.

A municipal corporation may, within reasonable limits, regulate and prescribe the speed at which street cars may be operated over its streets, and, when it has done so by valid ordinance, it will be negligence per se for a street car company to run its cars at a speed exceeding that fixed by the ordinance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, § 201.]

7. SAME—FENDERS.

Where, by valid municipal ordinance, street cars are required to be equipped with fenders of an approved make, it is negligence per se to operate such cars without such equipment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 173, 201.]

(Syllabus by the Court.)

Error to Circuit Court, Kanawha County. Action by Allie E. Ashley, administratrix, against the Kanawha Valley Traction Company. Judgment for defendant, and plaintiff brings error. Reversed.

Littlepage, Cato & Bledsoe, John Baker White, and Clarence Burdette, for plaintiff in

error. Chilton, MacCorkle & Chilton and T. R. English, Jr., for defendant in error.

SANDERS, J. This writ of error is to a judgment of the circuit court of Kanawha county, rendered in an action brought by Allie E. Ashley, administratrix of John J. Ashley, deceased, against the Kanawha Valley Traction Company, to recover damages for the alleged wrongful and negligent killing of said John J. Ashley by the defendant company. The circuit court excluded all plaintiff's evidence, directed a verdict for the defendant, and entered judgment dismissing the action. The question to be determined in reviewing the judgment of the circuit court is whether or not the defendant is chargeable with such negligence as directly caused the injury from which Ashley died, and, if so, was Ashley guilty of such contributory negligence as would bar plaintiff's right to recover?

On the 6th day of October, 1902, the defendant was the owner and operator of a street railroad in the city of Charleston, and on that day the deceased was standing at the southeast corner of Virginia and Court street, in said city, engaged in conversation with one George Warner. At this time a car of the defendant company was going east on Virginia street, in the direction of Ashley, and when it had reached a point some distance from where he was standing he mounted his bicycle and started across the street in front of the approaching car. When nearly across the car track the rear wheel of his bicycle seemed to hang momentarily upon the rail farthest from where he started, and while in this position the car struck the rear wheel of the bicycle, and as a result the rider was thrown against the curbstone, and received injuries from which he died shortly afterwards. The place of the accident is where Virginia and Court streets cross, and Ashley was traveling in a northerly direction on Court street, crossing Virginia street, over which the defendant's car track ran. It is not clear from the record just where the car was at the time Ashley mounted his bicycle and started across the track, but we think it can be safely said that it was at least 200 feet west of the point where the accident occurred. The car was running at a high rate of speed—estimated by the witnesses to have been from 15 to 30 miles an hour—one witness estimating it from 15 to 17 miles, another from 25 to 30 miles, and two other witnesses from 18 to 25 miles—the lowest estimate being 15 miles and the highest 30 miles an hour. The speed of the car was not slackened until after it struck the bicycle, after which it ran about 90 feet before it was stopped. One of the witnesses stated in reply to an inquiry as to whether or not, from the time he first saw the car until it struck Ashley, there was any slackening of speed: "I didn't see any. Of course the street car was running so fast that it could not be slackened up right

there. I don't think it could be. I didn't see it slacken none." Another witness stated that the car was running unusually fast at this time, and also stated that at this point the cars usually ran about 10 or 12 miles an hour. The gong was not sounded, and no alarm whatsoever was given until the car was within about 30 feet of Ashley, and this was after it had passed the western line of Court street. At the time Ashley was attempting to cross Virginia street there was also a wagon crossing it, which was between him and the street car. The wagon crossed the street car track and had gone beyond it about 10 or 15 feet when the car reached the point at which it had crossed. It also appears at the time of the accident there was an ordinance of the city of Charleston in force, limiting the speed of street cars within the city limits and within the business portion of the city to 8 miles, and in the suburban districts to 15 miles, an hour. There was also another ordinance of said city, making it unlawful for cars to be run or operated therein without fenders of the most approved make. The car in use at the time of the injury here complained of was not equipped with a fender of any character whatsoever.

In dealing with the questions presented, we will first do so independently of the ordinance of the city limiting the speed of cars and requiring them to be equipped with fenders. The place where the accident occurred being a street crossing, we approach a solution of the questions involved with the understanding that at this point the rights of the parties were equal. A street railway company operating its cars over the streets of a town or city has at street crossings no higher or paramount right of way to that of pedestrians or other users of such streets, but its right to the use of streets at street crossings, where the car tracks cross other streets than the one they run along, is precisely the same as that of pedestrians or vehicles crossing its tracks there. Neither has a superior right to the other. The right of each must be exercised in a reasonable and careful manner, having due regard for the rights of others, and so as not to unreasonably obstruct or interfere with the right of passage or proper use of the streets. The car has the right to cross, and must cross, the street, and the pedestrian or traveler has the right to cross, and must cross, the railroad track. The rule is somewhat different at points other than street intersections, or crossings, but as this accident occurred at a crossing, it is not necessary to refer to, or point out, such difference. *Bass' Adm'r v. Norfolk Ry. & Light Co.*, 100 Va. 1, 40 S. E. 100; *Richmond, etc., Ry. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839; *Solomon v. Buffalo Ry. Co.* (Sup.) 89 N. Y. Supp. 90; *Thompson on Negligence*, § 1399; *Nellis, Street Railways*, § 14. The care required to be used by the defendant

at street intersections must be such as is commensurate with the increased dangers arising from the travel at such crossings. The defendant, operating dangerous machinery over the streets of a city, must know, and is bound in law to know, that others have an equal right to the use of the streets and may be upon them. Where a pedestrian or traveler is approaching a street crossing toward which a car is approaching, the duty to stop and avoid a collision is on the party who can most easily and readily adjust himself to the exigencies of the case; and as to whether or not the defendant used that degree of care chargeable to it depends upon all the facts and circumstances. There can be no rule of general application defining the degree of care required to be used by a street railway company in operating its cars over the public streets of a city, or fixing the rate at which such cars should be run, because of the varied facts and circumstances applicable to each particular case; and in every instance the true inquiry is, was the car, at the time of the injury, being operated in a prudent and careful manner, taking into consideration the place of its operation, the various uses of the street, and the amount and kind of usual travel, and the other facts and circumstances surrounding the case? More care is required to be exercised at street intersections than at other points, because the company may expect pedestrians or other users of the streets to be constantly crossing its track, as they have the lawful right to do, and, therefore, the car should approach the crossing in a careful and cautious manner, so as to avoid injury to others who are using the streets in a proper and careful way. In the case of *Richmond, etc., Ry. Co. v. Garthright*, supra, it was held that it was gross negligence in a street railway company to so overcrowd and load down its cars with passengers beyond any reasonable or proper limit as not to be able to stop them readily as they approach intersecting streets in case it may be necessary to avoid a collision or prevent an accident. It was the duty of the defendant to have given notice or warning upon approaching the crossing, and not only this, but, as it neared the crossing, to run at such a rate of speed as to have the car under control and be able to stop it readily. *Bass' Adm'r v. Norfolk Ry. Co.*, supra.

When we apply these principles to the plaintiff's evidence, we can but come to the conclusion that the case should have been submitted to the jury for their determination as to whether or not the defendant was guilty of negligence. The defendant, at the street crossing where the accident occurred, in the business part of a populous city, was running its cars at from 15 to 30 miles an hour, as estimated by the witnesses—none of them making it less than 15 miles, and none fixing it at a higher rate than 30 miles. It is true, there is some controversy as to

whether this point is in the business portion of the city, but it must be remembered that this is a motion to exclude evidence, and we must say upon this motion that this is so, because the jury, under the evidence, could have found this fact. While so operating the car, the motorman could see that a wagon was crossing the car track at the crossing where the accident occurred, between the point where Ashley was injured and the car, and also while the car was about 200 feet from the crossing he could see that Ashley was attempting to cross the track. Notwithstanding this, the speed of the car was not slackened, and no effort was made to check its speed, nor was any care whatsoever used to avoid a collision with the wagon or the deceased. Not only did the motorman continue to run the car at this high rate of speed up to the point where the streets intersect, but it was continued at the same rate of speed across Court street until the wheel of Ashley's bicycle was struck, notwithstanding the fact that he was in plain view of the motorman at the time he started across the track, and so continued until the car struck his wheel. No effort was made to stop the car until it struck the wheel, and then it could not be stopped until it had gone about 90 feet beyond the point at which the accident occurred. No notice or alarm was given, and the gong was not sounded, taking the most favorable view of it for the defendant, until the car was within 30 feet of Ashley, and after it had passed the western line of Court street. These facts the jury could have found, and this being so, the case should have been submitted to them. They should have been permitted to pass upon the evidence, and by their verdict say whether or not these facts were established. Although the jury could have found from the evidence that the car was not operated in a careful and prudent manner, yet before the plaintiff could recover the negligence of the defendant must have been the proximate cause of the injury. The company may have been negligent, yet, at the same time, if the injury was the result of an inevitable accident, it could no more be held liable than it could if it were free from negligence and operated its car in a careful and prudent manner, and, therefore, we will inquire, was this injury the direct result of the defendant's negligence, or was it the result of an inevitable accident? The rear wheel of the bicycle hung momentarily upon the rail of the car track. Was this such an event as could have been expected by the company in operating its car in a prudent and careful manner? In other words, would a prudent and careful person, in operating the car in a prudent and careful manner, have foreseen or anticipated the happening of such an event? If not, then the accident must fall within the inevitable class. This should have been submitted to the jury. The evidence is such as called for its submission to them for their

decision. A bicycle is a vehicle. It may be lawfully ridden upon a street or highway, and has the same rights upon the highway as other vehicles, and it is the duty of a street railway company to give to a bicyclist who is riding on, or attempting to cross, its track in front of its car the usual and sufficient warning, and to exercise the same degree of care as is required in favor of other vehicles. Here the rear wheel of the bicycle only hung momentarily upon the rail, and as to whether or not this could have been anticipated should have been left to the jury.

But it is urged that the plaintiff's right to recover is barred by the contributory negligence of the deceased. Of what does this negligence consist? The car, at the time Ashley started from the corner of the street where he was in conversation with Warner, was about 200 feet west of the point where the accident occurred, and the distance that he had to travel in order to pass over the track was about 25 feet. Then the question arises, would a reasonably prudent person, under the existing circumstances, have attempted to cross the track? If so, we cannot say that Ashley was guilty of negligence. Defendant's counsel contend that Ashley, seeing the car, and knowing that it was coming in his direction, voluntarily mounted his bicycle and attempted to cross the track in front of it. This is true, but it certainly cannot be said that, because a person can see a car 200 feet away, coming in the direction of the point where he expects to cross the track, he has to stand and wait until the car has passed. In a populous, active business city it would be an anomaly to hold that every traveler, in endeavoring to cross a street car track, must look and listen for a car, and, if he can hear or see one distantly approaching, he must wait until the car has passed before attempting to cross the track. This is certainly not required. Ashley had the right to judge as to whether or not he had sufficient time within which to cross the track in front of the approaching car, and it was for the jury to say whether or not he exercised such judgment as a reasonably prudent person would have exercised under like circumstances. He had the right to assume that the street car company was running its car at a lawful rate of speed, that it would approach the street crossing in a lawful manner, that it would have due regard for his rights, and that, when it saw him upon its track, it would so operate its car as to avoid, if possible, injuring him. The question as to whether or not the decedent was guilty of contributory negligence was a question for the jury, and the testimony bearing upon this feature of the case should have been submitted to them. *Richmond Passenger & Power Co. v. Gordon* (Va.) 46 S. E. 772; *Indianapolis Street Railway Co. v. Schmidt* (Ind. App.) 71 N. E. 663; *Moore v. Metropolitan Street Ry. Co.* (Sup.) 82 N. Y. Supp. 778; *Dallas, etc., Ry. Co. v. Illo*

(Tex. Civ. App.) 73 S. W. 1076; *Bertsch v. Metropolitan Street Ry. Co.*, 68 App. Div. 228, 74 N. Y. Supp. 238; *McDermott v. Brooklyn Heights R. Co.* (Sup.) 85 N. Y. Supp. 807; *Cass v. Third Ave. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356; *Hanheide v. St. Louis Transit Co.* (Mo. App.) 78 S. W. 820; *Meng v. St. Louis, etc., Ry. Co.* (Mo. Sup.) 81 S. W. 907.

The plaintiff offers another reason why the court erred in excluding the evidence and directing a verdict for the defendant, and that is that, at the time of the injury complained of, there was an ordinance of the city of Charleston in force, limiting the speed of street cars in the business portion of the city to 8 miles an hour, and in the suburban district to 15 miles an hour, and that, it having been shown that the place at which the accident occurred was within the business portion of the city, and that the car was being operated at not less than 15 miles an hour, the company is then guilty of negligence per se. A municipal corporation, for the protection of life and property, has the unquestionable right, under its police power, to adopt ordinances limiting and regulating the speed of street cars operated upon its streets. This being within the constitutional power of such corporation, a violation of such ordinance, if it be the direct and proximate cause of the injury, is negligence per se. "Here the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as mere matter of law, otherwise called negligence per se, and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill, so that, if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains to be done is to assess his damages." *Thompson on Negligence*, § 10.

The courts are at variance as to whether or not a violation of the ordinance which is the direct and proximate cause of the injury is negligence per se, or whether it is simply evidence of negligence to be submitted to the jury. The great weight of authority seems to hold that it is negligence per se, and this, in reason, seems to be the better rule. *Deltring v. St. Louis Transit Co.* (Mo. App.) 85 S. W. 140; *Kolb v. Same* (Mo. App.) 76 S. W. 1050; *Meyers v. Same* (Mo. App.) 73 S. W. 379; *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621, 58 S. W. 32, 80 Am. St. Rep. 650; *Central of Ga. Ry. Co. v. Bond* (Ga.) 36 S. E. 299; *Tobey v. Burlington, etc., R. Co.*, 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496; *St. Louis, etc., R. Co. v. Huggins*, 20 Ill. App. 639; *Omaha St. Ry. Co. v. Duval*, 40 Neb. 29, 58 N. W. 531; *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah, 428, 37 Pac. 681. "It is to be regretted that two or three authoritative courts have fallen into

the aberration of holding that the violation of a statute or municipal ordinance, enacted for the public safety, does not establish negligence per se, but is merely what the books term 'evidence of negligence'; that is to say, competent, but not conclusive, evidence to be submitted to the jury on the question of negligence or no negligence. It seems to have escaped the attention of the judges who laid down this rule that it has the effect of clothing common juries with the dispensing power." Thompson on Negligence, § 11. Was the violation of the ordinance the proximate cause of the injury? The plaintiff's intestate is presumed to have known of the existence of the ordinance, and had the right to believe that the car was being operated at a speed not exceeding eight miles an hour. The car approaching him, it was impossible for him to judge accurately as to what speed it was traveling, but the mortman knew that the speed should be limited to eight miles an hour, and he knew that he was traveling at a much greater rate of speed than that prescribed by the ordinance. If the provisions of the ordinance had been complied with, the deceased would have had time to have passed over the track without injury. This the jury could have found from the evidence, and, if this be true, then they could have found that the violation of the ordinance was the direct and proximate cause of the injury.

And, again, it is advanced that another ordinance of the city of Charleston was in force, requiring the cars of street railway companies to be equipped with fenders of the most approved make, and that, if the car which struck the bicycle of the deceased had been equipped with such fender, the injury would not have occurred. What has been said as to the power of a municipal corporation in adopting the speed limit ordinance can also be applied to the adoption of the ordinance now under discussion. The adoption of the ordinance is clearly within the constitutional power of a municipal corporation. This ordinance is also shown to have been violated. But it will not do to show only the violation of the ordinance. It must be shown that such violation is the proximate cause of the injury—that, if the car had been equipped with fenders, as provided by the ordinance, the injury would not have occurred. This is proper to be shown to the jury. It is, however, urged by the defendant that the evidence shows that there are two kinds of fenders of an approved make, one projecting out in front of the car and the other hanging underneath the front part of the car, and that, this being so, the company would have the right to elect which of the two kinds of fenders it would use, and that, if it should use the last mentioned, the injury would have occurred the same as if no fender had been used. These are questions of fact to be submitted to the jury. If it can be shown that the accident would not

have occurred if the car had been equipped with such fender as the ordinance prescribed, and that the car was not equipped with such fender, then this would be negligence sufficient to charge the company. But, upon the other hand, if it could be shown that the accident would have happened if the car had been equipped with such fender, the same as it did when not so equipped, then the omission to provide such fender would not be the proximate cause of the injury, and the company could not be held liable for failing to so provide them. Evidence tending to show either of these theories is admissible. *Henderson v. Durham Traction Co.* (N. C.) 44 S. E. 598.

The evidence of Joseph Moss as to the rate of speed at which the car was running, is admissible, under the authority of *McVey v. Chesapeake & Ohio Ry. Co.*, 46 W. Va. 111, 32 S. E. 1012: "The speed of a passing train is not a question of science, but of observation, and any one possessing knowledge of time and distance is competent to testify in relation thereto"—and citing *Railroad Co. v. Van Steinburg*, 17 Mich. 99.

The defendant says that the judgment could be sustained because the plaintiff failed to prove that Allie E. Ashley was duly appointed the administratrix of the estate of John J. Ashley. She sues as such administratrix, and under the pleadings she was not called upon to prove it. A plea to the merits admits it. This is not an open question. In the recent case of *Hanley v. W. Va. Cent. & Pittsburgh Ry. Co.* (W. Va.) 53 S. E. 625, it is so held, and also the same is held in *McDonald v. Cole*, 46 W. Va. 186, 32 S. E. 1033. But, were this not so, still the record shows that the defendant admitted that the plaintiff was the duly and regularly appointed administratrix of the deceased.

The judgment is reversed.

SANSOM v. WOLFORD et al.

(Supreme Court of Appeals of West Virginia.
Oct. 23, 1906. Rehearing Denied
Jan. 10, 1907.)

1. FRAUD—EVIDENCE.

When fraud is relied upon by a party to sustain his contention, the fraud must be clearly established by proof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fraud, § 56.]

2. GUARDIAN AND WARD—SALE OF WARD'S LAND—BILL TO SET ASIDE—FRAUD.

A case in which the fraud is not so established.

(Syllabus by the Court.)

Appeal from Circuit Court, Mingo County.

Bill by Riley Sansom, by his next friend, against W. R. Wolford and others. Decree for defendants, and plaintiff appeals. Affirmed.

Sheppard, Goodykoontz & Scherr, for appellant. Marcum & Marcum, for appellees.

McWHORTER, P. J. C. Sansom purchased from Missouri Murphy a lot of about one-fourth acre of land near the town of Devon, Mingo county, and caused the same to be conveyed to his youngest son, Riley Sansom, who was some 18 years of age. In 1898 said J. C. Sansom, as guardian of Riley Sansom, proceeded in the circuit court of Mingo county to sell the said land for the benefit of said Riley Sansom. On the 17th day of January, 1899, the court decreed a sale of said lot and appointed John L. Stafford a special commissioner to make sale thereof. Said commissioner sold the same at public auction, when W. R. Wolford became the purchaser of the same at the price of \$211, which sale was confirmed by decree entered on May 16, 1899, and a deed therefor directed to be made by the said Stafford, who was appointed a commissioner for that purpose, to the said purchaser, which deed was duly executed. At the April rules, 1904, the said Riley Sansom, who sued by his next friend, Ezekiel Blankenship, filed his bill in equity in the circuit court of Mingo county against said W. R. Wolford and J. C. Sansom, in his own right and as guardian of said Riley Sansom, which bill is in the nature of a bill of review, alleging that the suit for the sale of said lot of the infant was instituted by said Sansom for the purpose of carrying out a contract that he had made before that time with said Wolford for the purchase of said land; that said Wolford had contracted for the land for about \$700, and had paid about \$100 thereon, and, finding that Sansom could not make him good title, the defendants Wolford and Sansom combined together to have the said suit instituted for the purpose of obtaining said title and carrying out the contract; that, when said land had been sold and confirmed to the said Wolford at the price of \$211, Wolford refused to carry out the contract made with Sansom and to pay the additional money due thereunder, and contended that he had a right to hold said land at the price purchased at the sale, regardless of his contract made with said Sansom; that the said Wolford fraudulently entered into said arrangement for the purpose of procuring the title at a wholly inadequate price; that he had agreed to bid the full amount of the price agreed upon between them, but refused to do so, and fraudulently procured the affidavits of two parties for the purpose of getting said sale confirmed to him at said inadequate price; that a portion of said money for which the land was sold was improperly used in the payment of illegal costs and expenses of the sale, and that finally there was left of said sum only about \$163, which the said Sansom refused to receive as plaintiff's guardian as the full payment of the purchase price for said land, and that said money was still under the control of the special commissioner, and no part of it had

been paid over to his guardian nor used in his care, education, support, and maintenance; that said proceedings were irregular in many respects, which would render the same void; and that by reason of the fraudulent conduct of the defendants plaintiff was entitled to have the sale set aside and thereby reinvested with his land—and prayed that the proceedings in said suit be declared null and void and fraudulent, and that the sale by said commissioner to Wolford be set aside and held for naught, and for general relief. Defendant Wolford filed his demurrer to the bill, which was overruled, and he then filed his answer, denying all fraud or fraudulent intent on his part, and averring that he had purchased the land before the proceedings entered to sell it, and had paid on account of the purchase money \$247, but expressly denying that he agreed or was to pay \$700, as alleged in plaintiff's bill, and, finding that he could not get a good title from the guardian, except by the proceedings of the court, that the same were instituted that a sale might be had to enable him to receive a good title, and averring that \$211, under the circumstances, was a fair cash price for the land. He expressly denied that he had any contract, arrangement, or agreement with said Sansom, as guardian for Riley Sansom, to pay any further sum for the lot, except the \$211 that he bid for the lot at the sale and the \$247 that he had theretofore paid for the same, and any and all allegations in the plaintiff's bill alleging any such understanding or agreement were absolutely false and untrue. He denied that he had fraudulently procured the affidavits of two parties for the purpose of getting said sale confirmed at an inadequate price. He admitted that it was true he procured the affidavits of Taylor and Haubert, by which it was shown that said land was not worth exceeding \$200, excluding the buildings recently erected thereon by Wolford, but denied that said affidavits were obtained by him through fraud or misrepresentation, but were obtained from parties who were well acquainted with the land and its value, for the purpose of showing to the court that the \$211 bid by respondent was a fair and adequate cash price for the same. He was not advised as to what disposition was made of the \$211 paid by him to Commissioner Stafford, as to whether the amount was improperly used in the payments of illegal costs and expenses, as alleged, but averred that it was disbursed under the orders and directions of the circuit court of Mingo county, and that the same was properly disbursed and paid out; denied that the proceedings under which the sale was had were irregular, but averred, on the contrary, that they were regular, and that the sale to him and the confirmation and the conveyance of said lot to respondent by J. L. Stafford, commissioner, vested the legal

title to said lot in respondent, and for the purpose of showing the regularity of the proceedings in which the lot was sold referred to said cause, and made the same and the orders and decrees therein a part of his answer, and asked that the same be read therewith; and averred that he had been in the absolute and notorious possession of said land for ——— years, and had paid all taxes due thereon, and had made valuable improvements on said lot, amounting to \$500 or \$600. Depositions were taken and filed in said cause by both plaintiff and defendant. The cause was heard on the 22d day of September, 1904, upon the bill and exhibits and answer, with general replication thereto, and the depositions taken and filed in the cause, in consideration whereof it was the opinion of the court that the plaintiff was not entitled to the relief prayed for, and accordingly decreed the dismissal of his bill, giving the defendant Wolford a decree for his costs, from which decree the plaintiff appealed.

The evidence shows that the value of the ground ordinarily was about \$100 to \$125; that, shortly before the institution of the proceedings to sell it for the benefit of the infant, the plaintiff here, a timber operation had been started to get the timber out of Knox creek, and it had to be taken through a portion of this property for the purpose of being loaded in the cars on the railroad, which fact enhanced the value to something like \$600. Several of the witnesses testified that it would likely sell for that amount in the proceedings then pending; that the "timber job" would last some two or three years, and that when it was done the land would sell for about \$100, or, in other words, be worth about what it was before; that the work of getting out the timber had given the land an enhanced temporary value. One witness, H. W. Preece, on behalf of plaintiff, stated that, when the sale was made by the commissioner, witness and one Lee Baker had offered an upset bid; that Baker offered \$200 for about 80 feet of it, and witness offered \$240 or \$250 for the balance, as an upset bid, but the commissioner would not do anything. This upset bid, if offered, was not equal to what Wolford was paying for the property. He had already paid to the guardian, J. C. Sansom, according to the pleadings and the proof, \$247 before the proceedings were taken, and then had bid \$211 at the sale, making in all \$458 which he was paying for the property, when the defendant testified that he had agreed with the guardian, Sansom, before the proceedings were instituted, to purchase the property at the price of \$450. In support of the motion to confirm the sale the affidavits of two persons, G. W. Taylor and P. J. L. Haubert, are filed, who testified that they were well acquainted with the lot sold, and that it was not worth exceeding \$200,

exclusive of the buildings then recently erected thereon by Wolford, and that such sum would be a full cash value for same. This court can know nothing from the record what manner of men these affiants are. Counsel for appellant refer to the affiants Haubert and Taylor in their brief as knowing "nothing about the value of real estate, and do not pretend to have any such knowledge. These two unknown men undertake to represent to the court that some of this land lay 'under the bank' and 'is frequently overflowed,' and that after deducting the value of the buildings recently erected by Wolford the land is not worth exceeding \$200." While, on the other hand, counsel for appellees in their brief make the following comment upon such reference: "We were surprised to find in the brief of counsel for the appellant a reference to Taylor and Haubert as 'unknown' persons and strangers. G. W. Taylor was the owner of large tracts of valuable land in Mingo county, had been sheriff of the county, lived within a few miles of the lot in question, and was well qualified to speak as to the value of it. Haubert was a merchant, landowner, and timber dealer, living within 300 feet of the lot, and knew it and its value well. And these facts as to the qualifications of these persons to judge of values of lands were well known to the judge of the circuit court of Mingo county." These affiants state under oath that they were well acquainted with the lot in question, and there is nothing in the record to dispute that fact, and there is no evidence to prove the allegation of the bill that these affidavits were fraudulently procured by said Wolford "for the purpose of getting said sale confirmed to him at said inadequate price." When Wolford purchased the property, he went into possession thereof, and made considerable improvements on and has had continuous possession of it ever since. The attempt to open up and set aside the sale under the proceedings taken by Sansom, guardian, to sell the property, in which it was purchased by Wolford, is based upon fraud practiced by the defendants Wolford and Sansom, guardian; but plaintiff has failed in his proofs. In *College Trustees v. Blair et al.*, 45 W. Va. 812, 32 S. E. 203, it is held (Syl., point 1): "The onus probandi is on him who alleges fraud, and, if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted;" and (point 2) "to entitle a plaintiff to relief in equity on the ground of mistake or fraud, the mistake or fraud must be clearly established." And in *Clay v. Deekins*, 36 W. Va. 350, 15 S. E. 85: "The rule of law is that he who alleges fraud must prove it." There is no principle of law better settled than that fraud charged must be clearly proved before a court of equity will grant relief on that ground.

It is contended by counsel for appellant that Wolford was a party to the proceedings

to sell the infant's property, having made himself a party thereto by filing his petition to have the sale confirmed and introducing the affidavits of Haubert and Taylor in support of his petition, and therefore is not protected in his purchase under section 8, c. 132, Code 1899; citing *Dunfee v. Childs*, 45 W. Va. 155, 30 S. E. 102. Wolford testifies that he had nothing to do with the bringing of the suit to sell the land, and that "the first he knew anything about the suit to sell was when notices were stuck up on Jim Reynold's store that the property was to be sold at the court house door to the highest bidder." It matters not what the property was worth, or what Wolford was doing with it, or getting for it in the way of rents, issues, or profits, at the time or since this suit was brought. The question is: Was he a bona fide purchaser in good faith when the property was sold under the decree of the court? If so, he is entitled to be protected in his purchase. There is some conflict in the testimony. The fraud and conspiracy charged are by no means clearly proven.

We see no reason for reversing the finding and decree of the circuit court, and the decree is therefore affirmed.

STOKES v. STOKES.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. DIVORCE—JUDGMENT FOR ALIMONY—REVIEW—ERROR, WRIT OF.

The judgment of a judge of a superior court in a proceeding for alimony, whether in term or vacation, or in the progress of the cause, is the subject of writ of error on the same terms that are prescribed in cases of injunctions. Civ. Code 1895, § 2468.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, § 764.]

2. SAME—SUPERSEDEAS—GRANT.

When a judgment granting or refusing an injunction is brought to the Supreme Court by a fast bill of exceptions, no supersedeas results merely from the filing of the bill of exceptions, and making an affidavit of inability from poverty to pay costs and give security. In such cases the judge is authorized to grant a supersedeas upon such terms as may be by him deemed necessary to preserve the rights of the parties until the judgment of the Supreme Court can be had. A supersedeas in such a case only results when an order of the judge has been passed prescribing the terms upon which the supersedeas will be granted and such order has been complied with. Civ. Code 1895, § 4925; *Ryan v. Kingsberry*, 14 S. E. 596, 88 Ga. 361.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 2245, 2246.]

3. DIVORCE—ALIMONY—ENFORCEMENT OF JUDGMENT—CONTEMPT PROCEEDINGS—RIGHT TO JURY TRIAL.

The provisions of section 4046 of the Civil Code of 1895 providing for a trial by jury in certain proceedings for contempt has no application to a rule for contempt issued in the progress of an alimony case, requiring the respondent to show cause why he should not comply with the order of the court requiring him to

pay given amounts as temporary alimony and attorney's fees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Divorce, §§ 754-756; vol. 81, Jury, §§ 63, 103, 139.]

4. ERROR, WRIT OF—SUPERSEDEAS—BOND—DISCRETION OF COURT.

When, in a proceeding for contempt founded upon a failure to comply with an order of the court requiring the payment of alimony and attorney's fees, the judge finds that the respondent is in contempt and commits him to jail, it is, when a bill of exceptions assigning error upon such judgment is tendered, within the discretion of the judge to make a supersedeas of the judgment dependent upon the respondent's giving a bond in a reasonable amount conditioned to comply with the order of the court for the payment of alimony and attorney's fees, in the event the judgment in the contempt case is upheld by the Supreme Court.

5. DIVORCE—ALIMONY.

The evidence authorized the order complained of, and no sufficient reason appears for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action by Angeline Stokes against William Stokes for divorce. From a judgment on a rule to show cause why defendant should not be punished for contempt, he brings error. Affirmed.

Henry Walker, for plaintiff in error. C. E. Davis, for defendant in error.

COBB, P. J. Judgment affirmed. All the Justices concur.

HOLLAND v. WILLIAMS.

(Supreme Court of Georgia. Nov. 9, 1906.)

1. TRIAL—INSTRUCTIONS—SUGGESTIONS OF OPINION.

Where, in a suit for damages on account of an assault and battery, the court did not submit to the jury whether any exemplary damages should be found, but merely informed them that fines imposed by a mayor's court and city court on account of an alleged assault and battery should be considered in mitigation of exemplary damages, this contained an intimation of an opinion that the case was one for the allowance of such damages, and was error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 436-438; vol. 15, Damages, § 545.]

2. APPEAL—ERRORS IN CHARGE.

A ground of a motion for a new trial which assigned as error a mere fragmentary part of a sentence in the charge, to the effect that, if the jury believed certain things, "and if the jury further believe, etc.," is too incomplete, and furnishes no ground for a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 1743-1748.]

3. TRIAL—INSTRUCTIONS—NECESSITY OF REQUEST.

Where the charge as a whole covers the issues in the case, if more specific instructions are desired on any point, they should be requested.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

4. SAME—OBJECTIONS TO EVIDENCE—OFFER TO PROVE.

Where a question is asked, and, on objection, rejected, counsel, for the party seeking to introduce the evidence should be allowed to complete the record by showing what the witness would answer, or what testimony is expected to be elicited from him. But it is within the discretion of the court, instead of allowing counsel to state in the presence of the witness and jury what he expects the witness to testify, to cause the jury to retire and allow the witness himself to state in their absence what his answer would be.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 115, 118, 122.]

5. APPEAL—REVIEW.

None of the other grounds of the motion for a new trial present any reason for a reversal.

(Syllabus by the Court.)

Error from City Court of Statesboro; J. F. Braunen, Judge.

Action by R. M. Williams against M. M. Holland. Judgment for plaintiff, and defendant brings error. Reversed.

Braunen & Booth and H. B. Strange, for plaintiff in error. Deal & Lanier, Twiggs & Oliver, and R. Lee Moore, for defendant in error.

LUMPKIN, J. Williams brought his action against Holland to recover damages for an alleged assault and battery. A verdict was rendered in his favor for \$1,000. The defendant moved for a new trial, which was refused, and he excepted.

1. The charge of the court on the subject of exemplary damages was erroneous. He instructed the jury that fines imposed in a mayor's court and city court on the defendant because of the transaction furnishing the basis of the suit should be considered by them in mitigation of exemplary damages in the case, and, if the fines imposed were sufficient to offset exemplary damages, they need not consider such damages further. But he did not submit to them whether there should be any exemplary damages at all. The charge thus amounted to an intimation that such damages should be allowed, if the fines were not sufficient to offset them.

2. An exception to a fragment of a sentence in the charge, to the effect that, if the jury should believe certain things, and "if the jury further believe," etc., is too incomplete to furnish ground for reversal.

3. Various exceptions to the charge in its entirety are made on the ground that the presiding judge failed to charge certain propositions. An examination of the charge as a whole, however, shows that it was sufficient generally to cover the matters referred to, and, if more specific instructions on those points were desired, they should have been requested.

4. Where a question propounded to a witness is objected to and rejected, counsel should be allowed to place on record what evidence it is expected the question will elicit, in order that his exception may be

perfected. Frequently this is done by a statement of counsel in his place as to what he expects the witness will testify. But this is not an arbitrary right on the part of counsel or of his client. The court may exercise a sound discretion as to the mode of ascertaining what the witness will testify. Here he ruled that he would permit the witness himself to state, out of the hearing of the jury, what his testimony would be. This was not only not an error, but we think would often be good practice, where it is practicable, and where the court apprehends that the ends of justice require rather that the witness should state for himself what his testimony will be, than that the mere expectation of counsel as to it should be stated in the presence both of the witness and of the jury.

5. None of the other grounds of the motion contain any error requiring a reversal.

Judgment reversed. All the Justices concur.

SMITH v. STATE.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. CRIMINAL LAW—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where the question as to whether the deceased had a pistol in his possession and drew the same from his pocket at the time of the homicide was a contested issue on the trial, and both the state and the accused submitted testimony relative thereto, evidence alleged in a ground of a motion for a new trial to be newly discovered, that a pistol cartridge was found in the pocket of a vest worn by deceased at the time he was slain, if not merely cumulative and corroborative of the defendant's witnesses introduced on the trial, was not of such gravity and probative value as to require the granting of a new trial on that ground.

2. SAME — APPEAL — REVIEW — EXCLUSION OF EVIDENCE.

A ground of a motion complaining that the court erred "in ruling out the following testimony of S., 'as if trying to see what was going on in the room,'" does not raise any question for decision by this court, since it is impossible, without searching in the brief of evidence for the context which would render the fragmentary extract from the evidence intelligible, to discover whether the evidence repelled was material or not. *Holland v. Williams* (decided Nov. 9, 1906) 55 S. E. 1023.

3. HOMICIDE—EVIDENCE.

Evidence tending to show that an assault by the father of the accused upon the deceased and a companion of the deceased was made without provocation was not immaterial nor irrelevant, it appearing that simultaneously with the assault the accused fired the fatal shot, and the jury having, under the issues of fact made by this evidence, to decide whether the homicide, if not justifiable, was murder or voluntary manslaughter. And whether the state should be permitted to introduce this evidence after the defendant had closed his testimony, even if it was not strictly in rebuttal, was a matter resting in the sound discretion of the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 341-343, 354; vol. 14, Criminal Law, § 1618.]

4. SAME.

No error appears in any of the other rulings complained of. The evidence authorized

the verdict, and this court will not interfere with the judgment refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Monroe County; E. J. Reagan, Judge.

Otis Smith was convicted of murder, and brings error. Affirmed.

Cabaniss & Willingham, R. L. Berner, and J. M. Fletcher, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and Jno. C. Hart, Atty. Gen., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

VANDERFORD v. STATE.

(Supreme Court of Georgia. Nov. 14, 1906.)

1. CRIMINAL LAW—APPEAL—REVIEW—DISCRETION OF COURT.

An application for a change of venue in a criminal case, on the ground of the existence of prejudice against the defendant, and that he cannot obtain a fair and impartial trial in the county where he has been indicted, is addressed to the sound discretion of the presiding judge; and where the evidence is conflicting, his judgment will not be reversed, unless it appears that his discretion has been abused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 3044.]

2. SAME—NEW TRIAL—ABSENCE OF ACCUSED.

Where, in a criminal case, the accused was in custody, and, by inadvertence, a witness was placed on the stand, and began to testify, and in a few minutes it was discovered that the accused was absent from the courtroom, whereupon the presiding judge had him brought into court, withdrew from the consideration of the jury and small amount of testimony which had been given, warned them to give no consideration to it, and thereupon the examination was recommenced, and the witness, in the presence of the defendant testified to the same matter which he had stated previously, there was no error in this proceeding, and it furnished no ground for the granting of a new trial to the defendant after conviction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2168; vol. 14, Criminal Law, §§ 1465-1483.]

3. SAME—REMARKS OF COURT.

Where the court ascertained that the defendant's counsel knew that he was absent before the court discovered the fact, and the court certifies that, in a low voice, he said to counsel that the court was trying to give them a fair trial, but that they did not seem to appreciate it; that this was said to counsel who sat directly in front of him; that, in his judgment, it could not have been heard by the jury; and that the court stenographer, who was sitting between the court and the jury, did not hear it, such remark will not require a reversal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1520-1522.]

4. SAME—INSTRUCTIONS.

It is not necessary for the judge, in charging a jury in a criminal case, to make introductory remarks as to the importance of the case both to the state and the accused, but it is not error requiring a new trial for him to do so, provided what is said is not a misstatement of the law, or calculated to prejudice the minds of the jurors against the accused.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2210, 2212, 2218.]

5. RAPE—FORCE.

Force is an element of the crime of rape, but it may be exerted not only by physical violence, but also by threats of serious bodily harm which overpower the female, and cause her to yield against her will.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, § 6.]

6. CRIMINAL LAW—NEW TRIAL—INSTRUCTIONS.

There was no error against the defendant, requiring a new trial, in the charge of the court to the effect that a man cannot be convicted of the offense of rape upon the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence; nor in the charge given touching such corroboration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2210-2218.]

7. RAPE—EVIDENCE.

There is nothing in any of the other grounds of the motion for a new trial which require a reversal. The evidence amply sustained the verdict, and there was no error in overruling the motion for a new trial.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Rape, §§ 71-77.]

(Syllabus by the Court.)

Error from Superior Court, Gwinnett County; O. H. Brand, Judge.

R. L. Vanderford was convicted of crime, and brings error. Affirmed.

See 54 S. E. 822.

R. L. Vanderford was indicted for rape committed on the person of Pearl Helton. The evidence for the state showed in brief as follows: Pearl Helton was a girl 15 years of age. On March 22, 1906, she was at the house of her sister who lived about a mile from the Helton home. Shortly after dinner the defendant appeared at the home of her sister, and stayed some time. He inquired when Pearl intended to return home, and was informed that she would do so that afternoon. Soon after this was definitely stated, he left. About an hour before sundown Pearl and her sister, Mrs. Sells, left the house of the latter, and started toward the home of the former. Between the two places there was a swamp through which the way passed. After going part of the way, the sister turned back to return to her own home. A short while after this, Pearl saw the defendant in front of her. He turned, met her, and asked her if she was not afraid to go through there by herself; to which she replied that her sister accompanied her a portion of the way. He then asked her if she was not afraid of negroes; to which she answered that she was not much so. He asked her if she was afraid of him. He seized her by the arm, dragged her about five steps from the path, and threw her down. She screamed, and resisted. He put his hand over her mouth, and said, if she screamed again and did not hush, he would cut her throat. He threw her down, and committed rape upon her. She admitted in her testimony that he told her to push down her drawers, and that she did so, but gave as her reason that he had threatened to cut her throat, and that

she was afraid of him, fearing that he might kill her, or hurt her worse. After he had accomplished his purpose, he told her to fasten up her clothes, but she did not do so, and went on towards her home, holding up her clothing with her hands. Her dress had become partly unfastened. Her screaming was heard by her sister, who was returning home. The latter went back towards the place whence the outcry came, and also heard a sound as if the girl were choking, and a man's voice which sounded as if he were scolding. The sister fell, and could not go further, and then returned to her house, and reported what she had heard. Her husband mounted a horse, and went to the place indicated, but found no one there; but he overtook Pearl going across the field hurriedly. She turned and told him that she wanted him to kill Vanderford, the defendant, that he had gotten her down in the swamp. Her clothes were then unplanned, and she was holding them up. She made similar statements to others upon arriving at her home. When she reached there she was excited, and was screaming, or crying. Her hair was partly down over her face, and there was trash and straw on her clothing. She was examined some days later by a physician, who discovered that her hymen had been ruptured, and that there was a discharge of bloody pus from the vagina. He also found bruises on her left arm, like finger prints. She was in bed, and appeared to be very sore. Another witness testified that he found an irritated place on her mouth, which could have been made by the pressure of a hand. She remained in bed for six or eight days, or, as one witness said, about two weeks. At the place where she indicated that the crime had been committed, there were appearances of a struggle having taken place, and there were two indentations, as if made by the toes of a pair of shoes. The defendant is a married man with three children. The accused undertook to prove an alibi, and also to show certain conflicting statements on the part of witnesses for the state, and certain facts not consistent with the testimony of some of them. He sought to show that the girl had been to church with young men, and that one of them had left the neighborhood not long after the occurrence. In rebuttal, the state introduced witnesses who testified to the good character of the girl for chastity; and a brother of the young man who had left the community testified that his leaving was for other reasons, and had no connection with the crime. The jury found the defendant guilty, and recommended him to mercy; whereupon he was sentenced to the penitentiary for 20 years. He moved for a new trial, which was refused, and he excepted.

J. A. Perry, J. C. Flanigan, M. D. Irwin, and John R. Cooper, for plaintiff in error. S. J. Tribble, Sol. Gen., and John C. Hart, Atty. Gen., for the State.

LUMPKIN, J. (after stating the facts). 1. A motion was made for a change of venue, which was overruled. The evidence as to whether the defendant could get a fair and impartial trial in Gwinnett county was conflicting. The matter was one which addressed itself to the sound discretion of the presiding judge, and we cannot say that he erred in the use of his discretion. *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Young v. State*, 125 Ga. 584, 54 S. E. 82.

2, 3. The sixth ground of the motion for a new trial complains of certain occurrences on the trial, the material matters alleged being that a witness for the state had been sworn, and had testified for about five minutes, when it was discovered that the defendant was not in court; that the court then stopped the trial, had the sheriff to bring in the prisoner, and asked his counsel whether they wanted the witness to repeat the testimony given; to which they replied that they had nothing to say one way or the other. Whereupon, the court said: "Gentlemen, the court is trying to give you all a fair trial, but you don't seem to appreciate it." The presiding judge did not certify this ground as set out, except with the addition of an explanatory note as follows: "After reconvening court, the witness, Dr. Fowler, was put on the stand by the state. He had been examined by the Solicitor General some three or four minutes when the court discovered that the defendant had not arrived from jail, and was not present. The examination of this witness was immediately stopped, and the court asked the question: 'Where is the defendant?' Mr. Cooper remarked: 'We cannot waive his presence.' Trial of the case was suspended, and, in a minute or two, the officers arrived with the defendant. The court then asked defendant's counsel this question: 'Do you want him to give over his testimony, or just begin where Mr. Tribble left off?' Mr. Cooper replied in these words: 'We have nothing to object to. Go ahead. We do not care for that.' The court replied: 'You don't require him to begin anew.' Mr. Cooper answered: 'No, sir.' Thereupon the Solicitor proceeded to examine Dr. Fowler, beginning anew, when the court asked him why he did this; when Mr. Tribble replied that Mr. Cooper stated: 'We do not make any admissions or anything about his being absent.' Whereupon the court turned and addressed the jury in these words, viz: 'Gentlemen of the jury, anything testified to by Dr. Fowler when the defendant was not in court will not be considered by you at all. Take that entirely from your minds. Don't consider a single statement made by him when this man was absent.' The Solicitor then began with the witness, Fowler, and proved by him the same state of facts to which he had testified during the defendant's absence. (All the above taken from the reporter's notes.) When the court ascertained that defendant's counsel knew the defendant was absent from

the court discovered it for himself, the court, in a low tone of voice, used in substance the language excepted to, addressing counsel who sat directly in front of the court, which language, in my judgment, the jury could not hear. I am satisfied of this because the stenographer, who was sitting between the court and the jury, made no note of it, and states that he did not hear it. No objection was made to this remark and it was made while waiting for defendant to come into court, and before court asked counsel if they wanted Fowler to repeat his evidence. No motion to declare a mistrial was made by defendant's counsel for any reason whatever, as the allegations in this ground intimate was made." We might treat this ground as not certified to be true, and decline to consider it. But if the ground be decided upon its merits, an examination of the judge's note appended to the motion, as set out above, will show conclusively that no right of the defendant was violated. When the introduction of evidence had been inadvertently begun before the defendant was present, and this fact was discovered, the evidence, already introduced, was ruled out and withdrawn from the jury, the defendant was brought in, and the taking of testimony again begun in his presence. Without regard to the judge's statement that his counsel expressed a willingness to waive this, no error was committed, and no harm was done to the defendant. The note of the presiding judge also negatives the idea that his remark was made in the hearing of the jury, but shows that it was made in a low tone of voice privately to counsel. It could not have affected the jury.

4. The court gave a charge of some length, calling the attention of the jury to the importance of the case, both to the state and the accused, "to the state, because society is deeply interested in the maintenance, in the majesty and dignity of the laws, and the protection of its citizens; * * * to the accused, because with him it is a question of life or death, of liberty or imprisonment," etc. This charge was assigned as error on the ground that it laid too much stress upon the majesty and dignity of the law and the protection of the citizens, that the jury might have concluded from it that the court thought the prisoner guilty; and that it at least stated the gravity of the case too strongly. These remarks in regard to the importance of the case both to society and to the accused were practically the same as those made by Judge Bull in his charge in the case of *Cobb v. State*, 27 Ga. 881, but no exception was taken to them in that case. It is not necessary for a judge in charging a jury to make introductory remarks as to the importance of the case, but the propriety of doing so under the facts of the case is discretionary, and we cannot say that it was error, provided nothing said in the charge contains a misstatement of the law, or is calculated to prejudice the minds of the

jury against the accused. Neither of these things appeared in the present case. Indeed, the judge proceeded to impress upon the minds of the jurors the necessity for complete impartiality on their part. *Akridge v. Noble*, 114 Ga. 949, 41 S. E. 78.

5. In the eighth ground of the amended motion exception is taken to a charge which in effect instructed the jury that, if the girl alleged to have been raped, though resisting in the beginning of the alleged assault, afterwards consented to the sexual intercourse freely and voluntarily, and of her own will, they would not be authorized to convict the defendant; but that if she ceased to resist because of fear of violence and injury to her person, due to duress or intimidation of this character, which overpowered her will, then the failure to resist would not be counted against her, and if the defendant had carnal knowledge of her person against her will, under such circumstances, and by this means prevented her from further resistance, the jury would be authorized to find him guilty, if the case was otherwise made out. The ninth ground complains of a charge on the same subject to the effect that the terms "by force," as used in the statute, did not necessarily imply positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection, but that force or violence threatened as a result of noncompliance, and for the purpose of preventing resistance or extorting consent, if it be such as to create a real apprehension of dangerous consequences, or great bodily harm, or to overpower the mind of the woman so that she dare not resist, is equivalent to force actually exerted, but that force, actual or constructive, is an essential element in the crime of rape; and that the jury must be satisfied, if she failed to resist, that her failure was due to threats of violence which had the effect to overpower her will to resist, and that she failed to resist through fear of such threats. Both of these charges substantially informed the jury that force was a necessary element of the crime of rape, but that it might be exerted not only by physical violence, but also by threats thereof causing fear of serious bodily harm, which overpowered the female, and caused her to yield against her will. This is the law. Section 93 of the Penal Code of 1895 defines the crime of rape thus: "Rape is the carnal knowledge of a female, forcibly and against her will." This declares that the act shall be done forcibly and against the will of the female, in order to constitute the crime, but does not state in terms what character of force will suffice. In *Rapalje and Lawrence's Law Dictionary* rape is thus defined: "In criminal law, rape is the act of having carnal knowledge of a woman against her will, or without her conscious permission, or where her permission has been extorted by force or fear of im-

mediate bodily harm." This definition has been approvingly cited in *Gore v. State*, 119 Ga. 418, 48 S. E. 671, 100 Am. St. Rep. 182. In *Bailey v. Commonwealth*, 82 Va. 107, 3 Am. St. Rep. 87, it was said: "The law requires that the unlawful carnal knowledge shall be against her will. She must resist, and her resistance must not be a mere pretense, but must be in good faith. She must not consent. If she consent before the act, it will not be rape. But as to this consent, we may observe that it must be a consent not controlled and dominated by fear. * * * A consent induced by fear of bodily harm or personal violence is no consent, and though a man lay no hands on a woman, yet if, by an array of physical force, he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse." A writer in 13 Crim. Law Mag. (Mr. D. R. N. Blackburn), 503 et seq., discusses the subject of rape, and collates numerous authorities. See, also, *People v. Dohring*, 59 N. Y. (14 Sickels) 374, 17 Am. Rep. 349. The other complaints, that the charge was argumentative, without foundation in the evidence, misleading, etc., were without merit.

6. The court gave certain charges based on the opinion delivered by the majority of this court in *Davis v. State*, 120 Ga. 433, 48 S. E. 180. Among other things, Chief Justice Simmons said (page 435 of 120 Ga., page 181 of 48 S. E.): "The accused should not be convicted upon the woman's testimony alone, however positive it may be, unless she made some outcry, or told of the injury promptly, or her clothing was torn or disarranged, or her person showed signs of violence, or there were other circumstances which tend to corroborate her story." The justices were divided in opinion as to whether corroboration of the evidence of a person alleged to have been raped was necessary; and if so, whether there was sufficient corroboration in that case. But without discussing the two views, if that of the majority be accepted, and if the court should charge the jury on the subject as a rule of law, the better plan would be to inform them that the accused should not be convicted on the testimony of the woman alone, unless corroborated by circumstances. He may then call attention, if the evidence authorizes it, to whether there was any outcry by the woman or not, or whether she told of the injury promptly or not, or whether her clothes were torn or disarranged or not, or whether her person showed signs of violence or not, or other circumstances as to which there may be evidence, and inform them that such matters are for their consideration along with the other evidence, in determining whether the testimony of the woman was corroborated or not. The charge of the court on this subject, in some sentences of it, may not have been entirely free from liabil-

ity to verbal criticism, but upon the whole we do not think that there was any error in it requiring a new trial. He did charge that "a man cannot be convicted of the offense of rape on the testimony of the woman alone, unless there are some concurrent circumstances which tend to corroborate her evidence"; and further on instructed them to "inquire, then, if there are any concurrent circumstances which tend to corroborate her testimony. Look to the evidence. And if so, what are they?" If the opinion apparently entertained by Mr. Justice Candler in the *Davis Case*, that, under an indictment for rape, a conviction can be had upon the testimony of the woman alone, without corroboration, should be accepted as correct, then the charge of the judge in the present case was more favorable to the accused than he had any right to ask. Under either view, a careful consideration leads us to the opinion that the charges on this subject do not render a reversal necessary.

7. There is nothing in any of the other grounds of the motion which require a reversal. The sentence imposed furnished no ground for a motion for new trial. The evidence amply sustained the verdict, and we see no reason why it should not be allowed to stand.

Judgment affirmed. All the Justices concur.

CAUDELL et al. v. CAUDELL et al.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. REFORMATION OF INSTRUMENTS—MISTAKE IN DEED.

This is a suit to reform a deed so as to embrace a certain matter alleged to have been omitted therefrom by mistake at the time of execution. The evidence affirmatively shows that the matter was not omitted by mistake. Under such conditions, the deed will not be reformed.

2. APPEAL—OBJECTIONS WAIVED.

The contention that the deed should be canceled as a cloud upon the plaintiff's title, which was made by the pleadings, is not referred to in the brief of counsel for plaintiff in error, and under repeated rulings of this court, the assignment of error upon the refusal of the court to cancel the instrument in question will be treated as abandoned, and will not be considered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4256.]

3. TRIAL—NONSUIT.

The petition having set forth a cause of action against all of the defendants, and one of them having failed to answer, the allegations against him are to be taken as true, and a nonsuit should not have been rendered in his favor. As to the other two defendants, there was an answer, and, upon the issues created, the proof was insufficient to support the action against either of them for any relief whatever, and a nonsuit as to them was proper.

(Syllabus by the Court.)

Error from Superior Court, Banks County; R. B. Russell, Judge.

Action by D. Caudell and others against J. D. Caudell and others. Judgment for de-

fendants, and plaintiffs bring error. Reversed, with directions.

W. W. Starke, for plaintiffs in error. H. H. Perry and A. J. Griffin, for defendants in error.

ATKINSON, J. David Caudell instituted suit against his son, J. D. Caudell, and Marion Whitfield and John Garrison. It was alleged, among other things, that David Caudell, being of advanced years, desired to make provision for the distribution of his property among his several children after his death; that he had several hundred acres of land which he desired to convey to his sons upon condition that they pay his daughters certain sums in money; that, with this object in view, he attempted to convey the land in dispute to one of his sons, J. D. Caudell, intending at the time to express in the deed the condition above mentioned, specifying the sum to be paid and to whom it was to be paid; that, by mistake, he omitted in the deed all reference to the condition intended to be expressed; that the deed as prepared expressed natural love and affection as the only consideration, and purported to convey the property forever in fee simple, and concluded with this clause: "And the said David Caudell reserves to himself and his wife, Sarah C. Caudell, all the rights, privileges, rents, and profits during their natural lives, and at the death of the said David Caudell and his wife, Sarah Caudell, then this deed to take effect." It was further alleged that the plaintiff David Caudell did not surrender possession of the premises; but, on the contrary, had at all times remained, and was at the time of instituting the suit, in actual possession of the premises. It was further alleged that the defendant J. D. Caudell had never complied with the condition by paying any part of the money which it was intended that he should pay to his sisters, and was not entitled to any interest in the property; that, without having any interest, the said J. D. Caudell had sold the property to his codefendants Whitfield and Garrison; that neither of them was a bona fide purchaser because both had notice that he had no interest in the property, and both knew of the condition, which, by mistake, had been omitted from the deed, and both knew that he had not complied with the condition by paying to his sisters the money required under the condition. By amendment the sisters were made parties plaintiff.

It was prayed, among other things "(1) that said deed, mentioned in paragraph 1 of this petition be reformed and corrected by adding the condition to the same, mentioned in paragraph 2 of this petition; (2) that in the event said deed is not reformed and corrected, that it be ordered up and canceled by the court as a cloud upon peti-

tioner's title to said land; (3) that plaintiff recover of defendants the sum of \$400 which was to be paid to said Mrs. Payne and Mrs. Bolling." J. D. Caudell did not answer. His codefendants both answered, admitting that David Caudell had executed the deed hereinbefore referred to, and that by purchase through a chain of title originating in the said J. D. Caudell, they now own the interest which J. D. Caudell had in the property. They denied that there was any charge upon the estate in favor of J. D. Caudell's sisters, and denied that the plaintiff had continued in possession of the property, but averred, on the contrary, that J. D. Caudell had been in possession thereof under the deed. They also alleged that if there was any charge upon the property in favor of the sisters of J. D. Caudell, they had no notice thereof. They further alleged that the plaintiff expressly informed them that the property belonged exclusively to the defendant J. D. Caudell, and that he had a right to sell the same.

On the trial of the case, the plaintiff introduced the deed hereinbefore described, and testimony substantially to the effect as charged in the declaration, except upon the question of mistake. Upon that question, the plaintiff himself omitted to testify that the alleged condition upon which he undertook to convey the property to his son J. D. Caudell had by mistake been omitted from the deed. The defendant J. D. Caudell was also sworn for the plaintiff, and he likewise omitted to testify that the condition just referred to was omitted from the deed by mistake. The nearest approach which this witness made to testifying that the condition was omitted from the deed by mistake is found in the following words: "When my father made the deed to me, he said he would deed me and my two brothers the land. We were to pay the estate \$1,000 in proportion to what we received, and I had to pay \$400. The reason that was not put in the deed, he forgot it, he said; or, I reckon, he didn't think it was necessary to do it. That we would pay it. That was the agreement between us." James H. Caudell, a brother of plaintiff, testified: "I think I wrote the deed for my brother David Caudell to his sons, and my recollection is, while writing the deed and a judge (J. P.) was reading it from a form book—we got a right smart piece along in the deed, and he said something about 'What about your daughters?' 'Well,' he said 'the boys are going to pay their part of the \$1,000,' I think my recollection is, 'in accordance with the number of acres they get of their prorate share.' And we said something to him about maybe it ought to be in the deed, and he said: 'No, the boys will take the land, and pay the girls the money.' That is the reason why it was not put in the deed." There was other evidence introduced tending to sustain the proposition that the deed was made by David Caudell to J. D. Cau-

dell upon the understanding that he was to pay his sisters, who became plaintiffs by amendment, the sum of \$400, and that he had never paid any part of that sum. There was also evidence to the effect that the defendants Whitfield and Garrison knew of the condition, and that it had not been complied with. The plaintiff David Caudell testified that he had never told the defendant Whitfield that J. D. Caudell had a right to sell the property. He also testified that while J. D. Caudell had cultivated some of the land, it was always as his tenant, and that he had never yielded possession thereof to J. D. Caudell or to any one else. Upon the conclusion of the evidence, the court granted a nonsuit. To that ruling the plaintiff excepts, and assigns error thereon.

1. It was attempted by this suit to reform the instrument in question, so as to make it embrace substantial matter which it is alleged was omitted by mutual mistake. The evidence of the parties to the deed fails to sustain the allegation that the matter now sought to be incorporated was omitted by mistake. On the contrary, the evidence shows conclusively that there was no mistake connected with the execution of the deed. It appears from the plaintiff's own witness who drafted the instrument, and who was his own brother, that the matter which is now sought to be embraced in the deed was called to his attention at the time of the execution of the instrument, and the advisability of expressing the matter in the deed was suggested to him, and he expressly stated that it need not be done. This evidence conclusively disposes of the question touching the right to reform the instrument.

2. The second prayer seeks to cancel the instrument as a cloud upon the plaintiff's title, without assigning any reason therefor, nor is any reference made thereto in the brief of counsel for the plaintiff in error. Under these conditions, the assignment of error upon that ground will be treated as abandoned, and will not be considered by this court. See *Mayson v. State*, 124 Ga. 789, 53 S. E. 321, and citation.

3. The third prayer is that the plaintiff recover of the defendants the sum of \$400, which was to be paid to said Mrs. Payne and Mrs. Boling. Relative to this prayer, it will be noticed that one of the defendants, J. D. Caudell, did not answer, and for that reason the allegations of the petition stood as true, so far as he was concerned. Mrs. Payne and Mrs. Boling both having been made parties plaintiff with their father, the said David Caudell, there should have been a recovery against J. D. Caudell for the use of Mrs. Payne and Mrs. Boling for the amount claimed. There was nothing in the evidence to show any money liability upon the part of the defendants Whitfield and Garrison to the plaintiff. Whatever interest Whitfield and Garrison may have acquired in the property was acquired free of any con-

dition which was attempted to be charged upon the estate in favor of Mrs. Payne and Mrs. Boling. The nonsuit was properly granted as to Garrison and Whitfield. As to J. D. Caudell, there should not have been a nonsuit.

Judgment is reversed, with directions that the nonsuit stand as to the defendants Whitfield and Garrison, and that the case be reinstated as to J. D. Caudell, and that J. D. Caudell pay the costs of this writ of error.

Judgment reversed, with direction. All the Justices concur.

DE LA PERRIERE v. BOWLES.

(Supreme Court of Georgia. Nov. 16, 1906.)

SET-OFF AND COUNTERCLAIM—PLEADING.

If, in defense to an action ex contractu brought against one as administrator, he desires to plead, by way of set-off, that rent accruing from a certain tract of land and belonging to the estate he represented was illegally collected by the plaintiff, it is incumbent upon the defendant to allege facts from which the law will imply an obligation on the part of the plaintiff to account for the money so collected as money had and received by him to the defendant's use.

(Syllabus by the Court.)

Error from City Court of Jefferson; W. W. Stark, Judge.

Action by W. P. De La Perriere against G. B. Bowles, administrator. Judgment for defendant, and plaintiff brings error. Reversed.

According to the allegations of the petition, J. J. Bowles, an heir at law of A. Bowles, deceased, sold to the plaintiff his remainder interest in a tract of land, which was subsequently sold by the administrator of A. Bowles. The suit was against the administrator to recover \$171.96 and interest, alleged to be the share of J. J. Bowles, as an heir at law in the proceeds realized from the administrator's sale of the land. The defendant filed an answer, in which he admitted the sale of the land and that J. J. Bowles was an heir of his intestate, but in which he called upon the plaintiff to establish his claim that he had purchased the interest which this heir had in the land. By way of special plea the defendant set up the following defense: If the distributive share of J. J. Bowles really belongs to the plaintiff, the latter ought not to be allowed to collect it from the defendant, because the plaintiff is indebted to him, as administrator of the estate of A. Bowles, in the sum of \$175 "for rents received and collected by said plaintiff for the dower lands of the widow of said A. Bowles for the year 1904, which rents belong to, and are, the property of the said A. Bowles estate, the same having been planted and grown after the death of said widow, and it was collected and taken possession of by plaintiff without legal authority, and he owes to, and unjustly detains the same from, defendant as administrator aforesaid, and is therefore due the said amount" to him, which

amount he pleads as a set-off to plaintiff's demand. The plaintiff made a motion to strike this special plea, because it did not set forth the defendant's claim of set-off with sufficient certainty to put plaintiff on notice of the nature and character of the same, and did not show any liability on the part of the plaintiff to the defendant, nor any mutuality, and there was no "allegation as to when, or from whom, the rent alleged was collected, nor why defendant himself did not collect the rent from the lands if it was due him as administrator." This motion was overruled, the case proceeded to trial before the judge without the intervention of a jury, and a judgment for \$28.49 was rendered against the defendant. The plaintiff made a motion for a new trial, and, upon its being overruled, sued out a writ of error to review the ruling on his motion to strike the defendant's special plea, and the judgment denying him a new trial.

J. S. Ayers, for plaintiff in error. Pike & Bryson, for defendant in error.

EVANS, J. The plea of set-off is very indefinite and uncertain. Construing it to be an effort to set off a claim for rent collected by the life tenant's vendee, the rent accruing for the year after the life estate had terminated, the plea was open to the demurrer urged against it. There is no allegation that the tenants of the plaintiff ever attorned to the administrator of Bowles, or that the plaintiff's possession was held under him. On the contrary, the plaintiff owned the life estate of the dowress; this estate was ended by her death, and the defendant's contention was that the rent was collected and taken possession of by the plaintiff without legal authority, and that "he owes to, and unjustly detains the same from, the defendant as administrator." "When title is shown in the plaintiff and occupation by the defendant, an obligation to pay rent is generally implied, but, if the entry was not under the plaintiff, or if possession is adverse to him, no such implication arises." Civil Code 1895, § 3116. The plaintiff's entry upon the land was under his purchase of the life estate of the dowress. After the termination of this estate the administrator of the deceased owner was entitled to demand possession from the life tenant's vendee. The possession of the latter was not the possession of the administrator, without attornment. The administrator might maintain an action of trespass against the plaintiff, for the loss occasioned the estate of his intestate by being deprived of the use and occupancy of the land, but he cannot set off his claim against the plaintiff's suit, which is founded on contract. Civil Code 1895, § 4944. That the plaintiff, after the termination of the life estate, tortiously remained in possession, either in person or through his tenants, could not give rise to any implied promise to pay or account for

rent. *Allen v. Railroad Co.*, 107 Ga. 838, 849, 83 S. E. 696. It is clear, therefore, that the defendant did not allege facts showing that he was entitled to recover in assumption for the rent collected by the plaintiff from his tenants after the termination of the life estate.

As the court committed error in refusing to strike the plea on motion, it follows that another trial must be ordered.

Judgment reversed. All the Justices concur.

ATLANTA, K. & N. R. CO. v. SHIPPEN et al. (Supreme Court of Georgia. Nov. 14, 1906.)

1. JUSTICES OF THE PEACE—PLEADING.

"While the law does not require that a pleader in a justice's court shall set forth his cause of action with all the formality which the law requires in courts of record, what is required to be set forth is subject to the rule that pleadings are to be taken most strongly against the pleader."

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Justices of the Peace, § 306.]

2. SAME—JURISDICTION.

Applying the rule just cited in the present case, that which constituted the pleadings was ambiguous in meaning, and when taken most strongly against the pleader set forth a claim for a penalty which was not within the jurisdiction of the court.

(Syllabus by the Court.)

Error from Superior Court, Gilmer County; Geo. F. Gober, Judge.

Action by W. H. & F. E. Shippen against the Atlanta, Knoxville & Northern Railroad Company. Judgment for plaintiffs, and defendant brings error. Reversed.

The plaintiff sued the railway company in a justice's court. The summons required the defendant to appear and "answer plaintiff's demand in an action of debt due by account for overcharge on freight, a copy of which is hereto attached." The account attached was as follows:

Elbijay, Ga., Oct. 12, 1904.
The Atlanta, Knoxville & Northern R. R. Co.,
Dr., to W. H. and F. E. Shippen.
March 29, 1904.—To freight collected on
11 heater section, 2 boxes of fixtures,
7 grate bars, 2 bds. poker, 2 bags
asbeste, 4245 lbs. \$57 42
Should be 4245 lbs. at 68 cts. per 100
lbs. 28 86
Overcharge \$28 55
To double said overcharge for failing to
repay said overcharge within 30 days
after the demand had been made by
W. H. and F. E. Shippen upon the
Atlanta, Knoxville & Northern R. R.
Co. to repay said overcharge..... \$57 10

Following the account was an affidavit of one of the plaintiffs that the defendant was indebted to them "\$57.10 as stated above," and that the amount was due and unpaid. The defendant filed a plea to the jurisdiction, which, in effect, set up that the suit was for a penalty and should be brought in the county of defendant's residence and principal

office, which was Fulton county. The case was carried by appeal to the superior court. When the case came on for trial on the appeal, the defendant moved to dismiss the action on the ground that it was a suit for a penalty, and the justice's court had no jurisdiction. The court overruled the motion, holding that plaintiffs could proceed against the defendant for the recovery of the actual overcharge which had been collected. This ruling is assigned as error. Upon the conclusion of the evidence the judge directed a verdict for the plaintiff for \$28.55.

Clay & Blair and A. N. Edwards, for plaintiff in error. A. H. Bertz and J. Z. Foster, for defendants in error.

COBB, P. J. (after stating the foregoing facts). If the summons be considered alone, the suit was simply for an overcharge. If the account attached be considered alone, it is doubtful whether it constitutes a claim for an overcharge and a penalty, or a claim merely for a penalty. The affidavit to the account indicates an intention to claim a penalty only, as indicated by the amount referred to in the affidavit taken in connection with the item in the account. When the summons, the account, and the affidavits are all taken together, it is doubtful what is the character of the claim sought to be recovered. It might be construed to be a claim for an overcharge. It might be construed to be a claim for a penalty. It is possible to construe it as a claim for a penalty and an overcharge. In other words, that which constitutes the pleadings in this case is doubtful and equivocal. The rule that a pleading is construed most strongly against the pleader is applicable to that which takes the place of pleading in a justice's court. The penalty for the use of equivocal language is to be imposed in that court as well as in any other court, and the penalty for the use of such equivocal language is a dismissal, if the most unfavorable construction would oust the court of jurisdiction. *Atl. & West Point Ry. Co. v. Ga. Ry. & Elec. Co.*, 125 Ga. 798, 54 S. E. 758. In the case just cited the plaintiff saved his case by amendment, which removed the ambiguity. There was no amendment in this case, and the penalty for equivocal language should have been imposed and the case dismissed.

Judgment reversed. All the Justices concur.

PARISH v. DAVIS.

(Supreme Court of Georgia. Nov. 18, 1906.)

PLEADING—PETITION—AMENDMENT.

A petition with the heading, "Georgia, Bryan county," but not addressed to any court, in the first paragraph set forth as the plaintiff, S. F. Davis, administrator of J. F. Davis, and as the defendant, F. E. Parish; and in the second paragraph averred that F. E. Parish was indebted to the petitioner, as administra-

tor, J. F. Parish, in a stated sum, on two notes, copies of which are attached to the petition; and in the third paragraph prayed for process requiring the defendant to appear "at the next term of said superior court to be held in and for said county," etc. *Held*, that the petition was amendable by addressing it to the superior court of Bryan county, and changing J. F. Parish to J. F. Davis, in the second paragraph. Civ. Code 1895, §§ 5098, 5107.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 643, 644.]

(Syllabus by the Court.)

Error from Superior Court, Bryan County; P. E. Seabrook, Judge.

Action by S. F. Davis against F. E. Parish. Judgment for plaintiff, and defendant brings error. Affirmed.

J. H. Smith and R. F. O. Smith, for plaintiff in error. H. B. Strange, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

GLENN v. AUGUSTA DRUG CO.

(Supreme Court of Georgia. Nov. 16, 1906.)

JUSTICES OF THE PEACE—AFFIDAVIT OF ILLEGALITY—CERTIORARI.

The court did not commit error by overruling the petition for certiorari in this case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Process, § 25; vol. 21, Execution, § 278.]

(Syllabus by the Court.)

Error from Superior Court, Glascock County; H. M. Holden, Judge.

Affidavit of illegality between W. S. Glenn and the Augusta Drug Company. Judgment for plaintiff before a justice was sustained on certiorari, and Glenn brings error. Affirmed.

Execution was levied, and affidavit of illegality interposed. A jury in a justice's court found against the illegality. The finding was sustained on certiorari, and the defendant excepted. The affidavit of illegality is not in the record, nor are its grounds stated in the petition for certiorari or elsewhere in the transcript or bill of exceptions. The defendant was personally served with the summons in the suit wherein was rendered the judgment on which the execution issued, and appeared and suffered judgment to be rendered. The assignments of error in the petition for certiorari raise the following points: (1) That the suit in which the judgment was rendered was void, the name of the plaintiff, "Augusta Drug Co.," not importing a legal entity; there being no allegation that the same was a corporation or a partnership. (2) That the summons was invalid, it being directed "To the defendant," who was named in the caption but not in the body of the summons. (3) That the levy of the execution was void, the same being directed "To all and singular the constables of said county," and the levy having been

made by the sheriff on personal property. It appeared that a constable, before the levy by the sheriff, had levied on the same property by virtue of process other than the execution in question, and had taken a forthcoming bond. Upon the levy by the sheriff, the defendant gave to this officer a forthcoming bond for the property. (4) That the defendant should have had an opportunity to point out property for levy. The sheriff's entry of levy recites that the property levied on was pointed out by the plaintiff, and that it was in the possession of the defendant. There is no evidence as to whether the defendant was given an opportunity to point out property. (5) That the original suit was brought on a promissory note signed by the defendant apparently as principal, and by one Logue as security, and indorsed by one Carroll; that before trial the plaintiff dismissed the action as to Logue and Carroll; and that therefore the defendant was discharged from liability. (6) That the summons, judgment, and execution were all void, there being no such party plaintiff named and described as is required by law. (7) That during the argument of defendant's counsel one of the jurors slept (or, according to the magistrate's answer, "napped a little"), which rendered the trial and verdict void. (8) That the magistrate tried to stop the defendant's counsel when he argued to the jury that the entry of levy was in the handwriting of the plaintiff's attorney, and that defendant at no time was given a chance to point out property for levy. There was no evidence that the entry of levy was in the handwriting of the plaintiff's attorney. (9) That when the defendant's counsel was making the concluding argument to the jury (the defendant having introduced no evidence) and was discussing an authority cited, to which he had not referred in his opening argument, the magistrate, over his objection, allowed the plaintiff's counsel to interrupt and argue in answer to the plaintiff's counsel concerning the cited authority thus referred to. (10) That the verdict is contrary to law, and unsupported by evidence.

B. L. Stephens, for plaintiff in error. Ira S. Peebles, Jr., for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

LONG v. MITCHELL.

(Supreme Court of Georgia. Nov. 16, 1906.)
SALES—BREACH OF WARRANTY—EVIDENCE.

The evidence introduced in behalf of the plaintiff sustained his contention that he had, through his factor who had advanced the necessary funds and had taken his note therefor, paid to the defendant the purchase money for a mule sold by him under an express warranty as to gentleness, and that there was a breach of the warranty. This being so, the granting of a nonsuit was clearly erroneous.

(Syllabus by the Court.)

Error from City Court of Macon; Robt. Hodges, Judge.

Action by J. T. Long against L. A. Mitchell. Judgment for defendant, and plaintiff brings error. Reversed.

T. J. Long brought an action for damages for breach of warranty, against L. A. Mitchell, who, it was alleged, had sold to the plaintiff a mule, under a warranty that the animal was sound, gentle, and would work anywhere, when in fact the mule was vicious and could not be worked to the plow. The plaintiff stated in his petition that he paid \$140 for the mule, through Holmes & Hardeman, who advanced the money to him as a loan. The defendant, in his answer, averred that, according to his understanding, the sale of the mule was to Holmes & Hardeman, not to the plaintiff. On the trial the plaintiff testified that the mule would commence to kick whenever hitched to a plow, and was so vicious in this respect that he had to dispose of her, after the defendant had declined to refund the purchase money or give him another mule which was gentle. Proof was submitted as to the amount of damages sustained. The testimony in regard to the purchase was, in substance, as follows: Long went to Mitchell, who was a stableman, and said he wanted to buy a gentle mule that would work anywhere. Mitchell selected a mule and told him that the mule was "gentle, sound, and all right," and that he "would guaranty her anywhere." They agreed upon the purchase price, \$140. Long said he would take the mule, and would get Mr. Hardeman to send Mitchell the money. Mitchell said: "All right, take the mule and go on." But Long went off without the mule, to arrange with Hardeman for making payment of the price. Hardeman consented to furnish Long with the money to buy the mule, and took his note for \$140, and a mortgage on the mule. Long then got the mule from Mitchell. Hardeman testified: "Long gave me a purchase-money note for the mule. He came and said he had traded with Mitchell, and I rung Mitchell up and says, 'You have sold one of my customers a mule,' and I says, 'If I pay cash for it, will you give me anything off?' And he says, 'I will give you \$10,' which was customary between warehousemen and stablemen. The mule was \$130, and I got a purchase-money note for it. I only asked Mitchell, if I paid the bill, would he give me anything off, and he said he would give \$10 off, and I says: 'Send around and I will send you a check.' Mitchell said he had sold Long a mule. I may have put it this way: 'Long told me he had bought a mule, and if I pay the bill, will you allow me anything off?' and he says, '\$10'; and I says, 'Send around and get a check for your money.' As near as I can recollect I said: 'This mule has been priced for \$140, and if I pay you the money, do I get anything?' And he says, '\$10.' He sent me the bill and

I sent my check for \$130. I did not have any money in my hands at the time belonging to Mr. Long, and I did not owe Long anything. The reason I paid this money to Mitchell is, I was in the warehouse business, and Long had been a customer of mine, and accustomed to borrowing money, and asked me would I pay the bill to Mitchell for the mule, and I says, 'I will.' After I paid the bill I took Long's note for the money." The bill was against Holmes and Hardeman, and stated that it was for "one gray mare mule for T. J. Long, \$130." The court granted a nonsuit, upon what ground the record does not disclose, and the plaintiff excepted.

Hardeman & Moore, for plaintiff in error.
Hall & Wimberly, for defendant in error.

EVANS, J. Judgment reversed. All the Justices concur.

IVEY et al. v. CITY OF ROME et al.

(Supreme Court of Georgia. Nov. 16, 1906.)

1. ERROR, WRIT OF—AD INTERIM RESTRAINING ORDER—REVIEW.

The refusal of a judge to grant an ad interim restraining order in advance of the time set for a hearing on an application for a temporary injunction is not reviewable. *Hollinshead v. Town of Lincoln*, 10 S. E. 1094, 84 Ga. 590; *Mayor of Savannah v. Grayson*, 30 S. E. 693, 104 Ga. 108; *Smith v. Willis*, 33 S. E. 687, 107 Ga. 793.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3818-3821; vol. 27, Cent. Dig. Injunction, § 304.]

2. SAME—FAST WRIT OF ERROR.

A decree at chambers, dismissing a petition on motion, cannot be reviewed by a "fast" writ of error. *Jordan v. Kelly*, 63 Ga. 437.

3. SAME—DISMISSAL—TRANSFER.

If a bill of exceptions, properly sued out to the Supreme Court to review a final judgment, be docketed as a "fast" writ of error, when in fact it is not such, the case will not be dismissed, but will be transferred to the docket of the next term. *Jones v. Warnock*, 67 Ga. 484; *Bacon v. Jones*, 42 S. E. 401, 116 Ga. 136, 140.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; *Moses Wright, Judge*.

Action by J. E. Ivey and others against the city of Rome and others. Judgment for defendants, and plaintiffs bring error. Transferred to docket of the next term.

An election was held in East Rome by virtue of an act of the General Assembly to decide whether East Rome should be annexed to the city of Rome. Ivey and others filed a petition against the mayor and council of Rome to enjoin from entering upon the minutes of the city council the reported result of the election and from declaring by resolution or proclamation East Rome to be part of the city of Rome. The petition was returnable to the January term, 1907, of the superior court of Floyd county. The judge refused a restraining order, but granted a rule

nisi for a hearing on September 26, 1906. On that day the court dismissed the petition on the ground that the court was without jurisdiction of the subject-matter of the petition. To the order of dismissal the petitioners sued out a bill of exceptions, assigning as error the refusal of the court to grant a restraining order when the petition was presented and the dismissal of the petition before the return term of the case. The case was docketed in the Supreme Court as a "fast" writ of error at the instance of the complaining parties.

Henry Walker, for plaintiffs in error.
John W. & G. E. Maddox, for defendants in error.

EVANS, J. Ordered accordingly. All the Justices concur.

INTERNATIONAL HARVESTER CO. OF AMERICA v. DILLON.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. SALE — CONTRACT — CONSTRUCTION — WARRANTY—ACCEPTANCE.

A contract for the sale of a machine provided that it was sold subject only to the warranty that the machine would do good work, was well made, of good material, and durable when used with proper care. It also stipulated that if upon one day's trial the machine failed to work well, the purchaser should immediately give written notice to the seller, allow reasonable time for a man to be sent to put the machine in good order, and render necessary and friendly assistance to operate it. If, when this was done, the machine could not be made to work well, the purchaser should immediately return it to the seller, and the contract should be rescinded. It was also stipulated that failure on the part of the purchaser to comply with any of the conditions should be considered as an acceptance of the machine and a fulfillment of the warranty. *Held*, that the purchaser would not be let in to plead that the machine was worthless, unless he had complied with the conditions named in the contract.

2. SAME—ACTION FOR PRICE—DEFENSES—EVIDENCE.

The burden being upon the defendant to show a compliance with the conditions, and the evidence failing to show such compliance, the verdict in his favor on a plea of total failure of consideration was unauthorized.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1046.]

3. SAME—FAILURE OF CONSIDERATION.

If the defendant had given the notice required by the contract, he would be let into his defense of a total failure of consideration, if the plaintiff failed after reasonable time to send a man to put the machine in good order, and this would be true without reference to whether he returned the machine. If, however, a return of the machine was necessary, merely storing the machine and notifying the plaintiff it was subject to its order would not, under the contract, be a return.

4. SAME—INSTRUCTIONS.

Some of the assignments of error upon the instructions of the judge construing the contract were well taken, and the errors were of such a character as to require a reversal of the judgment.

(Syllabus by the Court.)

Error from Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Action by the International Harvester Company of America against George Dillon. Judgment for defendant, and plaintiff brings error. Reversed.

The International Harvester Company of America brought suit against Dillon, in a justice's court, upon two promissory notes, one for \$40 and the other for \$45. The defendant filed a plea that the consideration of the notes was a corn binder, which was worthless, and that the defendant was not liable on the notes, because the consideration had entirely failed. The justice rendered a judgment in favor of the defendant. The plaintiff entered an appeal to the superior court, and the case came on for trial in that court, and a verdict was rendered in favor of the defendant. The plaintiff filed a motion for a new trial, which contained numerous grounds assigning error upon specified portions of the judge's charge. The motion was overruled, and the plaintiff excepted.

Hardeman & Jones, for plaintiff in error. Nottingham & McClellan, for defendant in error.

COBB, P. J. (after stating the foregoing facts). Those portions of the contract of sale of the machine in question which are material to the present case are as follows: "It is distinctly understood that the above-mentioned machine is purchased subject to the following warranty, and no other, and the undersigned hereby acknowledges receipt of a copy of the same. International Harvester Company of America warrants this machine to do good work, to be well made, of good materials, and to be durable if used with proper care. If, upon one day's trial, the machine fails to work well, the purchaser shall immediately give written notice to said company, addressed to its office, corner Adams and Jefferson streets, in Chicago, Ill., or to its authorized agent through whom the machine was purchased, stating wherein it fails, allow reasonable time for a man to be sent to put it in good order, and render necessary and friendly assistance to operate it. If the machine cannot then be made to work well, the purchaser shall immediately return it to said agent, and the money or notes for it shall be refunded; which, when done, shall constitute a settlement in full of the transaction. Failure on the part of the purchaser to comply with any of the conditions herein named shall be considered an acceptance of the machine and a fulfillment of the warranty. The provisions of this warranty shall not be changed or waived in any respect; neither can this order be canceled without the consent of the International Harvester Company of America."

The contract contained an express warranty, and therefore the implied warranty of the law was excluded. *Holcomb v. Cable Co.*,

119 Ga. 466, 46 S. E. 671. The warranty was that the machine would do good work, was well made, and would be durable, if used with proper care. If this had been all that the contract contained, the defendant could have defeated a recovery upon the notes by showing that the warranty had in any one particular so far failed that damages resulting therefrom would amount to more than the amount due on the notes; or he would have been entitled to a credit on the notes if the damages were for a less sum. The contract, in terms, provided that insistence upon this warranty should be dependent upon the performance of certain conditions named in the contract. The first was that, if, upon one day's trial, the machine failed to work well, the purchaser was immediately to give written notice to the company at its office in Chicago, or to its agent through whom the purchase was made, stating wherein it failed; the second was that a reasonable time was to be allowed for a man to be sent to put the machine in good order; and the third was that the purchaser was to render necessary and friendly assistance to operate the machine. There was still another condition in the contract. If the machine, after the foregoing conditions were complied with, could not be made to work well, the purchaser was to return it immediately to the agent, and the contract was to be rescinded. It was distinctly provided that a failure on the part of the purchaser to comply with any of the conditions named should be considered as an acceptance of the machine and fulfillment of the warranty. This was the contract between the parties, and by it they are bound. Before the defendant could be released from liability on his notes, it must be made to appear that one day's trial of the machine had been made; that it did not work well; that written notice of the fact and the reason for the same had been given to the company, either at its office in Chicago or through its agent who sold it; that a reasonable time has elapsed, and that the company had either failed to send a man to make the machine work, or, having sent a man, he had been unable to make the machine do good work, and the purchaser had rendered the friendly assistance to accomplish this result, and that immediately after this fact became apparent the machine was returned to the company or its agent.

2. The burden upon the defendant being of the character above indicated, it becomes necessary to determine whether, under the evidence, the jury were authorized to return a verdict in his favor on his plea of failure of consideration. Although there were some conflicts in the evidence, there was ample evidence to authorize the finding that the machine would not do the work for which it was purchased. There was no conflict as to the trial of the machine. The evidence amply authorized the finding that it did not work

well. Such being the condition of affairs, under the contract it became obligatory upon the defendant to give written notice to the company at Chicago, or to its agent through whom the machine was purchased, that the machine failed to work well, "stating wherein it failed." There was no copy of any written notice introduced in evidence. It appears that the defendant was allowed to testify, without objection, as to the notice given to the company. His testimony on that subject is as follows: "The notice I gave the company was I went to them in person and wrote to the company in Chicago. I did give them notice as quick as I found it would not work after I worked three or four hours. I sent a man down town. I gave notice the same day they came to me and said it was working, five hours afterwards. They have never sent a man, and never have yet." This testimony follows a recital by the defendant of the efforts made to use the machine, and the failure of such efforts, and is followed by a statement that the machine is worth nothing, that he has been damaged by attempting to use it, and that he holds it subject to the orders of the plaintiff, and in the condition in which it was left by the agent of the plaintiffs, who attempted to remedy its defects. This is all the evidence on the subject of a notice to the company, and this notice, whatever it was, appears to have been given after there had been repeated efforts made by experts of the company to operate the machine, and such efforts had failed except in places where the corn was small and tender. There is no controversy in the evidence as to the fact that no man was ever sent after this notice was given. There seems to have been no complaint upon the part of the plaintiff that the defendant failed to render the friendly assistance in the operation of the machine required by the contract. There was no evidence that the machine had actually been returned to the plaintiff or its agent. The only evidence on this subject was that the machine had failed to work, and the company had failed to send a man to make it work, in response to the notice above referred to, and that the defendant stored the machine and held it subject to the orders of the plaintiff. It may be that the defendant has been grossly imposed upon, and that he has a machine that is worthless, but his right to avail himself of this fact as a defense depends upon his complying with the stipulations in a written contract which he has deliberately entered into. That contract provides that if the machine fails to work well, written notice of this fact, "stating wherein it fails," must be given to the company. The giving of this notice is a condition precedent to the right of the defendant to rely upon the warranty that the machine would work well. The defendant was allowed to testify to the

fact that he had given a written notice, but the burden was on him to show, not only this fact, but what the notice contained, and it was essential that this notice should show wherein the machine failed. There was no evidence as to the contents of the notice on this subject. At this point the defendant failed to make out his defense, and the verdict was therefore contrary to the evidence.

3. The plaintiff was under no obligation under the contract to send a man to make the machine work, unless it received a written notice of the character provided for in the contract. If the notice had been in conformity to the terms of the contract, then the defendant would have been let into his defense—a breach of the warranty—if the plaintiff failed after reasonable time to send a man to remedy the defect in the machine. This would be true without reference to whether he returned the machine. The return of the machine as a condition precedent to a defense of breach of warranty was only required in the event the machine failed to work, after written notice, as required by the contract, was given, and a man was sent to put the machine in working order, who failed to accomplish this result. In *McCormick Harvesting Machine Co. v. Allison*, 116 Ga. 445, 42 S. E. 778, it appears from the original record in the case that a man was sent to make the machine work, and failed to accomplish the purpose of his mission. In that case, therefore, it was properly held that, under the terms of the contract, the return of the machine was a condition precedent to a defense setting up a breach of warranty.

4. The evidence of the witness Williams as to the declaration of the expert who was sent out by the company to set up the machine, that the machine would not work, should have been excluded, for the reason that this declaration was made after the agent had left the place where the machine was, and was no longer engaged in any work of his principal. Its admission was harmless, for it appears that the statement as made really referred to the condition of the corn, rather than the machine. A new trial must, however, be granted for other reasons, which are sufficiently shown in the foregoing discussion.

We do not consider it necessary to discuss in detail the assignments of error upon the various extracts from the charge of the court. It is apparent that we do not agree with the learned judge who presided at the trial in his construction as to some portions of the contract; and, from what has been said, it can be seen what is our interpretation of the contract, and this will be followed by the judge when the case is tried again.

Judgment reversed. All the Justices concur.

IRVIN v. SPRATLIN et al.

(Supreme Court of Georgia. Nov. 16, 1906.)

JUDGMENT — RES JUDICATA — ISSUES DETERMINED—EXTRINSIC EVIDENCE.

Where several tenants in common brought a joint action for the recovery of land, and the defendant in his plea filed separate defenses, one to the effect that one of the joint plaintiffs was estopped from suing for the recovery of the land, and, for that reason, that none of the joint plaintiffs should recover, the other being that the defendant under color of title, and in good faith had been in possession of the land for a sufficient length of time to obtain a title by prescription; and where upon the trial, the case by consent, having been submitted to the judge to pass upon the law and the facts, the judge rendered a general judgment in favor of the defendant without specifying upon which plea the judgment was rendered; and where to a subsequent suit against the same defendant, by some of the former plaintiffs suing severally for the recovery of the same land, a proper plea was filed, setting up the former suit and judgment therein as an estoppel by judgment, it was competent for the defendant, in support of such plea, to introduce extrinsic evidence to show that the question actually passed upon by the judge in rendering judgment in the former suit was as to whether or not the defendant had a good prescriptive title. In such case, if the judge actually based his decision on that question, his judgment would be conclusive against the plaintiffs, and they could not recover in the second suit. It follows that the court erred in excluding from evidence, upon the ground of irrelevancy, certain extrinsic documentary, and parol evidence, tending to show that such was the ruling of the court.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Action by M. S. Spratlin and others against J. E. Irvin, administrator. Judgment for plaintiffs, and defendant brings error. Reversed.

S. H. Hardeman and J. L. Irvin, Jr., for plaintiff in error. S. H. Sibley, for defendants in error.

ATKINSON, J. Exception is taken to the ruling of the court in directing a verdict in favor of the plaintiffs for the land in dispute. The correctness of this ruling depends upon the correctness of the ruling in excluding the documentary and parol evidence which was tendered. With that evidence excluded there would be nothing left except the prima facie case admitted. No dispute over evidence or other issue would be left, and the prima facie case admitted by the defendant would demand a verdict, and a direction from the court would be proper. We come, then, directly to the assignments of error upon the rulings of the court in excluding the documentary and parol evidence submitted. It may be stated in limine that in the present case we are dealing with the doctrine of estoppel by judgment, and not res judicata. In the suit which resulted in the judgment which is pleaded as an estoppel, it appears by the declaration that all of the plaintiffs in-

sisted that all of the plaintiffs had joint title, and that they were entitled to recover for all; that the plaintiffs in that case included the three plaintiffs in the present case, and several others claiming jointly with them. Under those conditions that suit, with respect to both cause of action and parties, was different from the suit at bar, where the plaintiffs, being less in number than those included in the first suit, alleged that each had a separate and distinct title, and the success of one was not dependent upon the success of all. While the first suit was not res judicata, for the reasons indicated, it was possible for the plaintiffs in the present suit to have so litigated in the first suit as to have estopped them afterwards from prosecuting the present cause. The superior court record which was excluded was pleaded as an estoppel in the case of Callaway v. Irvin, and admitted; but when that case was brought to this court (123 Ga. 344, 51 S. E. 477), viewing the record unaided by extrinsic evidence, it was held that: "Estoppel by judgment cannot be successfully urged as a defense to a suit brought by a single plaintiff, where it appears that in a former suit, jointly instituted by him and others with respect to the same matter, the defendant interposed several distinct defenses, some going to the merits of the controversy, and one to the right to maintain the action as brought; and it does not appear upon which of these defenses the judgment in his favor was rendered." Under that ruling, the record as introduced was of no effect, and when the present case came on to be tried, the defendant, with the view of showing by extrinsic evidence upon which of the defenses the judgment was actually rendered, offered the bill of exceptions in the first case, containing, among other things, a brief of the evidence introduced in the court below, and assignments of error, and also parol evidence to the effect that the issues discussed by counsel in the court below and those mentioned by the court in rendering judgment were such as related to the merits of the case, and that the ruling actually made was upon the merits of the case and was not upon the technical point that the failure to show title in one of the several joint complainants in a suit for the recovery of land, required a decision against all the complainants. The trial court was of the opinion that extrinsic evidence was not admissible to explain that the merits of the case were actually passed upon, and that the judgment did not go upon the technical point already mentioned, and, upon objection urged, refused to admit in evidence the record in the first suit, the bill of exceptions, and parol evidence, all upon the ground of irrelevancy.

The effect of the sale by Simeon Parker Callaway, as executor to Samuel Barnett upon his own interest in the property, and

likewise the effect upon his coplaintiffs of his being estopped in the former suit, is well discussed by Mr. Justice Evans in the fourth paragraph of the opinion in *Callaway v. Irvin*, supra. In the same paragraph the learned justice discusses the question of the conclusiveness of judgments in cases where several defenses are interposed, and the judgment fails to disclose upon which defense the judgment was rendered. The judgment then and now under consideration was construed to be one of that kind. In that opinion, quoting from *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956, it is said: "It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." Justice Evans goes on to say: "In the case before us no such certainty exists. The defendant in the first suit interposed several defenses, one of which was that Simeon Parker Callaway was estopped, by the deed he had executed, from asserting title to the land; and this special defense was established, and affected, not only his right to recover, but also cut off his coplaintiffs from any recovery in that suit, independently of whether any of the other defenses were meritorious." That case leaves the question open as to whether by extrinsic evidence "such certainty can be shown to exist." In the case at bar the rejected evidence and bill of exceptions were relied upon to show the parties to the first suit, the subject-matter, the issues made by the pleadings, the judgment therein, and likewise the evidence introduced upon the trial of that suit as found in the bill of exceptions therein filed to this court, the purpose of introducing the evidence therein contained being to indicate what questions were actually passed upon by the court. It was proposed to supplement the rejected record just referred to by the rejected parol evidence, and thereby make more certain the exact question which the court actually passed upon in the first case. If it is competent to go behind the judgment and show by extrinsic evidence the particular defense upon which it was actually rendered, none of the excluded evidence was irrelevant, and none of it should have been excluded. Civ. Code 1895, § 3743, provides that: "Parol evidence is admissible to show that a matter apparently covered by the judgment was not really passed upon by the court." This section, since the adoption of the Code, has the binding effect of statutory law.

If upon principle, in cases of estoppel by judgment it is competent to prove by parol testimony that a matter apparently covered by the judgment "was really not passed upon," it is difficult to see upon what reasoning it would not be permissible by the same kind of evidence to show that the matter covered by the pleadings and "apparently covered by the judgment" was actually passed upon, or, when two matters are "apparently cov-

ered by the judgment," that one and not the other was actually passed upon. It would seem that if it would be permissible at all to go behind the judgment with parol evidence, it should be only for the discovery of truth, and this ought to permit the introduction of any competent evidence tending to accomplish that end. The case of *Johnson v. Lovelace*, 61 Ga. 62, was a claim case. On the trial the record in a former claim case between the same parties, where property had been levied upon by authority of a different execution, was introduced by the plaintiff. In that case it was ruled by this court that the claimant should be permitted to introduce all relevant evidence in defense of his title, and that he was not limited to the avoidance of the former judgment. In the opinion, Mr. Chief Justice Warner, speaking for the court, on page 64 of 61 Ga., says, upon authority of *Herman on Estoppel*, § 68: "When it appears on the face of the record that the question in controversy in the second suit was litigated in the first, the mere production of the record will be enough; but when it does not so appear, it must be shown by parol evidence, and the burden of proof rests upon the party who maintains the affirmative. If the record shows that the same matters might have been litigated in the former action, then the fact that they actually decided in that former action may be proved by extrinsic evidence." The ruling just quoted from *Johnson v. Lovelace* was not affected by the ruling in the case of *Kennedy v. McCarthy*, 73 Ga. 346. An examination of the cases will show that the former case is controlled by the doctrine of estoppel by judgment, while that in the latter case related strictly to the doctrine of res judicata. In the case of *Draper v. Medlock*, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 453, this court says: "Where a judgment is pleaded as an estoppel, the burden is upon the party relying upon the estoppel to sustain the plea by showing that the particular matter in controversy was necessarily or actually determined in the former litigation; and if it appear from the record introduced in support of the plea that several issues were involved in such litigation, and the verdict and judgment do not clearly show that this particular issue was then decided, before such plea can be sustained this uncertainty must be removed by extrinsic evidence showing that such matter was then decided in accordance with the contention of the party relying upon the plea." See, also, report of this case and notes thereto in 2 Am. & E. An. Cas. 650; 1 Freeman on Judgments, § 273.

In the case in which the judgment was rendered, which judgment is now relied on as an estoppel, two separate defenses were interposed, either of which would have authorized a judgment against the plaintiffs. One of these defenses was technical in its nature; the other was a defense upon the merits of

the case. On the trial the evidence would have demanded a verdict against the plaintiffs upon the technical defense, while, under the ruling in *Callaway v. Irvin*, supra, the evidence at the same trial may not have authorized a verdict in favor of the defendant upon the plea which went to the merits of the case. But under such record and evidence, the judge passing upon the law and facts rendered a general judgment, which judgment had never been set aside. In the case at bar that judgment was pleaded by the defendant as an estoppel against the plaintiffs, touching their right in the subject-matter involved in the present suit; and it was proposed, not to rest upon the mere face of the judgment finding against the defendants where two defenses were involved, as was done in the case of *Callaway v. Irvin*, supra, but to go further, and by additional record, offered as extrinsic evidence, and by testimony offered as parol extrinsic evidence, to show that the merits of the case by the pleadings in the former suit were actually involved, and that the court actually passed upon the merits of the case, and did not place the judgment upon the plea setting up the technical defense. If the matter which was actually passed upon by the court was the defense which went to the merits of the case, and the judgment of the court was actually upon the merits of the case, the pleadings authorizing it, whether right or wrong, the judgment was conclusive between the parties and should estop them from the maintenance of another suit involving the same matter. That judgment has never been set aside, and the parties had their day in court, and issues which were actually passed upon at that trial are closed now by the judgment, and all parties are estopped from denying them. It being competent to explain by extrinsic evidence what matter was actually passed upon by the court, the documents and testimony which were offered by the defendants and excluded by the court were material, and it was erroneous for the court to exclude them upon the ground of irrelevancy.

Judgment reversed. All the Justices concur.

IRVIN v. CALLAWAY.

(Supreme Court of Georgia. Nov. 16, 1906.)
JUDGMENT—RES JUDICATA.

This case, upon its facts, is controlled by the decision this day rendered in the case of *Irvin v. Spratlin*, 55 S. E. 1037, and the judgment of the trial court is therefore reversed.

(Syllabus by the Court.)

Error from Superior Court, Wilkes County; H. M. Holden, Judge.

Action by M. S. Callaway against C. E. Irvin, administrator. Judgment for plaintiff, and defendant brings error. Reversed.

S. H. Hardeman and J. I. Irvin, Jr., for plaintiff in error. S. H. Sibley, for defendant in error.

FISH, C. J. Reversed. All the Justices concur.

SOUTHERN RY. CO. et al. v. REYNOLDS.
(Supreme Court of Georgia. Nov. 10, 1906.)

1. TRIAL—DIRECTING VERDICT.

There having been evidence introduced by the plaintiff which would authorize the jury to find in his favor a nonsuit was properly refused; and in such a case it was not error to refuse to direct a verdict for the defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 382, 383.]

2. RAILROADS—ACCIDENT AT CROSSING—NEGLECT—INSTRUCTIONS.

Whether the defendant railroad company and its engineer, who is a codefendant in the action, were negligent in the running of its locomotive and train, and whether, if negligent, that negligence was the proximate cause of plaintiff's injuries, being questions for decision by the jury, it was not error for the court to refuse written requests to charge which contained, in effect, instructions that before the plaintiff could recover it should be made to appear from the evidence that the injury was inflicted by the willful misconduct of the defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, §§ 1190, 1194, 1213.]

3. TRIAL—INSTRUCTIONS.

The court is not bound to charge in the exact language of a request; and a new trial will not be granted because of a refusal to charge as requested, when the charge given substantially covers the request. *Battle v. State*, 32 S. E. 160, 105 Ga. 705.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651-659, 668.]

4. RAILROADS—ACCIDENT AT CROSSING—INSTRUCTIONS.

Exceptions to certain portion of the court's charge which were applicable to issues made by the pleadings and evidence, and were correct statements of the law, are without merit.

5. APPEAL—HARMLESS ERROR.

A charge which manifestly, from the evidence, does not mislead the jury, is not ground for a new trial, though it may have been inapplicable to the facts of the case. The error may be treated as harmless.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4219.]

6. SAME.

The charge was not subject to the criticism that "the court erred in failing to charge the jury the law applicable to a joint action against a master and servant, which would authorize a verdict against both jointly," it appearing from an inspection of the charge that this question was fully covered by instructions which were even more favorable to the defendant than he was entitled to.

7. DAMAGES—PERSONAL INJURIES.

The verdict in this case was not excessive. (Syllabus by the Court.)

Error from Superior Court, De Kalb County; L. S. Roan, Judge.

Action by J. F. Reynolds, by his next friend, against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Judgment on

main bill of exceptions affirmed. Cross-bill of exceptions dismissed.

Reynolds, by his next friend, brought suit against the railway company and Tedder, a locomotive engineer, for an injury alleged to have been occasioned by the negligence of the defendants. The material facts testified to by the plaintiff were as follows: Plaintiff was crossing over defendant's track at a public crossing, when he struck his foot against the rail and fell on the track, and was seized with a fit or fainting spell. The train was not in sight when he started to cross, but he heard it down the track after he had fallen on the track. He was unable to get off the track, because of said fainting spell, but he twisted around and got all off but one foot, which was crushed by the wheels of the train and had to be amputated between the knee and ankle. The train was running at an unusual rate of speed, and failed to blow for the crossing. Plaintiff was 10 years old at the time of the injury. Defendants alleged that plaintiff was injured while attempting to swing onto the train, and not as plaintiff claimed. There was some evidence to show that the train was running about 10 miles an hour, though other evidence tended to show that the rate of speed was not so high. The boy was not seen by any of the train crew, according to their testimony, and the engineer and fireman testified that they did not know that the boy was injured, until afterwards. The jury found for the plaintiff \$7,500.

H. L. Parry and Jno. J. Strickland, for plaintiff in error. Burton Smith and J. A. Branch, for defendants in error.

BECK, J. (after stating the facts). 1. The court below did not err in refusing to grant a nonsuit, nor in refusing to direct a verdict for the defendants. There was evidence from which the jury were authorized to find that the plaintiff was injured on a public crossing by the running of defendant company's train, that the engineer negligently failed to observe the blow post law, that he did not check the speed of his train as he approached the crossing where the injury was inflicted upon the plaintiff; and if the plaintiff's testimony is accepted as true, it was through no fault of his own that he was on the crossing when the train passed. Where the plaintiff was entitled to a verdict was a question that the court should have submitted to the jury, and this was done.

2. In subdivisions 4 and 5 of the sixth ground of the motion, exceptions are taken to the court's refusal to give in charge to the jury written requests to charge. There was, however, no error in refusing the written request now under consideration. In both of them there were embraced propositions which in substance instructed the jury that before they could be authorized to find for the plaintiff, they should believe from

the evidence, not only that the engineer, Tedder, was guilty of negligence in certain particulars there set forth, but that it should be made to appear from the evidence that there was "willful and wanton conduct" on the part of said engineer. The exact language of counsel in a part of one of these requests is as follows: "I charge you that in order to find a verdict for the plaintiff against either of the defendants in this case, you must be satisfied by a preponderance of the evidence, not only that the plaintiff was injured as he alleges, but that the injury was the result of the willful or wanton act of the defendant Tedder." And in the other request refused is embraced the following instruction: "The burden is on the plaintiff to show, in the first place, that he was injured as alleged by him; in the second place, that he was injured by the two defendants, as alleged by him; in the third place, that the injury was inflicted by the willful misconduct of the two defendants, or by such reckless and wanton conduct on the part of both as amounted to willful conduct." Such instructions as these would have placed upon the plaintiff a burden heavier than that which the law intends that he shall be made to carry. It having been alleged in the petition that the defendant, Tedder, was an employé or servant of the defendant company, and they having been sued jointly for the commission of the acts of negligence which resulted in the plaintiff's injury, it was essential to the maintenance of plaintiff's action that the liability of the servant or agent of the company should be made to appear. That liability, however, is made to appear where the evidence shows that such agent has failed to use reasonable care and diligence in the performance of his duty and such misfeasance results in injury to a third person. When once an agent "enters upon the performance of his contract with his principal, and, in doing so, omits or fails to take reasonable care in the commission of some act which he should do in its performance, whereby some third person is injured, he is responsible therefor to the same extent as if he had committed the wrong in his own behalf. See 2 Clark & Skyles on Agency, 1297 et seq. Misfeasance may involve also to some extent the idea of not doing; as where an agent engaged in the performance of his undertaking does not do something which it is his duty to do under the circumstances, or does not take that precaution or does not exercise that care, which a due regard to the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." Southern Ry. Co. v. Grizzle, 124 Ga. 737, 53 S. E. 244. In the case

just cited there is no hint that "willful or wanton conduct" upon the part of the agent is an essential element of his responsibility and liability to those who are injured through his failure to exercise the proper degree of care and diligence. When he enters upon the performance of some undertaking which he has contracted with his principal to perform, his negligent failure to observe reasonable care and diligence in the performance of the duty undertaken would create a liability on his part to a third person who receives injury, and whose injury is the proximate result of such omission.

3. The court was requested to give the following charge: "If you believe from the evidence that the plaintiff, Reynolds, was not injured in the manner as claimed, but that he was attempting to swing the train as it passed, and, in so doing, got injured, then I charge you that he cannot recover in this case." The court's failure to give it is complained of. But this exception can scarcely be regarded as meritorious, in view of the fact that the court did instruct the jury as follows: "The burden is upon the plaintiff to prove that he received the injury that he is alleged to have received by the running of the defendant's train in the manner alleged. If he received it otherwise—in other words, if he was injured ever so badly and received it by trying to swing the train by the side of it—he would not be entitled to recover a cent, because that is different from the way he has alleged it in his declaration."

4. In the seventh, eighth, fifteenth, and sixteenth grounds of the motion, the following portions of the court's charge, numbered, respectively, (1), (2), (3), (4), are excepted to. "(1) At the outset of this case the burden is upon the plaintiff to prove that he received the injuries that he is alleged to have received by the running of the defendant's train in the manner alleged. In other words, gentlemen, the burden is upon the plaintiff to show that he received these alleged injuries upon the public-road crossing set out in his declaration, at the crossing or upon the crossing. (2) Your first inquiry will be, did the plaintiff's injuries, if any injuries be shown, occur by the running of the cars or locomotives of the defendant company, as charged in the declaration? (3) Whatever the statute positively requires the defendants to do in the way of blowing the whistle, or checking the speed of the train, he was bound as a matter of law to do; but outside of these legal requirements, what would be required of them by the definition of ordinary care, as applicable to what you believe the facts to be in the present case, is a question for the jury. (4) Gentlemen, in that connection I will charge you that due care in a child of tender years is such care as its capacity, mentally, and physically, fits it for exercising in the actual circumstances of the oc-

casional and situation under investigation." These several instructions state correct principles of law, and were not inappropriate under the evidence, and no error is made to appear in any of the four grounds last referred to.

5. The ninth, tenth, eleventh, twelfth, and fourteenth grounds of the motion complain that the court gave in his charge certain sections of the Code, covering in part the subject of crossings. It would have been better had some portions of these sections been omitted, because there were no facts to which they were applicable; but the inapplicability being clear, the jury could scarcely have been misled by them, and their having been given in charge does not constitute reversible error. The criticism upon the charge of the court embraced in the seventeenth ground of the motion is sufficiently dealt with in the sixth headnote.

6. The verdict is not excessive, and there is nothing in the record to show that in making a verdict in this case the jury took into consideration any facts or evidence other than that which had been properly submitted for their consideration in the case on trial.

Judgment on main bill of exceptions affirmed. Cross-bill of exceptions dismissed. All the Justices concur.

LOVELACE v. BROWNE et al.

(Supreme Court of Georgia. Nov. 10, 1906.)

1. PLEADING — AMENDMENT — EXTENSION OF TIME.

The court below, on March 18, 1905, by an order duly passed, having sustained a special demurrer to defendants' plea, and having in the same order allowed defendants additional time within which to file an amendment to the plea, which time for amendment was by verbal orders still further extended, it was not error for the court at a subsequent term, on September 23, 1905, to allow an order to be taken nunc pro tunc, giving the additional time as provided in the verbal orders theretofore granted, over the objection of the plaintiff that the "defendants had had sufficient time for amendment, and that the time should not be extended."

2. SAME — JUDGMENT ON DEMURRER — CONCLUSIVENESS.

The court having rendered a judgment sustaining a special demurrer to the plea, and having embraced in the judgment the order allowing time for filing the amendment referred to in the preceding headnote, the subsequent order extending the time had the effect of preventing said judgment from becoming conclusive as against the defendants, until after the expiration of the period of time within which they were to amend, under the terms of the order.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 39, Pleading, §§ 558, 559; vol. 30, Judgment, § 195.]

3. DISMISSAL — MISJOINDER OF DEFENDANTS — INVOLUNTARY DISMISSAL.

The suit having been brought against Browne and Browne & Simpson and the insurance company, as principals, upon amendment to the petition showing that Browne and Browne & Simpson, who signed the contract sued on, were agents of said company, and that the company had ratified the execution of the

contract, it was proper for the court to dismiss the action as to Browne and Browne & Simpson, upon motion made by them at the term when the amendment was allowed, or at a subsequent term. *Lippincott v. Behre*, 50 S. E. 467, 122 Ga. 543; *Huffcut on Agency* (2d Ed.) 61.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Dismissal and Nonsuit, § 95.]

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by O. B. Lovelace, administratrix, against W. B. Browne and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. H. Terrell and Edgar Latham, for plaintiff in error. Hirsch & Hass, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

WALLACE v. STATE.

(Supreme Court of Georgia. Nov. 14, 1908.)

1. CRIMINAL LAW—INSTRUCTIONS.

That the court omitted or declined to charge the jury, before they retired to make up their verdict, concerning a pertinent legal proposition is not cause for new trial, when, after the jury had returned and asked for additional instructions, the court, in a recharge to them, fully covered this feature of the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2218.]

2. SAME—ARGUMENT OF COUNSEL—MISTRIAL.

Allusions to a matter extrinsic to the record by counsel in the argument of a case will not constrain the court to declare a mistrial in every instance. It is only when the foreign matter injected into the case by the argument is of such a prejudicial nature that a rebuke of the statement by counsel, and an instruction to the jury, in the discretion of the court, will be incommensurate to remove any improper impressions from the minds of the jurors that a mistrial should be declared.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2199.]

3. SAME—SENTENCE—CONTINGENT PUNISHMENT.

The sentence imposed upon a prisoner convicted of a misdemeanor should express the full punishment which the trial judge may, in a wise exercise of the discretion vested in him by Pen. Code 1895, § 1039, deem merited by the prisoner because of the offense committed by him, without regard to what his future conduct may be, and independently of any contingency which may arise after sentence has been pronounced, and the court has lost the power to impose punishment on him. A penalty to be inflicted upon him in the event he shall subsequently apply for relief from his sentence to jail imprisonment cannot legally be imposed, nor, if he be sentenced to five months in jail, can the court legally impose as an additional alternative punishment, in the event he fails to pay a fine, another definite term of six months' imprisonment in jail.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2521, 2524.]

(Syllabus by the Court.)

Error from Superior Court, Chatham County; Geo. T. Cann, Judge.

S. J. Wallace was convicted of keeping a

gaming house, and brings error. Affirmed with directions.

Robt. L. Colding, for plaintiff in error. W. W. Osborne, Sol. Gen., for defendant in error.

EVANS, J. The defendant was convicted of the offense of keeping and maintaining a gaming house. He made a motion for a new trial, which was overruled by the court, and he sued out a writ of error complaining of the overruling of his motion.

1. The substance of several grounds of the amendment to his motion is that the court in its charge to the jury omitted, and on request declined, to inform them that, if the accused was merely engaged in gaming, he would not be guilty of the offense charged. There is no merit in the complaint thus presented, for it affirmatively appears from the record that, in a recharge to the jury, the court gave them the following explicit instruction: If the accused "merely gambled in a house, he would not be guilty unless he did some act in furtherance of the maintenance or keeping of a gaming house."

2. In the course of his argument before the jury the solicitor general made the statement that "young men go up to that place and possibly lose their money," whereupon the accused asked that a mistrial be declared because of this remark by the solicitor. The court declined to order a mistrial, but instructed the jury that they were not to consider the statement made by the solicitor, and should eliminate the same from their consideration; that there was no such evidence, and therefore the state's counsel could not so comment or make any such statement. The improper remark of the solicitor was not, we think, of such an inflammatory and prejudicial nature as to constrain the granting of a mistrial upon the idea that the impression it was calculated to produce upon the jury could not be effectually overcome by instructions from the court to disregard it. *Patterson v. State*, 52 S. E. 534, 124 Ga. 408.

3. The sentence imposed upon the accused was as follows: "This not being the defendant's first offense, it is ordered and considered that the said defendant, S. J. Wallace, alias 'Peg Leg' Wallace, do pay within five days a fine of seven hundred and fifty dollars (\$750) and all costs, and also be imprisoned in the common jail of Chatham county for the space and term of five months. In the event that the defendant should apply for relief from the jail sentence, then it is ordered that the defendant be put to work in the chain gang of Chatham county, on the public works, or such other works as the county authorities may employ the chain gang for the space and term of three months. In the event the fine and costs above stated are not paid, it is ordered that the defendant be confined in the common jail of Chatham county for the term of six months, the jail

sentence for the failure, if any, to pay the fine and costs to be served first, and the other jail sentence to begin on the date of payment of fine and costs or upon the termination of the jail sentence for such failure, as the case may be." Complaint is made in the bill of exceptions that the court was without authority to impose such a sentence. The only sentence which the court could lawfully impose upon one convicted of the offense of keeping and maintaining a gaming house was a sentence in conformity with the provisions of the Penal Code 1895, § 1039. That section provides: "Every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain gang on the public works, or on such other works as the county authorities may employ the chain gang, not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the judge." The sentence passed upon the defendant was that he pay, within five days, a fine of \$750, and the costs; that he be imprisoned in the common jail for five months, and, if he applied for relief from this jail sentence, he should, as a fitting penalty therefor, be confined in the chain gang for three months. While it is clear that a judge may, in the exercise of a sound discretion, impose not only a fine and a jail sentence, but also punishment by confinement in the chain gang, it is equally clear that the section of the Code just cited does not contemplate that any one of these punishments should be meted out to the criminal as a penalty for applying to the proper authorities for relief from a portion of his sentence for the offense for which he was convicted, or should be used as a deterrent upon him to prevent him from seeking such relief after the power of the court to inflict punishment upon him has been exhausted. The sentence should express the full punishment which the court may, in its wisdom, deem fit for the criminal offense committed, without regard to what the future conduct of the prisoner may be, and independently of any contingency which may arise subsequently to the time sentence is pronounced. While it was within the power of the judge to impose an alternative sentence—i. e., to provide that, if the fine and costs should not be paid within a given period, the prisoner should serve a term in jail (*Gordon v. Johnson*, 126 Ga. 584, 55 S. E. 489)—yet this term could in no event extend beyond six months; and as the prisoner was unconditionally sentenced to imprisonment in jail for five months, he could not legally be sentenced to serve an additional definite term of six months, in the event he failed within the five days to pay the fine and costs. We think the sentence was illegal in the respects pointed out, and, as the accused is to be denied a new trial, direction is given that he be sentenced in terms of the law.

Judgment affirmed with direction. All the Justices concur in the opinion except ATKINSON, J., who concurs in the result.

ATKINSON, J. (specially concurring). I concur in the result, but not in the apparent qualification expressed in the last part of the opinion. One of the penalties for a misdemeanor is confinement in the jail for a term not to exceed six months. The court may, in its discretion, impose this penalty, or confinement for any less time, upon a misdemeanor convict. It is further provided that the court, after imposing the penalty of confinement in jail, may, in its discretion, provide that the convict may be relieved from confinement in jail by paying a specified sum of money, not exceeding \$1,000, as a fine. But a failure to pay this fine within a specified time has never been made penal. Such failure constitutes no offense. An order of court which directs confinement in jail for however short a time, or imposes any other penalty purely for a failure to pay the fine within the time specified by the judge, is without authority of law. It, in effect, punishes him for a supposed offense which does not exist in law, and for which there is no pretense that he had been convicted. Such was the effect of the sentence under review.

BELL et al. v. GRESS MFG. CO.

(Supreme Court of Georgia. Nov. 18, 1906.)

1. ERROR, WRIT OF—DISMISSAL—RETURN DAY.

A bill of exceptions having been sued out within 20 days of the date of the decision complained of, and having been transmitted to this court within the time allowed by statute, a motion to dismiss upon the ground that "the writ of error in said cause makes the same returnable to the March term, 1906, of the Supreme Court, whereas it should have been made returnable to the October term, 1905, of said court, the minutes of said court showing that said October term was still in session at the time the writ of error was sued out," is without merit, and is overruled. *Gordon v. Gordon*, 34 S. E. 324, 109 Ga. 262.

2. INJUNCTION—BREACH OF CONTRACT—UNILATERAL CONDITIONS.

The written instrument attached to plaintiff's petition and relied upon to sustain its contention that it was entitled to an injunction against the defendants, showed, upon its face, instead, that for a sum of money therein specified, which was represented by a promissory note, it had bargained and sold the timber upon certain described lands to one of the defendants; and the undisputed evidence showing that the vendee paid all the purchase price, his right to sell and convey all of said timber became absolute, notwithstanding there was embraced in said written instrument an alleged contract imposing certain obligations upon the vendee, which by its terms appeared to be unilateral and void for want of mutuality. Consequently, it was error for the court to grant an injunction against the defendant vendee, restraining and enjoining him and his codefendants, who had purchased from him the said property, from cutting and disposing of the timber. *Cooley v. Moss*, 51 S. E. 623, 123 Ga. 707.

(Syllabus by the Court.)

Error from Superior Court, Worth County; W. N. Spence, Judge.

Action by the Gress Manufacturing Company against H. F. Bell and others. Judgment for plaintiff. Defendants bring error. Reversed.

Payton & Hay, for plaintiffs in error.
F. S. Harrell, for defendant in error.

BECK, J. Judgment reversed. All the Justices concur.

HUNTER et al. v. STATE.

(Supreme Court of Georgia. Dec. 11, 1906.)

RIOT—WHAT CONSTITUTES—INSTRUCTIONS.

To constitute the offense of riot there must be a common intent to commit the act constituting the alleged riotous conduct. Accordingly, it was error requiring the grant of a new trial for the court, upon the trial of two persons charged with this offense, to instruct the jury that, if the defendants "united, with or without a common intent, in doing an unlawful act of violence, the acts and words of each one while the thing [was] in progress [became] the act and words of the other one engaged therein." *Tripp v. State*, 34 S. E. 1021, 109 Ga. 489; *Coney v. State*, 39 S. E. 425, 113 Ga. 1060; *Dixon v. State*, 31 S. E. 750, 105 Ga. 787, and citations.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Riot, § 3.]

(Syllabus by the Court.)

Error from City Court of Griffin; E. W. Hammond, Judge.

Joe Hunter and others were convicted of riot, and bring error. Reversed.

Robt. T. Daniel and E. C. Armistead, for plaintiffs in error. T. E. Patterson, Sol. Gen., for the State.

FISH, O. J. Judgment reversed. All the Justices concur.

WOODS v. STATE.

(Supreme Court of Georgia. Dec. 11, 1906.)

1. BURGLARY—EVIDENCE.

The defendant's guilt of the crime of burglary was clearly established by the testimony of his accomplice, which was corroborated by aliunde evidence connecting the accused with the criminal act.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Burglary, § 103.]

2. CRIMINAL LAW—NEW TRIAL.

The judge did not abuse his discretion in denying a new trial because of the discovery, since the trial, of evidence solely of an impeaching character.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 2331, 2332.]

(Syllabus by the Court.)

Error from Superior Court, Chattooga County; Moses Wright, Judge.

George Woods was convicted of burglary, and brings error. Affirmed.

C. D. Rivers, for plaintiff in error. W. H. Ennis, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

WELDON v. STATE.

(Supreme Court of Georgia. Dec. 11, 1906.)

CRIMINAL LAW—CERTIORARI—EVIDENCE.

The evidence, though wholly circumstantial, was ample to support the conviction in the the county court; and it was not erroneous for the judge of the superior court to overrule the petition for certiorari, complaining that the evidence was insufficient to establish the defendant's guilt of the larceny charged in the accusation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3074, 3075.]

(Syllabus by the Court.)

Error from Superior Court, Crisp County; Z. A. Littlejohn, Judge.

Charlie Weldon was convicted of larceny, and brings error. Affirmed.

Walter F. Hall, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

EVANS, J. Judgment affirmed. All the Justices concur.

FREDERICK v. STATE.

(Supreme Court of Georgia. Dec. 11, 1906.)

LARCENY — INDICTMENT — DESCRIPTION OF PROPERTY.

An indictment for the offense of larceny from the house, wherein it is alleged that the thing stolen consisted of "nine dollars in money of the value of nine dollars," is not subject to a special demurrer upon the ground that the property alleged to have been stolen was not sufficiently described. *Cannon v. State*, 54 N. E. 692, 125 Ga. 785.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Larceny, § 79.]

(Syllabus by the Court.)

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

William Frederick was convicted of larceny, and brings error. Affirmed.

G. L. Callaway, for plaintiff in error. J. S. Reynolds, Sol. Gen., and Jno. M. Graham, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

RICHARD v. STATE.

(Supreme Court of Georgia. Dec. 11, 1906.)

FORGERY—EVIDENCE—FORGED INSTRUMENTS.

On the trial of one indicted for forging certain bank checks, it appearing that the checks were in court and exhibited to the witnesses, they should have been introduced in evidence. Where this was not done, although the parol evidence showed that the defendant had obtained cash on certain checks which were forgeries, and the amount of one of the forged checks referred to by a witness accorded with

the amount of one of the checks set out in the indictment, but there was no other evidence as to the contents or purport of the forged instruments, or that they were identical with those set out in the indictment, a verdict of guilty was not supported by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Jasper County; H. G. Lewis, Judge.

James, alias John Richard, was convicted of forgery, and brings error. Reversed.

Greene F. Johnson, for plaintiff in error. Jos. E. Pottle, Sol. Gen., for the State.

LUMPKIN, J. Judgment reversed. All the Justices concur.

FOOTE v. KELLEY.

(Supreme Court of Georgia. Nov. 15, 1906.)

1. TRIAL — INSTRUCTIONS — EXCEPTION TO CHARGE.

The general exception to the entire charge of the court was not well taken, as the whole charge was not erroneous. 7 Mich. Enc. Dig. Ga. Rep. 648, and cit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 689.]

2. SAME—INSTRUCTIONS.

The issues were few and simple, and, in the absence of a proper request for a more specific statement of plaintiff's contentions, the charge was sufficiently comprehensive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 628.]

3. SAME.

In reading to the jury, as part of the charge, Civil Code 1895, §§ 2044, 2045, defining the kinds of loans, it was not error, in the absence of a proper request on the subject, to fail to explain to the jury the meanings of the terms "specie," "in kind," and "for consumption," as used in such sections.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 489.]

4. SAME.

Nor was it error to give in charge Civil Code 1895, § 2046, on the ground that the provisions of that section were not applicable to any contention of the plaintiff or the defendant. They were pertinent to one of the defendant's contentions.

5. MASTER AND SERVANT—TORTS OF SERVANT — INSTRUCTIONS.

The court instructed the jury that plaintiff insisted that the person who did a given act, which plaintiff claimed resulted in damage to him, was at the time in the employ of defendant, and that defendant insisted that this was not true, but that what such person did was gratuitous on his part, and he, defendant, was not responsible for it, and that the jury were to say what the facts were. Held: (a) Such instruction was not erroneous on the ground "that it restricted the jury to consider solely the question whether or not [such person] was in the employ of the defendant, and, if he was not, the defendant would not be liable, and if he was, then the defendant might or might not be liable." (b) The instruction being a correct statement of the respective contentions of the parties on a given point, it was not a good assignment of error thereon that the court failed to charge what would be the legal effect of a finding by the jury that plaintiff's contention was true.

6. SAME—EVIDENCE.

There was ample evidence to support the verdict, and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from Superior Court, Gilmer County; Geo. F. Gober, Judge.

Action by E. F. Foote against O. B. Kelley. Judgment for defendant, and plaintiff brings error. Affirmed.

N. A. Morris, for plaintiff in error. J. Z. Foster, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

SHUBERT v. STATE.

(Supreme Court of Georgia. Dec. 11, 1906.)

ASSAULT—EVIDENCE.

A conviction of the offense of assault is unauthorized when the evidence discloses that the only act of the accused relied on to sustain the conviction is that the accused, who had committed no offense, and against whom no warrant had been issued, raised a stick, and drew it back in a striking position with a threat to use the same when officers with a warrant against a relative approached him, and endeavored to compel him to go with them until they had made the arrest of such relative. Even if, under ordinary circumstances, such conduct would have amounted to an assault, the accused was justified in the act that he committed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 4, Assault and Battery, §§ 96, 97.]

(Syllabus by the Court.)

Error from Superior Court, Habersham County; J. J. Kinsey, Judge.

Will Shubert was convicted of assault, and brings error. Reversed.

I. L. Oakes, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

ATKINSON, J. Judgment reversed. All the Justices concur.

GASKINS v. STATE.

(Supreme Court of Georgia. Dec. 12, 1906.)

1. INTOXICATING LIQUORS — ILLEGAL SALE — EVIDENCE.

When a defendant is on trial charged with illegally selling intoxicating liquor, and the evidence shows that he received money from another person, accompanied with a request to procure for the latter some intoxicating drink, and shortly thereafter returned and delivered the article as requested, the burden is on the accused to explain, how, where, and from whom he obtained the liquor, and until some other person filling the character of seller in the transaction is shown to the satisfaction of the jury, they would be authorized to treat the defense that the accused acted as the agent of the buyer as a mere subterfuge to cover up an illegal sale by himself, and to find him guilty of selling the liquor. White v. State, 19 S. E. 49, 98 Ga. 47; Mack v. State, 42 S. E. 776, 116 Ga. 540.

2. SAME.

The evidence as to whether or not the liquor sold was in fact intoxicating was sufficient to authorize the jury to find that it was, and, the judge being satisfied with the verdict, it should be allowed to stand.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Intoxicating Liquors, § 353.]

(Syllabus by the Court.)

Error from City Court of Thomasville; C. P. Hansill, Judge.

Taylor Gaskins was convicted of a violation of the liquor law, and brings error. Affirmed.

Foudren Mitchell and W. B. Hambleton, Jr., for plaintiff in error. Roscoe Luke, Sol., for the State.

BECK, J. Judgment affirmed. All the Justices concur.

HARBIN v. STATE.

(Supreme Court of Georgia. Dec. 12, 1906.)

1. HOMICIDE—INSTRUCTIONS—MANSLAUGHTER.

When an accused is convicted of involuntary manslaughter in the commission of an unlawful act, the judgment will not be reversed for the reason that the judge failed to charge upon the law of voluntary manslaughter, even though the evidence might have warranted an instruction upon this subject.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 721.]

2. CRIMINAL LAW—ASSIGNMENTS OF ERROR.

If there was any error in any of the rulings which were the subjects of the assignments of error, the error is not so prejudicial in its nature as to require a reversal of the judgment.

3. HOMICIDE—EVIDENCE.

While there was evidence which might have authorized a verdict for an offense of a higher grade than that of which the accused was convicted, there is evidence authorizing the verdict as rendered, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Pike County; E. J. Reagan, Judge.

W. J. Harbin was convicted of manslaughter, and brings error. Affirmed.

E. F. Dupree and J. S. James, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and J. F. Redding, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur.

RAY v. STATE.

(Supreme Court of Georgia. Dec. 12, 1906.)

HOMICIDE — INSTRUCTIONS — INVOLUNTARY MANSLAUGHTER.

Under one phase of the testimony in this case, the jury would have been authorized to find the accused guilty of the offense of involuntary manslaughter in the commission of a lawful act without due caution and circumspection, and it was therefore error for the judge to fail to instruct the jury on the law relating to that grade of manslaughter.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 649-656.]

(Syllabus by the Court.)

Error from Superior Court, Telfair County; E. J. Reagan, Judge.

Gen Ray was convicted of murder, and brings error. Reversed.

D. M. Roberts, Tom Eason, and Eschol Graham, for plaintiff in error. E. D. Graham, Sol. Gen., B. M. Frizzell, and Jno. R. Cooper, for the State.

ATKINSON, J. Judgment reversed. All the Justices concur.

ALABAMA GREAT SOUTHERN R. CO. v. DAVIS.

(Supreme Court of Georgia. Dec. 12, 1906.)

APPEAL—REVIEW.

No error of law was complained of, the evidence authorized the verdict, and no sufficient reason has been shown for reversing the judgment.

(Syllabus by the Court.)

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action by W. W. Davis, by his next friend, against the Alabama Great Southern Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The plaintiff, by his next friend, brought suit against the railway company, alleging that he was an infant, 10 years of age, and was a passenger upon the train of defendant, and that when he arrived at his destination an employé of the defendant, who was standing at the steps of the car from which he was alighting, caught him roughly and caused him to strike his knee against some portion of the car or steps, and as a result his knee was bruised, strained, and dislocated, from which he has suffered great pain, and continues to suffer. The defendant, in its answer, denied all material allegations of the petition. The trial resulted in a verdict for the plaintiff for \$1,200. The defendant filed a motion for a new trial upon the general grounds, and also upon the ground that the verdict was excessive. The motion was overruled, and the defendant excepted.

J. B. Jacoway, for plaintiff in error. B. T. Brock and R. J. & J. McCann. for defendant in error.

COBB, P. J. (after stating the foregoing facts). The evidence of the plaintiff amply authorized a finding that he was roughly handled by the employé of the railroad company who assisted him from the train, and that as a result of this treatment his knee was injured by being struck against some part of the car. The evidence for the defendant was in direct conflict with this evidence; the employé, who it is claimed inflicted the injury, denying that he assisted the plaintiff or touched him in any way when he was alighting from the car. All this evidence presented questions for the jury, and their

finding in the matter, having met with the approval of the trial judge, will not be disturbed by this court. There was some evidence that the knee was dislocated, but there was a conflict on this point. It was shown, by the testimony of the plaintiff and his mother and father, that he had never entirely recovered from the injury to his knee, and that he still suffered pain. The trial took place a year or more after the injury is alleged to have occurred. It cannot be said that the evidence authorized a finding that the injury was permanent, but there was some evidence that pain or inconvenience resulting from the injury might continue for some time. While the verdict is full, we are not authorized to say, as a matter of law, that it was so excessive as to justify the conclusion that the jury were animated by prejudice or bias.

Judgment affirmed. All the Justices concur.

FULLER v. STATE

(Supreme Court of Georgia. Dec. 11, 1906.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL.

The charge of the court on the subject of trespass on the property of another as a defense to an assault upon such other with a deadly weapon was fully as favorable to the defendant as the evidence authorized.

2. SAME—INSTRUCTION—REASONABLE FEARS.

There was no error in not charging to the effect that if the defendant shot the person injured, and in so doing acted under the fears of a reasonable man that such person was attempting to seduce or debauch his daughter, if death had ensued, it would not have been murder. The doctrine of reasonable fears is not applicable to such a case, nor did the evidence authorize such a charge.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, § 128.]

3. SAME.

Evidence that, just after the shooting took place, a person present said to the accused that he had made a mistake and ought not to have shot the boy who was injured, and that the accused replied that he had done wrong, was admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 816, 817.]

4. SAME—EVIDENCE.

The verdict was amply sustained by the evidence.

(Syllabus by the Court.)

Error from Superior Court, Towns County; J. J. Kimsey, Judge.

Lee Fuller was convicted of assault and brings error. Affirmed.

I. L. Oakes, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

MEMORANDUM DECISIONS.

LEWIS v. DOUGLAS COUNTY CO-OPERATIVE STORE. (Supreme Court of Georgia. Aug. 17, 1906.) Error from Superior Court, Douglas County; A. L. Bartlett, Judge. Action between Elen Lewis and the Douglas County Co-operative Store. From an order granting a new trial, Lewis brings error. Reversed. J. S. Jones, for plaintiff in error. J. H. McLarty and Roberts & Hutchison, for defendant in error.

ATKINSON, J. The verdict in this case was required by the evidence, and it was erroneous for the judge to grant a new trial. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

ARRINGTON v. ARRINGTON et al. (Supreme Court of North Carolina. Sept. 25, 1906.) Appeal from Superior Court, Vance County; Ward, Judge. Action by Pattie D. B. Arrington against J. P. Arrington and another. From an order refusing an application for reinstatement of the cause on the civil issue docket, plaintiff appeals. Affirmed.

PER CURIAM. We gather from the manuscript argument filed in this court by the plaintiff in person that her object in desiring a reinstatement of the cause is to reopen the same and have another reference. The case came before this court at February term, 1894 (114 N. C. 151, 19 S. E. 351), and upon exceptions to the report of the referee. In an elaborate opinion by Shepherd, C. J., all the matters in controversy were decided and "the case remanded, in order that judgments may be entered in accordance with the opinion of this court." The record of the case since then is not before us, but we assume as a matter of course that such final judgments have long since been entered. There was nothing presented to Judge Ward, or in the papers sent here on this appeal from his order, which discloses a necessity for a further reference, or for reinstating the case on the docket of the superior court. The order of his honor in the superior court is affirmed.

DUFFY v. FIDELITY MUT. LIFE INS. CO. (Supreme Court of North Carolina. Nov. 8, 1906.) Action by Charles Duffy, Jr., against the Fidelity Mutual Life Insurance Company. Judgment for plaintiff, defendant appeals. Affirmed. J. W. Hinsdale & Son and W. W. Clark, for appellant. W. D. McIver and O. H. Guion, for appellee.

PER CURIAM. This appeal is governed by the decision made in the case of Duffy v. Insurance Co., 141 N. C. —, 55 S. E. 79. For the reasons therein stated, the judgment must be affirmed.

STATE v. ALSOBROOKS. (Supreme Court of North Carolina. Oct. 30, 1906.) Appeal from Superior Court, Union County; Moore, Judge. Gus Alsobrooks was convicted of failing to work the road, and he appeals. Affirmed. A. M. Stack, for appellant. Walter Clark, Jr., for the State.

PER CURIAM. We have given the case due consideration, and are of opinion that there are no errors alleged which give the defendant any just ground of complaint. The judgment against him is affirmed. No error.

INDEX.

ABANDONMENT.

Of assignments of error, see "Appeal and Error," §§ 16, 27.
Of child, see "Parent and Child."
Of husband bar to dower of wife, see "Dower," § 2.
Of insurance, see "Insurance," § 5.
Of right of way of railroad, see "Railroads," § 4.

ABATEMENT.

Of nuisance, see "Nuisance," §§ 1, 2.

ABATEMENT AND REVIVAL.

Appealability of judgment abating action, see "Appeal and Error," § 2.
Judgment as bar to another action, see "Judgment," § 8.
Plea in abatement on ground of defects in indictment or information, see "Indictment and Information," § 4.
Revival of judgment, see "Judgment," § 12.
Right of action by or against personal representative, see "Executors and Administrators," § 4.
Substitution of parties, see "Parties," § 1.
§ 1. Death of party and revival of action.
*Where a minor was injured at the same time with her father, if the right of action arose in the father, and he died before suit was brought, the cause of action did not survive to the mother.—*King v. Southern Ry. Co. (Ga.)* 965.

ABDUCTION.

See "Seduction."

§ 1. Offenses and responsibility therefor.

*The offense of abduction denounced by Revisal 1905, § 3358, *held* not established where there is no force or inducement, and the departure of the child from the custody of the father is voluntary.—*State v. Burnett (N. C.)* 72.

*To constitute the abduction of a child in violation of Revisal 1905, § 3358, *held* not necessary to prove that the taking away of the child was against the father's will.—*State v. Burnett (N. C.)* 72.

§ 2. Prosecution and punishment.

*One charged with the abduction of a child in violation of Revisal 1905, § 3358, has the burden of establishing the defense that the carrying away of the child was with the father's consent.—*State v. Burnett (N. C.)* 72.

An instruction on a trial for abduction *held* sufficiently favorable to accused.—*State v. Burnett (N. C.)* 72.

ABETTERS.

To homicide, see "Homicide," § 6.

*Point annotated. See syllabus.

ABSTRACTS.

Of record on appeal or writ of error, see "Appeal and Error," § 11.

ABUSE OF PROCESS.

See "Process," § 4.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see "Municipal Corporations," § 4.
Compensation for taking of or injury to lands or easements for public use, see "Eminent Domain," §§ 2, 4.
Rights in highways in general, see "Highways," § 1.
Rights in streets in cities, see "Municipal Corporations," § 6.

ACCEPTANCE.

Of assessments by mutual benefit insurance association, see "Insurance," § 14.
Of goods sold in general, see "Sales," § 4.

ACCESSION.

Intermixture of goods of same kind, see "Confusion of Goods."

ACCESSORIES.

To homicide, see "Homicide," § 6.

ACCIDENT.

Cause of death, see "Death," § 1.
Cause of personal injuries, see "Negligence," § 1.

ACCOMMODATION PAPER.

See "Bills and Notes."

ACCORD AND SATISFACTION.

See "Compromise and Settlement"; "Payment"; "Release."

*Where there is an agreement to settle a controverted demand for a consideration, all or a portion of which is executory, the defendant may plead the same as an accord and satisfaction by making proper averments of performance.—*Hayes v. Atlanta & C. Air Line R. R. (N. C.)* 437.

ACCOUNT.

Accounting by executor or administrator, see "Executors and Administrators," § 5.
Accounting by receiver, see "Receivers," § 3.
Accounting in proceedings to set aside foreclosure sale, see "Mortgages," § 3.

ACCRUAL.

Of right of action, see "Limitation of Actions," § 1.

ACKNOWLEDGMENT.

As ratification of insurance policy, see "Insurance," § 2.

Of deeds for registration, see "Deeds," § 2.
Operation and effect of admissions as evidence, see "Criminal Law," § 6; "Evidence," § 6.

Operation and effect of admissions as ground of estoppel, see "Estoppel," § 2.

§ 1. Nature and necessity.

*A deed registered upon an unauthorized probate cannot be introduced in evidence to show link in chain of title.—*Allen v. Burch* (N. C.) 354.

§ 2. Taking and certificate.

*The acknowledgment to a bill of sale executed in another state, held sufficient as a substantial compliance with the Virginia statute.—*Sullivan v. Gum* (Va.) 535.

ACTION.

Abatement, see "Abatement and Revival."

Accrual, see "Limitation of Actions," § 1.

Bar by former adjudication, see "Judgment," § 8.

Commencement within period of limitation, see "Limitation of Actions," § 1.

Jurisdiction of courts, see "Courts."

Limitation by statute, see "Limitation of Actions."

Malicious actions, see "Malicious Prosecution."

Pendency of action, see "Lis Pendens."

Restraining action at law, see "Injunction," § 2.

Survival, see "Abatement and Revival," § 1.

Actions between parties in particular relations.

See "Master and Servant," § 10.

Co-tenants, see "Partition," § 1.

Actions by or against particular classes of persons.

See "Brokers," § 2; "Carriers," §§ 1-9; "Executors and Administrators," § 4; "Guardian and Ward," § 3; "Infants," § 4; "Master and Servant," § 13; "Parent and Child"; "Sheriffs and Constables," § 1.

Assignees, see "Assignments," § 2.

Bank, see "Banks and Banking," § 2.

Bank officers, see "Banks and Banking," § 1.

Taxpayers, see "Municipal Corporations," § 8.

Trustees, see "Trusts," § 6.

Particular causes or grounds of action.

See "Bills and Notes," § 3; "Conspiracy"; "Death," § 1; "Fraud," § 1; "Insurance," §§ 13, 14; "Judgment," § 13; "Malicious Prosecution," § 3; "Negligence," § 2; "Torts"; "Trespass"; "Work and Labor."

Abuse of process, see "Process," § 4.

Breach of contract, see "Contracts," § 4; "Sales," §§ 7, 8; "Vendor and Purchaser," § 3.

Breach of contract for support of bastard, see "Bastards," § 1.

Breach of contract of carriage, see "Carriers," § 4.

Breach of contract required by statute of frauds to be in writing, see "Frauds, Statute of," § 6.

Breach of covenant, see "Covenants," § 3.

Breach of warranty, see "Sales," § 8.

Compensation of broker, see "Brokers," § 2.

Delay in delivery of shipment, see "Carriers," § 1.

Discharge from employment, see "Master and Servant," § 1.

Failure to deliver or misdelivery of goods shipped, see "Carriers," § 1.

Fires caused by operation of railroad, see "Railroads," § 14.

Foreign judgment, see "Judgment," § 13.

Injuries from defect in bridge, see "Bridges," § 2.

Injuries to animals caused by operation of railroad, see "Railroads," § 13.

Injuries to property from operation of railroad, see "Railroads," § 7.

Insurance premium note, see "Insurance," § 3.

Loss of or injury to passenger's effects, see "Carriers," § 9.

Negligence of bank officers, see "Banks and Banking," § 1.

Personal injuries, see "Carriers," § 6; "Husband and Wife," § 3; "Master and Servant," § 10; "Railroads," §§ 10-12; "Street Railroads," § 2.

Price of goods, see "Sales," § 7.

Recovery of bank deposit, see "Banks and Banking," § 2.

Recovery of land sold by vendor, see "Vendor and Purchaser," § 3.

Recovery of payment, see "Payment," § 3.

Recovery of price paid for land, see "Vendor and Purchaser," § 4.

Services, see "Work and Labor."

Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 4.

Wrongful attachment, see "Attachment," § 4.

Particular forms of action.

See "Ejectment"; "Replevin"; "Trespass," § 2.

Particular forms of special relief.

See "Divorce"; "Injunction"; "Partition," § 1; "Quieting Title"; "Specific Performance."

Abatement of nuisance, see "Nuisance," § 1.

Admeasurement or assignment of dower, see "Dower," § 2.

Alimony, see "Divorce," § 3; "Husband and Wife," § 4.

Cancellation of written instrument, see "Cancellation of Instruments."

Determination of adverse claims to real property, see "Quieting Title."

Enforcement or foreclosure of lien, see "Mechanics' Liens," § 2.

Establishment and enforcement of charity, see "Charities," § 1.

Establishment and enforcement of trust, see "Trusts," § 6.

Establishment of boundaries, see "Boundaries," § 2.

Establishment of will, see "Wills," § 2.

Foreclosure of mortgage, see "Mortgages," § 4.

Reformation of written instrument, see "Reformation of Instruments."

Removal of cloud on title, see "Quieting Title."

Restraining nuisance, see "Nuisance," § 2.

Separate maintenance of wife, see "Husband and Wife," § 4.

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

Particular proceedings in actions.

See "Appearance"; "Continuance"; "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Trial"; "Venue."

Bill of particulars, see "Pleading," § 6.

Default, see "Judgment," § 3.

Nonsuit, see "Trial," § 5.

Notice of action, see "Process," § 2.

*Point annotated. See syllabus.

Revival of judgment, see "Judgment," § 12.
Verdict, see "Trial," § 14.

Particular remedies in or incident to actions.
See "Attachment"; "Bail," § 1; "Garnishment"; "Injunction"; "Receivers."
Notice of pendency of action, see "Lis Pendens."
Stay of proceedings, see "Appeal and Error," § 6.

Proceedings in exercise of special or limited jurisdictions.

Courts of limited jurisdiction in general, see "Courts," § 3.
Criminal prosecutions, see "Criminal Law."
Suits in equity, see "Equity."
Suits in justices' courts, see "Justices of the Peace," § 3.

Review of proceedings.

See "Appeal and Error"; "Certiorari"; "Equity"; § 6; "Exceptions, Bill of"; "Judgment," § 6; "Justices of the Peace," § 4; "New Trial."

ACTION ON THE CASE.

See "Trespass," § 2.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity to abate nuisance, see "Nuisance," § 1.

ADJOINING LANDOWNERS.

See "Boundaries."

ADJUDICATION.

Of courts in general, see "Courts," § 2.
Operation and effect of former adjudication, see "Judgment," §§ 8, 9.

ADMEASUREMENT.

Of dower, see "Dower," § 2.

ADMINISTRATION.

Of charity, see "Charities," § 1.
Of estate of decedent, see "Executors and Administrators."
Of estate of ward, see "Guardian and Ward," § 1.
Of property by receiver, see "Receivers," § 2.
Of trust property, see "Trusts," § 4.

ADMISSION.

To practice law, see "Attorney and Client," § 1.

ADMISSIONS.

As evidence in civil actions, see "Evidence," § 6.
As evidence in criminal prosecutions, see "Criminal Law," § 6.
Operation and effect of admissions as ground of estoppel, see "Estoppel," § 2.

ADVANCEMENTS.

Of wages to servant, see "Master and Servant," § 2.

ADVERSE CLAIM.

To real property, see "Quieting Title."

*Point annotated. See syllabus.

ADVERSE POSSESSION.

See "Limitation of Actions."

Between co-tenants, see "Tenancy in Common," § 1.
Directing verdict on issue of, see "Trial," § 5.
Of property of infant, see "Infants," § 1.

§ 1. *Nature and requisites.*

*Constructive possession of lands defined.—Harriss v. Howard (Ga.) 59.

*The successor of a railroad company held to have acquired color of title to the full width of 200 feet, though the instrument of conveyance merely described it as the grantor's "right of way."—Bennett v. Atlantic Coast Line R. Co. (Ga.) 177.

*Facts held to constitute sufficient adverse possession under color of title to ripen into an indefeasible title.—Wall v. Wall (N. C.) 283.

*Possession of land under verbal consent of owner held insufficient to ripen into title without disavowal of owner's title.—Thompson v. Camper (Va.) 674.

*Limitations do not apply in favor of one claiming coal in state of nature in place not developed, for want of adverse actual possession.—Newman v. Newman (W. Va.) 377.

§ 2. *Operation and effect.*

*A devise in a will held to contain a sufficient description to operate as color of title.—Harriss v. Howard (Ga.) 59.

A devise of land under a will duly recorded may give color of title.—Harriss v. Howard (Ga.) 59.

Adjacent owners may be in constructive possession of the same land, being included in the boundaries of each tract.—Harriss v. Howard (Ga.) 59.

§ 3. *Pleading, evidence, trial, and review.*

In an action to enjoin a trespass on its right of way, a certain instruction held erroneous.—Bennett v. Atlantic Coast Line R. Co. (Ga.) 177.

ADVERTISEMENT.

Publication of process, see "Process," § 2.

AFFIDAVITS.

See "Depositions."

Particular proceedings or purposes.

See "Garnishment," § 1; "Injunction," § 4.
Illegality of municipal assessment, see "Municipal Corporations," § 4.
Inability to pay costs, see "Costs," § 2.
Publication of process, see "Process," § 2.
Registration of deed, see "Deeds," § 2.
Transfer of cause, see "Criminal Law," § 28.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

ALDERMEN.

See "Municipal Corporations," §§ 4, 5.

ALIAS SUMMONS.

See "Process," § 1.

ALIBI.

Instructions as to defense of, see "Criminal Law," § 14.

ALIENS.

Actions by nonresident alien, for death of resident alien, see "Death," § 1.

ALIMONY.

See "Divorce," § 3; "Husband and Wife," § 4.

ALLOTMENT.

Of homestead, see "Homestead," § 1.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 2.

ALTERATION.

Of geographical or political divisions, see "Municipal Corporations," § 1.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

Alteration of deed, see "Deeds," § 1.

AMBIGUITIES.

In pleading, see "Pleading," § 1.

AMENDMENT.

Of pleading to effect change of parties, see "Parties," § 1.

Of process pending appeal, see "Appeal and Error," § 5½.

In particular remedies or special jurisdictions.

See "Parties," § 2; "Trial," § 16.

Of particular acts, instruments, or proceedings.

See "Indictment and Information," § 5; "Process," § 3.

Pleading, see "Pleading," §§ 3, 4.

Record on appeal or writ of error, see "Appeal and Error," § 13.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 2; "Justices of the Peace," § 2.

ANIMALS.

Barking of dogs constituting nuisance, see "Nuisance," § 1.

Burial of in municipal corporation, see "Municipal Corporations," § 2.

Carriage of live stock, see "Carriers," § 2.

Inadequate or excessive damages for injuries to, see "Damages," § 2.

Injuries from operation of railroads, see "Railroads," § 13.

*When a horse is hired for a particular trip and is used for a further trip, such deviation alone will not render the hirer liable for the horse dying, without proof that its death came from its use for the further trip.—Carney v. Rease (W. Va.) 729.

*If a horse, hired to work, while at work becomes exhausted and sick, the hirer, knowing its condition, must desist from so working it,

else if it die he will be liable for its value.—Carney v. Rease (W. Va.) 729.

ANSWER.

In pleading, see "Equity," § 2.

APPEAL AND ERROR.

See "Certiorari"; "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 4.

Costs, see "Costs," § 1.

Review of proceedings of justices of the peace, see "Justices of the Peace," § 4.

Review in particular civil actions.

See "Divorce," § 3.

Review in special proceedings.

See "Habeas Corpus," § 2; "Mandamus," § 3.

Review of criminal prosecutions.

See "Criminal Law," §§ 24-29; "Homicide," § 3.

§ 1. *Nature and form of remedy.*

*A party who loses on appeal to the Supreme Court cannot review its decision by second appeal, but the only way is by petition to rehear.—Holland v. Seaboard Air Line Ry. Co. (N. C.) 885.

Where an appeal has been dismissed for failure to deposit with the clerk of the Supreme Court amount to pay for printing the record, as provided by Code 1906, c. 135, § 18, the appeal may be renewed at any time within the two years from the judgment.—Kelner v. Cowden (W. Va.) 649.

§ 2. *Decisions reviewable.*

*An appeal *held* not to lie to the Supreme Court from an order of the superior court remanding the cause to the clerk in condemnation proceedings.—Carolina & T. S. R. Co. v. Bailey (N. C.) 778.

*Refusal of court in an equity suit to grant reference to take evidence is not appealable.—Fludd v. Equitable Life Assur. Soc. (S. C.) 762.

*Where on appeal from a justice the jury found "for the defendant," and the court rendered judgment for costs, but no final judgment, *held*, that a writ of error would not lie.—Ritchie County Bank v. Bee (W. Va.) 380.

*A judgment founded on an erroneous construction of a statute, which makes its enforcement conflict with constitutional guaranties, *held* reviewable without regard to the amount in controversy.—Underwood Typewriter Co. v. Piggott (W. Va.) 664.

A judgment improperly abating an action on a ground which precludes further proceedings is appealable.—Underwood Typewriter Co. v. Piggott (W. Va.) 664.

§ 3. *Right of review.*

*Under Va. Code 1904, § 3454, a commissioner appointed in a decree directing a resale of land *held* not entitled to appeal from a decree setting aside the decree for resale.—Brown v. Howard & Whitehead (Va.) 682.

§ 4. *Presentation and reservation in lower court of grounds of review.*

Assignment of error *held* sufficient.—Kirkland v. Atlantic & B. Ry. Co. (Ga.) 23.

*A ground of a motion for a new trial, assigning as error a mere fragmentary part of the sentence in the charge, *held* too incomplete and to furnish no ground for reversal.—Holland v. Williams (Ga.) 1023.

*Point annotated. See syllabus.

An exception to the failure of the judge to reduce his charge on the law to writing is taken in time if first set out in appellant's "case on appeal."—*Sawyer v. Roanoke R. & Lumber Co.* (N. C.) 84.

*An exception "for errors in the charge" was too general, and was unavailable for any purpose.—*Davis v. Wall* (N. C.) 350.

Where in ejectment there was no evidence warranting an instruction in favor of plaintiff, and defendant had moved to dismiss the action, defendant was not bound to except to the instruction.—*Barrett v. Brewer* (N. C.) 414.

*Error in argument of counsel was not ground for reversal where the court's attention was not called to it and no exception was taken at the time.—*In re Shelton's Will* (N. C.) 705.

It is too late on appeal to raise the question whether one of the issues litigated was presented by the pleadings.—*National Union Bank of Maryland v. Hollingsworth* (N. C.) 809.

*An exception to evidence will not be considered where the ground of objection is not stated and the record does not show the ruling on the objection.—*Caldwell v. Atlantic Coast Line R. Co.* (S. C.) 131.

*An exception setting forth merely an extract from the charge without specifying the error is insufficient.—*Tucker v. Southern Ry. Co.* (S. C.) 154.

*Exceptions to evidence will not be considered where the objection stated no ground therefor, where like evidence was admitted without objection.—*Bussey v. Charleston & W. C. Ry. Co.* (S. C.) 163.

*Exception to evidence, without stating the objection, will not be considered.—*Hagins v. Etna Life Ins. Co.* (S. C.) 323.

*Judgment will not be set aside on grounds not raised below.—*Dantzler v. Cox & Dantzler* (S. C.) 774.

*Where a bill in equity shows a want of jurisdiction, the question may be raised for the first time on appeal.—*Thompson v. Adams* (W. Va.) 668.

An exception to the taking of a deposition, made while it is in progress, though noted in the deposition, must be brought to the notice of the court before hearing, else it will not be regarded on appeal.—*Whitehouse v. Jones* (W. Va.) 730.

*On writ of error to a judgment by default after a motion, under Code 1899, c. 134, § 5 [Code 1906, § 4036], to set aside had been denied, the sufficiency of the declaration cannot be assigned as error if the matter therein is such as, if well pleaded, would constitute a cause of action.—*Talbot v. Southern Oil Co.* (W. Va.) 1009.

§ 5. Requisites and proceedings for transfer of cause.

Rulings on demurrer or a motion to dismiss in the nature of a demurrer to an answer to an equitable petition as a whole and to certain parts thereof are not reviewable on a fast writ of error.—*Foster v. Case* (Ga.) 921.

A decree at chambers dismissing a petition on motion cannot be reviewed by a fast writ of error.—*Ivey v. City of Rome* (Ga.) 1034.

§ 5½. Effect of transfer of cause or proceedings therefor.

*Where an amendment of process pending an appeal is made below and is shown to the Supreme Court, if it is properly made it will relate back to the time of service.—*Gaulley Coal Land Ass'n v. Spies* (W. Va.) 903.

Pending an appeal and supersedeas in the Supreme Court, the return of service of process may be amended in the lower court, and such fact may be shown to the Supreme Court by supplemental record.—*Gaulley Coal Land Ass'n v. Spies* (W. Va.) 903.

§ 6. Supersedeas or stay of proceedings.

*When a judgment granting or refusing an injunction is brought to the Supreme Court by a fast bill of exceptions, no supersedeas results from the filing of the bill and a pauper affidavit, but a supersedeas results only when an order has been passed by the judge, under Civ. Code 1895, § 4925.—*Stokes v. Stokes* (Ga.) 1023.

Where, in proceedings for contempt for failure to pay alimony and attorney's fees, the judge commits respondent to jail, and exceptions are taken, it is within the discretion of the judge to grant a supersedeas on respondent's giving a bond conditioned to comply with the order.—*Stokes v. Stokes* (Ga.) 1023.

§ 7. Record and proceedings not in record—Matters to be shown by record.

A bill of exceptions to the opinion of the county court, under Code 1906, c. 39, § 48, is a part of the record if it shows that the bill was signed by the commissioners or a majority of them at the same term of court at which the trial took place.—*Jones v. Harmer* (W. Va.) 657.

§ 8. — Scope and contents of record.

*Under Code 1906, c. 131, § 9, a bill of exceptions signed by a judge in vacation within 30 days after the adjournment of the term is not a part of the record unless the judge certified the bill and the order certifying it was recorded.—*Jones v. Harmer* (W. Va.) 657.

§ 9. — Necessity of bill of exceptions, case, or statement of facts.

*Bill of exceptions held not necessary to present ruling of trial court on motion for bill of particulars in record for review.—*Blue Ridge Light & Power Co. v. Tutwiler* (Va.) 639.

Exception held saved so that it may be reviewed by the appellate court.—*Williams & Davisson Co. v. Ferguson Contracting Co.* (W. Va.) 1011.

§ 10. — Contents, making, and settlement of case or statement of facts.

*The settlement of a case on appeal does not cure a failure to serve the case in apt time.—*Cozart, Eagles & Carr v. Assurance Co. of America* (N. C.) 411.

*In the absence of an agreement the court has no power to extend the statutory time for the preparation and service of a case on appeal.—*Cozart, Eagles & Carr v. Assurance Co. of America* (N. C.) 411.

*Where time for the preparation and filing of a case on appeal is fixed by the parties, it cannot be extended by the court.—*Cozart, Eagles & Carr v. Assurance Co. of America* (N. C.) 411.

That appellant's failure to file the case on appeal within the time required was due to the negligence of his counsel held no excuse.—*Cozart, Eagles & Carr v. Assurance Co. of America* (N. C.) 411.

*The "case on appeal" should contain such incidents of the trial as were duly excepted to.—*Gaither v. Carpenter* (N. C.) 625.

§ 11. — Abstracts of record.

*In the preparation of a brief of evidence only such portions of a document should be embraced therein as were actually read or considered at the trial.—*Crawford v. Roney* (Ga.) 499.

*Point annotated. See syllabus.

Affidavits, documents, and records introduced in evidence, but not incorporated in an approved brief of evidence, cannot be considered.—*Askew v. Hogansville Cotton Oil Co.* (Ga.) 921.

Motion to dismiss on the ground that no brief of evidence was approved or filed denied.—*Postal Telegraph Cable Co. v. Kuhnen* (Ga.) 987.

§ 12. — Making, form, and requisites of transcript or return.

When counsel do not agree, only the "case settled" by the judge should be incorporated in the appeal record.—*Gaither v. Carpenter* (N. C.) 625.

Where the court adopted "appellant's case as amended by appellee's exceptions," it was appellant's duty to have the case as modified redrafted, and submitted to the judge for signature.—*Gaither v. Carpenter* (N. C.) 625.

Where a case on appeal was not redrafted after the allowance of amendments, but was submitted in that form, there was no "case settled," and the court had discretion either to affirm the judgment, or remand the case.—*Gaither v. Carpenter* (N. C.) 625.

§ 13. — Defects, objections, amendment, and correction.

*After the trial judge has settled the case on appeal, he has no power to change it except by consent of the parties or of the Supreme Court.—*Slocumb v. Philadelphia Const. Co.* (N. C.) 196.

*Certiorari held not to be granted requiring trial judge to correct record where he states his opinion that it is correct.—*Slocumb v. Philadelphia Const. Co.* (N. C.) 196.

*Where papers constituting record proper are lost, proper practice held to be to file case on appeal, and ask for certiorari for record proper.—*Slocumb v. Philadelphia Const. Co.* (N. C.) 196.

§ 14. — Questions presented for review.

Exceptions containing only extracts from a charge will not be reviewed unless they contain only a single proposition, the mere reading of which would indicate the point on which the opinion of the court is sought.—*Fludd v. Equitable Life Assur. Soc.* (S. C.) 762.

*Assignments of error involving the evidence cannot be considered where the evidence was not made a part of the record by a bill of exceptions.—*State v. Stutler* (W. Va.) 908.

§ 15. — Matters not apparent of record.

*Affidavits, documents, and records submitted in evidence should be incorporated in the bill of exceptions to review a refusal of an interlocutory injunction, or be attached thereto as exhibits, or be embodied in an approved brief of evidence and brought up as part of the record.—*Askew v. Hogansville Cotton Oil Co.* (Ga.) 921.

§ 16. Assignment of errors.

Alleged defects in a petition cannot be considered under an assignment that the court erred in directing a verdict for plaintiff for the recovery of land.—*Irvin v. Porterfield* (Ga.) 946.

*An assignment on a bill of exceptions that there was no authority for the clerk of the superior court to issue the execution in question held sufficient.—*Martin v. Craven* (Ga.) 962.

*An assignment of error "that the court failed to state in a plain and correct manner the evidence in the case, and to declare and explain the law arising thereon" is too general.—*Davis v. Keen* (N. C.) 359.

*Where an exception is not assigned for error, nor noted in the brief, it will be treated as abandoned.—*Beard v. Southern Ry. Co.* (N. C.) 505.

§ 17. Briefs.

*Where the Supreme Court orders briefs to be filed by a day named, and plaintiff in error fails so to do, the case can be saved from dismissal only where he was prevented by providential cause from complying with the order, and the ordinary delay of the mails does not constitute such a cause.—*Long v. Bank of Minden* (Ga.) 915; *Bank of Minden v. Long, Id.*; *Long v. Hodges* (Ga.) 916.

*When, for want of time to hear, during a term of the Supreme Court, oral argument, the court orders parties to file briefs, and limits the time for so doing, cases in which briefs have not been filed by the day named fall within rule 24 (26 S. E. ix), and will be dismissed.—*Long v. Bank of Minden* (Ga.) 915; *Bank of Minden v. Long, Id.*; *Long v. Hodges* (Ga.) 916.

§ 18. Dismissal, withdrawal, or abandonment.

*Where affidavits and documents introduced in evidence are not properly a part of the record, and the only question raised involves a consideration of the evidence, the writ of error must be dismissed.—*Askew v. Hogansville Cotton Oil Co.* (Ga.) 921.

If a bill of exceptions properly sued out to review a final judgment be docketed as a fast writ of error, when in fact it is not such, the case will be transferred to the docket of the next term.—*Ivey v. City of Rome* (Ga.) 1034.

A motion to dismiss on the ground that the writ of error makes the same returnable to the March term 1906 of the Supreme Court instead of the October term of said court held without merit.—*Bell v. Gress Mfg. Co.* (Ga.) 1043.

Where, in the preparation of the record on appeal, appellant did not comply with Revisal 1905, § 591, and Supreme Court Rules 19 (2), 19 (3), 21 (140 N. C. 660, 53 S. E. vii), 27 (53 S. E. viii), the appeal will be dismissed, as authorized by Rule 20 (53 S. E. vii).—*Davis v. Wall* (N. C.) 350.

*Appeal dismissed, under Code Civ. Proc. §§ 339, 345, 349, for failure to serve case and exceptions for approval, as required by law.—*Bledsoe v. Columbia Mills Co.* (S. C.) 886.

§ 19. Review—Scope and extent in general.

When a demurrer embracing several grounds is sustained in part, and one of the parties sues out a bill of exceptions, the correctness of so much of the judgment as is in his favor does not come under review.—*Ogletree v. Ogletree* (Ga.) 954.

*Instructions are to be reviewed with reference to the theory on which the case was tried and with reference to the evidence.—*Cotton v. Highland Park Mfg. Co.* (N. C.) 358.

*In an action for injuries to an employé, rulings on questions relating to certain defenses held immaterial.—*Hairston v. United States Leather Co.* (N. C.) 847.

Where no final judgment appears in the record, but only a judgment for costs, the appellate court cannot extend the judgment into a final judgment to pass upon the alleged errors.—*Ritchie County Bank v. Bee* (W. Va.) 380.

Where an order for the payment of money is appealed from, and is based on a former order, which is void, though entered more than two years before the appeal is allowed, the order appealed from will be reversed.—*Kelner v. Cowden* (W. Va.) 649.

*Point annotated. See syllabus.

*Where an order is appealed from within the statutory time, and the error complained of is based on an appealable order not reversed, entered more than two years before the appeal is taken, the error cannot be reviewed.—*Kelner v. Cowden* (W. Va.) 649.

§ 20. — Parties entitled to allege error.

*Plaintiff, acquiescing in a ruling that the case is subject to a nonsuit, and introducing additional evidence, cannot thereafter claim that the additional evidence was unnecessary.—*Crawford v. Roney* (Ga.) 499.

*Where a motion to dismiss an action for irregularities is denied, defendant may proceed with the trial without losing his right to have the ruling reviewed on appeal.—*Woodard & Woodard v. Tri-State Milling Co.* (N. C.) 70.

*Where, after plaintiff has introduced all his evidence, a motion by defendant to exclude the same has been overruled, and defendant introduces his evidence, the motion is waived.—*Williams & Davidson Co. v. Ferguson Contracting Co.* (W. Va.) 1011.

§ 21. — Presumptions.

Where a case has been brought up by a direct bill of exceptions, no motion for new trial having been made, and no brief of evidence filed, and error is assigned on specific rulings on evidence, and it does not appear that the verdict was necessarily controlled by any of such rulings, it cannot be reviewed.—*Anderson v. Wyche* (Ga.) 19.

Under Revisal of 1905, § 1424, where on appeal it does not appear that the action before the justice of the peace was dismissed on answer and proof by defendant that the title to realty was involved, such fact cannot be inferred.—*Brown v. Southerland* (N. C.) 108.

Where a service on a foreign insurance company, not made in accordance with Revisal 1905, § 4750, was sustained by the trial judge, it would be presumed, on appeal, in the absence of a finding that defendant was licensed to do business within the state, that such was not the fact.—*W. P. Parker & Co. v. Continental Ins. Co.* (N. C.) 717.

Where an action on a policy was brought within a year after the cause of action accrued, and the record on appeal disclosed a nonsuit, but not when the new suit was instituted, it would be presumed, in support of the court's judgment for plaintiff, that it was instituted within six months after the nonsuit, as required by Revisal 1905, § 4809.—*W. P. Parker & Co. v. Continental Ins. Co.* (N. C.) 717.

*Where a new trial has been properly refused, on appeal therefrom it must be shown that the rulings to which exception was taken were erroneous, and that the appellant has suffered prejudice by such erroneous rulings.—*Reed v. Southern Ry., Carolina Division* (S. C.) 218.

§ 22. — Discretion of lower court.

*The granting or refusing of interlocutory injunctions, where the evidence is conflicting, is within the discretion of the court, and will not be controlled unless manifestly abused.—*Green v. Freeman* (Ga.) 45.

*Refusal to grant an ad interim restraining order in advance of the time set for the hearing of an application for a temporary injunction is not reviewable.—*Ivey v. City of Rome* (Ga.) 1034.

The discretion of the trial judge in setting aside a verdict is not reviewable.—*Slocumb v. Philadelphia Const. Co.* (N. C.) 196.

The exercise of a trial judge's discretion to set aside a verdict will not be reviewed on appeal unless the right was exercised arbitrarily

or willfully.—*Jarrett v. High Point Trunk & Bag Co.* (N. C.) 338.

*The refusal to exclude a question on the ground that it is leading is not appealable unless an abuse of discretion is shown.—*Caldwell v. Atlantic Coast Line R. Co.* (S. C.) 131.

*Motion for continuance held addressed to discretion of court, and not reviewable unless abused.—*Ex parte Cannon* (S. C.) 325.

Rulings of the court as to the admission of irrelevant evidence are not reviewable, unless there has been an abuse of discretion.—*Dantzler v. Cox & Dantzler* (S. C.) 774.

§ 23. — Questions of fact, verdicts, and findings.

The issue being conflicting as to whether a deed was forged, the court will not disturb the judgment of the lower court.—*Knight v. Sudeth & Crenshaw* (Ga.) 31.

*The findings of fact by the judge are as conclusive on appeal as when found by a jury, if there is any evidence to support them.—*Matt-hews v. Fry* (N. C.) 787.

*Findings of fact in habeas corpus proceedings held not reviewable on appeal.—*Ex parte Cannon* (S. C.) 325.

*The Supreme Court will not reverse an order refusing a new trial on the ground that the verdict was contrary to the preponderance of the evidence.—*Ruddell v. Seaboard Air Line Ry.* (S. C.) 528.

*A verdict for plaintiff, based on alleged fraud on the part of defendants, will not be set aside because there is no direct evidence sustaining the defense.—*Dantzler v. Cox & Dantzler* (S. C.) 774.

Where a case is tried by the court, its finding will not be disturbed, unless against the decided preponderance of the evidence, or without evidence to support it.—*Kinsey v. Carr* (W. Va.) 1004.

§ 24. — Harmless error in general.

A charge held not to authorize the Supreme Court to set aside the verdict and grant a new trial.—*Cox v. Macon Ry. & Light Co.* (Ga.) 232.

*A defendant against whom a verdict has been returned cannot complain that it is for a less amount than that demanded by the evidence.—*Pullman Co. v. Schaffner* (Ga.) 933.

*A party cannot complain of the sustaining of an objection to a juror, where at the time he had not exhausted his peremptory challenges, and the jury chosen constituted a panel acceptable to both parties.—*Ives v. Atlantic & N. C. R. Co.* (N. C.) 74.

*In an action for the price of a machine, an error in an instruction held not prejudicial to the seller.—*Smith Premier Typewriter Co. v. Rowan Hardware Co.* (N. C.) 417.

*The error of the court in allowing a party's challenge of a juror is not prejudicial to the adverse party, who did not exhaust his peremptory challenges.—*Hodgin v. Southern Ry. Co.* (N. C.) 413.

*Error in imposing on the propounder of a will the burden of showing that a purported revocation was not genuine was not prejudicial to the contestant.—*In re Shelton's Will* (N. C.) 705.

*Though an instruction as to the measure of damages is erroneous, the error is harmless where the jury find for defendant.—*Tucker v. Southern Ry. Co.* (S. C.) 154.

In claim and delivery, defendant cannot complain of a verdict for plaintiff for a portion of

*Point annotated. See syllabus.

the property sought to be replevied or a sum equal in value to the whole of the property as described in the complaint.—*Phoenix Furniture Co. v. Jaudon* (S. C.) 308.

Where, in an action for a willful tort, the court instructed that plaintiff could not recover unless a case of willfulness was established, the fact that the jury gave only compensatory damages was not prejudicial to defendant.—*Wilson Lumber Co. v. D. W. Alderman & Sons Co.* (S. C.) 447.

§ 25. — Harmless error in rulings on evidence.

Refusal to allow certain questions to be propounded to a witness was harmless error where they or others of similar import were subsequently answered by the witness.—*Kessler v. Pearson* (Ga.) 963.

In an action for loss sustained by fire communicated from the right of way of defendant railroad company, the admission of evidence that the spark arrester and fire box of the locomotive emitting the fire were defective *held* harmless.—*Knott v. Cape Fear & N. Ry. Co.* (N. C.) 150.

*The error in sustaining an objection to a question *held* harmless, where the witness subsequently testified as to the matter.—*Yarborough v. Banking Loan & Trust Co.* (N. C.) 296.

*In an action for injuries to a passenger, the admission of a clergyman's reduced permit, containing a provision that plaintiff assumed all risk of injury, *held* harmless to plaintiff.—*Marable v. Southern Ry. Co.* (N. C.) 355.

In an action for malicious prosecution, evidence that, in a criminal action, the jury were out a considerable time and at first stood seven for acquittal and five for conviction, though erroneous, was not prejudicial to plaintiff.—*Gaither v. Carpenter* (N. C.) 625.

*Admission of irrelevant evidence is not reversible error where no abuse of discretion was shown.—*Lathan v. Western Union Telegraph Co.* (S. C.) 134.

*That the court admitted irrelevant evidence is no ground for reversal, where no abuse of discretion is shown.—*Bussey v. Charleston & W. C. Ry. Co.* (S. C.) 163.

*Admission of evidence as to a fact not in dispute is not prejudicial error.—*Young v. Seaboard Air Line Ry.* (S. C.) 225.

*Admission of irrelevant evidence which is not prejudicial is harmless error.—*Armour & Co. v. Ross* (S. C.) 315; *Jones v. Western Union Telegraph Co.* (S. C.) 318.

*The exclusion of evidence technically relevant is not ground for reversal where the same facts were proved by the same witness without objection.—*Strickland v. Phillips* (S. C.) 453.

*Admission of evidence that plaintiff, in action for personal injuries, had a wife and child dependent on him *held* not rendered harmless by admission of other evidence.—*Southern Ry. Co. v. Simmons* (Va.) 459.

§ 26. — Harmless error in rulings at trial.

A charge inapplicable to the evidence which does not mislead the jury is not ground for new trial.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

An instruction, though not based on evidence, *held* not prejudicial.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

*The insertion of a word in the submission of an issue decided in favor of appellant *held* harmless error if any.—*Davis v. Keen* (N. C.) 359.

*In an action for delay in delivery of a telegram contradictory charges *held* not reversible error, where the instruction adverse to appellant was not erroneous.—*Mort v. Western Union Telegraph Co.* (N. C.) 363.

In an action for breach of a contract of employment, plaintiff *held* not prejudiced by the admission of parol evidence that he represented himself as competent to fill the position for which he was employed.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 613.

Finding that a fire along the right of way was caused by certain negligent acts of the company *held* to preclude complaint by the company that an issue as to other negligence was not presented.—*North Fork Lumber Co. v. Southern Ry. Co.* (N. C.) 781.

*A judgment should be reversed for error in instructions, though there may be other grounds on which it may reasonably be based.—*Cole v. Blue Ridge Ry. Co.* (S. C.) 128.

*That the judge in his charge stated that he was not permitted to say whether there was any willfulness shown or not, was not prejudicial error where, as a matter of fact, there was evidence tending to sustain the allegations of willfulness.—*Talbert v. Charleston & W. C. Ry.* (S. C.) 138.

*Where an attorney in his argument referred to a letter which was offered in evidence and ruled out, and on objection the judge instructed the jury not to consider the letter, it was no ground for reversal.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (S. C.) 768.

*Where a proper instruction is refused, but modified and given, it is not reversible error if the instruction when modified is the same in legal effect as the one refused.—*Morrison v. Fairmont & C. Traction Co.* (W. Va.) 669.

§ 27. — Error waived in appellate court.

*Where a contention that a deed should be canceled is not referred to in the brief, an assignment of error on the refusal to cancel the instrument *held* abandoned.—*Caudell v. Caudell* (Ga.) 1028.

§ 28. — Subsequent appeals.

*Judgment on appeal *held* law of case on second appeal.—*Neal v. Conwell* (Ga.) 936.

*A defendant in divorce *held* not entitled to review for the second time on appeal question whether the facts justified a finding that he was in contempt for failure to comply with an order concerning alimony.—*Green v. Green* (N. C.) 818.

§ 29. Determination and disposition of cause.

Where Supreme Court found that an account against defendant was an asset in the hands of a receiver, it was not competent to prove by parol a previous agreement that it should not pass to the plaintiff with other assets on second trial.—*Neal v. Conwell* (Ga.) 936.

*Under Revisal 1905, § 539, on reversal of a judgment rendered after refusal of nonsuit, the trial court will be directed to dismiss the action, and enter a nonsuit.—*Hollingsworth v. Skelding* (N. C.) 212.

Affirmance of nonsuit reviewing ruling, refusing a certain deed as evidence, *held* not to preclude the admission of the same deed in evidence in another action, after proper probate and registration.—*Allen v. Burch* (N. C.) 354.

On remand after reversal, plaintiff *held* entitled to judgment without submitting to a new trial.—*Matthews v. Fry* (N. C.) 787.

*Point annotated. See syllabus.

Where, in an action on a contract, judgment is rendered for plaintiff, and defendant appeals, if there was no evidence to sustain a counterclaim set up by defendant, the Supreme Court could not dismiss the counterclaim, but only grant a new trial.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (S. C.) 768.

APPEARANCE.

An agreement *held* not a general appearance, and defendant may object to the insufficiency of the service of process.—*Woodard & Woodard v. Tri-State Milling Co.* (N. C.) 70.

*The appearance of an attorney to move to dismiss the action *held* a special appearance, and the right to dismiss may be insisted on.—*Woodard & Woodard v. Tri-State Milling Co.* (N. C.) 70.

Where a defendant appears in the action, either personally or by a duly authorized attorney, he thereby waives service of summons.—*Hatcher v. Faison* (N. C.) 284.

*Defendant's exception to the overruling of his motion to dismiss, made under special appearance, does not affect plaintiff's right to a personal judgment, where, after the motion was overruled, defendant entered a general appearance.—*Lemly v. Ellis* (N. C.) 629.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," §§ 4, 12.

Required to be used in operation of railroad, see "Railroads," § 8.

Required to be used in operation of street railroads, see "Railroads," § 2.

APPLICATION.

For insurance, see "Insurance," §§ 3, 11.

Of payment, see "Payment," § 1.

Temporary alimony, see "Husband and Wife," § 4.

For particular remedies or forms of relief.

See "Injunction," § 4; "Mandamus," § 8.

Certiorari to review prosecution for violation of municipal ordinance, see "Municipal Corporations," § 5.

Confirmation of report in partition, see "Partition," § 1.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of trustee, see "Trusts," § 8.

APPRAISAL.

Of estate of decedent, see "Executors and Administrators," § 2.

ARBITRATION AND AWARD.

See "Reference."

ARGUMENT OF COUNSEL.

In civil actions, see "Trial," § 4.

In criminal prosecutions, see "Criminal Law," § 12.

In justices' courts, see "Justices of the Peace," § 3.

Objections to for purpose of review, see "Appeal and Error," § 4.

ARREST.

See "Bail."

On execution, see "Execution," § 6.

ARREST OF JUDGMENT.

In civil actions, see "Judgment," § 5.

In criminal prosecutions, see "Criminal Law," § 22.

ASSAULT AND BATTERY.

Assault with intent to kill, see "Homicide," § 2.

Liability of master for assault by servant, see "Master and Servant," § 13.

Limitation of prosecution, see "Criminal Law," § 3.

Province of court and jury at trial in action for assault, see "Trial," § 6.

§ 1. **Criminal responsibility.**

*A conviction of assault *held* unauthorized.—*Shubert v. State* (Ga.) 1045.

*One *held* guilty of assault at common law, if not under Revisal 1905, § 3822.—*State v. Scott* (N. C.) 69.

*The right to protect person or property by force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except in urgent cases.—*State v. Scott* (N. C.) 69.

*One may lawfully use as much force as is reasonably necessary to protect his property or to retake it when wrongfully taken by another.—*State v. Scott* (N. C.) 69.

ASSESSMENT.

Mandamus to compel tax assessment, see "Mandamus," § 1.

Of compensation for property taken for public use, see "Eminent Domain," § 3.

Of damages, see "Damages," § 8.

Of expenses of public improvements, see "Municipal Corporations," § 4.

Of loss on insured, see "Insurance," § 14.

Of tax, see "Taxation," § 3.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 16; "Criminal Law," § 28.

ASSIGNMENTS.

Effect of usury, see "Usury," § 1.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

Transfers of particular species of property, rights, or instruments.

See "Covenants," § 1; "Insurance," § 4.

Admeasurement or assignment of dower, see "Dower."

§ 1. **Requisites and validity.**

*Where an order is drawn for a certain sum to be paid out of a particular fund, and is not equal to the entire fund, it operates as an equitable assignment which equity will enforce.—*Wamsley v. Ward* (W. Va.) 998.

*Where an order is drawn for a certain sum to be paid out of a particular fund, and the order is not equal to the entire fund, no action at law can be maintained thereon.—*Wamsley v. Ward* (W. Va.) 998.

*Point annotated. See syllabus.

§ 2. Actions.

*Where one assigns his entire salary earned for a named period, it is not necessary for the assignee to go into equity to recover the amount thereof from the assignor's employer.—*Western Union Telegraph Co. v. Ryan* (Ga.) 21.

Though, in a suit by an assignee of salary earned, it was shown that the assignment was made to secure a usurious loan, evidence by the employer of the assignor that he had been notified by the assignor that he had been discharged in bankruptcy from the debt *held* inadmissible.—*Western Union Telegraph Co. v. Ryan* (Ga.) 21.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy."

§ 1. Requisites and validity.

A transfer of a corporation's stock to a creditor of its president in payment of the debt *held* not an assignment for the benefit of creditors, within Acts 1893, p. 433, c. 453.—*National Union Bank of Maryland v. Hollingsworth* (N. C.) 809.

ASSOCIATIONS.

Mutual benefit insurance associations, see "Insurance," § 14.

ASSUMPSIT, ACTION OF.

See "Work and Labor."

ASSUMPTION.

By judge as to facts, see "Trial," § 6.
Of risk by employe, see "Master and Servant," §§ 8, 10, 12.
Of risk by passenger, see "Carriers," § 5.

ATTACHMENT.

See "Execution"; "Garnishment."

Abuse of process, see "Process," § 4.
Liability of sheriff for use of property attached, see "Sheriff and Constables," § 1.
Nature and essentials of judgment in general, see "Judgment," § 1.

§ 1. Nature and grounds.

Code 1887, § 2959 [Va. Code 1904, p. 1568], providing for the issuing of an attachment at the time of bringing any action for the recovery of personal property, etc., applies to a motion for judgment by notice.—*Breeden v. Peale* (Va.) 2.

*Under Code 1887, § 2959 [Va. Code 1904, p. 1568], *held* that the facts did not authorize the issuance of an attachment.—*Breeden v. Peale* (Va.) 2.

§ 2. Property subject to attachment.

*An attachment on lands which, prior to the institution of the action, had been conveyed by those named in the attachment, is void, creating no lien.—*Morrison v. New Haven & Wilkerson Min. Co.* (N. C.) 611.

Where property is brought within the custody of the court, it will be retained to answer any judgment that may be obtained; it being immaterial how it was brought under the control of the court, whether by attachment or some other equivalent and lawful act.—*Lemly v. Ellis* (N. C.) 629.

*An attachment of bonds by one who was garnishee in a prior attachment *held* not vitiated under the facts in evidence.—*Lemly v. Ellis* (N. C.) 629.

*Point annotated. See syllabus.

§ 3. Levy, lien, and custody and disposition of property.

In attachment proceedings if no property of defendant has been seized nor levy made nor summons of garnishment issued prior to the return term all subsequent proceedings are invalid.—*Albright-Prior Co. v. Pacific Selling Co.* (Ga.) 251.

Though Revisal 1905, § 784, provides for the sale of attached property by the sheriff on judgment for the plaintiff, defendant could not complain where the court treated the proceeding as one in equity and ordered a sale by commissioner, since he had a right to object if the property did not bring a fair price.—*Lemly v. Ellis* (N. C.) 629.

*In the absence of fraud or collusion, an attaching creditor can acquire through his attachment no greater rights to the property than the defendant had when the attachment was levied.—*Seward & Co. v. Miller & Higdon* (Va.) 681.

§ 4. Wrongful attachment.

Evidence that a replevy bond could have been secured for a small sum *held* admissible on the question of damages in an action for detention of goods on attachment.—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* (N. C.) 422.

*Statement of measure of damages for detention of property on attachment.—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* (N. C.) 422.

ATTESTATION.

Of mortgages, see "Mortgages," § 1.

ATTORNEY AND CLIENT.

Advice of counsel instituting prosecution as rebutting malice, see "Malicious Prosecution," § 2.

Allowance to receiver of attorney's fees, see "Receivers," § 2.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 4.

Argument and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 12.

Argument of counsel in justices' courts, see "Justices of the Peace," § 3.

Attorney fee as element of damages in action for malicious prosecution, see "Malicious Prosecution," § 3.

Attorneys as purchasers at execution sale, see "Execution," § 4.

Attorney's fees in action on note, see "Bills and Notes," § 3.

Attorneys in fact, see "Principal and Agent." Essentials of judgment as affected by representation by attorney, see "Judgment," § 1.

Laws relating to admission of attorneys as encroachment on judiciary, see "Constitutional Law," § 2.

Negligence of counsel as excuse for failure to file case on appeal in proper time, see "Appeal and Error," § 10.

Objections to argument of counsel for purpose of review, see "Appeal and Error," § 4.

§ 1. The office of attorney.

The right to establish the qualifications for the office of an attorney rests in the police power of the state.—*In re Applicants for License* (N. C.) 635.

*Under Revisal 1905, §§ 207, 208, relating to the admission of attorneys, *held* that one who complies with the formal prerequisites and shows himself to have competent knowledge is entitled to a license, and no investigation is to be made into his character.—*In re Applicants for License* (N. C.) 635.

AUCTIONS AND AUCTIONEERS.

Disposal of goods at public auction by carrier as conversion, see "Carriers," § 1.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.
 Of guardian, see "Guardian and Ward," § 1.
 Of judge in granting or refusing new trial, see "New Trial," § 2.
 Of justice of the peace, see "Justices of the Peace," § 2.
 Of legislature, see "States," § 1.
 Of officer of municipal corporation, see "Municipal Corporations," § 3.
 To issue execution, see "Execution," § 2.

BAGGAGE.

Of passenger, see "Carriers," §§ 8, 9.

BAIL.**§ 1. In civil actions.**

Where defendant, arrested on a body execution, had been discharged on habeas corpus, he could not thereafter be held on a surrender by his sureties.—Ledford v. Emerson (N. C.) 969.

BAILMENT.

Particular species of bailments, and bailments incident to particular occupations.

See "Banks and Banking," § 2; "Carriers," § 1; "Innkeepers."

Hiring of animals, see "Animals."

*The proprietor of a bathhouse held liable for any loss of patrons' valuables occurring from want of ordinary care on his part.—Walpert v. Bohan (Ga.) 181.

BAIL TROVER.

See "Replevin," § 1.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

§ 1. Assignment, administration, and distribution of bankrupt's estate.

*A buyer, receiving goods from a seller and paying for them, held not to receive a preference within the bankruptcy act.—Weeks v. Spooner (N. C.) 432.

BANKS AND BANKING.

Restraining payment of cashier's check, see "Injunction," § 2.

Taxation of banks, see "Taxation," § 3.

§ 1. Banking corporations and associations.

Complaint in action by stockholder against officers of bank for negligence held sufficient.—Sigwald v. City Bank (S. C.) 109.

§ 2. Functions and dealings.

A contract by which a bank received collections subject to the owner's risk held not to relieve it from liability for its own negligence in selecting the drawee of the check as its agent to make payment and remit the proceeds.—Bank of Rocky Mount v. Floyd (N. C.) 95.

Custom of banks to send checks to the drawee bank for payment, where the drawee is the collecting bank's agent at the place where the check is payable, held invalid.—Bank of Rocky Mount v. Floyd (N. C.) 95.

Where a bank to which a check was sent for collection forwarded it to the drawee bank for payment, the collecting bank was guilty of negligence rendering it liable for the amount on the drawee's failure to remit prior to its failure.—Bank of Rocky Mount v. Floyd (N. C.) 95.

*Where a check payable in another place is deposited with a bank for collection, the bank's duty is performed if it seasonably transmits the check to a suitable bank or other agent for collection.—Bank of Rocky Mount v. Floyd (N. C.) 95.

In an action by a bank on a check not collected by the negligence of defendant collecting bank, a telegram sent by plaintiff to the latter informing it that all responsibility would fall on defendant and the drawee bank held admissible.—Bank of Rocky Mount v. Floyd (N. C.) 95.

*A bank paying out a depositor's money on a forged check cannot cast on the depositor the duty of seeking to recover it from the person receiving it.—Yarborough v. Banking & Trust Co. (N. C.) 296.

*A bank, sued for a deposit which it admits having received, has the burden of proving payment.—Yarborough v. Banking Loan & Trust Co. (N. C.) 296.

An instruction, in an action against a bank for a deposit, held to properly submit the issue of the liability of the bank.—Yarborough v. Banking Loan & Trust Co. (N. C.) 296.

In an action against a bank for a deposit, the admission in evidence of a paragraph of its answer held not prejudicial to it.—Yarborough v. Banking Loan & Trust Co. (N. C.) 296.

BAR.

Admission to practice law, see "Attorney and Client," § 1.

Of action by former adjudication, see "Judgment," § 8.

Of dower, see "Dower," § 1.

BASTARDS.**§ 1. Custody, support, and protection.**

*An agreement by the mother of a bastard not to resort to bastardy proceedings is a good consideration for a pecuniary settlement by the putative father.—Burton v. Belvin (N. C.) 71.

A complaint held to state a cause of action for breach of promise to support a woman and her bastard children.—Burton v. Belvin (N. C.) 71.

BATH-HOUSE KEEPERS.

See "Bailment."

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see "Insurance," § 14.

BENEFITS.

Acceptance of, as ground of estoppel, see "Estoppel," § 2.

BEQUESTS.

See "Wills."

*Point annotated. See syllabus.

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

BETTING.

See "Gaming."

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF LADING.

See "Carriers," § 1.

BILL OF PARTICULARS.

See "Pleading," § 6.

BILL OF REVIEW.

See "Equity," § 6.

BILL OF SALE.

Acknowledgment of, see "Acknowledgment," § 2.

BILLS AND NOTES.

Corporate powers as to, see "Corporations," § 8.
Given for price of goods, see "Sales," § 7.

Jurisdiction of justice in action on note, see "Justices of the Peace," § 2.

Note for insurance premium, see "Insurance," § 3.

Notes for purchase price of realty, see "Vendor and Purchaser," § 2.

Parol or extrinsic evidence, see "Evidence," § 10.

Payment and collection of checks by bank, see "Banks and Banking," § 2.

§ 1. Requisites and validity.

Under the express provisions of Revisal 1905, § 2173, in relation to negotiable instruments, an antecedent debt constitutes value.—*Singer Mfg. Co. v. Summers* (N. C.) 522.

§ 2. Rights and liabilities on indorsement or transfer.

Under Revisal 1905, § 2202, a cashier's check *held* not indorsed so long after issue as to render the holder one not in due course.—*Singer Mfg. Co. v. Summers* (N. C.) 522.

Notes in the hands of a bank as collateral for money loaned the payee, but *held* without indorsement, were subject to all defenses and equities available against the payee.—*Keel v. East Carolina Stone & Construction Co.* (N. C.) 828.

*Evidence *held* to show that the defendant was not an accommodation indorser of the note sued on.—*Bank of Spartanburg v. Mahon* (S. C.) 529.

*Where one makes a negotiable note, and the payee does not indorse it, and strangers sign their names on its back, the payee, in the absence of an agreement, may treat them as joint promisors, or as guarantors, or indorsers, at his election.—*Golding Sons Co. v. Cameron Pottery Co.* (W. Va.) 396.

Where the secretary of a corporation executes his note, payable to a third party, and indorses it in the name of the corporation by himself as secretary, the form of the paper carries notice to a purchaser of the possible want of power to make the indorsement.—*Wheeling Ice & Storage Co. v. Connor* (W. Va.) 982.

*Point annotated. See syllabus.

§ 3. Actions.

The expression "return day," as used in Acts 1900, p. 58; Van Epps' Code Supp. § 6185, amending Civ. Code 1895, § 3867—relating to an agreement to pay attorney's fees in case of an action on a note, means "filing day," or the last day on which suits may be filed.—*J. Everett & Son v. M. Ferst's Sons & Co.* (Ga.) 916.

*Where written notice was given in an action on a note providing for attorney's fees, as required by Van Epps' Code Supp. § 6185, it was not error to direct a verdict for plaintiff for the amount of the attorney's fees stipulated in the notes, though after the return day, and before the first day of the term, the defendant had paid the principal, interest, and accrued costs.—*J. Everett & Son v. M. Ferst's Sons & Co.* (Ga.) 916.

Where a suit was brought on a note signed by defendant as principal and by another as security, and indorsed by a third person, and plaintiff dismissed as to the security and the indorser, defendant was not discharged from liability.—*Glenn v. Augusta Drug Co.* (Ga.) 1032.

*Under the express provisions of Revisal 1905, § 2208, when it is shown that the title of any person who has negotiated an instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course.—*Singer Mfg. Co. v. Summers* (N. C.) 522.

BOARD.

Mandamus to county board of education, see "Mandamus," § 1.

Of aldermen, see "Municipal Corporations," § 4.

Of commissioners of municipal corporation, see "Municipal Corporations," § 2.

BODY EXECUTION.

See "Execution," § 6.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

BONDS.

Of municipal corporations, see "Municipal Corporations," § 2.

Of township, see "Towns," § 1.

Performance of contract in general for purchase of, see "Contracts," § 3.

Sureties on bonds, see "Principal and Surety."

Bonds for performance of duties of trust or office.

See "Guardian and Ward," § 4.

Bonds in judicial proceedings.

See "Appeal and Error," § 6; "Bail"; "Replevin," § 1.

On appeal from justice's court, see "Justices of the Peace," § 4.

§ 1. Requisites and validity.

*Statutory bond *held* valid if it is sufficiently clear from it that the intent of the parties was to comply with the statute.—*Chambers v. Cline* (W. Va.) 999.

*In the absence of anything to the contrary it will be presumed that the intent of the parties was to execute a statutory bond as the statute requires.—*Chambers v. Cline* (W. Va.) 999.

BOOKS OF ACCOUNT.

Opinion evidence as to, see "Evidence," § 11.

BOUNDARIES.

Conclusiveness of judgment as to boundaries, see "Judgment," § 9.

Declarations as to, see "Evidence," § 7.

Of municipality, see "Municipal Corporations," § 1.

Trespass by party to processioning proceeding, see "Trespass," § 1.

§ 1. Description.

*Deed of land bounded by nonnavigable river *held* to convey to thread of stream including island in river.—Wall v. Wall (N. C.) 283.

§ 2. Evidence, ascertainment, and establishment.

*Where the return of processioners is made the judgment of the court, the judgment unappealed from *held* conclusive as against protestant and his privies in title.—Martin v. Patisillo (Ga.) 240.

Where, in an action to recover land, the only issue involved is a disputed boundary line, the submission of an issue as to which of two lines designated on a map was the true line between plaintiff's and defendant's lands *held* sufficient.—Williamson v. Bryan (N. C.) 77.

Evidence *held* sufficient to locate a corner forming the point of beginning in the description of land conveyed.—Broadwell v. Morgan (N. C.) 340.

Under Revisal 1905, § 717, special proceedings brought under sections 325 and 326 for the establishment of boundaries, and in which the question of title arises *held* properly transferred by the clerk to the civil issues docket for trial on all issues.—Woody v. Fountain (N. C.) 425.

*In proceedings to establish a boundary brought under Revisal 1905, §§ 325, 326, and transferred under section 717 to the civil issues docket, the burden of establishing the boundary alleged, *held* to be on plaintiff.—Woody v. Fountain (N. C.) 425.

*In an action to establish boundaries brought under Revisal 1905, § 326, and transferred to the civil issues docket under section 717 on account of the raising of an issue of title, the burden of proving title *held* to rest on plaintiff.—Woody v. Fountain (N. C.) 425.

BREACH.

Of condition, see "Insurance," §§ 6, 7.

Of contract, see "Contracts," § 3; "Sales," § 4; "Vendor and Purchaser," § 2.

Of covenant, see "Covenants," § 2.

Of warranty, see "Sales," §§ 6, 8.

BREACH OF THE PEACE.

See "Riot."

BRIDGES.

Obstruction of navigable waters, see "Navigable Waters," § 1.

§ 1. Establishment, construction, and maintenance.

*The term "bridge" includes all the appurtenances necessary to its proper use, and embraces abutments and approaches.—Howington v. Madison County (Ga.) 941.

*Point annotated. See syllabus.

§ 2. Regulation and use for travel.

An allegation in a petition brought against a county for damages by a defect in a bridge *held* an averment of notice of defect to the county good as against a general demurrer.—Howington v. Madison County (Ga.) 941.

BRIEFS.

Of evidence for purpose of review, see "Appeal and Error," § 11.

On appeal or writ of error, see "Appeal and Error," § 17.

BROKERS.

See "Principal and Agent."

Compensation of broker as agent in general, see "Principal and Agent," § 1.

Insurance brokers, see "Insurance," § 1.

§ 1. Compensation and lien.

*Where an agent is empowered to procure a purchaser for real estate within a certain time, he cannot recover commission unless he furnishes a purchaser within that time.—Ice v. Maxwell (W. Va.) 899.

*Where a broker is authorized to procure a purchaser of land within a certain time, but the owner waives a performance within the time agreed, and treats the contract as in force, the broker will be entitled to compensation when he procures a purchaser.—Ice v. Maxwell (W. Va.) 899.

*Where a broker is authorized to procure a purchaser for real estate at a fixed sum and for a stipulated compensation, he can recover the compensation where he procures a purchaser from whom the owner accepts a less sum than that at which he authorized the agent to sell.—Ice v. Maxwell (W. Va.) 899.

§ 2. Actions for compensation.

Where a contract to procure a purchaser for real estate has been continued, or the time within which the sale was to have been made waived, the presumption is that the broker is entitled to recover the commission originally agreed upon.—Ice v. Maxwell (W. Va.) 899.

Whether there is evidence that the time given a real estate broker to procure a purchaser has been waived, or the contract continued, is for the jury.—Ice v. Maxwell (W. Va.) 899.

BURDEN OF PROOF.

In criminal prosecutions, see "Criminal Law," § 6; "Homicide," § 5.

BURGLARY.

Relevancy of evidence, see "Criminal Law," § 6.

§ 1. Prosecution and punishment.

*Where defendant's guilt was established by the testimony of an accomplice and corroborated by aliunde evidence, a conviction was authorized.—Woods v. State (Ga.) 1044.

BY-LAWS.

Of mutual benefit insurance association, see "Insurance," § 14.

CANCELLATION OF INSTRUMENTS.

See "Quietting Title"; "Reformation of Instruments."

Competency of witness in action to set aside deed, see "Witnesses," § 1.

Declarations as evidence, see "Evidence," § 7.
 Equitable jurisdiction, see "Equity," § 1.
 Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

Grounds for cancellation or rescission of particular instruments.

See "Deeds," § 4.

Contracts for sale of goods, see "Sales," § 3.

Contracts for sale of realty, see "Vendor and Purchaser," § 1.

Insurance policy, see "Insurance," §§ 5, 13, 14.

Usurious assignment or conveyance, see "Usury," § 1.

§ 1. Right of action and defenses.

*In a suit to quiet title, equity has jurisdiction to cancel an instrument of title at the suit of one in possession under a good title, though the instrument be void on its face.—*Whitehouse v. Jones* (W. Va.) 730.

§ 2. Proceedings and relief.

Where a married woman conveyed land to her husband by a deed void because not signed by him, and remained in possession for 10 years, a suit by her to declare such deed void, brought 1 year after a conveyance by heirs of her husband, is not barred by laches.—*Mullins v. Shrewsbury* (W. Va.) 736.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Appliances required to be used in operation of railroad, see "Railroads," § 8.

Applicability of instructions to pleading in action for injuries to passenger, see "Trial," § 9.

Compensatory damages in action for delay in delivery of baggage, see "Damages," § 1.

Construction of constitutional provisions relating to issuance of mileage books, see "Constitutional Law," § 1.

Form and sufficiency of instructions in action for injuries to passenger, see "Trial," § 8.

Harmless error in action for injuries to passenger, see "Appeal and Error," § 25.

Jurisdiction of justice of action for loss of shipment, see "Justices of the Peace," § 2.

Laws providing for issuance of mileage books as denial of due process of law, see "Constitutional Law," § 9.

Province of court and jury in action for injuries to passenger, see "Trial," § 6.

Regulations of interstate commerce, see "Commerce," § 1.

Time for performance of contract with, see "Contracts," § 2.

§ 1. Carriage of goods.

*Where consignors deliver goods to carrier with directions to deliver to third person on his presentation of the bill of lading and payment of draft, and the carrier delivers the goods before payment of the draft and without presentation of the bill of lading, but, afterwards, the consignors treat directly with such party, accepting a part in cash, and a check for the balance, which was not paid, but consignors waived any right they might have against the carrier.—*Callaway & Truitt v. Southern Ry. Co.* (Ga.) 22.

In an action against a railroad for freight improperly delivered, evidence insufficient to fix the identity of the goods or show their market price was properly excluded.—*Callaway & Truitt v. Southern Ry. Co.* (Ga.) 23.

*A carrier held guilty of conversion in disposing of a shipment at public auction for the pur-

pose of enforcing collection of freight and storage charges.—*Southern Ry. Co. v. Born Steel Range Co.* (Ga.) 173.

*Where a consignee cannot be located the carrier held bound to hold the shipment a reasonable length of time, subject to the consignor's order.—*Southern Ry. Co. v. Born Steel Range Co.* (Ga.) 173.

*Under the general law embodied in Civ. Code 1895, § 2004, every express company doing business in the state held subject to suit for failure to perform its duties as a carrier, either in the county where the goods are received for shipment, or in the county where the delivery of the goods is directed to be made.—*Southern Express Co. v. B. R. Electric Co.* (Ga.) 254.

*Freight must be transported with all reasonable diligence where no time for delivery is expressly agreed upon.—*Harby v. Southern Ry. Co.* (S. C.) 760.

*Where a consignee of certain fruit sold the same to a second purchaser after a bank had discounted a draft drawn on the first purchaser, the acceptance of payment of the draft from the second purchaser by the bank transferred all its rights to the property to him.—*Seward & Co. v. Miller & Higdon* (Va.) 681.

*Discount of a draft attached to an order on a carrier for the delivery of freight held to vest title to the goods in the bank, and to confer on it the rights of a mortgagee in possession, as to attaching creditors of the consignee.—*Seward & Co. v. Miller & Higdon* (Va.) 681.

A bank, having discounted a draft attached to an order on a carrier for the delivery of goods, held not required to record the papers under Code, § 2465, in order to preserve its lien as against creditors of the consignee.—*Seward & Co. v. Miller & Higdon* (Va.) 681.

§ 2. Carriage of live stock.

*A connecting carrier held entitled to benefit of limiting value clause in contract of shipment with initial carrier.—*Harby v. Southern Ry. Co.* (S. C.) 760.

§ 3. Carriage of passengers—Fares, tickets, and special contracts.

*Sufficiency of ticket sold by carrier over connecting lines determined.—*Bussey v. Charleston & W. C. Ry. Co.* (S. C.) 163.

§ 4. — Performance of contract of transportation.

Failure to stop a train at a station and allow a passenger an opportunity to alight, held to render the lessor liable where the road is being operated by a lessee.—*Pickens v. Georgia R. & Banking Co.* (Ga.) 171.

*Cost of ticket held an element of damage in action against carrier for failure to stop and take on passengers.—*Caldwell v. Atlantic Coast Line R. Co.* (S. C.) 131.

Where a carrier sold a ticket which showed on its face that it was intended to have coupons attached, and no such coupons were in fact attached, together with testimony that defendant's conductor told plaintiff that a ticket in the form in which it was, was not good, was admissible to show recklessness and disregard of plaintiff's rights.—*Bussey v. Charleston & W. C. Ry. Co.* (S. C.) 163.

Declaration in an action against a carrier for willfully refusing to furnish transportation and ejecting plaintiff, construed.—*Bussey v. Charleston & W. C. Ry. Co.* (S. C.) 163.

In an action against a carrier for refusal to transport passenger, plaintiff may show that ticket was defective over other lines.—*Bussey v. Charleston & W. C. Ry. Co.* (S. C.) 163.

*Point annotated. See syllabus.

A carrier having knowledge of a quarantine rendering a journey impossible *held* bound to give notice to a passenger seeking information in connection therewith.—*Hasseltine v. Southern Ry. Co.* (S. C.) 142.

Evidence *held* to support allegation that plaintiff, a passenger, was induced by the conductor to get off at the wrong station.—*Ford v. Southern Ry.* (S. C.) 448.

Instruction not supported by the pleadings *held*, under the evidence, harmless error.—*Ford v. Southern Ry.* (S. C.) 448.

Passenger on through train which does not stop at station to which she had purchased a ticket should minimize her damages by getting off at next preceding station and waiting for following local train.—*Carter v. Southern Ry.* (S. C.) 771.

§ 5. — Personal injuries.

*A carrier *held* not an insurer of a passenger but only liable for injuries caused by negligence.—*Hollingsworth v. Skelding* (N. C.) 212.

*In taking passage on a freight train, a passenger assumes the usual risks incident to traveling on such trains when managed by prudent men in a careful manner.—*Marable v. Southern Ry. Co.* (N. C.) 355.

*Liability of a carrier for injuries to a passenger is based on negligence.—*Marable v. Southern Ry. Co.* (N. C.) 355.

*A railroad company which has leased its track and rolling stock is liable for injury to a passenger by the negligence of the lessee's servants.—*Carleton v. Yadkin R. Co.* (N. C.) 429.

*Evidence *held* to justify the jury in determining whether conductor of train was guilty of willful misconduct.—*Talbert v. Charleston & W. C. Ry.* (S. C.) 138.

§ 6. — Actions for personal injuries.

In an action by a passenger on a street car for injuries received in alighting from the car a certain instruction *held* not erroneous.—*Savannah Electric Co. v. McElvey* (Ga.) 192.

In an action by a passenger for injuries received in alighting from a street car, testimony that on the street where the injury occurred there was a place where street cars stopped at the crossing was admissible.—*Savannah Electric Co. v. McElvey* (Ga.) 192.

In an action against a street railway company, petition alleging that plaintiff's minor child was pushed from a moving car by a person in the employ of the company *held* to set forth a cause of action.—*Primus v. Macon Ry. & Light Co.* (Ga.) 924.

*Instruction in an action for injury to a passenger on a street car when the question of negligence and contributory negligence was material *held* correct.—*Savannah Electric Co. v. Mullikin* (Ga.) 945.

In an action against a railroad company for injuries to a passenger alighting on the wrong side of a train, the question of the negligence of the carrier *held* for the jury.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

The question of the negligence of a carrier in not providing means to prevent passengers from alighting on the wrong side of the train, *held* for the jury.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

An instruction in an action against a railroad company for injuries to a passenger *held* not erroneous for the use of the words "continuing negligence."—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

In an action for injuries to a passenger instructions *held* not erroneous under the evidence.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

*In an action for injuries to a passenger, evidence *held* insufficient to sustain his theory as to the cause of the accident.—*Hollingsworth v. Skelding* (N. C.) 212.

*Railroad companies jointly operating their roads through the agency of a lessee *held* properly joined in one action for negligent injuries to a passenger.—*Carleton v. Yadkin R. Co.* (N. C.) 429.

*In action for injury to a passenger, certain instructions *held* reversible error, as excluding plaintiff's version of the case.—*Miller v. Atlanta & C. Air Line R. Co.* (N. C.) 439.

In an action for injuries to passenger, certain instructions *held* error as making defendant's liability depend exclusively on certain fact.—*Miller v. Atlanta & C. Air Line R. Co.* (N. C.) 439.

Evidence that an engineer suddenly and violently backed his train without warning at a place where passengers might be expected to alight was some evidence of wantonness.—*Heirs v. Atlantic Coast Line R. Co.* (S. C.) 457.

§ 7. — Contributory negligence of person injured.

An instruction in an action against a railroad company for injuries to a passenger *held* not erroneous for the use of the word "directly" instead of the word "proximately" in defining contributory negligence.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

*In an action for injuries to a passenger, plaintiff's contributory negligence under the evidence *held* question for the jury under proper instructions.—*Miller v. Atlanta & C. Air Line R. Co.* (N. C.) 439.

*Under Revisal 1905, § 2628, railroad company *held* not liable for injuries to passenger going upon platform of a car in violation of posted regulations of the company.—*Shaw v. Seaboard Air Line Ry.* (N. C.) 713.

*Whether it is gross negligence for a passenger to cross and recross the track at a station after hearing whistle of approaching train *held* a question for the jury.—*Drawdy v. Atlantic Coast Line R. Co.* (S. C.) 444.

§ 8. — Passengers' effects.

*Person traveling on pass, providing that railroad should not be liable for injury to baggage, could not recover except for willful misconduct.—*Hutto v. Southern Ry. Co.* (S. C.) 445.

§ 9. — Palace cars and sleeping cars.

*The personal effects which a passenger may carry on his journey so as to render a sleeping car company liable for their loss through its negligence may include jewelry.—*Pullman Co. v. Schaffner* (Ga.) 933.

*It is the duty of a sleeping car company to exercise reasonable care to guard the personal effects of the passengers from theft.—*Pullman Co. v. Schaffner* (Ga.) 933.

*In a suit against a sleeping car company by a passenger for loss of baggage, where articles of personal adornment were stolen while he was sleeping, the burden is on defendant to show reasonable diligence.—*Pullman Co. v. Schaffner* (Ga.) 933.

CASE ON APPEAL.

Making and settlement, see "Appeal and Error," § 10.

*Point annotated. See syllabus.

CATTLE.

See "Animals."

CAUSE OF ACTION.

See "Attachment," § 1.

CERTIFICATE.

Certified copies, see "Evidence," § 9.
Mandamus to compel issuance of teacher's certificate, see "Mandamus," § 1.
Mutual benefit insurance certificate, see "Insurance," § 14.
Of acknowledgment of written instrument, see "Acknowledgment," § 2.

CERTIORARI.

To correct record on appeal or error, see "Appeal and Error," § 13.

Review in particular proceedings.

Criminal prosecution, see "Criminal Law," §§ 26, 27.
Proceedings before justices of the peace, see "Justices of the Peace," § 4.
Prosecution for violation of municipal ordinance, see "Municipal Corporations," § 5.

§ 1. Proceedings and determination.

Where an allegation of fact on which an assignment of error in a petition for certiorari is based is not verified by the answer such assignment cannot be considered.—*Western Union Telegraph Co. v. Ryan* (Ga.) 21.

*A judge of the superior court held not to have abused his discretion in overruling a certiorari from the ordinary's decision, discontinuing a public road, in a proceeding under Pol. Code, §§ 520, 524.—*Wilcher v. Nunn* (Ga.) 924.

*The judge of a superior court in hearing a certiorari is restricted to errors alleged to have been committed on the trial below.—*Bryant v. Ridgway* (Ga.) 982.

*Where the evidence is conflicting, the discretion of the judge of a superior court in granting on certiorari a first new trial will not be controlled.—*Bryant v. Ridgway* (Ga.) 982.

*The second grant of a new trial on certiorari from a justice will not be reversed where the evidence in support of the verdict is weak and the overwhelming preponderance of the evidence is against it.—*Loudermilk v. Stephens* (Ga.) 956.

Where the transcript shows copies of certiorari bond and certificate as to costs, but with no record of filing, each bearing a given date, and a copy of a writ of certiorari bearing a date subsequent to that of the papers first referred to, there will be a presumption that the clerk according to law did not issue the writ until after such papers had been first duly filed.—*Loudermilk v. Stephens* (Ga.) 956.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 2.

Review of discretionary rulings, see "Criminal Law," § 29.

CHARGE.

To jury in civil actions, see "Trial," §§ 6-12.
To jury in criminal prosecutions, see "Criminal Law," § 14.

*Point annotated. See syllabus.

CHARITIES.**§ 1. Construction, administration, and enforcement.**

In a suit by the executors held that they failed to make such a case as would authorize the court to so construe the will as to allow them to administer the trust funds in a manner other than that clearly expressed in the will.—*Harris v. Neal* (W. Va.) 740.

CHARTER.

See "Municipal Corporations," §§ 4, 5.
Of railroad, see "Railroads," § 3.

CHATTEL MORTGAGES.

Confusion of mortgaged goods, see "Confusion of Goods," § 1.
In fraud of creditors, see "Fraudulent Conveyances," § 1.

§ 1. Requisites and validity.

*Contract for sale of personality, title to remain in seller until paid for, held a mortgage.—*State v. Haynes* (S. C.) 118.

§ 2. Construction and operation.

*A chattel mortgage of all household goods, all office furniture, and all stock of merchandise does not cover merchandise thereafter acquired.—*Armour & Co. v. Ross* (S. C.) 315.

§ 3. Removal or transfer of property by mortgagor.

*Taking mortgaged property out of the state held a violation of Cr. Code 1902, § 337.—*State v. Haynes* (S. C.) 118.

*Taking mortgaged chattels into a foreign state and pawning them held a violation of Cr. Code 1902, § 337.—*State v. Haynes* (S. C.) 118.

CHATELS.

See "Property."

CHEAT.

See "False Pretenses"; "Fraud."

CHECKS.

Payment by bank, and collection, see "Banks and Banking," § 2.
Restraining payment of, see "Injunction," § 2.

CHILDREN.

See "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."

Death or injuries to infant servant, see "Master and Servant," §§ 8, 11.

Devises to, by will, see "Wills," § 3.

Employment of minor, see "Master and Servant," § 2.

Habeas corpus to obtain possession of child, see "Habeas Corpus," § 2.

Marriage of child, see "Marriage."

Risks assumed by minor servant, see "Master and Servant," § 8.

CHOSE IN ACTION.

Assignment, see "Assignments."

CIRCUMSTANTIAL EVIDENCE.

Instructions as to, see "Criminal Law," § 14.

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

Equal protection of laws, see "Constitutional Law," § 8.

Privileges and immunities, see "Constitutional Law," § 7.

CIVIL RIGHTS.

See "Constitutional Law," §§ 8, 7, &.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 8.

CLASS LEGISLATION.

See "Constitutional Law," § 7.

CLERKS OF COURTS.

Authority of as agent for sheriff in collection of costs, see "Principal and Agent," § 2.

Effect of refusal of to revive judgment, see "Judgment," § 12.

CLOUD ON TITLE.

See "Quietling Title."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 10.

COLLATERAL ATTACK.

Of process in justice court, see "Justices of the Peace," § 8.

On assessment for municipal improvements, see "Municipal Corporations," § 4.

COLLATERAL SECURITY.

Holder of note as collateral security as bona fide purchaser, see "Bills and Notes," § 2.

COLLATERAL UNDERTAKING.

See "Frauds, Statute of," § 1.

COLLECTION.

By bank, see "Banks and Banking," § 2.

Of costs, see "Costs," § 2.

COLOR OF TITLE.

Possession of land by infants having color of title, see "Infants," § 1.

To sustain adverse possession, see "Adverse Possession."

COMBINATIONS.

See "Conspiracy"; "Monopolies," § 1.

COMMERCE.

Carriage of goods and passengers, see "Carriers."

On navigable waters, see "Navigable Waters," § 1.

§ 1. Means and methods of regulation.

*Penal Code 1895, § 420, forbidding, with certain exceptions, the running of freight trains on Sunday, is not unconstitutional as a violation of interstate commerce.—*Seale v. State* (Ga.) 472.

That Act Aug. 10, 1906, fixing the license fee for the sale of liquors in Irwin county, discriminates against wines made outside of the state, does not render the act invalid, but places all wines on the same basis, whether made within or without the state.—*Glover v. State* (Ga.) 592.

*Sales of drugs and patent medicines held to constitute interstate commerce, and therefore were not within Revisal 1906, §§ 5150, 5151, prohibiting a sale of patent medicines or drugs without the seller first having obtained a license.—*State v. Trotman* (N. C.) 599.

*Civ. Code 1902, vol. 1, §§ 1710, 2176, and Laws 1903, Act No. 1 (24 St. at Large, p. 1), requiring a carrier to trace freight shipped over it, etc., held not regulations of interstate commerce and unconstitutional.—*Skipper v. Seaboard Air Line Ry.* (S. C.) 454.

COMMERCIAL PAPER.

See "Bills and Notes."

COMMISSION.

Control of railroads by corporation commission, see "Railroads," §§ 1, 8.

Laws providing corporation commission as denial of due process of law, see "Constitutional Law," § 9.

Laws providing for corporation commission as delegation of legislative power, see "Constitutional Law," § 2.

Laws providing corporation commission as denial of equal protection of laws, see "Constitutional Law," § 8.

To take testimony, see "Depositions."

COMMISSIONERS.

Disposition of township taxes by county commissioners, see "Towns," § 1.

In partition, see "Partition," § 1.

Mandamus by state tax commissioner, see "Mandamus," § 1.

Of municipal corporation, see "Municipal Corporations," § 2.

COMMISSIONS.

Of broker, see "Brokers," §§ 1, 2.

Of receiver, see "Receivers," § 8.

COMMITMENT.

On conviction of crime, see "Criminal Law," § 23.

COMMITTEE.

Authority of Legislature to appoint, see "States," § 1.

Competency of witness in examination by legislative committee, see "Witnesses," § 1.

*Point annotated. See syllabus.

COMMON CARRIERS.

See "Carriers."

COMMON LAW.

Assault at common law, see "Assault and Battery," § 1.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 2.

Of particular classes of officers or other persons.
See "Brokers," §§ 1, 2; "Receivers," § 3.
Agent, see "Principal and Agent," § 1.
Court stenographer, see "Courts," § 2.

COMPLAINT.

In civil actions, see "Pleading," § 2.
In criminal prosecution, see "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPOUNDING FELONY.

*An indictment for compounding a felony must charge clearly the agreement not to prosecute.—*State v. Hodge* (N. C.) 626.

*An indictment for compounding a felony held fatally defective for failure to charge that the persons with whom it was claimed defendant entered into an unlawful agreement were in fact guilty of the felony.—*State v. Hodge* (N. C.) 626.

COMPROMISE AND SETTLEMENT.

See "Accord and Satisfaction"; "Payment"; "Release."

Agreement that plaintiff might remove timber cut and that he should relinquish any further right to cut and remove timber held based on a sufficient consideration.—*York v. Westall* (N. C.) 724.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 1.

CONCLUSION.

Of witness, see "Evidence," § 11.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

Equitable jurisdiction to give relief against condition in deed, see "Equity," § 1.

In contracts and conveyances.

See "Deeds," § 3.
Contracts of employment, see "Master and Servant," § 1.
Insurance policies, see "Insurance," §§ 6, 7, 9, 13.

Precedent to actions or other proceedings.

Setting up release as defense, see "Release," § 1.
To judgment in foreclosure of lien, see "Mechanics' Liens," § 2.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 3.
Of judgment, see "Judgment," § 2.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

CONFLICT OF LAWS.

See "Wills," § 3.
Injuries to servant, see "Master and Servant," § 3.

CONFUSION OF GOODS.

§ 1. *Rights and remedies of persons interested.*

Where a deed of trust was executed on goods to secure an indorser on a note, and the debtor while in possession mingled the goods with additional goods purchased, and an execution was levied on the whole stock, and the trustee filed his petition to release the goods from levy, under Code 1899, c. 50, § 152 [Code 1906, c. 50, § 2103], held, that the burden was on the execution creditor to identify the additional goods.—*Weaver v. R. L. Neal & Co.* (W. Va.) 909.

CONNECTING CARRIERS.

See "Carriers," §§ 2, 3.

CONSIDERATION.

Of contract in general, see "Contracts," § 1.

Of particular classes of contracts.

See "Bills and Notes," § 1; "Fraudulent Conveyances," § 1; "Sales," § 1.
For support of bastard, see "Bastards," § 1.
Oil lease, see "Mines and Minerals," § 1.

CONSPIRACY.

Combinations to monopolize trade, see "Monopolies," § 1.
Restraining by injunction, see "Injunction," § 2.

§ 1. *Criminal responsibility.*
*An indictment drawn under Revisal 1905, § 3698, charging that defendant and others conspired to enter a jail, held not defective for failing to name the other conspirators.—*State v. Lewis* (N. C.) 600.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Presentation in lower court of constitutional questions for purpose of review, see "Criminal Law," § 25.

Provisions relating to particular subjects.

See "Counties," § 1; "Courts," § 4; "Criminal Law," § 19; "Eminent Domain," § 1; "Intoxicating Liquors," § 1; "Jury," § 1; "Justices of the Peace," § 2; "Master and Servant," §§ 7, 12; "Taxation," § 2.

*Point annotated. See syllabus.

Enactment and validity of statutes, see "Statutes," § 1.

Exemptions, see "Homestead," § 1.

Special or local laws, see "Statutes," § 2.

Subjects and titles of statutes, see "Statutes," § 3.

§ 1. Construction, operation, and enforcement of constitutional provisions.

The State Corporation Commission, under Const. 156 (c) [Va. Code 1904, p. cclli] has jurisdiction to pass on the constitutionality of Act March 15, 1906 (Acts 1906, p. 451, c. 256), requiring railroads to sell mileage books at reduced rates, in a proceeding to enforce such act.—Commonwealth v. Atlantic Coast Line R. Co. (Va.) 572.

County courts cannot refuse obedience to a legislative act limiting their taxing powers as a violation of Const. U. S. art. 1, § 10, cl. 1, prohibiting the passage of laws impairing the obligation of contracts; they being mere agencies of the Legislature and not interested in the debts due.—State v. Braxton County Court (W. Va.) 382.

*Courts will not hear objections to law on the ground of unconstitutionality from persons whose rights are not affected thereby.—State v. Braxton County Court (W. Va.) 382.

§ 2. Distribution of governmental powers and functions.

*Revisal 1905, §§ 207, 208, making it the duty of the court to admit attorneys to practice on complying with the formal prerequisites and showing themselves to have competent knowledge, *held* not in violation of Declaration of Rights, § 8, providing that the different parts of the government shall be kept separate.—In re Applicants for License (N. C.) 635.

*Revisal 1905, §§ 207, 208, relating to the admission of attorneys, *held* not in violation of Const. art. 4, § 12, which provides that the General Assembly shall not deprive the judicial department of any power which rightfully pertains to it.—In re Applicants for License (N. C.) 635.

Acts 1904, p. 144, c. 99 [Va. Code 1904, p. 468, § 1014a], relating to extension of corporate limits, *held* not violative of Bill of Rights or of Const. art. 3 [Va. Code 1904, p. ccxviii], as devolving on the judges legislative powers.—Henrico County v. City of Richmond (Va.) 683.

*Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl, cclii], and the statutes passed in pursuance thereof, creating a state corporation commission clothed with limited legislative, executive, and judicial powers, *held* not in violation of Bill of Rights, § 5 [Va. Code 1904, p. cclx], or any requirement of the federal Constitution.—Winchester & S. R. Co. v. Commonwealth (Va.) 692.

§ 3. Personal, civil, and political rights.

*Under Const. art. 1, § 16, there can be no imprisonment to enforce payment of a debt under final process unless it has been adjudged on an allegation in the complaint and corresponding issue found that defendant has been guilty of fraud.—Ledford v. Emerson (N. C.) 969.

§ 4. Vested rights.

Exemption from jury duty may subsequently be revoked.—State v. Cantwell (N. C.) 820.

§ 5. Obligation of contracts.

Under Const. art. 8, § 1, the exemption from jury duty granted by Priv. Acts 1868-69, p. 72, c. 55, *held* not a contract which the state could not revoke.—State v. Cantwell (N. C.) 820.

*Point annotated. See syllabus.

§ 6. Retrospective and ex post facto laws.

*Revisal 1905, § 1591, is constitutional as a retrospective act, and, where a testator died in 1896 and special proceedings were had by a devisee for sale of the land devised to her, a conveyance of such interest pursuant to a decree passed a good title.—Anderson v. Wilkins (N. C.) 272.

§ 7. Privileges or immunities, and class legislation.

24 St. at Large, p. 441, exempting Confederate veterans who enlisted "from the state" from any license for carrying on any business is unconstitutional as unjust discrimination.—City of Laurens v. Anderson (S. C.) 136.

§ 8. Equal protection of laws.

*Act 24 St. at Large, p. 441, providing that soldiers and sailors of the Confederate States who enlisted from the state should be exempt from any license for carrying on business, *held* in violation of Const. art. 1, § 5, and fourteenth Amend. Const. U. S. § 1.—City of Laurens v. Anderson (S. C.) 136.

*Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl, cclii], and laws passed in pursuance thereof, subjecting all transportation companies in the matter of their public duties and charges to a corporation commission, *held* not a denial of the equal protection of the law.—Winchester & S. R. Co. v. Commonwealth (Va.) 692.

§ 9. Due process of law.

*Act March 15, 1906 (Acts 1906, p. 451, c. 256), requiring railroad companies to keep mileage books for sale at not more than two cents a mile, *held* unconstitutional, as a deprivation of property without due process of law.—Commonwealth v. Atlantic Coast Line R. Co. (Va.) 572.

Proceedings determining the rights of transportation companies before the corporation commission created by Const. art. 12, §§ 155, 156 [Va. Code 1904, pp. ccl, cclii], *held* to constitute due process of law.—Winchester & S. R. Co. v. Commonwealth (Va.) 692.

CONSTRUCTIVE TRUSTS.

See "Trusts," §§ 1, 6.

CONTEMPT.

Decision on former appeal as law of the case, see "Appeal and Error," § 28.

Jury trial in contempt proceedings for disobedience to orders in alimony case, see "Divorce," § 3.

Power of committee of legislature to commit witness for, see "States," § 1.

Supersedeas on appeal in contempt proceedings, see "Appeal and Error," § 6.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 7.

Review of discretionary rulings, see "Appeal and Error," § 22.

*Under Revisal 1905, § 531, order granting continuance for plaintiff on payment of costs of term, *held* within discretion of trial judge.—Slocumb v. Philadelphia Const. Co. (N. C.) 196.

*Refusal to continue a case because of absence of counsel *held* not error.—Rice v. Lockhart Mills (S. C.) 160.

*Refusal of continuance in habeas corpus proceedings *held* not error.—Ex parte Cannon (S. C.) 825.

*Refusal of continuance *held* not an abuse of discretion.—Heirs v. Atlantic Coast Line R. Co. (S. C.) 457.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Assignment, see "Assignments."

Cancellation, see "Cancellation of Instruments."

Declarations as evidence in action on, see "Evidence," § 7.

Impairing obligation, see "Constitutional Law," § 5.

Mitigation of damages for breach of contract, see "Damages," § 1.

Operation and effect of customs or usages, see "Customs and Usages."

Operation and effect of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Reformation, see "Reformation of Instruments."

Restraining performance or breach, see "Injunction," § 2.

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of persons.

See "Carriers," §§ 1, 3; "Corporations," § 8; "Infants," § 2; "Municipal Corporations," § 8; "Receivers," § 3.

Banks, see "Banks and Banking," § 2.

Contracts relating to particular subjects.

See "Mines and Minerals," § 1.

Collections by bank, see "Banks and Banking," § 2.

Exemption of railroad from liability to servant, see "Master and Servant," § 3.

Ground for mechanics' liens, see "Mechanics' Liens," § 1.

Support of bastard, see "Bastards," § 1.

Transmission of telegram, see "Telegraphs and Telephones," § 1.

Transportation of goods, see "Carriers," § 1.

Transportation of passengers, see "Carriers."

Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; "Bonds"; "Covenants"; "Insurance"; "Liens"; "Master and Servant"; "Partnership"; "Sales."

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," § 1.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Mutual benefit insurance, see "Insurance," § 14.

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Work and Labor."

Particular modes of discharging contracts.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment"; "Release."

§ 1. Requisites and validity.

*A contract in consideration of past cohabitation to support the woman and children begotten during the cohabitation is not void.—Burton v. Belvin (N. C.) 71.

*Where at the time of the sale of a lot it was agreed that if the vendee resold the same the vendor should have the profits realized,

*Point annotated. See syllabus.

the consideration for the sale was sufficient to support the collateral agreement.—Bourne v. Sherrill (N. C.) 799.

*The validity of a contract is determined by the law of the place where it is made.—Cannaday v. Atlantic Coast Line R. Co. (N. C.) 836.

Rule for determining whether a contract in partial restraint of trade is reasonable or not defined.—Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co. (S. C.) 973.

§ 2. Construction and operation.

*A contract is to be interpreted in accordance with the law of the place where it is made.—Cannaday v. Atlantic Coast Line R. Co. (N. C.) 836.

*A contract between plaintiff's assignor and defendant railroad company for the operation of a branch line connecting with the coal mines and coking plant of plaintiff's assignor *held* terminable at the election of the railroad company.—Stonega Coke & Coal Co. v. Louisville & N. R. Co. (Va.) 551.

§ 3. Performance or breach.

*Recommendation of the validity of certain bonds by plaintiffs' attorney *held* a condition precedent to plaintiffs' obligation to purchase the bonds under a proposal so to do "when legally issued to the satisfaction of plaintiffs' attorney."—C. A. Webb & Co. v. Trustees of Morganton Graded School (N. C.) 719.

The rights of the parties to a contract for the construction of a building destroyed by fire before its completion determined.—Keel v. East Carolina Stone & Construction Co. (N. C.) 826.

§ 4. Actions for breach.

In an action for breach of contract, testimony of a witness that he loaned plaintiff money to enable him to fulfill his contract, *held* admissible on an issue as to plaintiff's ability and readiness to perform.—Ives v. Atlantic & N. C. R. Co. (N. C.) 74.

In an action for breach of contract certain testimony *held* not objectionable on the ground that its effect was to make witness the real plaintiff.—Ives v. Atlantic & N. C. R. Co. (N. C.) 74.

CONTRADICTION.

Of witness, see "Witnesses," § 3.

CONTRIBUTORY NEGLIGENCE.

Of passenger, see "Carriers," § 7.

Of person injured, see "Negligence," § 2.

Of person injured by operation of railroad, see "Railroads," §§ 10, 11.

Of person injured by operation of street railroad, see "Street Railroads," § 2.

Of servant, see "Master and Servant," §§ 8-12.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Conveyances by or to particular classes of persons.

See "Corporations," § 8; "Guardian and Ward," § 2.

Married women, see "Husband and Wife," § 2.

Conveyances of particular species of, or estates or interests in, property.

See "Mines and Minerals," § 1.

Separate property of married women, see "Husband and Wife," § 2.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

As employers, see "Master and Servant," § 7.
 Bona fide purchasers of note executed by corporate officer, see "Bills and Notes," § 2.
 Declarations as evidence in action by or against, see "Evidence," § 7.
 Jurisdiction of corporation commission to pass on constitutional questions, see "Constitutional Law," § 1.
 Laws providing for corporation commission as delegation of legislative power, see "Constitutional Law," § 2.
 Laws providing corporation commission as denial of due process of law, see "Constitutional Law," § 9.
 Multifariousness in pleading in suit by or against, see "Equity," § 2.
 Taxation of corporations and corporate property, see "Taxation," § 3.
 Transfer of corporate stock as assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.

Particular classes of corporations.

See "Municipal Corporations"; "Railroads"; "Street Railroads."
 Banks, see "Banks and Banking."
 Insurance companies, see "Insurance."
 Telegraph and telephone companies, see "Telegraphs and Telephones."

§ 1. Capital, stock, and dividends.

*A corporation purchasing its own shares which are not fully paid cannot charge the shareholders with individual liability for the unpaid portions of subscription unless they, on a sufficient consideration, promise to pay the same.—*Crawford v. Roney* (Ga.) 499.

*In a suit by a corporation against a stockholder for unpaid subscription, proof of the subscription and of a call duly made makes a prima facie case.—*Crawford v. Roney* (Ga.) 499.

§ 2. Members and stockholders.

*It is essential to the validity of acts of stockholders of a corporation that they be performed pursuant to action taken at a deliberative meeting regularly organized.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*Notice to stockholders of the time and place of a meeting of stockholders held essential to its validity unless they attend in person or by proxy, or the time and place is fixed by statute, charter, or usage.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

Proceedings at a subsequent meeting of stockholders held to cure any defect in the notice of a prior meeting at which a lease of the corporation's property was authorized.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*In the absence of proof to the contrary, it will be presumed that an annual or stated meeting of a corporation's stockholders was held in accordance with the requirements of its charter.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

§ 3. Corporate powers and liabilities.

A corporation is not liable for the malicious acts of its agent unless such acts were authorized or were within the scope of his duties or were a violation of the duty owed by the corporation to the party injured, or were ratified by the corporation.—*Southern Ry. Co. v. Chambers* (Ga.) 37.

Evidence held sufficient to sustain a finding that a purchaser of a corporation's stock and

assets was a bona fide purchaser for value.—*National Union Bank of Maryland v. Hollingsworth* (N. C.) 809.

One not a creditor of a corporation held not entitled to complain that a transferee of all of its stock and assets did not pay all of the corporation's debts as agreed.—*National Union Bank of Maryland v. Hollingsworth* (N. C.) 809.

*A corporation held not liable on a note indorsed by its president in the name of a firm which the corporation had succeeded.—*National Union Bank of Maryland v. Hollingsworth* (N. C.) 809.

A resolution for the leasing of the property of a railroad company held to require a deposit of \$100,000 in money, or securities having a current value of not less than that sum, and not bonds or securities having a par value of \$100,000.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

Stockholders of a corporation held to have waived any objection to the fact that a deposit to secure the terms of a lease was paid to a trust company instead of to the State Treasurer, as required by the resolution authorizing the lease.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

Where a lease of a corporation's property exceeded the term of the lessor's corporate existence, it was valid for the length of the lessor's corporate life, and for a period during which its charter might be renewed, not exceeding the term of the lease.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

A stockholder of a corporation, having delayed taking steps to annul a lease of the corporation's property for more than a year, held to have waived his right to object to irregularities in the execution of the lease.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*Stockholders of a corporation held not entitled to set aside a lease of its assets and franchises on the ground that the same was ultra vires.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*Adoption of the report of the president of a corporation disclosing a lease of the corporation's property, at a regular annual meeting of the corporation's stockholders, held an implied ratification of the lease without objection.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*There is no presumption that the secretary of a corporation has power to bind the corporation as an accommodation indorser of his own promissory notes.—*Wheeling Ice & Storage Co. v. Connor* (W. Va.) 982.

§ 4. Foreign corporations.

*A foreign corporation selling and delivering goods in the state on orders taken therefor by its agents and traveling salesmen and forwarded to it, and transacting no other business in the state, does not carry on business in the state within Code, c. 54, § 30, as amended by Acts 1901, p. 108, c. 35, § 31 [Code 1906, § 2322].—*Underwood Typewriter Co. v. Piggott* (W. Va.) 664.

CORRECTION.

Of irregularities and errors at trial, see "Trial," § 18.
 Of record on appeal or writ of error, see "Appeal and Error," § 13.

COSTS.

Authority of clerk of court as agent for sheriff in collection of, see "Principal and Agent," § 2.

*Point annotated. See syllabus.

§ 1. On appeal or error, and on new trial or motion therefor.

*Costs of appeal in case of a partial new trial *held* in the discretion of the court, under Revised 1905, § 1279, notwithstanding section 1251, requiring in certain cases judgment for costs against sureties for prosecution.—*Raburn v. Pennsylvania Casualty Co.* (N. C.) 296.

§ 2. Payment and remedies for collection.

Where plaintiff files an affidavit of inability to pay the costs in two previous actions brought against the same defendants and which had been dismissed, it relieved her of the necessity of paying such costs, and the question whether when she brought the second action she had paid the costs in the first or made the prescribed affidavit is immaterial.—*Seaboard Air-Line Ry. v. Randolph* (Ga.) 47.

The clerk of the Superior Court on request of plaintiff's counsel, charged the costs to such counsel and released plaintiff, stating that he also had authority to collect for the sheriff as well as himself. *Held*, that this was not an actual payment of the costs under Civ. Code 1895, § 5043, at least as to the sheriff.—*Board of Education of Tennille v. Kelley* (Ga.) 238.

*Where plaintiff commences a second suit after dismissal of a prior suit for the same cause of action and fails to pay the costs, or file a proper affidavit stating his inability to do so, such failure is ground for a plea in abatement.—*Board of Education of Tennille v. Kelley* (Ga.) 238.

*Under Civ. Code 1895, § 5043, *held* that plaintiff cannot bring a second suit for the same cause of action after dismissal, unless he pays the costs or files a proper affidavit stating his inability to do so.—*Board of Education of Tennille v. Kelley* (Ga.) 238.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL.

See "Municipal Corporations," §§ 1-3, 6.

COUNTERFEITING.

See "Forgery."

COUNTIES.

See "Municipal Corporations."

Construction of constitutional provisions limiting power of county court to tax, see "Constitutional Law," § 1.

Enactment and validity of statutes relating to, see "Statutes," § 1.

Grant of right to use of highway, see "Highways," § 1.

Liability for damages from defect in bridge, see "Bridges," § 2.

Local option in, see "Intoxicating Liquors," §§ 2, 3.

Mandamus to county commissioners, see "Mandamus," § 1.

Special or local laws relating to, see "Statutes," § 2.

§ 1. Government and officers.

The clause of Code 1899, c. 39, § 29, as amended by Acts 1905, p. 445, c. 48 [Code 1906, § 1231], prohibiting county courts from levying taxes in 1905, 1906, and 1907, which shall exceed a certain amount, *held* not beyond the legislative competency by reason of the constitutional

powers respecting county levies possessed by county courts.—*State v. Braxton County Court* (W. Va.) 382.

County courts are subject to the legislative control as to the money they may raise by taxation for county purposes, within the limitation imposed by Const. art. 10, § 7.—*State v. Braxton County Court* (W. Va.) 382.

Where the citizens of a county desire the relocation of a county seat, and file their petition, under Code 1906, § 1217, and the petition is signed on several separate papers, such several papers constitute only one petition.—*Chambers v. Cline* (W. Va.) 999.

Where a vote on the removal of a county seat was taken at a general election, under Code 1906, § 1217, and the election was *held* invalid, the county court could, on petition by the requisite number of legal voters, order the holding of a special election in a subsequent year in which no general election is held.—*Chambers v. Cline* (W. Va.) 999.

COUNTS.

In indictment or information, see "Indictment and Information," §§ 1, 3.
In pleading, see "Pleading," § 3.

COUNTY SEAT.

See "Counties," § 1.

COURTS.

Judicial power, see "Constitutional Law," § 2.
Jurisdiction of criminal prosecutions, see "Criminal Law," § 1.

Justices' courts, see "Justices of the Peace."
Province of court and jury, see "Trial," § 6.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.
Trial by court without jury, see "Trial," § 15.
Want of jurisdiction, ground for relief by habeas corpus, see "Habeas Corpus," § 1.

§ 1. Nature, extent, and exercise of jurisdiction in general.

*It is too late, after verdict, to question the jurisdiction of a court which was competent to deal with the subject-matter of a suit against a corporation which voluntarily appeared and made defense.—*Southern Express Co. v. B. R. Electric Co.* (Ga.) 254.

*The state may provide by statute that the title to real estate shall be settled by suit in which defendant, being a nonresident, is brought into court by publication.—*Clem v. Given's Ex'r* (Va.) 567.

§ 2. Establishment, organization, and procedure in general.

*When the stenographer of a superior court by order of judge takes down the evidence and other proceedings, the judge can allow him compensation, at the rate of 10 cents per 100 words, and can prescribe by whom such compensation shall be paid, under Civ. Code 1895, § 4447.—*Seaboard Air-Line Ry. v. Memory* (Ga.) 15.

The judge cannot, upon an ex parte application of a stenographer, render judgment in his favor against a party in an action, in which he has taken down the proceedings, for the amount of the stenographer's bill for a transcript of the evidence and charge.—*Seaboard Air-Line Ry. v. Memory* (Ga.) 15.

*Power to fix the compensation of a court stenographer and prescribe by whom it shall be paid, which the judge has under Civ. Code 1895, § 4447, carries with it the power to render

*Point annotated. See syllabus.

judgment in favor of the stenographer.—*Seaboard Air-Line Ry. v. Memory* (Ga.) 15.

Under Civ. Code 1895, § 4446, a stenographer is entitled to compensation not only for taking down the evidence, but also for taking down the charge of the court and other proceedings.—*Seaboard Air-Line Ry. v. Memory* (Ga.) 15.

*The Supreme Court is bound to follow previous decisions which have become rules of property.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*A decision of the United States Supreme Court on the constitutionality of a state statute held conclusive on the courts of another state on the question of the validity of a similar statute of that state.—*Commonwealth v. Atlantic Coast Line R. Co.* (Va.) 572.

§ 3. Courts of limited or inferior jurisdiction.

In the city court of Washington, as to cases returned to the monthly term of such court, the practice in the superior court in regard to appearance days and the allowance of 30 days in which to open default held not applicable.—*Thurmond v. C. L. Groves & Co.* (Ga.) 915.

Under Acts 1905, pp. 404, 405, §§ 17, 18, the first term in the city court of Washington is the trial term, and the presiding judge is not vested with discretion to open default at a later term.—*Thurmond v. C. L. Groves & Co.* (Ga.) 915.

If there were any duty on the part of the judge of the city court of Washington to mark a case in default, under Act 1905, pp. 404, 405, §§ 17, 18, the presumption would be that he did so.—*Thurmond v. C. L. Groves & Co.* (Ga.) 915.

§ 4. Courts of appellate jurisdiction.

Under Const. art. 6, § 88, and Code 1904, § 388a, where the constitutionality of Code 1904, § 62, relating to the qualifications of voters in liquor license elections, was not raised in a contest of such an election, the decision of the circuit court therein could not be reviewed by the Supreme Court of Appeals on a writ of error.—*Hulvey v. Roberts* (Va.) 585.

COVENANTS.

In leases, see "Landlord and Tenant," § 1. Jurisdiction of justice of action for breach of covenant, see "Justices of the Peace," § 2.

§ 1. Construction and operation.

A covenant of seisin held to include both tracts conveyed.—*Eames v. Armstrong* (N. C.) 405.

*A covenant after conveying his title may sue for breach of covenant of seisin.—*Eames v. Armstrong* (N. C.) 405.

§ 2. Performance or breach.

*The right of action for breach of covenant of seisin held complete on delivery of deed.—*Eames v. Armstrong* (N. C.) 405.

§ 3. Actions for breach.

*Where defendant in an action for breach of covenant of seisin merely denies the breach, plaintiff held to have the burden of proof.—*Eames v. Armstrong* (N. C.) 405.

Defendant in an action for breach of covenant of seisin having in a defense setting up matters of avoidance admitted he had no title when he executed the deed held a breach need not be proved.—*Eames v. Armstrong* (N. C.) 405.

*Where, in fixing damages for a breach of covenants in a deed, it became necessary to determine the value of corporate stock conveyed with the land, the value of the stock should have been determined as of the time the cove-

nants were made, and not by the subsequent financial condition of the corporation.—*Lemly v. Ellis* (N. C.) 629.

COVERTURE.

See "Husband and Wife."

CREDIBILITY.

Of witness, see "Witnesses," § 3.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

Remedies against surety on guardian's bond, see "Guardian and Ward," § 4. Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Appointment of receivers, see "Receivers," § 1. Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

Conviction of husband for crime as ground for divorce, see "Divorce," § 1.

Conviction of offense included in that charged, see "Indictment and Information," § 6.

Fines, see "Fines."

Indictment, information, or complaint, see "Indictment and Information."

Restraining criminal acts by injunction, see "Injunction," § 2.

Offenses by particular classes of persons.

See "Infants," § 3; "Justices of the Peace," § 1.

Particular offenses.

See "Abduction"; "Assault and Battery," § 1; "Burglary"; "Compounding Felony"; "Conspiracy," § 1; "False Pretenses"; "Forgery"; "Fornication"; "Gaming," § 1; "Homicide"; "Larceny"; "Obcenity"; "Rape"; "Riot"; "Seduction," § 1; "Trespass," § 3; "Vagrancy."

Abandonment of child, see "Parent and Child." Against liquor laws, see "Intoxicating Liquors," §§ 3, 4.

Against Sunday laws, see "Sunday."

Enticing servant from employment, see "Master and Servant," § 14.

Malpractice by justice of the peace, see "Justices of the Peace," § 1.

Removal of mortgaged chattels, see "Chattel Mortgages," § 3.

Violations of municipal ordinances, see "Municipal Corporations," § 5.

§ 1. Jurisdiction.

Larceny from the house of goods exceeding \$50 in value is a felony of which a city court has no jurisdiction.—*Toliver v. State* (Ga.) 478.

§ 2. Venue.

*The venue for a prosecution, under Acts 1903, p. 90, for obtaining advances under a contract of employment is in the county where the advance is received.—*Dyas v. State* (Ga.) 488.

Revisal 1905, § 3233 (Laws 1893, p. 440, c. 461, § 4), fixing the venue for the crime of "lynching," held to fix the procedure for the crime defined in section 3698 (Laws 1893, p. 440, c. 461, § 1).—*State v. Lewis* (N. C.) 600.

*Revisal 1905, § 3233, authorizing an indictment for lynching to be brought by the grand jury of a county adjoining the one where the crime was committed, is not an improper

*Point annotated. See syllabus.

exercise of legislative power.—*State v. Lewis* (N. C.) 600.

A judge at chambers cannot grant a change of venue on the ground that the ends of justice will be thereby promoted under Code Civ. Proc. 1902, § 147.—*Castles v. Lancaster County* (S. C.) 115.

§ 3. Limitation of prosecutions.

Under Revisal 1905, §§ 3621, 3291, 2676, and Acts 1870-71, p. 94, c. 43, a prosecution for assault with a deadly weapon with intent to kill is barred in two years by section 8147.—*State v. Frisbee* (N. C.) 722.

§ 4. Former jeopardy.

Where a conviction of murder in the second degree under an indictment charging murder in the first degree, is set aside, accused on a subsequent trial, may be tried for murder in the first degree.—*State v. Matthews* (N. C.) 842.

§ 5. Arraignment and pleas, and nolle prosequi or discontinuance.

An alleged plea to the jurisdiction in a criminal case, denying that the court was lawfully constituted, held a nullity.—*State v. Hall* (N. C.) 806.

*It is not error to allow solicitor to nol. pros. the first indictment for the purpose of getting out a second bill.—*State v. Thomas* (S. C.) 893.

§ 6. Evidence.

*A declaration by defendant to the officer having him in custody, held properly admitted.—*Allred v. State* (Ga.) 178.

Evidence that a third person stated to accused while under arrest that he had received a telephone message from another requesting accused to go along quietly and make no move, and evidence of certain statements by accused held insufficient to prove either that the message was actually sent or that accused made any admission.—*Allred v. State* (Ga.) 178.

*Judicial cognizance will be taken that the territory now embraced in Crisp county was, before the creation of that county, within the boundaries of Dooly county, wherein the sale of intoxicating liquors was prohibited.—*Moore v. State* (Ga.) 327; *Parker v. Same* (Ga.) 329.

*A witness is not shown to be inaccessible within Pen. Code 1895, § 1001, so as to authorize evidence of his testimony on a former trial, when he is absent from the county, and when last heard from was within the state.—*Taylor v. State* (Ga.) 474.

*Evidence held insufficient to show that the offense was committed before the filing of the accusation.—*Lightner v. State* (Ga.) 477.

*There was no error in rejecting evidence that, less than five minutes after the shooting, the accused made a statement self-serving in its character, where it was not shown whether it was made at the scene of the homicide or elsewhere.—*Park v. State* (Ga.) 489.

A statement by accused when first required to account for his possession of goods alleged to have been recently stolen is admissible.—*Lanier v. State* (Ga.) 496.

*On trial for riot, it being a subject of inquiry as to the effect of words used by a defendant on the bystanders, it was error to permit a witness to testify that said words "had the worst kind of effect."—*Shuler v. State* (Ga.) 496.

*In the absence of proof connecting one accused of burglary with an article picked up at the scene of the crime, that it was there found is wholly irrelevant.—*Field v. State* (Ga.) 502.

*Evidence that just after the shooting took place a person said to the accused that he had

made a mistake and ought not to have shot the boy who was injured, and the accused replied that he had done wrong, was admissible.—*Fuller v. State* (Ga.) 1047.

In a prosecution for seduction, it is proper for the state to ask defendant if he had not transferred his property to avoid the result of the indictment.—*State v. Kincaid* (N. C.) 647.

The burden is on accused, charged with committing a statutory offense, to prove that the offense falls within an exception, unless the exceptions forms part of the description of the offense.—*State v. Connor* (N. C.) 787.

In a prosecution under an indictment under Revisal 1905, § 3360, making elopement with the wife of another a crime, provided the woman since marriage has been innocent and virtuous, the burden of proving that the case does not fall within the statute is on the state.—*State v. Connor* (N. C.) 787.

In a prosecution under Revisal 1905, § 3360, making it a crime to elope with the wife of another if she has been innocent and virtuous since marriage, evidence on the part of the state as to the general character of the woman for virtue is admissible.—*State v. Connor* (N. C.) 787.

*Evidence of a voluntary confession of defendant, in a prosecution for murder, that he killed decedent, giving his reasons and detailing circumstances connected therewith, is admissible.—*State v. Bohanon* (N. C.) 797.

*The fact that the confession of a prisoner was made to an officer while under arrest is no ground for its exclusion.—*State v. Henderson* (S. C.) 117.

It is competent for a witness in describing a foot track to describe the peculiarities by reference to the shoe of accused.—*State v. Langford* (S. C.) 120.

§ 7. Time of trial and continuance.

*Where a subpoena could not be served because the witness had left the county, the accused held entitled, on proper and timely motion, to time to secure the presence of the witness, or to continuance.—*Rumsey v. State* (Ga.) 167.

*Where an applicant for a continuance fails to show that his application is not for delay, the court does not abuse its discretion in overruling the application.—*Jones v. State* (Ga.) 171.

A refusal of a continuance on account of absence of witnesses held not an abuse of discretion.—*Fitzgerald v. State* (Ga.) 482.

*Under Pen. Code, § 958, accused held entitled to an acquittal for delay in prosecution.—*Dublin v. State* (Ga.) 487.

§ 8. Trial—Preliminary proceedings.

*There is no error in a separate trial of one defendant on an indictment for felony against several because the record does not show that the state asked a separate trial.—*State v. Barrick* (W. Va.) 652.

§ 9. — Course and conduct of trial in general.

*Remark of court to counsel held no ground for reversal.—*Vanderford v. State* (Ga.) 1025.

*One on trial for crime held not prejudiced by the action of the court forcing him to trial in the absence of a material witness.—*Bennett v. Commonwealth* (Va.) 698.

§ 10. — Reception of evidence.

*The reopening of a criminal case to allow the state to introduce inculpatory statements made by the defendant was a matter of discretion with the court.—*Whitehead v. State* (Ga.) 404.

*Point annotated. See syllabus.

*The defendant's statement should be restricted to a narrative account of the matter under investigation.—*Nero v. State* (Ga.) 404.

Whether the state should be permitted to introduce certain evidence after the defendant has closed his testimony *held* within the sound discretion of the court.—*Smith v. State* (Ga.) 1024.

*In prosecution for unlawful sale of intoxicating liquor, state *held* required to elect between offenses proved.—*Hatcher & Shaw v. Commonwealth* (Va.) 677.

§ 11. — Objections to evidence, motions to strike out, and exceptions.

*Where certain evidence of a witness of considerable length was objected to as a whole, and much of it was admissible, there was no error in overruling the objection.—*Park v. State* (Ga.) 489.

§ 12. — Arguments and conduct of counsel.

*In a prosecution for seduction, a reference in argument to other sexual offenses of defendant, which were in evidence, *held* proper.—*State v. Kincaid* (N. C.) 647.

*It is not error for prosecuting attorney in an opening statement on a felony trial to state what he expects to show.—*State v. Barrick* (W. Va.) 652.

§ 13. — Province of court and jury in general.

An instruction that there is nothing that the jury has to consider except the law and the evidence, and the statement of defendant *held* not too restrictive.—*Moss v. State* (Ga.) 481.

*A charge intimating what had been proved *held* erroneous.—*Shuler v. State* (Ga.) 496.

*The accused is entitled to have his statement considered by the jury in its entirety, unaffected by any disparagement of it by the court.—*Field v. State* (Ga.) 502.

An instruction on circumstantial evidence *held* not erroneous as a charge on the facts.—*State v. Langford* (S. C.) 120.

§ 14. — Necessity, requisites, and sufficiency of instructions.

*In a prosecution for murder *held* that the court properly eliminated from his charge all reference to the law relating to defense of one's habitation against riotous intruders.—*Rumsey v. State* (Ga.) 167.

*The court having charged that to convict the jury must believe accused guilty beyond a reasonable doubt, it was no ground for a new trial that he did not define a reasonable doubt.—*Nash v. State* (Ga.) 406.

That the presiding judge charged on the subject of justifiable homicide as contained in Pen. Code 1895, § 70, and also as to reasonable fears, as contained in section 71, and also as to mutual combat under section 73, did not cause such a confusion of the various sections as was calculated to injure the defendant.—*Park v. State* (Ga.) 489.

Conflicting instructions not explanatory or qualitative of each other are ground for reversal.—*Cress v. State* (Ga.) 491.

*Where the trial judge has once fully stated the law of reasonable doubt it is not necessary that he should repeat his instruction in connection with each new proposition.—*Cress v. State* (Ga.) 491.

Where two defendants were charged with keeping a gaming house, and the evidence was circumstantial as to one and direct as to the other, it was not error to instruct on the law of circumstantial evidence as to one and to

refuse to charge such law as to the other.—*Rosenthal v. State* (Ga.) 497.

*Where the record shows direct evidence that defendant did certain proprietary acts in the operation of a gaming house, it was not error to refuse to charge on circumstantial evidence.—*Rosenthal v. State* (Ga.) 497.

*That the jury were informed that the defense of alibi involved the impossibility of accused being at the scene of the alleged crime *held* not erroneous.—*Field v. State* (Ga.) 502.

An instruction as to the degree of certainty required to convict is not open to criticism because the court did not include a statement that the certainty must arise from the evidence.—*Field v. State* (Ga.) 502.

An instruction that the jury were not, under the evidence on the defense of alibi, bound to conclude that the defense had been conclusively established was not error.—*Field v. State* (Ga.) 502.

Where the trial judge has once correctly defined reasonable doubt, it is not necessary that he should repeat such instructions in connection with each new proposition laid down.—*Goodin v. State* (Ga.) 503.

*Instruction on circumstantial evidence *held* not error.—*State v. Langford* (S. C.) 120.

Instruction as to duty of jury and reasonable doubt *held* not erroneous.—*State v. Thomas* (S. C.) 893.

*Mere failure of an instruction to say that the evidence must prove guilt beyond a reasonable doubt is not cause for reversal.—*State v. Detwiler* (W. Va.) 654.

§ 15. — Requests for instructions.

*Failure to charge on impeachment of witnesses is not reversible error in the absence of a written request for such charge.—*Cress v. State* (Ga.) 491.

*It is not necessary for the court in a criminal case to give requested instructions verbatim.—*State v. Burnett* (N. C.) 72.

Instruction as to effect of admission of guilt of one of two defendants *held* not erroneous.—*State v. Thomas* (S. C.) 893.

§ 16. — Custody, conduct, and deliberations of jury.

Where the presiding judge fully instructed as to the law of the case, and as to the forms of verdict, there was no error in allowing the jury to carry out with them written forms of verdicts.—*Park v. State* (Ga.) 489.

*One convicted of crime *held* not entitled to a reversal because of the separation of the jury during the adjournments of the case.—*Bennett v. Commonwealth* (Va.) 698.

§ 17. — Verdict.

*Where a general verdict of guilty was returned under an indictment containing two counts, and the evidence justified a conviction on one of the counts, it was immaterial that no conviction could be had on the other.—*State v. Sheppard* (N. C.) 146.

*A verdict *held* sufficient to sustain a conviction.—*State v. Scott* (N. C.) 270.

§ 18. Motions for new trial and in arrest.

It is no ground for a new trial that another has been indicted since the trial for the same offense of which defendant was convicted.—*Nero v. State* (Ga.) 404.

*A ground of a motion for a new trial, that the court erred after the jury had recommended the defendant to mercy in sentencing him to three years in the penitentiary, *held* not a proper

*Point annotated. See syllabus.

ground for such motion.—*Beaudrot v. State* (Ga.) 592.

*Where a witness began to testify when it was discovered that accused was absent from the courtroom, whereupon he was brought into court and the testimony given was withdrawn and the examination was recommenced, it was no ground for a new trial after conviction.—*Vanderford v. State* (Ga.) 1025.

*It is not necessary in charging the jury to remark as to the importance of the case, but it is not error so to do requiring a new trial.—*Vanderford v. State* (Ga.) 1025.

*It was not error against defendant requiring a new trial to charge that a man cannot be convicted of rape on the testimony of the woman alone unless there are some concurrent corroborating circumstances.—*Vanderford v. State* (Ga.) 1025.

*That the court declined to charge as to a pertinent legal proposition is not ground for new trial where, after the jury had asked for additional instructions, the court in a recharge covered this feature of the case.—*Wallace v. State* (Ga.) 1042.

*It is only when foreign matter injected in argument is of so prejudicial a nature that a rebuke of the statement and an instruction will be insufficient to remove improper impressions from the minds of the jurors that a mistrial should be declared.—*Wallace v. State* (Ga.) 1042.

*Where in a felony trial evidence is taken in the absence of accused, a new trial must be granted.—*State v. Detwiler* (W. Va.) 654.

§ 19. — Disqualification of jurors.

*A new trial will not be granted because of relationship within the prohibited degrees of a juror to the accused, though such relationship was unknown to the accused or his counsel until after verdict.—*McCrimmon v. State* (Ga.) 481.

*An objection to a juror that his name does not appear in the jury box must be made when the juror is put upon the accused.—*Wall v. State* (Ga.) 484.

*The mental incapacity of a juror may be urged as a ground of new trial if not known to the accused at the time of accepting him.—*Wall v. State* (Ga.) 484.

*Where, the evidence seeking to impeach a juror only shows that his name was not in the jury box, it was not error to refuse a new trial for his disqualification.—*Wall v. State* (Ga.) 484.

Const. art. 1, § 18, provides that accused shall have a speedy trial by an impartial jury. Civ. Code 1902, § 2946, providing that objections to jurors must be made before the jury is impaneled or charged with the trial. *Held*, that the fact that a juror sat on a former trial of the same case is not ground for setting aside the conviction at the second trial, where counsel for defendant and the juror had both forgotten such fact until after verdict.—*State v. Langford* (S. C.) 120.

§ 20. — Newly-discovered evidence.

*Where alleged newly discovered evidence is cumulative and impeaching the discretion of the court in refusing a new trial, will not be disturbed.—*Walker v. State* (Ga.) 483.

*New trial for newly discovered evidence denied for want of diligence.—*Park v. State* (Ga.) 480.

Where the evidence made out the charge, there was no error in overruling a motion for new trial, where the only complaint was that the evidence did not justify the verdict.—*Binyard v. State* (Ga.) 498.

Where the question as to whether the deceased had a pistol in his possession and drew the same was a contested issue, newly discovered evidence that a cartridge was found in the pocket of his vest when he was slain was not of such gravity as to require the granting of a new trial.—*Smith v. State* (Ga.) 1024.

*A denial of new trial because of the discovery of evidence of an impeaching character was proper.—*Woods v. State* (Ga.) 1044.

*A new trial in a criminal case for newly discovered evidence, chiefly impeaching, is properly denied.—*Bennett v. Commonwealth* (Va.) 698.

*A new trial will not be granted on affidavit that prosecutrix, giving evidence of rape, has since admitted that accused was innocent.—*State v. Barrick* (W. Va.) 652.

§ 21. — Application for new trial.

*The grounds of a motion for a new trial that the verdict was contrary to law, evidence, and the weight of evidence, was properly overruled the evidence supporting the verdict.—*Young v. State* (Ga.) 477.

Where a juror is sought to be impeached on motion for new trial on the ground of prejudice, the judge will hear evidence on such ground, and if it is sustained a new trial should be granted.—*Wall v. State* (Ga.) 484.

*Under Civ. Code 1895, § 5338, a juror cannot be heard to impeach his verdict.—*Bowden v. State* (Ga.) 499.

*There is no law authorizing the making of a motion for new trial in vacation, so that it is erroneous for a judge to take jurisdiction, and his judgment on such motion will be reversed.—*Perkins v. State* (Ga.) 501.

*Where a motion for new trial was made and decided in vacation, and nothing was done in respect to it either at the term when the trial was had, or at any subsequent term, the judgment is erroneous.—*Perkins v. State* (Ga.) 501.

*Where a motion for new trial was made in vacation, and erroneous judgment was entered upon it, it will be reversed, and direction given that the motion itself, and the action of the judge thereon, be treated as a nullity.—*Perkins v. State* (Ga.) 501.

*A complaint in a motion for new trial that error was committed in admitting certain evidence presents no question for decision unless the grounds of objection raised are set forth.—*Field v. State* (Ga.) 502.

Grounds of a motion for a new trial that the verdict is contrary to certain specified instructions are equivalent to saying that the jury found contrary to law.—*Goodin v. State* (Ga.) 503.

The ground of motion complaining that the court erred in ruling out the testimony of S, "as if trying to see what was going on in the room," does not raise any question for decision, as it is impossible, without searching in the brief of evidence, to discover whether the evidence was material.—*Smith v. State* (Ga.) 1024.

§ 22. — Grounds for arrest of judgment.

An accusation under Pen. Code 1895, § 122, charging that accused enticed away servant of a named person, *held* to sufficiently state a contract of employment as against a motion in arrest.—*Hudgins v. State* (Ga.) 492.

It has never been the practice in Georgia to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered and when sentence was pro-

*Point annotated. See syllabus.

nounced, and from arraignment to sentence.—*Rawlins v. Mitchell* (Ga.) 953.

§ 23. Judgment, sentence, and final commitment.

*Where an indictment is void *held* that a motion to set aside the judgment is not an appropriate remedy.—*McDonald v. State* (Ga.) 235.

*A mayor sentenced accused to the chain-gang or the guardhouse to be released on payment of \$500. The sentence further directed that on payment of \$100 the other \$400 should be suspended. Defendant was released on such payment, and on evidence heard in another case was arrested and held for the payment of the additional \$400 or for imprisonment under the original sentence. *Held*, that the recorder had no power to direct his arrest and put him on the chain-gang, or imprison him unless he paid the additional \$400.—*Gordon v. Johnson* (Ga.) 489.

*The sentence imposed on a prisoner convicted of a misdemeanor which the judge may, under Pen. Code 1895, § 1039, deem merited by the prisoner, should express the full punishment, and the court cannot, on sentence to five months in jail if he fails to pay a fine, impose as an additional alternative punishment another term of six months' imprisonment.—*Wallace v. State* (Ga.) 1042.

§ 24. Appeal and error, and certiorari—Form of remedy, jurisdiction, and right of review.

*Where a bill of exceptions was filed to the judgment of a city court on the ground that the verdict was contrary to the evidence, and the bill was dismissed by the Supreme Court, the party complaining might file certiorari to the superior court within three months from the dismissal.—*Winn v. State* (Ga.) 178.

§ 25. — Presentation and reservation in lower court of grounds of review.

*The constitutionality of a statute cannot be questioned for the first time in the Supreme Court.—*Griggs v. State* (Ga.) 179; *Moore v. State* (Ga.) 327.

*An assignment of error on the overruling of an objection to evidence, will not be considered where the grounds of objection were not urged below.—*Simmons v. State* (Ga.) 479.

*A defendant in a criminal prosecution who does not ask for additional instructions cannot complain that the court did not present his contentions to the jury.—*State v. Bohanon* (N. C.) 797.

§ 26. — Proceedings for transfer of cause, and effect thereof.

Where the act creating a city court does not prescribe the method of taking a case of certiorari to the superior court, the procedure pointed out in Civ. Code 1895, § 4637, is to be followed.—*Miller v. State* (Ga.) 405.

Plaintiff *held* entitled to certiorari, on conviction in a city court.—*Miller v. State* (Ga.) 405.

*Filing of an affidavit provided for in Pen. Code 1895, § 763, is a condition precedent to the granting of certiorari from a conviction in the county court.—*Grant v. State* (Ga.) 471.

§ 27. — Record and proceedings not in record.

A bill of exceptions assigning error to refusal to sanction certiorari, had attached as an exhibit a copy of the petition for certiorari and the various entries thereon, with the certificate of the judge. *Held*, that the exhibit was sufficiently identified.—*Taylor v. State* (Ga.) 474.

A motion in the Supreme Court to cause the clerk of the superior court to send up a transcript of the answer to a writ of certiorari denied.—*Evans v. City of Forsyth* (Ga.) 490.

*The Supreme Court has no authority to require the judge of the superior court to certify to additional facts transpiring during the hearing of the cause, and not appearing in the bill of exceptions or the record.—*Evans v. City of Forsyth* (Ga.) 490.

*The Supreme Court is without jurisdiction to pass on any bill of exceptions the recitals of fact in which are not certified as required by Civ. Code 1895, § 5523.—*Binyard v. State* (Ga.) 498.

*Granting leave to file a paper or ordering that it be made a part of the record *held* not a certificate verifying the case.—*Binyard v. State* (Ga.) 498.

*Exceptions *pendente lite* must be tendered within the time prescribed, and if allowed under Civ. Code 1895, § 5528, must be certified by the judge, and ordered put in the record under section 5541.—*Binyard v. State* (Ga.) 498.

On application for mandamus to compel a judge to certify a bill of exceptions assigning error on his refusal to entertain a motion to set aside judgment in a criminal case, mandamus will not be granted where the motion to set aside the judgment is wholly without merit.—*Rawlins v. Mitchell* (Ga.) 958.

*A bill of exceptions is insufficient where neither the evidence taken nor the instructions are a part of the record.—*State v. Banks* (W. Va.) 739.

§ 28. — Assignment of errors and briefs.

*An assignment of error in these words, "because the court erred in confining the word 'aggression' to an assault," etc., is fatally defective in not setting forth the charge wherein the word was used.—*Beaudrot v. State* (Ga.) 592.

§ 29. — Review.

*Where no errors of law are complained of, and there is sufficient evidence to authorize a verdict, the judgment of the lower court, refusing a new trial, will not be disturbed.—*Wright v. State* (Ga.) 167.

Allowing a witness to be questioned as to particular transaction to prove the bad character of a witness in violation of Pen. Code 1895, § 1027, *held* prejudicial.—*Allred v. State* (Ga.) 178.

The only criticism of the charge being that it fails to present another theory of defense *held* insufficient when such ground is certified with the qualification that "both defenses and the law applicable thereto were presented to the jury."—*Bell v. State* (Ga.) 476.

*Where the evidence authorized the verdict, there was no error in overruling a certiorari alleging that the verdict was contrary to law and the evidence.—*Stocks v. State* (Ga.) 478.

*Where after verdict an attack is made on a juror not impartial, a finding of the trial judge that the juror is competent will not be reversed, unless his discretion is manifestly abused.—*McCrimmon v. State* (Ga.) 481.

*An error beneficial to the party affords him no ground of complaint.—*Oress v. State* (Ga.) 491.

*To allow counsel to ask a witness leading questions is in the sound discretion of the court.—*Beaudrot v. State* (Ga.) 592.

*An application for change of venue on the ground of prejudice is addressed to the sound discretion of the presiding judge, and where the

*Point annotated. See syllabus.

evidence is conflicting his judgment will not be reversed.—*Vanderford v. State* (Ga.) 1025.

*Where the evidence, though circumstantial, supported a conviction, it was not error for the superior court to overrule a petition for certiorari on the ground that the evidence was insufficient.—*Weldon v. State* (Ga.) 1044.

*In prosecution for murder, not permitting witness for defense to testify *held* not reversible error, where it did not appear that defendant was prejudiced.—*State v. Hodge* (N. C.) 791.

*A party cannot object that a juror was not rejected for cause if his peremptory challenges are not exhausted when the panel is completed.—*State v. Bohanon* (N. C.) 797.

The findings of fact as to indifference of juror are not reviewable.—*State v. Bohanon* (N. C.) 797.

Conclusion of trial judge that confession was voluntary will not be disturbed.—*State v. Henderson* (S. C.) 117.

§ 30. Punishment and prevention of crime.

*Where defendant was convicted of violating a city ordinance, and was sentenced to the chain-gang on default in payment of \$500, and the sentence further provided that on the payment of \$100 the other \$400 should be suspended during good behavior, it gave defendant a right to release on the payment of \$100.—*Gordon v. Johnson* (Ga.) 489.

CROSS-EXAMINATION.

See "Witnesses," § 2.

CURTESY.

See "Dower."

Right of husband to curtesy as qualifying him to serve on jury of freeholders, see "Jury," § 2.

CUSTODY.

Of child, see "Bastards," § 1.
Of jury, see "Criminal Law," § 16; "Trial," § 13.

CUSTOMS AND USAGES.

Of banks, see "Banks and Banking," § 2.

Where the evidence of a custom was contradicted the court could hold, as a matter of law, that there was such custom.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Damages for particular injuries.

See "Trespass," § 2.

Breach by buyer of contract for sale of goods, see "Sales," § 7.

Breach by seller of contract for sale of goods, see "Sales," § 8.

Breach by vendee of contract for sale of land, see "Vendor and Purchaser," § 3.

Breach of contract of carriage, see "Carriers," § 4.

Delay or failure to deliver telegram, see "Telegraphs and Telephones," § 1.

Injuries from operation of railroad, see "Railroads," §§ 7, 11.

Injuries to wife, see "Husband and Wife," § 3.
Use of property by sheriff, see "Sheriffs and Constables," § 1.

Wrongful attachment, see "Attachment."

*Point annotated. See syllabus.

Recovery in particular actions or proceedings.
See "Injunction," § 1; "Malicious Prosecution," § 3.

For taking of or injury to property in exercise of right of eminent domain, see "Eminent Domain," § 4.

§ 1. Grounds and subjects of compensatory damages.

Where there has been a definite breach of contract, the injured party must do what fair business requires to reduce the damage, or that which arises from his own neglect will be considered too remote for recovery.—*Tillinghast, Styles Co. v. Providence Cotton Mills* (N. C.) 621.

Where the plaintiff seeks to recover additional damages for breach of contract of sale arising by special circumstances, he is required to show that defendant had knowledge of these circumstances, from which it could be inferred that the parties contemplated that they should be considered as affecting the question of damages.—*Tillinghast, Styles Co. v. Providence Cotton Mills* (N. C.) 621.

*One held liable for a wrecked nervous system caused by fright as the result of his negligence.—*Kimberly v. Howland* (N. C.) 778.

*In an action for personal injuries damages for mental and physical pain "reasonably certain" only can be recovered.—*Green v. Catawba Power Co.* (S. C.) 125.

*In an action based on a willful tort plaintiff may recover not only punitive, but also compensatory damages.—*Wilson Lumber Co. v. D. W. Alderman & Sons Co.* (S. C.) 447.

*Passenger held not entitled to special damages for delay of baggage, where no notice was given to the carrier of the special circumstances under which they were claimed.—*Millhous v. Atlantic Coast Line R. Co.* (S. C.) 764.

§ 2. Inadequate and excessive damages.

*In an action for injuries to a mule, a verdict for \$75 held excessive.—*Atlanta Ice & Coal Co. v. Mixon* (Ga.) 237.

A verdict of \$1,200 for injuries to child will not be set aside as excessive.—*Alabama Great Southern R. Co. v. Davis* (Ga.) 1046.

§ 3. Pleading, evidence, and assessment.

An instruction in a personal injury action held to correctly define the measure of damages.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

*An instruction construed as authorizing punitive damages.—*Wilson v. Atlantic Coast Line R. Co.* (N. C.) 257.

An instruction as to elements necessary to warrant punitive damages held not erroneous.—*Tucker v. Southern Ry. Co.* (S. C.) 154.

*In an action for personal injuries, evidence that plaintiff has a wife and children is inadmissible on the question of damages.—*Southern Ry. Co. v. Simmons* (Va.) 459.

DEATH.

Caused by operation of railroad, see "Railroads," §§ 9, 10.

Competency of party to testify after death of adverse party, see "Witnesses," § 1.

Liability of master for death of servant, see "Master and Servant," §§ 9, 11.

Of party to action ground for abatement, see "Abatement and Revival," § 1.

Suspension of running of statute of limitation, see "Limitation of Actions," § 1.

§ 1. Actions for causing death.

Under Va. Code 1904, § 2902 et seq., an administrator of a decedent who was a resident

alien and whose widow and infant child are nonresident aliens may bring an action for his death, caused by the wrongful act of another.—*Low Moor Iron Co. v. La Bianca's Adm'r* (Va.) 532.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Declarations against interest, see "Evidence," § 7.

Estates, see "Executors and Administrators." Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATION.

In pleading, see "Pleading," § 2.

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 7.

As evidence in criminal prosecutions, see "Criminal Law," § 6.

Dying declarations, see "Homicide," § 5.

DEEDS.

See "Boundaries," § 1.

Acknowledgment of execution, see "Acknowledgment."

Cancellation, see "Cancellation of Instruments."

Competency of witness in action to set aside deed, see "Witnesses," § 1.

Covenants in deeds, see "Covenants."

Conveyances in execution of powers, see "Powers," § 1.

Documentary evidence, see "Evidence," § 9.

Equitable jurisdiction to give relief against condition in deed, see "Equity," § 1.

Establishment of lost deed, see "Lost Instruments."

In fraud of creditors, see "Fraudulent Conveyances."

Parol or extrinsic evidence, see "Evidence," § 10.

Presumptions as to recitals in, see "Evidence," § 2.

Reformation, see "Reformation of Instruments."

Review of finding as to validity of, see "Appeal and Error," § 23.

Sheriff's deed as secondary evidence of execution, see "Evidence," § 4.

Deeds by or to particular classes of persons.

See "Guardian and Ward," § 2.

Married women, see "Husband and Wife," §§ 1, 2.

Deeds of particular species of, or estates or interest in, property.

Separate property of married women, see "Husband and Wife," § 2.

Timber land, see "Logs and Logging."

Particular classes of deeds.

In trust, see "Trusts," § 2.

Tax deeds, see "Taxation," § 4.

Trust deeds, see "Mortgages."

§ 1. *Requisites and validity.*

*Where the name of the grantee in a deed was changed before registration without the

knowledge of the grantor to the original grantee's wife, the deed never having been delivered by the grantor to the wife, it was invalid to pass title to her.—*Perry v. Hackney* (N. C.) 289.

§ 2. *Recording and registration.*

An affidavit for the registration of an ancient deed held not a substantial compliance with the requirements of Act 1905, p. 323, c. 277 (Revisal 1905, § 981).—*Allen v. Burch* (N. C.) 354.

§ 3. *Construction and operation.*

*A deed construed, and held a conveyance of the land by the tract, and not by the acre.—*Kendall v. Wells* (Ga.) 41.

A deed construed, and held to convey to a wife an equitable estate for the joint life of her husband and herself, with a contingent remainder in fee, dependent on her surviving him, with remainder over to her children, dependent on her predeceasing him.—*Cherry v. Cape Fear Power Co.* (N. C.) 287.

A party claiming land to be within an exception in a patent has the burden of proving such fact.—*East Lake Lumber Co. v. East Coast Cedar Co.* (N. C.) 304.

Where land was conveyed in trust, the income to be paid to a beneficiary, with the right on her part to sell the land at any time, an attempted limitation over on the death of such beneficiary was void for repugnancy and uncertainty.—*Morgan v. Morgan* (W. Va.) 389.

*A deed containing two inconsistent provisions will be held to pass the life estate or the fee simple, as the one or the other may appear to be the primary intent disclosed by a consideration of the whole instrument.—*Morgan v. Morgan* (W. Va.) 389.

*In granting real estate on condition, where the performance of the act does not necessarily precede the vesting of the title, it is a condition subsequent.—*Spies v. Arvondale & C. R. Co.* (W. Va.) 464.

§ 4. *Pleading and evidence.*

*Where the grantee in a deed is the agent, confidential friend, and adviser of the grantors, the law raises a presumption of fraud and imposes on the grantee the burden of showing that the transaction was fair and honest.—*Smith v. Moore* (N. C.) 275.

*In an action to set aside a deed on the ground of fraud, the grantee's failure to register the deed till 10 months after its date might be considered in determining the issue as to fraud.—*Smith v. Moore* (N. C.) 275.

DEFAULT.

Judgment by, see "Judgment," § 3.

DELAY.

In criminal prosecution, see "Criminal Law," § 7.

In delivery of telegram, see "Telegraphs and Telephones," § 1.

In transportation or delivery of goods by carrier, see "Carriers," § 1.

DELIVERY.

Of deed, see "Deeds," § 1.

Of goods by carrier, see "Carriers," § 1.

Of goods sold, see "Sales," § 4.

Of telegram, see "Telegraphs and Telephones," § 1.

*Point annotated. See syllabus.

DEMONSTRATIVE EVIDENCE.

In civil actions, see "Evidence," § 5.

DEMURRER.

In pleading, see "Equity," § 2; "Pleading," § 3.
To indictment, see "Indictment and Information," § 4.

DEPOSITIONS.

See "Witnesses."

Exceptions to taking of, for purpose of review, see "Appeal and Error," § 4.

*Where depositions have been taken and regularly returned, an exception based on the form of the notice should be raised before trial.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 613.

*Where notice to take depositions provided for the taking in two different places at the same time, and the party notified appeared and cross-examined the witness at one place without objection to the notice, such objection was waived.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 613.

DEPOSITS.

In bank, see "Banks and Banking," § 2.

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators"; "Wills."

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 8.
Of property conveyed, see "Boundaries," § 1; "Deeds," § 8.
Of property mortgaged, see "Chattel Mortgages," § 2.

DESERTION.

Ground for divorce, see "Divorce," § 2.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," § 5.

DISABILITIES.

Effect on limitation, see "Limitation of Actions," § 1.
Of married women, see "Husband and Wife," § 1.

DISCHARGE.

From employment, see "Master and Servant," § 1.

From indebtedness, obligation, or liability.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Release."

*Point annotated. See syllabus.

Liability as insurer, see "Insurance," § 12.
Liability as surety, see "Principal and Surety," § 1.

DISCLAIMER.

In ejectment, see "Ejectment," § 2.

DISCRETION OF COURT.

Admission of secondary evidence, see "Evidence," § 4.
Allowance of temporary alimony, see "Husband and Wife," § 4.
Amendment for defect in parties, see "Parties," § 2.
Amendment of pleading, see "Pleading," § 3.
Award of new trial on certiorari, see "Certiorari," § 1.
Continuance in civil actions, see "Continuance." Continuance in criminal prosecutions, see "Criminal Law," § 7.
Costs, see "Costs," § 1.
Cross-examination of witness, see "Witnesses," § 2.
Grant or refusal of injunction, see "Injunction," §§ 2, 4.
Grant or refusal of new trial, see "Criminal Law," § 20; "New Trial," § 2.
Grant or refusal to open judgment granting allowance to widow, see "Executors and Administrators," § 2.
Opening default in municipal courts, see "Courts," § 3.
Overruling of certiorari, see "Certiorari," § 1.
Quashing indictment or information, see "Indictment and Information," § 4.
Reception of evidence in civil actions, see "Trial," § 3.
Reception of evidence in criminal prosecutions, see "Criminal Law," § 10.
Review in civil actions, see "Appeal and Error," § 22.
Review in criminal prosecutions, see "Criminal Law," § 29.
Setting aside verdict, see "Trial," § 14.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 5.
Dismissal of cause removed from state court, see "Removal of Causes," § 1.
Special appearance on motion to dismiss, see "Appearance."

In particular actions or proceedings.

See "Replevin," § 1.
Against personal representatives, see "Executors and Administrators," § 4.
Appeal or writ of error, see "Appeal and Error," §§ 1, 17, 18.
Certiorari from justice's court, see "Justices of the Peace," § 4.
For breach of warranty, see "Sales," § 8.
On appeal from justice's court, see "Justices of the Peace," § 4.
On bill or note, see "Bills and Notes," § 3.
Suit in equity, see "Equity," § 4.

§ 1. *Involuntary.*

*Where a suit was brought against an insurance company and other defendants as principals on amendment to the petition showing that the other defendants were agents of the insurance company which had ratified the contract, it was proper to dismiss as to the other defendants.—*Lovelace v. Browne* (Ga.) 1041.

DISOBEDIENCE.

Of rules by servant, see "Master and Servant," § 9.

DIVORCE.

Decision on former appeal as law of the case, see "Appeal and Error," § 28.
 Supersedeas on appeal in contempt proceedings for failure to pay alimony, see "Appeal and Error," § 6.

§ 1. Grounds.

*Under Civ. Code 1895, § 2426, par. 8, providing that the conviction of a married person of an offense involving moral turpitude, followed by a sentence of imprisonment in the penitentiary for a term of two years or longer, gives to the other party to the marriage a right to a divorce, this right is not affected by an executive pardon granted after the sentence has been imposed.—*Holloway v. Holloway* (Ga.) 191.

The offense of voluntary manslaughter involves moral turpitude within a statute providing that the conviction of a married person of an offense involving moral turpitude, followed by a sentence of imprisonment in the penitentiary for two years or longer, gives to the other party to the marriage a right of divorce.—*Holloway v. Holloway* (Ga.) 191.

§ 2. Jurisdiction, proceedings, and relief.

*A suit by a wife to annul the marriage is a divorce proceeding and the complaint must be verified.—*Johnson v. Johnson* (N. C.) 341.

*A certain person *held* not entitled under the facts to intervene and oppose a motion by plaintiff to set aside a decree invalidating her marriage to defendant.—*Johnson v. Johnson* (N. C.) 341.

Evidence *held* to show husband entitled to divorce for desertion.—*Castilow v. Castilow* (W. Va.) 592.

§ 3. Alimony, allowances, and disposition of property.

*The provisions of Civ. Code 1895, § 4046, for trial by jury in certain proceedings for contempt, does not apply to a rule for contempt in progress of an alimony case.—*Stokes v. Stokes* (Ga.) 1023.

*The judgment of a superior court in a proceeding for alimony *held* a subject of writ of error on the same terms that are prescribed by Civ. Code 1895, § 2468, in cases of injunction.—*Stokes v. Stokes* (Ga.) 1023.

Facts *held* not to show that defendant in divorce had complied with an order relative to alimony.—*Green v. Green* (N. C.) 818.

DOCKETS.

Of causes for trial, see "Trial," § 1.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 9.

Offer of document at trial, see "Trial," § 3.

DOGS.

Barking of, as constituting nuisance, see "Nuisance," § 1.

DOING BUSINESS.

By foreign corporation, see "Corporations," § 4.

DORMANT JUDGMENTS.

See "Judgment," § 12.

*Point annotated. See syllabus.

DOWER.

Competency of widow as witness in action for, see "Witnesses," § 1.

Rights of wife in mortgaged property, see "Mortgages," § 4.

Right to trial by jury in action for admeasurement of dower, see "Jury," § 1.

§ 1. Inchoate interest.

A mortgage executed by a husband without the joinder of his wife *held* valid.—*Shakleford v. Morrill* (N. C.) 82.

§ 2. Rights and remedies of widow.

*Under a statute providing that abandonment of the wife shall bar dower, evidence in a proceeding for dower as to whether plaintiff left her husband's home of her own volition, or by reason of facts which would constitute compulsion, *held* admissible.—*Hicks v. Hicks*, (N. C.) 106.

*Under Revisal 1905, § 3084, purchasers of land from a husband *held* entitled to require that dower be allotted to his widow out of the remaining lands.—*Harrington v. Harrington* (N. C.) 409.

DRAFT.

Attached to bill of lading, see "Carriers," § 1.

DRUNKARDS.

Avoidance of insurance policy for drunkenness, see "Insurance," § 6.

DUE PROCESS OF LAW.

See "Constitutional Law," § 9.

DYING DECLARATIONS.

See "Homicide," § 5.

EASEMENTS.

See "Highways."

Restraining interference with easement, see "Injunction," §§ 1, 4.

Right of way of railroad, see "Railroads," § 4.

§ 1. Extent of right, use, and obstruction.

*Before a railway company is entitled to invoke the aid of equity in protecting its easement of right of way, it must show that it has a right of way, together with the extent of it, and that defendants are obstructing or threaten to obstruct its use.—*Seaboard Air Line R. Co. v. Olive* (N. C.) 263.

*A railroad company owning a right of way *held* entitled to judge of the necessity and extent of the use of the right of way as against a person in possession thereof.—*Seaboard Air Line R. Co. v. Olive* (N. C.) 263.

EJECTMENT.**§ 1. Right of action and defenses.**

*In an action to recover land *held* that evidence of title acquired after commencement of suit was inadmissible.—*Deas v. Sammons* (Ga.) 170.

*Where parties to action for recovery of land, claim under a common grantor, plaintiff need not show title in such person.—*Brinkley v. Bell* (Ga.) 187.

*Defendants in ejectment *held* not estopped, by introduction of grant from state in 1882, to deny validity of plaintiff's grant from state in 1879.—*Wall v. Wall* (N. C.) 283.

*Where a husband was only a pro forma party to his wife's suit to recover certain land, and there was no allegation that he had title, he could not recover on proof that he held the equitable title to the property.—*Perry v. Hackney* (N. C.) 289.

A party in an action to recover land who claims under a deed from a devisee cannot question the validity of the probate of the will.—*Steadman v. Steadman* (N. C.) 784.

*Where, in an action to recover land, both parties claim under a common grantor, defendant is estopped from questioning the title of such grantor.—*Steadman v. Steadman* (N. C.) 784.

§ 2. Pleading and evidence.

Where, in an action to recover land, the evidence shows that plaintiff's claim under a deed in which a life estate is created by their father with remainder to them, and that defendant claims under a deed from their father, and that the father is dead, a prima facie case is made out.—*Brinkley v. Bell* (Ga.) 187.

Where, in an action to recover land, a deed from a common grantor is produced by defendant under notice, the presumption arises that defendant claims under a deed; but such presumption may be overcome by evidence that defendant claims under another and independent source of title.—*Brinkley v. Bell* (Ga.) 187.

Where the answer to an action for land denied possession in defendant, it was not error at the trial term to refuse to enter a disclaimer at plaintiff's instance and to allow defendant to amend by withdrawing such denial.—*Moore v. Moore* (Ga.) 950.

Where, in ejectment, plaintiff based his claim on the fact that his ancestor died in possession of the realty, proof that it was set apart as a year's support to the widow of the ancestor, and that plaintiff was not her heir, required a finding for defendant.—*Moore v. Moore* (Ga.) 950.

In an action to recover land, in which defendant admitted that plaintiff owned all land on one side of a boundary line, plaintiff was not bound to prove title out of the state.—*Williamson v. Bryan* (N. C.) 77.

In ejectment, the question whether plaintiff had been in possession for 25 years prior to the commencement of the action held immaterial in view of the facts.—*Broadwell v. Morgan* (N. C.) 340.

*Defendant in ejectment, disclaiming after verdict for plaintiff, held liable to judgment against him.—*Thompson v. Camper* (Va.) 674.

ELECTION.

Between counts in pleading, see "Pleading," § 7.

Of beneficiaries to interest or profits on funds in hand of receivers, see "Receivers," § 2.

ELECTIONS.

Appellate jurisdiction of particular courts as to validity of elections as to liquor licenses, see "Courts," § 4.

Mandamus to compel holding of local option election, see "Mandamus," § 1.

ELECTRICITY.

Use by municipal corporation, see "Municipal Corporations," § 8.

ELOPEMENT.

See "Criminal Law," § 6.

EMINENT DOMAIN.

Appealability of judgment in condemnation proceedings as dependent on finality of determination, see "Appeal and Error," § 2.

Appropriation of highway to additional use, see "Highways," § 2.

Condemnation of right of way, see "Railroads," § 4.

Effect on right of abutting owners to damages by increased use caused by consolidation of railroads, see "Railroads," § 7.

Entry on land by corporation without condemnation as trespass, see "Trespass," § 2.

Public improvements by municipalities, see "Municipal Corporations," § 4.

§ 1. Nature, extent, and delegation of power.

A railroad company held organized under Priv. Laws 1861-62, p. 116, c. 129, and not under Priv. Laws 1854-55, p. 280, c. 230, nor under Priv. Laws 1862-63, p. 27, c. 26 and such act regulates the method of acquiring the right of way.—*Seaboard Air Line R. Co. v. Olive* (N. C.) 263.

§ 2. Compensation.

*Under Revisal N. C. 1905, §§ 2575, 2587, a railroad company does not, in the absence of an agreement, acquire the right to enter land to build its road until the amount appraised has been paid into court.—*State v. Wells* (N. C.) 210.

*Where land is taken by a railroad company, compensation to be paid is the true market value thereof, and the benefits can only be set off against damages to the residue of the tract.—*Morrison v. Fairmont & C. Traction Co.* (W. Va.) 669.

§ 3. Proceedings to take property and assess compensation.

*Under Private Acts N. C. 1901, c. 42, p. 88, and Revisal N. C. 1905, § 2575, a railroad and logging company does not, in the absence of an agreement, acquire any right in the land except to lay out its line and designate the sites required for the construction of the road.—*State v. Wells* (N. C.) 210.

*Where a map and profile is not served with the summons in condemnation proceedings, as required by Revisal N. C. 1905, § 2569, the omission may be supplied by amendment.—*State v. Wells* (N. C.) 210.

§ 4. Remedies of owners of property.

Proceeding for the assessment of damages for land taken for widening a highway under Laws 1901, p. 198, c. 50, § 5, as amended by Laws 1905, p. 932, c. 770, § 1 (2), must be taken "not later" than six months after the road had been changed or a new road opened and completed.—*In re Wittkowsky's Land* (N. C.) 617.

Where a jury was appointed to assess damages for the taking of land for highway purposes under Laws 1901, p. 198, c. 50, § 5, as amended by Laws 1905, p. 932, c. 770, § 1 (2), notice of such appointment to the township trustees and county commissioners was required.—*In re Wittkowsky's Land* (N. C.) 617.

Where land was taken for a highway under the right of eminent domain, the notice of such condemnation by the board of township trustees to the owner of the land held not the commence-

*Point annotated. See syllabus.

nent of legal proceedings.—In re Wittkowsky's Land (N. C.) 617.

*In an action for damages by the appropriation of land by a municipality, *held* proper to admit evidence showing that the land was already burdened with an easement.—Creighton v. Board of Water Com'rs of City of Charlotte (N. C.) 511.

In an action for damages because of the appropriation of land by a municipality, a former deed placing an easement on the land *held* admissible.—Creighton v. Board of Water Com'rs of City of Charlotte (N. C.) 511.

*In an action for damages from an appropriation of land by a municipality, certain testimony *held* admissible to show the value of the land.—Creighton v. Board of Water Com'rs of City of Charlotte (N. C.) 511.

Where an assessment of damages for land taken for a highway was made without notice to the township trustees or county commissioners, and they appealed from the award, it was proper for the court either to try the matter or remand it to the clerk for a new assessment.—In re Wittkowsky's Land (N. C.) 617.

*Evidence of appropriation of land is admissible under a declaration alleging that defendant laid its railroad track "along and upon" the property of plaintiff.—Morrison v. Fairmont & C. Traction Co. (W. Va.) 669.

*The measure of damages for injury to land from the construction of a railroad defined.—Morrison v. Fairmont & C. Traction Co. (W. Va.) 669.

EMPLOYES.

See "Master and Servant."

ENTICEMENT.

Of servant, see "Master and Servant," § 14.

ENTIRE CONTRACT.

See "Sales," § 2.

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE ASSIGNMENTS.

See "Assignments," § 1.

EQUITABLE ESTOPPEL.

See "Estoppel," § 2.

EQUITY.

Appealability of order refusing reference in equity suit, see "Appeal and Error," § 2. Equitable assignments, see "Assignments," § 1. Equitable estoppel, see "Estoppel," § 2. Relief against judgment, see "Judgment," § 7. Setting aside foreclosure of mortgage, see "Mortgages," § 3.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments": "Fraudulent Conveyances"; "Injunction"; "Nuisance," §§ 1, 2; "Partition," § 1; "Quieting Title"; "Receivers"; "Reformation of Instruments": "Specific Performance"; "Trusts."

Obstruction of easement, see "Easements," § 1. Usurious contracts, see "Usury," § 1.

*Point annotated. See syllabus.

§ 1. Jurisdiction, principles, and maxims.

Under Civ. Code 1902, § 1828, authorizing life insurance companies to sue to vacate a policy for fraud in the application, where the right to cancel is set up in answer to action on policy, defendant is not entitled to have the issue tried in equity.—Fludd v. Equitable Life Assur. Soc. (S. C.) 762.

*Equity will never enforce a forfeiture, but will sometimes give relief against the consequence of a breach of condition and save the estate from forfeiture.—Spies v. Arvondale & C. R. Co. (W. Va.) 464.

§ 2. Pleading.

Where an answer presenting no defense is offered, the court on objection should refuse to permit it to be filed.—Gaulley Coal Land Ass'n v. Spies (W. Va.) 908.

Bill *held* not multifarious.—Wheeling Ice & Storage Co. v. Connor (W. Va.) 982.

*Where a bill avers that plaintiff had been appointed by a clerk of the county court guardian of an infant, and files an order of the clerk, though the order may not fully prove the appointment, the averment is taken for true on demurrer.—Wells v. Simmons (W. Va.) 990; Tallman v. Same (W. Va.) 991.

§ 3. Evidence.

In assailing a prima facie right or title by a bill in equity, plaintiff must aver and prove facts sufficient to overcome it, and he cannot otherwise put defendant to the proof of a perfect, indefeasible title or right.—Hardman v. Cabot (W. Va.) 756.

§ 4. Dismissal before hearing.

Dismissal of a petition to enjoin a sale under a power *held* not error.—Baggett v. Edwards (Ga.) 250.

§ 5. Hearing, submission of issues to jury, and rehearing.

*Where in equity an answer, praying for affirmative relief, is filed and the bill is dismissed because equity is without jurisdiction the dismissal of the bill carries with it the answer.—Spies v. Arvondale & C. R. Co. (W. Va.) 464.

*Where the original bill is dismissed the cross-bill goes with it where the subject-matter of the cross-bill is simply defensive of the case made by the original bill.—Spies v. Arvondale & C. R. Co. (W. Va.) 464.

§ 6. Bill of review.

Where on an original bill by infants a decree restoring a lost deed for land pronounced in another suit is reversed, the court cannot adjudicate the question of title to the land between them and a purchaser under a decree in a suit subsequent to the suit restoring the deed, and between different parties, when the decree restoring the deed did not adjudicate the title, and when the bill of the infants cannot be maintained as a bill to remove a cloud.—Poling v. Poling (W. Va.) 993.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.

Of bridges, see "Bridges," § 1.

Of courts, see "Courts," § 2.

Of highways, see "Highways," § 1.

Of lost instruments, see "Lost Instruments."

Of railroads, see "Railroads," § 5; "Street

Railroads," § 1.

Of trusts, see "Trusts," § 6.
Of will, see "Wills," § 2.

ESTATES.

Created by deed, see "Deeds," § 2.
Created by will, see "Wills," § 3.
Decedents' estates, see "Executors and Administrators."
Estates for years, see "Landlord and Tenant."
Execution on estates created by will, see "Execution," § 1.
Tenancy in common, see "Tenancy in Common."
Trusts, see "Trusts," § 2.

Particular estates.

See "Dower"; "Remainders."

ESTOPPEL

Acts of guardian as estoppel against ward, see "Guardian and Ward," §§ 1, 2.
Acts of guardian as estoppel on surety, see "Guardian and Ward," § 4.
Against infants, see "Infants," § 2.
By judgment, see "Judgment," §§ 8, 9.
To allege error see "Appeal and Error," § 20.
To assert invalidity of judgment by confession, see "Judgment," § 2.
To avoid or forfeit insurance policy, see "Insurance," § 8.
To claim failure to enforce ordinances, see "Municipal Corporations," § 7.
To claim royalty under oil lease, see "Mines and Minerals," § 1.
To deny title of common grantor in ejectment, see "Ejectment," § 1.

§ 1. By record.

*Statements in a guardian's return held not solemn admissions in judicio by his surety, though the latter may have instigated or approved of them, and they may have been for his benefit.—*Rich & Bros. v. Fidelity & Deposit Co. of Maryland* (Ga.) 336.

§ 2. Equitable estoppel.

A plea of estoppel in pais held insufficient.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 330.

*An estoppel or admission in pais cannot arise where there is no action on the part of the person setting up the estoppel in reliance thereon, and no injury resulted to them.—*Rich & Bros. v. Fidelity & Deposit Co. of Maryland* (Ga.) 336.

A surety in a bond given by the purchaser of land at judicial sale held estopped to assert a lien on the land as against another lienholder.—*Davis v. Roller* (Va.) 4; *Bowman's Ex'rs v. Same*, Id.

*To bar one of his right to land by estoppel by conduct his representation must have been made with intent to mislead.—*Mullins v. Shrewsbury* (W. Va.) 736.

*Estoppel in pais will not bar the assertion of title to land where the representation comes only from one's ignorance of his title arising from ignorance of law.—*Mullins v. Shrewsbury* (W. Va.) 736.

*To bind one by estoppel from his conduct he must have reasonable grounds to anticipate that another will change his position or act on the faith of it to his detriment.—*Mullins v. Shrewsbury* (W. Va.) 736.

Where a guardian petitions to sell land of infants, stating that her husband died seized of it, and sells part, and the land in fact belongs to her, she is not barred by that suit from asserting her own title to land not so sold, con-

veyed by one of the heirs to a stranger.—*Mullins v. Shrewsbury* (W. Va.) 736.

Where one renders services to another in his business from which the latter receives a benefit, and stands by and sees what is being done without objection, he is estopped to deny that the services were rendered at his request.—*Ice v. Maxwell* (W. Va.) 899.

EVIDENCE

See "Depositions"; "Witnesses."
Applicability of instructions to evidence, see "Trial," § 9.
Improperly acknowledged deed as evidence, see "Acknowledgment," § 1.
Newly discovered evidence ground for new trial, see "Criminal Law," § 20.
Parol evidence to establish trust, see "Trust," § 1.
Province of court and jury at trial as to weight and effect of evidence, see "Trial," § 6.
Questions of fact for jury, see "Trial," § 5.
Reception at trial, see "Criminal Law," § 10; "Trial," § 3.
Verdict or findings contrary to evidence, see "New Trial," § 1.

As to particular facts or issues.

See "Boundaries," § 2; "Damages," § 3; "Deeds," § 4; "Fraudulent Conveyances," § 2; "Judgment," § 14; "Payment," § 2.
Customs and usages, see "Customs and Usages."
Fraud in sale of land of infant, see "Guardian and Ward," § 3.
Negligence in blasting, see "Explosives."
Property conveyed by deed, see "Deeds," § 3.
Undue influence in making will, see "Wills," § 1.

In actions by or against particular classes of persons.

Assignees, see "Assignments," § 2.
Banks, see "Banks and Banking," § 2.
Telegraph companies, see "Telegraphs and Telephones," § 2.

In particular civil actions or proceedings.

See "Divorce," § 2; "Ejectment," § 2; "Fraud," § 1; "Habeas Corpus," § 2; "Malicious Prosecution," § 3; "Negligence," § 2; "Reformation of Instruments," § 1.
Equity, see "Equity," § 3.
For accounting by personal representatives, see "Executors and Administrators," § 5.
For breach of contract, see "Contracts," § 4.
For breach of contract of carriage, see "Carriers," § 4.
For breach of contract of employment, see "Master and Servant," § 1.
For breach of covenant, see "Covenants," § 3.
For damages for delay or failure to deliver telegram, see "Telegraphs and Telephones," § 2.
For damages for taking of or injury to land in exercise of right of eminent domain, see "Eminent Domain," § 4.
For delay in delivery of shipment, see "Carriers," § 1.
For fires caused by operation of railroad, see "Railroads," § 14.
For injuries to animals caused by operation of railroad, see "Railroads," § 13.
For loss of or injury to passengers' effects, see "Carriers," § 9.
For personal injuries, see "Carriers," § 6; "Railroads," §§ 11, 12; "Street Railroads," § 2.
For price of goods, see "Sales," § 7.
For wrongful attachment, see "Attachment," § 4.

*Point annotated. See syllabus.

For wrongful cancellation of insurance policy, see "Insurance," § 14.
 On bill or note, see "Bills and Notes," § 8.
 On insurance policy, see "Insurance," § 13.
 Probate proceedings, see "Wills," § 2.
 To construe will, see "Wills," § 3.
 To establish boundary, see "Boundaries," § 2.
 To recover bank deposit, see "Banks and Banking," § 2.

In criminal prosecutions.

See "Abduction," § 2; "Burglary," § 1; "Criminal Law," § 6; "Forgery," "Fornication"; "Homicide," § 5; "Obscenity"; "Rape," § 2; "Riot"; "Seduction," § 1; "Vagrancy," § 2.
 For enticing servant from employment, see "Master and Servant," § 14.
 For fraudulently obtaining advances on labor contract, see "Master and Servant," § 2.
 For offenses against liquor laws, see "Intoxicating Liquors," § 4.
 For offenses against Sunday laws, see "Sunday."
 For violation of municipal ordinance, see "Municipal Corporations," § 5.
 For willful trespass, see "Trespass," § 3.

Review and procedure thereon in appellate courts.

See "Appeal and Error," § 23.
 Decision on appeal in general as to admission of, see "Appeal and Error," § 29.
 Exceptions to rulings on for purpose of review, see "Appeal and Error," § 4.
 Harmless error in rulings on, see "Appeal and Error," § 25; "Criminal Law," § 29.
 Inclusion in record on appeal or writ of error, see "Appeal and Error," §§ 11, 14.
 Objections to rulings on for purpose of review, see "Criminal Law," § 25.
 Review of discretionary rulings on, see "Appeal and Error," § 22.

† 1. **Judicial notice.**

*Courts cannot take judicial notice of the laws of another state, but they must be proved as a fact.—App v. App (Va.) 672.

† 2. **Presumptions.**

*Where a sheriff's deed, regular upon its face and reciting a levy and sale under an execution issued from a justice's court, has been admitted in evidence, and there is no evidence of the loss of the execution, it is presumed that before the land was levied upon a proper officer had made upon the execution an entry of no personal property to be found.—Patterson v. Drake (Ga.) 175.

After defendant has failed to make out a prima facie defense, it is not incumbent on plaintiff to offer any counter evidence to that upon which he relies, and hence the rule that an unfavorable inference may be drawn against a party who fails to produce available proof has no application.—Southern Express Co. v. B. E. Electric Co. (Ga.) 254.

*Insanity once shown to exist is presumed to continue, in the absence of testimony showing a restoration to mental soundness.—Beard v. Southern Ry. Co. (N. C.) 505.

*The receipt of a letter purporting to have been signed by a person is no evidence that it was written by such person.—Beard v. Southern Ry. Co. (N. C.) 505.

† 3. **Relevancy, materiality, and competency in general.**

*Where the question is what was proper to be done under given circumstances at a particular point, proof of what was usually done at a point nearby under different circumstances is incompetent.—Atlanta Ice & Coal Co. v. Mixon (Ga.) 237.

The declarations of the manager of defendant to a justice of the peace issuing a warrant for the arrest of plaintiff suing for malicious prosecution *held* admissible as a part of the res gestæ.—Stanford v. A. F. Messick Grocery Co. (N. C.) 815.

*Statement of foreman shortly after accident to employé *held* admissible as part of the res gestæ.—Young v. Seaboard Air Line Ry. (S. C.) 225.

In an action grounded on fraud, evidence is admissible, though only remotely connected with the transaction out of which the controversy had arisen.—Dantzler v. Cox & Dantzler (S. C.) 774.

† 4. **Best and secondary evidence.**

*Under Civ. Code 1895, § 3630, providing that where an original deed duly recorded is lost or destroyed, a certified copy from the registry is admissible whenever the court is satisfied of the loss or destruction, the sufficiency of the evidence as to the loss or destruction is within the discretion of the court.—Patterson v. Drake (Ga.) 175.

*The recitals in a sheriff's deed of an execution and a seizure and sale thereunder may be looked to as secondary evidence of the contents of the execution, when it appears that the execution has been lost, and is not recorded.—Patterson v. Drake (Ga.) 175.

*Where the execution under which land was sold is lost or destroyed, and it was not recorded with the sheriff's deed, parol evidence as to its contents is admissible after proof of its loss or destruction.—Patterson v. Drake (Ga.) 175.

*Where a person to whom a letter is addressed admits its receipt and the correctness of a copy, the copy is admissible against him in the place of the original which is not produced.—Beard v. Southern Ry. Co. (N. C.) 505.

*Service of a notice on plaintiff to produce original letters at the trial *held* too late where plaintiff resided in another town some 70 miles from the place where the trial was being held.—Beard v. Southern Ry. Co. (N. C.) 505.

*An alleged "substantial copy" of a letter written by plaintiff to defendant *held* inadmissible as secondary evidence of the contents of the letter.—Ivey v. Bessemer City Cotton Mills (N. C.) 613.

*Plaintiff *held* not entitled to introduce an alleged copy of a letter written to defendants, where no notice had been served on defendant to produce the original.—Ivey v. Bessemer City Cotton Mills (N. C.) 613.

*Where no special search has been made for letters called for, it is insufficient to admit secondary evidence of their contents.—Leesville Mfg. Co. v. Morgan Wood & Iron Works (S. C.) 768.

*The loss of a paper, so as to admit secondary evidence thereof, is a question addressed to the discretion of the trial judge.—Leesville Mfg. Co. v. Morgan Wood & Iron Works (S. C.) 768.

† 5. **Demonstrative evidence.**

In probate proceedings *held* error for counsel for propounder to show jury revocatory words on margin of will and compare them with signature.—In re Shelton's Will (N. C.) 705.

† 6. **Admissions.**

*Declarations of an agent, when not made dum ferebat opus or as a part of the res gestæ, are hearsay.—Miller & Co. v. McKensie (Ga.) 952.

*A declaration made by the personal representative of a decedent which is germane to the

*Point annotated. See syllabus.

issue involved in a suit brought by him, is competent against him.—*Bennett v. Best* (N. C.) 84.

Question to witness *held* not to call for hearsay evidence.—*Ex parte Parker* (S. C.) 122.

§ 7. Declarations.

In an action against a corporation for breach of contract, evidence as to an agreement between plaintiff and defendant's president *held* admissible.—*Ives v. Atlantic & N. C. R. Co.* (N. C.) 74.

*Declaration by grantor, since deceased, as to execution of deed, *held* admissible as declaration against interest.—*Smith v. Moore* (N. C.) 275.

*In action by daughter to set aside deed of her mother and herself, evidence of declaration by the mother, since deceased, *held* admissible in evidence against the daughter.—*Smith v. Moore* (N. C.) 275.

*The declaration of a person since deceased in regard to the location of a corner *held* admissible.—*Broadwell v. Morgan* (N. C.) 340.

A declaration of a person, made while in possession of real estate, *held* competent as against one claiming under a deed from him.—*Steadman v. Steadman* (N. C.) 784.

*A letter from defendant to plaintiff's attorney, stating that defendant did not owe the sum claimed, and inviting the attorney to go over the matter with the defendant, was properly excluded as a self-serving declaration.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (S. C.) 768.

§ 8. Hearsay.

*It was error to permit a witness to testify that a surveyor had told him that the building in controversy was within the lines fixed by the survey.—*Martin v. City of Gainesville* (Ga.) 499.

§ 9. Documentary evidence.

Civ. Code 1895, § 3628, providing that where a deed is offered in evidence and an affidavit that the deed is a forgery is filed, the court will require an issue to be made is cumulative only.—*Knight v. Suddeth & Crenshaw* (Ga.) 81.

On an interlocutory hearing of the petition for an injunction the provisions of Civ. Code 1895, § 3628, for arresting of a cause and trying an issue of forgery as to a deed offered in evidence, is not applicable, but any deed offered may be attacked as a forgery by any competent evidence.—*Knight v. Suddeth & Crenshaw* (Ga.) 81.

*Under Civ. Code 1895, §§ 5214, 5215, a transcript from the docket of a justice of the peace, *held* admissible in evidence in the courts of the county in which the justice holds office.—*Patterson v. Drake* (Ga.) 175.

*A sheriff's deed is admissible as a muniment of title when accompanied by the execution under which the land was sold.—*Patterson v. Drake* (Ga.) 175.

*Where it is merely sought to establish the fact that a judgment has been rendered, a certified copy of the judgment without the proceedings prior thereto is admissible.—*Patterson v. Drake* (Ga.) 175.

*A letter received in due course of business *held* presumed to be that of the corporation whose name is signed thereto.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (S. C.) 768.

§ 10. Parol or extrinsic evidence affecting writings.

*A contract of employment of a traveling salesman *held* ambiguous, authorizing defendant, in an action by plaintiff to recover \$100 per month for the balance of the year, to file a plea alleg-

ing that the contract was ambiguous and that parol evidence was necessary to explain it.—*Novelty Hat Mfg. Co. v. Wiseberg* (Ga.) 922.

Parol evidence to vary terms of contract by showing that the provision for the manufacture and sale of lumber was only a security for payment of the price was incompetent.—*Burton v. O'Neill Mfg. Co.* (Ga.) 933.

*Where a written contract between a landlord and his tenant and the transfer thereof were plain, parol evidence conflicting with them was not admissible.—*Cobb v. Johnson* (Ga.) 935.

*A deed conveying land *held* to sufficiently describe the point of beginning so as to render parol evidence to locate it admissible.—*Broadwell v. Morgan* (N. C.) 340.

*Parol evidence is admissible to show that the note sued on was given for the price of land.—*Davis v. Evans* (N. C.) 344.

*Proof of statements of an agent procuring an order for the purchase of a machine *held* not objectionable as contradicting the written order.—*Smith Premier Typewriter Co. v. Rowan Hardware Co.* (N. C.) 417.

*Certain parol testimony *held* not objectionable as contradicting a written instrument.—*Smith Premier Typewriter Co. v. Rowan Hardware Co.* (N. C.) 417.

*Parol evidence *held* admissible to explain the intent of the parties to a contract ambiguously worded.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 613.

*Where a letter accepting plaintiff's offer to enter defendant's service did not disclose the nature of the service contracted for, parol evidence was admissible.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 613.

*Parol evidence *held* admissible to show the consideration of a written promise to pay plaintiff a specified salary where the consideration was not clearly expressed in the writing.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 613.

*Evidence of a vendee's parol agreement to pay the vendor any profits realized from a resale of the property *held* not objectionable as contradicting the conveyance.—*Bourne v. Sherrill* (N. C.) 799.

*Where the meaning of a written contract is obscure, parol proof of the acts of the parties under it and of what was said and done when it was executed, *held* admissible.—*Shenandoah Land & Anthracite Coal Co. v. Clarke* (Va.) 561.

A contract for the sale of certain known veins of coal *held* not ambiguous, nor is a latent ambiguity therein disclosed by the discovery that there are other veins of coal on the land.—*Armstrong v. Ross* (W. Va.) 895.

Parol evidence *held* not necessary to explain property conveyed by deed.—*Armstrong v. Ross* (W. Va.) 895.

§ 11. Opinion evidence.

*A question to a nonexpert witness *held* properly excluded as calling for mere opinion.—*Atlanta Ice & Coal Co. v. Mixon* (Ga.) 237.

*When books of account have been introduced in evidence, an expert bookkeeper may testify that he has examined the books and reached given results from the entries therein, the question of proper deductions from the entries being for the jury.—*Crawford v. Roney* (Ga.) 499.

*A physician who had attended plaintiff and knew his condition *held* entitled to testify that in his opinion the fall described by plaintiff would produce the mental condition in which witness found him, etc.—*Beard v. Southern Ry. Co.* (N. C.) 506.

*Point annotated. See syllabus.

*On an issue as to plaintiff's mental capacity at the time he signed a release, a nonexpert held entitled to express an opinion as to plaintiff's want of capacity.—*Beard v. Southern Ry. Co.* (N. C.) 505.

§ 12. Weight and sufficiency.

*Hearsay evidence has no probative value.—*Miller & Co. v. McKenzie* (Ga.) 952.

EXAMINATION.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

For purpose of review, see "Appeal and Error," § 4.

In statutes, see "Statutes," § 1.

Negating exception in statute in indictment or information, see "Indictment and Information," § 2.

To allotment of homestead, see "Homestead," § 1.

To findings by court at trial, see "Trial," § 15.

To instructions at trial in civil actions, see "Trial," § 11.

To pleading, see "Pleading," § 3.

To report of commissioners, in partition, see "Partition," § 1.

EXCEPTIONS, BILL OF.

As part of record on appeal or error, see "Appeal and Error," § 7.

Incorporation in record on appeal, see "Criminal Law," § 27.

Necessity for purpose of review, see "Appeal and Error," § 9.

Taking exceptions at trial, see "Trial," § 11.

§ 1. Settlement, signing, and filing.

*Neither under the provisions of Civ. Code 1895, § 5543, nor any other provision of law is one who has been a trial judge given any authority to certify, after he has gone out of office, a "fast" bill of exceptions.—*Brand v. City of Lawrenceville* (Ga.) 967.

EXCESSIVE DAMAGES.

See "Damages," § 2.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXECUTION.

See "Attachment"; "Garnishment."

Best and secondary evidence of, see "Evidence," § 4.

Enforcement of municipal assessment, see "Municipal Corporations," § 4.

Exemptions, see "Homestead."

Habeas corpus to procure discharge from execution against person, see "Habeas Corpus," §§ 1, 2.

Imprisonment in supplementary proceedings as denial of civil rights, see "Constitutional Law," § 3.

Levy of execution on confused goods, see "Confusion of Goods," § 1.

Presumptions as to, see "Evidence," § 2.

§ 1. Property subject to execution.

*An estate in land created by will held by a judgment debtor, which is determinable upon his ceasing to remain in possession of land, is

too intangible to be the subject of a levy and sale under execution.—*W. T. Harber & Bro. v. Nash* (Ga.) 928.

§ 2. Issuance, form, and requisites of writ.

Under Act July 27, 1903 (Acts 1903, p. 124), abolishing the city court of Clarkeville, the clerk of the superior court had no authority to issue an execution on a judgment previously rendered in the city court.—*Martin v. Craven* (Ga.) 962.

§ 3. Lien, levy or extent, and custody of property.

Levy of execution held not void where it was directed to the constables of the county and the levy was made by the sheriff.—*Glenn v. Augusta Drug Co.* (Ga.) 1032.

§ 4. Sale.

*Where suit is brought upon a demand for compensation of an attorney and judgment rendered for the attorney, the fact that the demand arose out of the relationship of attorney and client will not prevent the attorney from purchasing at the sale under execution.—*Patterson v. Drake* (Ga.) 175.

§ 5. Supplementary proceedings.

*A defendant cannot be ordered to appear in supplementary proceedings before the clerk of the court, while there is a similar proceeding instituted for the same purpose pending on appeal to the Supreme Court.—*Ledford v. Emerson* (N. C.) 969.

§ 6. Execution against the person.

Where an issue of fraud is raised by the pleadings, the plaintiff must sustain the burden of establishing the fact of fraud before he can entitle himself to an execution against defendant's person.—*Ledford v. Emerson* (N. C.) 969.

Revisal 1905, § 735, pertaining to arrests in civil action, held applicable to an arrest as a provisional remedy before judgment, and not to an arrest under a *capias ad satisfaciendum*.—*Ledford v. Emerson* (N. C.) 969.

EXECUTORS AND ADMINISTRATORS.

See "Wills."

Actions for death of decedent, see "Death," § 1.

Administration of charities by, see "Charities," § 1.

Effect of administration on limitation, see "Limitation of Actions," § 1.

Parties to action for settlement, see "Parties," § 2.

Requirements of statute of frauds as to memorandum of administrator's sale, see "Frauds, Statute of," § 3.

Restraining suit by executor or administrator, see "Injunction," § 2.

Subrogation of purchaser at sale of decedent's land to rights of creditor, see "Subrogation."

Testimony as to transactions with decedents, see "Witnesses," § 1.

§ 1. Appointment, qualification, and tenure.

On appeal from probate court, in proceedings denying administration on ground that petitioner is not relation of intestate, court need not require, before submitting to jury, that petitioner *prima facie* show relationship.—*Ex parte Gantt* (S. C.) 892.

§ 2. Allowances to surviving wife, husband, or children.

*Where application by a widow for a year's support has been granted, objections may be made at or before the next term of the court of ordinary and before final action on the application.—*Foster v. Turnbull* (Ga.) 925.

*Point annotated. See syllabus.

No objections having been filed to a widow's allowance, and the ordinary, at first term of court, having ordered that the return of the appraisers shall be recorded, it is not an abuse of discretion to refuse to open a judgment at a later date and allow objections to be filed.—*Foster v. Turnbull* (Ga.) 925.

That plaintiff's ancestor had a homestead set apart in the land sued for, where such land was set apart as a year's support to the widow of the ancestor, did not strengthen the title of plaintiff, who was not the heir of the widow.—*Moore v. Moore* (Ga.) 950.

When a report of appraisers shows that they appraised the entire estate and designated the whole of it as a year's allowance to the widow, failure to minutely describe the realty does not render the proceeding void.—*Moore v. Moore* (Ga.) 950.

Where a year's support is set apart out of homestead property, the homestead becomes extinguished.—*Moore v. Moore* (Ga.) 950.

§ 3. Allowance and payment of claims.

Revisal 1905, § 94, is not available to a claimant who has not presented his claim, under section 41, if personal notice to exhibit his claim has been served on the creditor, and he fails to make exhibit within 6 months.—*Morisey v. Hill* (N. C.) 193.

Revisal 1905, § 39, being independent of section 93 requiring a claimant to sue within 6 months after notice of rejection of his claim, the publication of notice under the former section is not necessary to the enforcement of the latter.—*Morisey v. Hill* (N. C.) 193.

§ 4. Actions.

If, in defense to an action *ex contractu* against an administrator, he desires to plead by way of set-off that rent on land of the estate was illegally collected by plaintiff, he must allege facts from which the law will imply an obligation on the part of plaintiff to account for such money as money had and received.—*De LaPerriere v. Bowles* (Ga.) 1030.

Under Revisal 1905, § 93, a counterclaim founded on a rejected claim presented in an action by an executor more than 2 years after its rejection, was barred.—*Morisey v. Hill* (N. C.) 193.

In an action by the personal representative of a wife against a vendee of her husband's heir at law, to recover personal property on the ground that the husband was the agent of the wife, a nonsuit *held* properly granted.—*Du Bose v. Gladden* (S. C.) 152.

A suit against the heirs and personal representatives of a surety in a bond to recover the amount of the liability by virtue of the suretyship *held* not barred by limitations, notwithstanding Code 1887, § 2020 [Va. Code 1904, p. 699].—*Sipe v. Taylor* (Va.) 542.

§ 5. Accounting and settlement.

It is competent for heirs and distributees suing the administrator for a settlement to show any indebtedness due the estate.—*Mann v. Baker* (N. C.) 102.

An administrator in an action for a final settlement has the burden of showing that he used due diligence to collect debts and having collected the same, has accounted therefor.—*Mann v. Baker* (N. C.) 102.

In an action by heirs and distributees against the administrator for a settlement, the complaint *held* to show an action for an accounting for any sums which the administrator should have collected.—*Mann v. Baker* (N. C.) 102.

*In an action by heirs and distributees against an administrator for a settlement it

is sufficient to aver a breach of duty on the part of the administrator in failing to file final account and to fully settle.—*Mann v. Baker* (N. C.) 102.

In an action by the heirs and distributees against an administrator for a settlement, the administrator *held* required to show that he used due diligence to collect money in the hands of a former administrator.—*Mann v. Baker* (N. C.) 102.

EXEMPLIFICATIONS.

As evidence, see "Evidence," § 9.

EXEMPTIONS.

See "Homestead."

From jury duty as vested right, see "Constitutional Law," § 4.

From jury duty, laws revoking as impairing obligation of contracts, see "Constitutional Law," § 5.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 11.

In criminal prosecutions, see "Criminal Law," § 6.

EXPLOSIVES.

*Where one blasted near residences without properly smothering the blast, *held* he should have foreseen the danger to persons living there, so as to be liable for the injury to them.—*Kimberly v. Howland* (N. C.) 778.

*Evidence *held* sufficient to show negligence in blasting.—*Kimberly v. Howland* (N. C.) 778.

EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 6.

EXTENSION.

Of time for service of case on appeal, see "Appeal and Error," § 10.

FACTORS.

See "Brokers"; "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FALSE PRETENSES.

On trial for swindling in that accused, after having agreed with the prosecuting witness to work for a certain length of time in order to pay a sum of money procured by the defendant, refused to perform such work or return the money, until the 26th day of June, constitutes a variance, a verdict of guilty *held* not supported by the evidence.—*Chapple v. State* (Ga.) 471.

Evidence *held* not sufficient to show beyond all reasonable doubt that the representations relied on as a foundation for swindling were false.—*Swift v. State* (Ga.) 478.

FAST WRIT OF ERROR.

See "Appeal and Error," § 5.

*Point annotated. See syllabus.

FEES.

Of court stenographer, see "Courts," § 2.

FELLOW SERVANTS.

See "Master and Servant," §§ 7, 9, 12.

FELONY.

See "Compounding Felony."

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 1.

Indictment or presentment, see "Indictment and Information," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

By court at trial, see "Trial," § 15.

Review on appeal or writ of error, see "Appeal and Error," § 23.

Setting aside, see "New Trial," § 1.

Special findings by jury, see "Trial," § 14.

FINES.

Punishment for crime, see "Criminal Law," §§ 23, 30.

*When a misdemeanor convict is sentenced in the alternative, to the chain gang, and to be discharged on payment of a fine, it is the duty of the court to prescribe a reasonable time within which to pay the fine.—*Dunaway v. Hodge* (Ga.) 483.

*Where the sentence provides that defendant may be discharged at any time from the sentence by payment of the fine, and that five days are given to pay the fine, the law will declare what is a reasonable time.—*Dunaway v. Hodge* (Ga.) 483.

*Where accused is sentenced to the chain gang to be discharged on payment of a certain fine, a tender of the fine 15 days after the sentence is within a reasonable time.—*Dunaway v. Hodge* (Ga.) 483.

FIRE INSURANCE.

See "Insurance," § 2.

FIRES.

Caused by operation of railroad, see "Railroads," § 14.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

Review of proceedings in justice's court, see "Justices of the Peace," § 4.

FORECLOSURE.

Of lien, see "Mechanics' Liens," §§ 1, 2.

Of mortgage, see "Mortgages," §§ 3, 4.

*Point annotated. See syllabus.

FOREIGN CORPORATIONS.

See "Corporations," § 4.

FOREIGN JUDGMENTS.

See "Judgment," §§ 11, 13.

FOREMAN.

As fellow servant, see "Master and Servant," § 7.

FORFEITURES.

Equitable jurisdiction as to, see "Equity," § 1.

Of insurance, see "Insurance," §§ 7, 8, 14.

FORGERY.

Payment of forged paper by bank, see "Banks and Banking," § 2.

Review of findings on issue of in civil action, see "Appeal and Error," § 23.

When on trial for forgery there was some evidence to support a conviction, the court will not disturb a judgment refusing a new trial.—*Allen v. State* (Ga.) 478.

Evidence held insufficient to sustain a conviction for forgery.—*Richard v. State* (Ga.) 1044.

FORMER ADJUDICATION.

See "Judgment," §§ 8, 9.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 4.

FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass," § 2.

FORNICATION.

See "Seduction," § 1.

Evidence held not to support a verdict of guilty of fornication.—*Lightner v. State* (Ga.) 471.

FRANCHISES.

Of railroad, see "Railroads," § 6.

FRAUD.

See "False Pretenses"; "Fraudulent Conveyances."

Equitable jurisdiction, see "Equity," § 1.

Foreclosure of mortgages, see "Mortgages," § 3.

Recovery of property obtained by fraud as dependent on ownership and identity, see "Property."

Relevancy of evidence, see "Evidence," § 3.

Review of verdict on conflicting evidence involving issue of fraud, see "Appeal and Error," § 23.

By particular classes of persons, or persons in particular relations.

See "Infants," § 3.

Servant in obtaining advances, see "Master and Servant," § 2.

In particular classes of conveyances, contracts, transactions, or proceedings.

See "Deeds," § 4; "Insurance," § 6.

Conveyance of realty, see "Vendor and Purchaser," § 2.

Foreign judgments, see "Judgment," § 11.
Insurance application, see "Insurance," § 3.
Sale of land of infant, see "Guardian and Ward," § 3.

Particular remedies.

Body execution, see "Execution," § 6.

§ 1. Actions.

*Where fraud is relied on it must be clearly established.—*Sansom v. Wolford* (W. Va.) 1020.

FRAUDS, STATUTE OF.

Questions for jury on conflicting evidence on issue of, see "Trial," § 5.

§ 1. Promises to answer for debt, default, or miscarriage of another.

*An oral promise to pay for services rendered a third person is not actionable if the services were rendered wholly or partly on the credit of such third person.—*Johnson v. Bank* (W. Va.) 394.

*In ascertaining the intent of a party in determining whether an oral promise is original or collateral, the words of the promise and the situation of the parties should be considered.—*Johnson v. Bank* (W. Va.) 394.

*In determining whether an oral promise to pay the debt of another is original or collateral, the intent of the parties must be considered.—*Johnson v. Bank* (W. Va.) 394.

§ 2. Agreements not to be performed within one year.

A contract of employment for a year to begin in present is not within the statute of frauds.—*Hudgins v. State* (Ga.) 492.

§ 3. Real property and estates and interests therein.

*A contract of sale of growing trees concerns an interest in realty which under Civ. Code 1895, § 2693 (4) must be in writing.—*Corbin v. Durden* (Ga.) 80.

*No memorandum in writing is necessary to charge either the administrator or the purchaser at any administrator's sale.—*Green v. Freeman* (Ga.) 45.

An oral contract whereby one of the parties agreed to cut timber on the land of the other and deliver it for a certain price per cord, was not within the statute of frauds.—*Ives v. Atlantic & N. O. R. Co.* (N. C.) 74.

*A contract for the sale of standing timber is within the statute of frauds, and must be in writing.—*Ives v. Atlantic & N. O. R. Co.* (N. C.) 74.

Agreement that plaintiff might remove timber cut, but should relinquish further right to cut the timber, held not within statute of frauds.—*York v. Westall* (N. C.) 724.

A parol agreement by a vendee to pay profits on a resale to the vendor held not within the statute of frauds.—*Bourne v. Sherrill* (N. C.) 799.

§ 4. Requisites and sufficiency of writing.

*There is no statute requiring the authority to make the memorandum required by the statute of frauds to be in writing.—*Brandon v. Pritchett* (Ga.) 241.

A parol ratification of a contract for the sale of land, made by one assuming without authority to act for the owner held valid.—*Brandon v. Pritchett* (Ga.) 241.

§ 5. Operation and effect of statute.

On a sale of growing timber without a valid written contract, partial payment of the price unaccompanied by possession will not

take the case from the statute of frauds.—*Corbin v. Durden* (Ga.) 80.

§ 6. Pleading, evidence, trial, and review.

*Where action is brought for damages for breach of a contract required by the statute of frauds to be in writing, the petition need not state whether the contract was in writing or not.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 830.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 1.

By mortgagor of chattels, see "Chattel Mortgages," § 3.

§ 1. Transfers and transactions invalid.

*A provision in a deed of trust to secure an indorser of a note that it also shall secure future indorsements does not render the trust fraudulent on its face as to creditors.—*Weaver v. R. L. Neal & Co.* (W. Va.) 909.

§ 2. Remedies of creditors and purchasers.

*Rule stated as to proof required to show fraud as against creditors in the sale of property.—*Harrisonburg Harness Co. v. National Furniture Co.* (Va.) 678.

GAMING.

Requisites and sufficiency of instructions, see "Criminal Law," § 14.

§ 1. Criminal responsibility.

In a prosecution for maintaining a gaming house, it was not error in an instruction on the elements of the offense to use the language: "If the defendant did anything which contributed to the maintenance or keeping of the gaming house," etc.—*Rosenthal v. State* (Ga.) 497.

GARNISHMENT.

See "Attachment"; "Execution."

Nature and essentials of judgment in general, see "Judgment," § 1.

§ 1. Proceedings to support or enforce.

Writ of attachment held void for variance between the individual described in the affidavit and the firm against which the writ issued, so that the judgment against the garnishee was also void.—*A. Leflier & Sons v. Union Compress Co.* (Ga.) 927.

Judgment against a garnishee who fails to answer, if the antecedent garnishment proceedings be void on their face, should be arrested.—*A. Leflier & Sons v. Union Compress Co.* (Ga.) 927.

GAS.

Gas lease, see "Mines and Minerals," § 1.

Use of highway by gas company, see "Highways," §§ 1, 2.

In a suit to enjoin the use of a public road under permission granted by the county court to convey natural gas, on the ground that the pipes are not maintained and the gas conveyed by means thereof for such purpose, the plaintiff must show such fact, and defendant may introduce evidence to prove that the company's pipes are so maintained and the gas so conveyed.—*Hardman v. Cabot* (W. Va.) 756.

GIFTS.

By will, see "Wills," § 3.
Charitable gifts, see "Charities."

*Point annotated. See syllabus.

GOOD FAITH.

Affecting right to injunction, see "Injunction," § 1.
Of purchaser, see "Bills and Notes," § 2.

GRAND JURY.

See "Indictment and Information."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."
Requirements of statute of frauds, see "Frauds, Statute of," § 1.

GUARDIAN AD LITEM

For infant married woman, see "Infants," § 4.

GUARDIAN AND WARD.

Estoppel by guardian's return, see "Estoppel," § 1.

Lease of oil lands of infants, see "Mines and Minerals," § 1.

§ 1. Custody and care of ward's person and estate.

*The acts of a guardian without authority and in excess of his powers do not operate as an estoppel against the infants.—*Headley v. Hoopengartner* (W. Va.) 744.

§ 2. Sales and conveyances under order of court.

Where, after summary proceedings for the sale or lease of infants' lands, under Code 1899, c. 83 (Code 1906, §§ 3228, 3245), the guardian accepts a less amount of royalty for several years, this will not estop the infants from claiming that part of the oil which the guardian did not receive, nor will those infants who have continued to receive the oil in the same proportion since their majority be estopped from claiming their full share.—*Headley v. Hoopengartner* (W. Va.) 744.

*A summary proceeding for the sale or lease of infants' lands, under Code 1899, c. 83 (Code 1906, §§ 3228-3245), is a judicial proceeding, and the court sells only the title such as it is, of the parties to the suit.—*Headley v. Hoopengartner* (W. Va.) 744.

Where, in summary proceeding under Code 1899, c. 83 (Code 1906, §§ 3228-3245), one purchases the interests of the infants in oil lands and agrees to pay a stipulated royalty therefor, he will not be relieved, after the sale is confirmed on the ground that the father in his lifetime disposed of one-sixteenth of the oil and gas produced on such lands.—*Headley v. Hoopengartner* (W. Va.) 744.

§ 3. Actions.

In a suit by an infant, against his guardian and another, alleging that a suit for the sale of the land of the infant was fraudulent, evidence held insufficient to show fraud.—*Sansom v. Wolford* (W. Va.) 1020.

§ 4. Liabilities on guardianship bonds.

*The obtaining of the approval of a guardian's return, though participated in by his surety, held not to render the surety liable to creditors for the amount of their claim.—*Rich & Bros. v. Fidelity & Deposit Co. of Maryland* (Ga.) 336.

*The return of a guardian held not to operate as estoppel by judgment on the surety, where the allowance of the return was not a judgment in a proceeding to which the surety and the plaintiffs were parties.—*Rich & Bros. v. Fidelity & Deposit Co. of Maryland* (Ga.) 336.

HABEAS CORPUS.

Continuance, see "Continuance."

Effect of discharge by habeas corpus on bail, see "Bail," § 1.

Review of findings in habeas corpus proceedings, see "Appeal and Error," § 23.

Right to reference, see "Reference," § 1.

§ 1. Nature and grounds of remedy.

*Where defendant was sentenced to the chain-gang or the jail on default of payment of \$500, with a provision that, on a payment of \$100, the \$400 should be suspended and he paid the \$100, and was thereafter arrested for alleged misbehavior, such custody was unlawful, and he was entitled to discharge on habeas corpus.—*Gordon v. Johnson* (Ga.) 489.

*Under Revisal 1905, § 1822, habeas corpus will lie to obtain a judgment debtor's discharge from an execution against his person, where it appears from the judgment roll that the court had no jurisdiction to issue such execution.—*Ledford v. Emerson* (N. C.) 969.

§ 2. Jurisdiction, proceedings, and relief.

Where a defendant arrested on a *capias ad satisfaciendum* obtained his discharge on habeas corpus, from which plaintiff appealed, his proceeding might be treated as a motion to recall the execution and to discharge the defendant, the denial of which was reviewable by appeal.—*Ledford v. Emerson* (N. C.) 969.

In habeas corpus to obtain possession of minor children left by a father in charge of his brother, evidence held to sustain a judgment for delivery of the children to their mother.—*Ex parte Cannon* (S. C.) 325.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," §§ 24-26.

In criminal prosecutions, see "Criminal Law," § 29.

Health ordinances, see "Municipal Corporations," § 7.

HEARING.

In equity, see "Equity," § 5.

In probate proceedings, see "Wills," § 2.

HEARSAY EVIDENCE.

In civil actions, see "Evidence," § 8.

HIGHWAYS.

See "Bridges"; "Municipal Corporations," §§ 6, 7; "Navigable Waters," § 1.

Accidents at railroad crossings, see "Railroads," § 11.

Condemnation of property for, see "Eminent Domain," § 4.

Use of, by gas company, see "Gas."

§ 1. Establishment, alteration, and discontinuance.

As to the rights of the public in highways and the power of the Legislature over the same, there is no distinction between streets of incorporated cities and towns and country roads.—*Hardman v. Cabot* (W. Va.) 756.

*Point annotated. See syllabus.

The right to convey natural gas for public use along a highway by means of pipes laid under the surface is dependent on the will of the authorities.—*Hardman v. Cabot* (W. Va.) 756.

Use of a public highway to lay a pipe line for natural gas may be granted by a county court to a natural person.—*Hardman v. Cabot* (W. Va.) 756.

§ 2. Highway districts and officers.

A pipe line in a highway, laid under proper authority, and used to supply the public with natural gas, *held* not a use in excess of the right of the public, and not to impose an additional burden on the estate in fee in the land.—*Hardman v. Cabot* (W. Va.) 756.

HOLIDAYS.

See "Sunday."

HOMESTEAD.

§ 1. Protection and enforcement of rights.

Under Const. art. 10, §§ 1, 2, and Revisal 1905, §§ 688, 693, 697, allotment of homestead and appraisal of exempt personality by appraisers without the consent of the debtor *held* void.—*McKeithen v. Blue* (N. C.) 285.

Exceptions by a debtor to the allotment of homestead and personal exemption by appraisers *held* insufficient as exceptions, under Revisal 1905, § 699, fixing the method of procedure therein.—*McKeithen v. Blue* (N. C.) 285.

Proceeding to protect the debtor's constitutional right to select his own homestead and exempt personality *held* properly considered by the court, though irregular as exceptions to valuation and allotment, authorized by Revisal 1905, § 699.—*McKeithen v. Blue* (N. C.) 285.

HOMICIDE.

By husband as grounds for divorce by wife, see "Divorce," § 1.

Confessions, see "Criminal Law," § 6.

Conviction of offense included in that charged, see "Indictment and Information," § 6.

Former jeopardy, see "Criminal Law," § 4.

Harmless error, see "Criminal Law," § 29.

Limitation of prosecution, see "Criminal Law," § 3.

New trial, see "Criminal Law," § 20.

Relevancy of evidence in prosecution for, see "Criminal Law," § 6.

Requisites and sufficiency of instructions, see "Criminal Law," § 14.

Res gestæ, see "Criminal Law," § 6.

§ 1. Manslaughter.

*Where there was neither an actual assault upon defendant nor an attempt to commit upon upon him a serious bodily injury, *held* necessary, in order to reduce a homicide from murder to voluntary manslaughter, that the proof should show that the circumstances of the killing were in the nature of an assault or an attempt to seriously injure defendant's person.—*Rumsey v. State* (Ga.) 167.

*Where the evidence authorized a finding that accused and deceased became engaged in a sudden quarrel which led to a mutual combat with deadly weapons, a conviction of voluntary manslaughter is proper.—*Giles v. State* (Ga.) 405.

*Voluntary manslaughter defined.—*Wall v. State* (Ga.) 484.

§ 2. Assault with intent to kill.

*On trial for assault with intent to kill, an instruction that, if defendant shot the person injured under the fear that he was attempting to seduce his daughter, and death ensued, it could not have been murder, was properly refused.—*Fuller v. State* (Ga.) 1047.

§ 3. Excusable or justifiable homicide.

*The evidence *held* to show that the killing was murder.—*Bowden v. State* (Ga.) 499.

§ 4. Indictment and information.

*An indictment charging defendant and others with the offense of murder *held* sufficient to establish an assault with intent to murder against one of the defendants.—*Smith v. State* (Ga.) 475.

§ 5. Evidence.

In a prosecution for murder, certain evidence *held* admissible.—*Rumsey v. State* (Ga.) 167.

*In a trial for murder it is error to charge that if a person receives a wound willfully inflicted under such circumstances that it will be murder if death ensues and death results, the burden is on him who inflicted it to show that it did not cause death.—*Daniel v. State* (Ga.) 472.

*That a witness to a dying declaration stated that he did not remember every word the deceased said, did not render his testimony inadmissible.—*Park v. State* (Ga.) 489.

*Where a witness to a dying declaration stated that while it was being made he asked the dying person one or two questions, this was insufficient to show that the declaration was not voluntarily made.—*Park v. State* (Ga.) 489.

*Where a proper foundation was laid for the admission of a dying declaration, that while it was being made an interruption took place, but a short time thereafter the dying person completed the statement, would not render such declaration inadmissible.—*Park v. State* (Ga.) 489.

*Where the evidence showed prima facie that dying declarations were made while the person was in articulo mortis and was conscious of his condition, they were properly admitted.—*Park v. State* (Ga.) 489.

*Evidence showing an assault by the father of accused on deceased and a companion of deceased, without provocation, was not immaterial, it appearing that simultaneously with the assault the accused fired the fatal shot.—*Smith v. State* (Ga.) 1024.

Proof that a murder was intentionally done by poison, lying in wait, etc., *held* to raise the presumption of murder in the first degree.—*State v. Matthews* (N. C.) 342.

*A declaration of decedent *held* admissible, in a prosecution for murder, as a dying declaration.—*State v. Bohanon* (N. C.) 797.

*Where the evidence showed that defendant intentionally killed deceased and no other fact is known, malice is presumed.—*State v. Henderson* (S. C.) 117.

§ 6. Trial.

*Where the facts proved authorized a charge on the law of voluntary manslaughter, it was not error to give such charge.—*Ellington v. State* (Ga.) 403.

Evidence *held* to tend to show involuntary manslaughter in the commission of an unlawful act, requiring an instruction on such subject.—*Dorsey v. State* (Ga.) 479.

Evidence *held* to present the theory of mutual combat so as to authorize an instruction in the language of Pen. Code 1895, § 73, relating to

*Point annotated. See syllabus.

homicide in self-defense.—*Moss v. State* (Ga.) 481.

Where, on trial for murder, the evidence authorizes charges on the law of murder, voluntary manslaughter, and justifiable homicide, it was error to charge unqualifiedly that if the weapon used was one not likely to produce death the jury might infer a want of malice, and in such case it would be voluntary manslaughter.—*Cress v. State* (Ga.) 491.

Where, in a prosecution for murder, there is some evidence of an altercation and mutual combat, it is proper to charge Pen. Code 1896, § 73, as to voluntary manslaughter.—*Goodin v. State* (Ga.) 503.

*Where all the defendants were charged in one count with murder, and there was evidence to authorize the instruction, it was not error to charge that if it appeared beyond a reasonable doubt that either of the defendants killed deceased, and the other defendants, acting with a common purpose and in concert, were present aiding and abetting, they would be authorized to find that defendants killed him.—*Goodin v. State* (Ga.) 503.

*Where the testimony would have authorized the jury to find accused guilty of involuntary manslaughter in the commission of a lawful act without due caution, it was error to fail to instruct on that grade of manslaughter.—*Ray v. State* (Ga.) 1046.

*Instruction as to self-defense held properly excluded when covered by the charge as given.—*State v. Ross* (S. C.) 977.

*An instruction on the issue of self-defense held proper.—*State v. Ross* (S. C.) 977.

§ 7. New trial.

*After a conviction of voluntary manslaughter, newly discovered cumulative evidence tending to show the animus of deceased, and that he was the assailant, was no ground for a new trial.—*Park v. State* (Ga.) 489.

§ 8. Appeal and error.

*Where accused was convicted of involuntary manslaughter in the commission of an unlawful act, the judgment will not be reversed for failure to charge on voluntary manslaughter.—*Harbin v. State* (Ga.) 1046.

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Divorce"; "Dower"; "Executors and Administrators," § 2; "Marriage."

Burden of proof in prosecution for elopement, see "Criminal Law," § 6.

Cancellation of conveyance between, see "Cancellation of Instruments," § 2.

Competency as witnesses, see "Witnesses," § 1. Conveyance of trust property by, see "Trusts," § 2.

Effect of coverture on limitations, see "Limitation of Actions," § 1.

Husband signing for wife, see "Signatures."

Infant married woman, see "Infants," § 4.

Mental suffering of wife by delay in telegram, see "Telegraphs and Telephones," § 2.

Mortgage by, in general, see "Mortgages," § 4.

§ 1. Disabilities and privileges of coverture.

*Under Revisal 1905, § 2117, a deed executed by the wife alone after her husband has permanently abandoned her is valid.—*Pardon v. Paschall* (N. C.) 365.

§ 2. Wife's separate estate.

*A mere creditor of a married woman, on her insolvency, cannot attack a mortgage executed by her on the ground that it was given to secure the debt of her husband and son.—*Hawes v. Glover* (Ga.) 62.

Where a husband as agent bargained for the sale of his wife's property, and she executed a deed thereto, the purchaser held to take a good title, though the money obtained was used to pay the debts of the husband.—*Skinner v. Braswell* (Ga.) 914.

*Evidence held not to sustain presumption that husband in buying certain property acted as agent of his wife.—*Du Bose v. Gladden* (S. C.) 152.

A deed by a wife to her husband, he not executing it, they living together, is void.—*Mullins v. Shrewsbury* (W. Va.) 736.

§ 3. Actions.

*A husband held entitled to recover for loss of his wife's services, society, aid, and comfort from injury to her.—*Kimberly v. Howland* (N. C.) 778.

§ 4. Separation and separate maintenance.

*On application by a wife for temporary alimony and counsel fees, where the evidence as to the cause of the separation is conflicting, the discretion of the judge in refusing the application will not be controlled.—*Parks v. Parks* (Ga.) 176.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 5.

IMPLIED CONTRACTS.

See "Work and Labor."

IMPRISONMENT.

See "Bail"; "Execution," § 6.

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."

INDECENCY.

See "Obscenity."

INDEMNITY.

See "Principal and Surety."

Cancellation of insurance policy affecting right to, see "Insurance," § 5.

INDICTMENT AND INFORMATION.

Nolle prosequi of, see "Criminal Law," § 5.

Against particular classes of persons.

See "Justices of the Peace," § 1.

Servant for swindling, see "Master and Servant," § 2.

*Point annotated. See syllabus.

For particular offenses.

See "Compounding Felony"; "Conspiracy," § 1; "Homicide," § 4; "Larceny," § 2; "Obscenity"; "Rape," § 2.

Against liquor laws, see "Intoxicating Liquors," § 4.

Malpractice by justice of the peace, see "Justices of the Peace," § 1.

Willful trespass, see "Trespass," § 3.

§ 1. Finding and filing of indictment or presentment.

Finding of grand jury of no bill on count charging two persons with larceny, and true bill on count charging one with larceny and the other with receiving the stolen goods, is not contradictory.—State v. Thomas (S. C.) 893.

§ 2. Requisites and sufficiency of accusation.

*An indictment charging an offense defined by statute in the language of the statute, *held* sufficiently specific.—Glover v. State (Ga.) 592.

*An indictment under Revisal 1905, § 3360, making elopement with the wife of another a crime, provided the woman since marriage has been innocent and virtuous, must negative the exception in the proviso.—State v. Connor (N. C.) 787.

*An exception in a statute creating an offense need not be negated in an indictment unless the exception forms part of the description of the offense.—State v. Connor (N. C.) 787.

*An indictment naming a defendant as "Charles Foyles, commonly called 'Happy Jack,'" is not bad because of the use of the words "Happy Jack."—State v. Barrick (W. Va.) 652.

§ 3. Joinder of parties, offenses, and counts, duplicity, and election.

*An indictment charging in one count a violation of Revisal 1905, § 3358, punishing abduction, and in another count a violation of section 3630, prohibiting the enticement of a minor beyond the limits of the state, cannot be quashed for misjoinder of offenses.—State v. Burnett, (N. C.) 72.

§ 4. Motion to quash or dismiss, and demurrer.

A demurrer to an indictment in that it charges the accused with two distinct offenses of different nature in the same count is too indefinite unless it discloses what offenses are referred to.—Field v. State (Ga.) 502.

*A motion to quash an indictment after plea of not guilty is allowable only in the discretion of the court.—State v. Burnett (N. C.) 72.

*The proper method for attacking an indictment as defective in that the crime was committed in another county is by a plea in abatement rather than a motion to quash.—State v. Lewis (N. C.) 600.

§ 5. Amendment.

*Ordering amendment of indictment for sale of intoxicating liquor *held* not error.—Hatcher & Shaw v. Commonwealth (Va.) 677.

§ 6. Conviction of offense included in charge.

Under Revisal 1905, §§ 3260, 3271, a jury on a trial for murder committed by poison *held* warranted in finding accused guilty of murder in the second degree.—State v. Matthews (N. C.) 342.

*Under an indictment for murder in the form prescribed by Revisal 1905, § 3245, the jury may, under sections 3260, 3271, find accused guilty of murder in the second degree.—State v. Matthews (N. C.) 342.

*Point annotated. See syllabus.

Revisal 1905, §§ 3269, 3271 *held* applicable to all indictments for murder defined by section 6331.—State v. Matthews (N. C.) 342.

INDORSEMENT.

Of bills of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Guardian and Ward"; "Parent and Child." Bill of review by, see "Equity," § 6.

Equitable relief against judgment, see "Judgment," § 7.

Inadequate or excessive damages for injuries to, see "Damages," § 2.

Injuries to infant passengers, see "Carriers," § 6.

Lease of oil lands of infants, see "Mines and Minerals," § 1.

§ 1. Property and conveyances.

Under the evidence it would not be presumed that a father went into possession of land in behalf of his infant children having color of title thereto.—Barrett v. Brewer (N. C.) 414.

§ 2. Contracts.

In order to determine whether a contract of an infant for a course in stenography was a contract for "necessaries," the evidence must show the condition in life of the infant, and that the parents or guardian of such infant refused to furnish such alleged necessary.—Mauldin v. Southern Shorthand & Business University (Ga.) 922.

*While the doctrine of estoppel in pais applies to infants of years of discretion, for intentional fraudulent conduct, yet estopped by contract and for mere silence does not apply to them.—Headley v. Hoopengartner (W. Va.) 744.

§ 3. Crimes.

A minor who has arrived at the age of criminal responsibility may be convicted under the Act of 1903, of fraud though his contract of service was not civilly enforceable.—Anthony v. State (Ga.) 479.

§ 4. Actions.

*Code Civ. Proc. 1902, § 135, *held* not to authorize a suit by a married woman who is a minor by joining her husband with her as coplaintiff, but a guardian ad litem is necessary.—Hiers v. Atlantic Coast Line R. Co. (S. C.) 457.

*To avail infant parties, defendants to a suit in chancery, in maintaining a bill to reverse the decree in such suit, the cause for reversing must have existed at the time of the entry of the decree.—Poling v. Poling (W. Va.) 993.

*Infant defendants to a suit in chancery may before attaining majority maintain an original bill by next friend to reverse the decree in such suit.—Poling v. Poling (W. Va.) 993.

INFERIOR COURTS.

See "Courts," § 3.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INJUNCTION.

Dismissal before hearing, see "Equity," § 4.
Documentary evidence, see "Evidence," § 9.

Incidental to particular remedies or proceedings.

See "Quieting Title," § 2.

Relief against particular acts or proceedings.

See "Nuisance," § 1, 2.

Construction of bridge over navigable waters, see "Navigable Waters," § 1.

Erection of railroad depot, see "Railroads," § 3.

Location of right of way of railroad, see "Railroads," § 3.

Obtaining right of way by street railroad, see "Street Railroads," § 1.

Payments by municipal corporation, see "Municipal Corporations," § 8.

Use of highway by gas company, see "Gas."

Review of proceedings for injunction.

Matters not apparent of record on appeal, see "Appeal and Error," § 15.

Review of discretionary rulings, see "Appeal and Error," § 22.

§ 1. Nature and grounds in general.

*Where a railroad company is about to tear up a portion of its track, and relocate the same, plaintiffs *held* entitled to an interlocutory injunction, the injury being irreparable in its nature and one for which the road was incapable of responding in damages.—*Brown v. Atlantic & B. Ry. Co. (Ga.) 24.*

*On an interlocutory hearing of a petition to enjoin a trespass, *held*, that same should be granted without qualification.—*Hart v. Lewis, Shore & Co. (Ga.) 189.*

*An easement of a right of way acquired by a railroad company will be protected by injunction from interference without regard to the solvency of the persons interfering therewith.—*Seaboard Air Line R. Co. v. Olive (N. C.) 263.*

Where defendants, in good faith, were cutting timber from certain land to which they showed prima facie title, it was error to include such tracts in a preliminary injunction restraining defendants from cutting timber on other land.—*East Lake Lumber Co. v. East Coast Cedar Co. (N. C.) 304.*

*In order to justify an injunction restraining injuries to real property, plaintiff's title must either be admitted or must appear to be manifestly good, unless the injunction is prayed pending an action to establish such title.—*East Lake Lumber Co. v. East Coast Cedar Co. (N. C.) 304.*

*Injunction *held* a proper remedy to protect a street railway's located right of way from a threatened interference by another company.—*Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.*

*Where a license has already expired by its limitation, the court cannot enjoin the revocation thereof.—*Spencer v. Mahon (S. C.) 321.*

§ 2. Subjects of protection and relief.

*One seeking to enjoin the cutting of timber must show that he has title to the land or is in possession thereof; and if he relies on possession alone, it must be actual possession of that portion on which the trespass is being committed.—*Downing v. Anderson (Ga.) 184.*

*Where repeated acts of wrong are done or threatened, so as to make the trespass a continuous one, an injunction will lie.—*Martin v. Patillo (Ga.) 240.*

Where a will has been probated in common form, and the sole heir at law has called on the executor to probate it in solemn form, and has filed a caveat, a suit by the executor against such heir to recover property devised in the will may be enjoined at the discretion of the

court until the issue of *devisavit vel non* has been determined.—*Foster v. Case (Ga.) 921.*

Where a will has been probated in common form, and the heir at law calls on the executor to probate it in solemn form, and has filed a caveat, *held* there was no abuse of discretion in refusing to enjoin a suit by the executor against the heir at law to recover property devised in the will.—*Foster v. Case (Ga.) 921.*

*On breach by vendee of contract for the sale of land, providing that the timber thereon should be sawed into lumber and delivered by the vendee to the vendor at a stipulated price, to the irreparable injury of plaintiff, it was not error to grant injunction.—*Burton v. O'Neill Mfg. Co. (Ga.) 933.*

In a suit to enjoin sale of timber, *held*, that defendant's right to sell was absolute, notwithstanding a contract imposing certain obligations on the vendee which were void for want of mutuality.—*Bell v. Gress Mfg. Co. (Ga.) 1043.*

*Under the facts, *held* that payment of a cashier's check should be restrained until the rights of the parties could be determined.—*Singer Mfg. Co. v. Summers (N. C.) 522.*

*That the enforcement of a valid criminal law would materially injure plaintiff's business or property is no ground for equitable interference.—*Cain v. Daly (S. C.) 110.*

*Prosecution under void statute may be enjoined where irreparable injury would result.—*Cain v. Daly (S. C.) 110.*

*A prosecution under a valid law will not be restrained because the statute is not enforced against some violators.—*Cain v. Daly (S. C.) 110.*

§ 3. Actions for injunctions.

Where a railroad was about wrongfully to tear up a portion of its track which would work special and irreparable damage to plaintiffs, they could apply for an injunction.—*Brown v. Atlantic & B. Ry. Co. (Ga.) 24.*

*In a petition for an injunction on the ground of irreparable damages, it is unnecessary that there should be in terms an allegation that the damages would be irreparable.—*Burton v. O'Neill Mfg. Co. (Ga.) 933.*

§ 4. Preliminary and interlocutory injunctions.

*The refusal of an interlocutory injunction *held* not error.—*Kirkland v. Atlantic & B. Ry. Co. (Ga.) 23.*

That a railroad company had begun to tear up its tracks before injunction was applied for, if wrongful and working special damage to the plaintiffs, is not ground for refusing to enjoin it.—*Brown v. Atlantic & B. Ry. Co. (Ga.) 24.*

*Where a railroad company owned two lines crossing each other, a general allegation in the answer to an application for an injunction to restrain the tearing up of a part of one of them *held* not to furnish a reason for allowing the intervening section to be torn up, and to prevent an injunction until final trial could be had.—*Brown v. Atlantic & B. Ry. Co. (Ga.) 24.*

Where a railroad company has begun to tear up its tracks a mandatory injunction to require the relaying of a substantial portion of the track which had been torn up will be denied.—*Brown v. Atlantic & B. Ry. Co. (Ga.) 24.*

On the interlocutory hearing of a petition for an injunction, where the judge announces that he will grant a restraining order but will pass the case for two days to make certain rulings on the evidence, it is not error to refuse to re-

*Point annotated. See syllabus.

ceive other affidavits tendered by defendant.—*Green v. Freeman* (Ga.) 45.

*The granting or refusing of interlocutory injunctions, where the evidence is conflicting, is within the discretion of the court and will not be controlled unless manifestly abused.—*Green v. Freeman* (Ga.) 45.

*Where, in a suit to prevent interference with an easement, there is a controversy in respect to the facts necessary to be proved to entitle plaintiff to the injunction, both parties will be restrained from interfering until a trial can be had.—*Seaboard Air Line R. Co. v. Olive* (N. C.) 268.

INNKEEPERS.

*Relation of innkeeper and guest *held* not to exist between innkeeper conducting bathhouse and persons using same.—*Walpert v. Bohan*, (Ga.) 181.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INSANE PERSONS.

Opinion evidence as to insanity, see "Evidence," § 11.

Presumptions as to insanity, see "Evidence," § 2.

Suicide of insured, while insane, see "Insurance," §§ 9, 14.

Testimony as to transactions with persons subsequently incompetent, see "Witnesses," § 1.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

INSTRUCTIONS.

In civil actions, see "New Trial," § 1; "Trial," §§ 6-12.

In criminal prosecutions, see "Criminal Law," § 14; "Homicide," § 6.

INSURANCE.

Carrier as insurer of safety of passengers, see "Carriers," § 5.

Dismissal of action against insurance company, see "Dismissal and Nonsuit," § 1.

Equitable jurisdiction of action to vacate policy, see "Equity," § 1.

Presumptions on appeal in action against foreign insurance company, see "Appeal and Error," § 21.

Presumptions on appeal or error in action on policy, see "Appeal and Error," § 21.

§ 1. Insurance agents and brokers.

Act of agent changing date for payment of premium *held* binding on insurance company.—*Hagins v. Aetna Life Ins. Co.* (S. C.) 323.

§ 2. The contract in general.

*Under Civ. Code 1895, § 2089, codified in the original Code which went into effect in 1863 (Code 1863, § 2744), and Civ. Code 1895, § 2007 et seq., *held* that contracts of fire insurance in Georgia must be in writing and signed by the insurer or some person authorized to sign for it.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 330.

The proper place for the signature to a policy of fire insurance is at the end of the matter which it attests, but it will suffice if, with the intent to constitute a signing, the signature is

inserted in another place.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 330.

A vacancy permit, which was granted and signed by a reinsuring company, *held* an acknowledgment of a policy of the number stated, and the signature to such permit would supply the lack of signing that policy.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 330.

§ 3. Premiums, dues, and assessments.

In an action on a note given as a premium for an insurance policy false answer in application *held* no defense where, with knowledge of such answer, the insurance company insisted that the policy was valid.—*Doyle v. Hill* (S. C.) 446.

§ 4. Assignment or other transfer of policy.

Assignment of policy of insurance to C. as beneficiary *held* valid.—*Ogletree v. Ogletree* (Ga.) 954.

§ 5. Cancellation, surrender, abandonment, or rescission of policy.

*An agreement for an immediate cancellation of an insurance policy without the five days' notice required by the policy could be shown by the acts of the parties.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co.* (Ga.) 11.

*An officer of insured corporation *held* not to have implied authority to send cancellation of policy to insurer after loss and thereby defeat any right of indemnity which had accrued to the insured.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co.* (Ga.) 11.

*If a proposition for cancellation of policy by agreement was made by letter and a reply by letter was relied on as an acceptance, the reply would take effect from the time it was sent.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co.* (Ga.) 11.

*Insurance policy construed and *held*, that cancellation could only occur either by the exercise of the right on the part of the insured or by the insurer on five days' notice, or by an agreed cancellation.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co.* (Ga.) 11.

§ 6. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

*A man is not of intemperate habits, within the meaning of an insurance policy, because he occasionally uses intoxicating liquors and occasionally to excess.—*Fludd v. Equitable Life Assur. Soc.* (S. C.) 762.

False swearing by insured as to one of two policies *held* not to vitiate the other.—*Williams v. Virginia State Ins. Co.* (Va.) 680.

§ 7. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Where a policy allowed 30 days for taking an inventory and opening books required to be kept in an iron safe, and a fire occurred within 30 days after the policy was issued, there was no breach of the iron-safe clause.—*W. P. Parker & Co. v. Continental Ins. Co.* (N. C.) 717.

§ 8. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

*Insurance company *held* estopped by knowledge of agent to assert forfeiture of life policy.—*Fludd v. Equitable Life Assur. Soc.* (S. C.) 762.

§ 9. Risks and causes of loss.

*A provision limiting an insurer's liability if the insured die by his own act, whether sane

*Point annotated. See syllabus.

or insane, *held valid*.—*Thaxton v. Metropolitan Life Ins. Co. (N. C.) 419.*

*A provision limiting insurer's liability if insured died by his own act *held* not to include killing by accident even by the act of the insured.—*Thaxton v. Metropolitan Life Ins. Co. (N. C.) 419.*

§ 10. Notice and proof of loss.

*Objections to form of proof of death of insured *held* waived by insurer.—*Thaxton v. Metropolitan Life Ins. Co. (N. C.) 419.*

§ 11. Right to proceeds.

A stipulation in a policy of life insurance *held* merely an appointment by the parties to the contract of a person who may collect the amount due for the benefit of the person ultimately entitled thereto.—*Ogletree v. Hutchinson (Ga.) 179.*

Where an application for a policy of life insurance designates a named person as the beneficiary, and a policy is issued which does not contain the name of any beneficiary, the person named in the application is to be treated as the beneficiary of the contract. Otherwise, if the application name one person and the policy name another, and the policy be accepted by the insured.—*Ogletree v. Hutchinson (Ga.) 179.*

§ 12. Payment or discharge, contribution, and subrogation.

A stipulation in a policy of life insurance that payment of the amount of the policy to any relative of the insured belonging to a designated class will discharge the company from liability is valid.—*Ogletree v. Hutchinson (Ga.) 179.*

§ 13. Actions on policies.

In an action on an insurance policy, a verdict for plaintiff *held* properly directed.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co. (Ga.) 11.*

That negotiations were pending for cancellation of policy but had not been completed before a fire, was no defense to the company to a suit on the policy.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co. (Ga.) 11.*

A petition *held* to show that a contract of reinsurance was signed.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. (Ga.) 330.*

*In an action on a life policy, evidence *held* insufficient to overcome the presumption that the insured, who was found dead with a gunshot wound in his side, did not intentionally commit suicide.—*Thaxton v. Metropolitan Life Ins. Co. (N. C.) 419.*

In an action on a life insurance policy, where the answer admitted the death of the insured, the insurer cannot object to proof of the death of insured, presented to the company, as insufficient.—*Thaxton v. Metropolitan Life Ins. Co. (N. C.) 419.*

Where insurer denied liability for breach of an iron-safe clause, it could not also plead plaintiff's failure to file proofs of loss as a defense.—*W. P. Parker & Co. v. Continental Ins. Co. (N. C.) 717.*

§ 14. Mutual benefit insurance.

A certificate made by the treasurer of an insurance company as to the mailing of notice of assessment *held* inadmissible as hearsay in an action for the wrongful cancellation of an insurance policy.—*Duffy v. Fidelity Mut. Life Ins. Co. (N. C.) 79.*

A by-law of an assessment insurance company making a certificate by the treasurer or bookkeeper conclusive evidence of the mailing of a notice of an assessment is unreasonable and invalid.—*Duffy v. Fidelity Mut. Life Ins. Co. (N. C.) 79.*

*A by-law of an assessment insurance company providing that notice of an assessment may be given members by mail is valid.—*Duffy v. Fidelity Mut. Life Ins. Co. (N. C.) 79.*

*To sustain a forfeiture for nonpayment of an assessment *held* that it was incumbent on the insurer to show that notice of assessment was mailed, properly addressed, and within the time fixed.—*Duffy v. Fidelity Mut. Life Ins. Co. (N. C.) 79.*

*Beneficiary *held* not entitled to pay back assessments and have certificate reinstated three months after delinquent assessment became due.—*Hay v. People's Mut. Benev. Ass'n of North Carolina (N. C.) 623.*

*Acceptance by beneficial association of assessments after they became due *held* not a waiver of the right of forfeiture for the subsequent nonpayment of an assessment.—*Hay v. People's Mut. Benev. Ass'n of North Carolina (N. C.) 623.*

A demurrer to a plea in an action on a benefit certificate, alleging that the insured committed suicide, and died from the effects of a pistol wound inflicted by himself with suicidal intent admits that the insured committed suicide while sane.—*Plunkett v. Supreme Conclave, Improved Order of Heptasophs (Va.) 9.*

A demurrer to a plea in an action on a benefit certificate *held* to admit the regular enactment of a new law which became operative retrospectively except as to rights which had become vested by the terms of the certificate.—*Plunkett v. Supreme Conclave, Improved Order of Heptasophs (Va.) 9.*

*The right of a beneficiary in a mutual benefit certificate to recover thereon *held* defeated by the insured committing suicide while sane.—*Plunkett v. Supreme Conclave, Improved Order of Heptasophs (Va.) 9.*

INTENT.

Element of offenses, see "Homicide," §§ 2, 4.
In execution of bond, see "Bonds," § 1.

INTEREST.

See "Usury."
Disqualification as witness, see "Witnesses," § 1.
Liability of receivers for, see "Receivers," § 2.
Power coupled with an interest, see "Powers," § 1.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 4.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERPRETATION.

Of contract, see "Contracts," § 2.

INTERROGATORIES.

To jury, see "Trial," § 14.
To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Commerce."

*Point annotated. See syllabus.

INTERVENTION.

In actions in general, see "Parties," § 1.

INTOXICATING LIQUORS.

Amendment of indictment in prosecution for offense against liquor laws, see "Indictment and Information," § 5.

Appellate jurisdiction of particular courts as to validity of elections as to liquor licenses, see "Courts," § 4.

Enactment and validity of statutes relating to, see "Statutes," § 1.

Mandamus to compel holding of local option election, see "Mandamus," § 1.

Reception of evidence in prosecution for offense against liquor laws, see "Criminal Law," § 10.

Regulations of commerce, see "Commerce," § 1. Special or local laws relating to, see "Statutes," § 2.

Subjects and titles of statutes relating to, see "Statutes," § 3.

Use of, as ground for avoidance of insurance policy, see "Insurance," § 6.

§ 1. Constitutionality of acts and ordinances.

Evidence held insufficient to show that the license fee authorized by Act Aug. 10, 1906, for the sale of liquors in Irwin county, at \$20,000, was necessarily prohibitory.—Glover v. State (Ga.) 592.

§ 2. Local option.

*Under the express provisions of Acts 1905, p. 46, authorizing the organization of new counties, the local prohibition law, prevailing in Dooly county, immediately became of full force and effect in the county of Crisp.—Moore v. State (Ga.) 327.

§ 3. Offenses.

*One selling intoxicating liquor in a county where the selling thereof is altogether prohibited cannot be properly indicted for the statutory offense of selling liquor without a license.—Moore v. State (Ga.) 327.

One who in S. county receives orders for liquors by telephone from customers in C. county, held not liable under Pen. Code 1895, § 428, as amended by Acts 1897, p. 39, for illegal sale in C. county.—Moore v. State (Ga.) 327.

Under the express provisions of the act of 1905 (Acts 1905, p. 46), authorizing the organization of new counties, the local prohibition law prevailing in Dooly county immediately became of full force and effect in Crisp county, and has since its creation undergone no change.—Parker v. State (Ga.) 329.

*Intoxication, within Code 1899, c. 32, § 16 [Code 1906, § 928], punishing sales of liquors to intoxicated persons, defined.—State v. Nethken (W. Va.) 742.

§ 4. Criminal prosecutions.

Where there was sufficient evidence to show that defendants were guilty of an illegal sale of liquors within the statute of limitations, but the evidence did not sufficiently show whether the date of the sale was prior to the finding of an indictment or subsequent thereto, the judgment will be reversed.—Bragg v. State (Ga.) 232.

*An indictment under Pol. Code 1895, § 1548, and Pen. Code 1895, § 451, averring that accused did sell and barter liquors for a valuable consideration, is sufficiently definite as to the consideration.—Taylor v. State (Ga.) 474.

On trial for illegally selling intoxicating liquor, the jury held authorized to treat the defense, that accused acted as agent of the

buyer, as a mere subterfuge, and find him guilty of selling the liquor.—Gaskins v. State (Ga.) 1045.

Where, on a trial for illegally selling liquor, the judge is satisfied with the verdict of guilty, it will not be set aside.—Gaskins v. State (Ga.) 1045.

*On trial of an indictment charging defendant as a licensed dealer in liquors with having sold or given liquors to an intoxicated person knowing that he was intoxicated, the state must prove that defendant has a license.—State v. Nethken (W. Va.) 742.

Proof held to make a prima facie case against defendant as a licensed liquor dealer.—State v. Nethken (W. Va.) 742.

IRON SAFE CLAUSE.

See "Insurance," §§ 7, 13.

IRREPARABLE INJURY.

Ground for injunction, see "Injunction," §§ 1-3.

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 4.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 4.

JOINDER.

Of offenses in indictment, see "Indictment and Information," § 3.

Of parties in civil action, see "Parties," § 2.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

Grant of motion for new trial in criminal prosecution in vacation, see "Criminal Law," § 21. Remarks of court at trial in criminal prosecution, see "Criminal Law," § 9.

JUDGMENT.

As estoppel on surety of guardian, see "Guardian and Ward," § 4.

Decisions of courts in general, see "Courts," § 2.

Jurisdiction of courts in general to render judgment on substituted service of process, see "Courts," § 1.

On demurrer, see "Pleading," § 3.

In particular civil actions or proceedings.

See "Garnishment," § 1; "Replevin," § 1.

Foreclosure, see "Mortgages," § 4.

For price of goods, see "Sales," § 7.

In justices' courts, see "Justices of the Peace," § 3.

On appeal or writ of error, see "Appeal and Error," § 29.

To enforce vendor's lien, see "Vendor and Purchaser," § 3.

To foreclose lien, see "Mechanics' Liens," § 2.

*Point annotated. See syllabus.

In criminal prosecutions.

See "Criminal Law," § 23.

For violation of municipal ordinance, see "Municipal Corporations," § 5.

Review.

See "Appeal and Error."

§ 1. Nature and essentials in general.

The entry or levy of an attachment on personal property is amendable but the amendment will not relate back and validate a judgment rendered on an attachment entered at a time when no legal levy appeared to have been made.—*Albright-Prior Co. v. Pacific Selling Co.* (Ga.) 251.

In attachment against a nonresident executed by service of summons of garnishment, the court has no jurisdiction to render a judgment on the attachment until it appears from the answer of the garnishee that the property or effects of or a debt due the defendant, within the jurisdiction, have been seized under the garnishment.—*Albright-Prior Co. v. Pacific Selling Co.* (Ga.) 251.

*Where attachment is issued against two defendants and is levied on property, and the entry of levy simply describes the property as the property of the defendant the entry is insufficient as a basis for a judgment on the attachment against either defendant.—*Albright-Prior Co. v. Pacific Selling Co.* (Ga.) 251.

*In attachment proceedings where no personal judgment is sought the levy takes the place of service so as to give the court jurisdiction to render judgment.—*Albright-Prior Co. v. Pacific Selling Co.* (Ga.) 251.

*A judgment was not void because the action was brought in the name of the Augusta Drug Company; there being no allegation that the same was a corporation.—*Glenn v. Augusta Drug Co.* (Ga.) 1032.

Where judgment is rendered against a defendant properly served and represented by attorney, he is bound by the judgment in the hands of an innocent purchaser.—*Hatcher v. Faison* (N. C.) 284.

*An allegation in a complaint that the value of timber removed from plaintiff's land was \$150, and a prayer for relief in the same amount, *held* not to preclude the court from giving any appropriate relief.—*Davis v. Wall* (N. C.) 350.

§ 2. By confession.

A debtor *held* estopped by acquiescence in a judgment by confession and the running of the statute against the claim, to set up formal insufficiency, under Revisal 1905, § 581, of the affidavit on which the judgment was based.—*J. S. Martin & Son v. Briscoe* (N. C.) 782.

*Under Revisal 1905, § 581, no statement need be made by the debtor in support of a judgment by confession, that the controversy is real and the proceedings in good faith.—*J. S. Martin & Son v. Briscoe* (N. C.) 782.

Code 1899, c. 50, § 114 [Ann. Code 1906, § 2065], providing that when a judgment is confessed it shall be entered without delay, is directory and not mandatory.—*McDowell County Bank v. Wood* (W. Va.) 753.

§ 3. By default.

*Defendant in action for breach of contract *held* not entitled to judgment on counterclaim by default, since complaint was a denial of counterclaim.—*Tillinghast, Styles Co. v. Providence Cotton Mills* (N. C.) 621.

*Defendant in action for breach of contract of sale *held* not entitled to judgment by de-

fault on counterclaim, where plaintiff entered formal denial thereof.—*Tillinghast, Styles Co. v. Providence Cotton Mills* (N. C.) 621.

§ 4. On motion or summary proceeding.

A motion for judgment, under Code 1899, c. 121, § 6 [Code 1906, § 3783], must indicate with reasonable certainty that the demand is that of defendant.—*Anderson v. Prince* (W. Va.) 656.

Where the person giving the notice of a motion for judgment correctly describes himself as the payee of a note sued on, the word "assignee" added to his signature to the notice may be ignored.—*Anderson v. Prince* (W. Va.) 656.

Insufficiency of a notice of a motion for judgment, under Code 1899, c. 121, § 6 [Code 1906, § 3786], for the amount due on a note not under seal, is not cured by the reading of the note as upon over thereof demanded.—*Anderson v. Prince* (W. Va.) 656.

Failure to comply with the statute as to the docketing of a notice of a motion for judgment is not cause for quashing it.—*Anderson v. Prince* (W. Va.) 656.

Where the person giving a notice of a motion for judgment correctly describes himself as payee of the note sued on, the word "assignee" added to his signature of the notice does not vitiate the notice.—*Anderson v. Prince* (W. Va.) 656.

§ 5. On trial of issues.

A motion in arrest may at a subsequent term be amended by adding new and distinct grounds of attack.—*A. Leffler & Sons v. Union Compress Co.* (Ga.) 927.

§ 6. Opening or vacating.

A motion to set aside a judgment is amendable by the addition of grounds other than those taken in the original motion.—*Albright-Prior Co. v. Pacific Selling Co.* (Ga.) 251.

A party *held* not entitled to have the judgment against him set aside on the ground that it was erroneous.—*Becton v. Dunn* (N. C.) 101.

§ 7. Equitable relief.

Code 1906, c. 132, § 7, giving infants right to show cause against a decree during their minority and within six months thereafter, does not give additional remedies to adults to a suit to show cause against a decree, or extend the time in which they may do so.—*Poling v. Poling* (W. Va.) 993.

§ 8. Merger and bar of causes of action and defenses.

*A denial of mandamus on the ground that the railroad involved was in the hands of a federal receiver *held* not to preclude, after the discharge of the receiver, proceedings involving the same matters before the corporation commission.—*Winchester & S. R. Co. v. Commonwealth* (Va.) 692.

§ 9. Conclusiveness of adjudication.

*Defendant, not having raised an issue of title in a processioning proceeding, *held* estopped by the judgment from denying the boundary thus determined.—*Davis v. Wall* (N. C.) 350.

§ 10. Lien.

The estate of a surety of a purchaser at a judicial sale *held* not entitled to exoneration by having the judgment against the purchaser and the estate of the surety enforced against lands previously sold by the purchaser.—*Sipe v. Taylor* (Va.) 542.

§ 11. Foreign judgments.

*Where a foreign judgment obtained by fraud was open to attack by the judgment defendant proceeding in equity to restrain the enforcement thereof, the courts of North Carolina,

*Point annotated. See syllabus.

in an action on the judgment, would give faith and credit to the judgment, though it gave defendant similar relief.—*Levin v. Gladstein* (N. C.) 371.

§ 12. Suspension, enforcement, and revival.

An entry made by a proper officer upon an execution issued from a judgment, unless recorded on the proper execution docket, will not, even as between the parties to the judgment, arrest the running of the dormancy statute.—*Palmer v. Inman* (Ga.) 229.

An equitable petition which seeks to subject property to the payment of a dormant judgment without any revival of the judgment, and without suing upon it, its properly dismissed.—*Palmer v. Inman* (Ga.) 229.

A judgment debtor *held* not entitled to the vacation of a judgment reviving a former judgment, the effect of which would be to defeat the holder's claim by a plea of limitations.—*Hatcher v. Faison* (N. C.) 284.

Where notice to show cause why a judgment should not be revived is served, failure to defend gives the revived judgment no more efficacy than the original judgment possessed.—*Hatcher v. Faison* (N. C.) 284.

A judge having before him on appeal a refusal of the clerk to grant a motion to revive a dormant judgment, *held* authorized either to remand or himself revive the judgment.—*J. S. Martin & Son v. Briscoe* (N. C.) 782.

§ 13. Actions on judgments.

*A defendant in an action on a judgment cannot set up as a common-law defense that it was procured through fraud.—*Levin v. Gladstein* (N. C.) 371.

*A defendant in an action on a judgment may in equity on a proper showing obtain an injunction, restraining the enforcement of the judgment.—*Levin v. Gladstein* (N. C.) 371.

*A defendant sued on a judgment rendered by a court of a sister state need not to obtain relief on the ground that the judgment was obtained by fraud go into the sister state, and enjoin there the enforcement of the judgment, but he may in the state in which the judgment is sued on obtain such relief.—*Levin v. Gladstein* (N. C.) 371.

*Under the Code, a defendant sued on a foreign judgment may set up the equitable defense that the judgment was procured through fraud.—*Levin v. Gladstein* (N. C.) 371.

In computing limitations under Code 1904, § 3577, relative to limitations against an action on a judgment *held*, under the facts, that a certain period should be excluded.—*Davis v. Roller* (Va.) 4; *Bowman's Ex'rs v. Same*, *Id.*

An execution *held* to have been "issued" under Code 1904, § 3577, relative to limitations against an action on a judgment.—*Davis v. Roller* (Va.) 4; *Bowman's Ex'rs v. Same*, *Id.*

§ 14. Pleading and evidence of judgment as estoppel or defense.

*Where a judgment is sought to be used as an estoppel upon the parties thereto, a certified copy thereof without the proceedings prior thereto is not admissible.—*Patterson v. Drake* (Ga.) 175.

Where in a second suit against the same defendant by former plaintiffs a plea of *res judicata* was filed, defendant could show by extrinsic evidence that the question passed upon by the judge in the former suit was the same as that now in issue.—*Irvin v. Spratlin* (Ga.) 1087; *Same v. Callaway* (Ga.) 1089.

*Point annotated. See syllabus.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.
In criminal prosecutions, see "Criminal Law," § 6.

JUDICIAL POWER.

See "Constitutional Law," § 2.

JUDICIAL SALES.

Confirmation of judicial sale as discharge of sureties of purchaser at such sale, see "Principal and Agent," § 1.

In attachment proceedings, see "Attachment," § 3.

Laws relating to as retrospective laws, see "Constitutional Law," § 6.

Of property of infant, see "Guardian and Ward," § 2.

On execution, see "Execution," § 4.

Persons entitled to appeal from decree directing resale, see "Appeal and Error," § 3.

To enforce vendor's lien, see "Vendor and Purchaser," § 3.

To foreclose mortgages, see "Mortgages," § 3.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 2.

Effect of appearance, see "Appearance."

Want of jurisdiction ground for relief by habeas corpus, see "Habeas Corpus," § 1.

Jurisdiction of particular actions or proceedings.

See "Divorce," § 2; "Habeas Corpus," § 2; "Mandamus," § 3.

Criminal prosecutions, see "Criminal Law," § 1.

To abate nuisance, see "Nuisance," § 1.

Special jurisdictions and jurisdictions of particular classes of courts.

See "Equity," § 1.

Appellate jurisdiction, see "Criminal Law," §§ 24-29.

Justices' courts in civil cases, see "Justices of the Peace," § 2.

Particular courts, see "Courts."

JURY.

Custody and conduct, see "Criminal Law," § 16; "Trial," § 13.

Disqualification or misconduct ground for new trial, see "New Trial," § 1.

Exemption from jury duty as vested right, see "Constitutional Law," § 4.

Exemption from jury duty; laws revoking as impairing obligation of contracts, see "Constitutional Law," § 5.

Grounds for reference instead of trial by jury, see "Reference," § 1.

Harmless error in rulings relating to, see "Appeal and Error," § 24; "Criminal Law," § 29.

Instructions in civil actions, see "Trial," §§ 6-12.

Instructions in criminal prosecutions, see "Criminal Law," § 14.

Jury trial in contempt proceedings for disobedience to orders in alimony case, see "Divorce," § 8.

Questions for jury in civil actions, see "Trial," § 5.

Questions for jury in criminal prosecutions, see "Criminal Law," § 13.

Taking case or question from jury at trial, see "Trial," § 5.

Verdict in civil actions, see "Trial," § 14.

Verdict in criminal prosecutions, see "Criminal Law," § 17.

§ 1. Right to trial by jury.

In action for an admeasurement of dower, defendant *held* not entitled to a jury, under Code Civ. Proc. 1902, §§ 274, 276, except to determine specific issues.—*Frierson v. Jenkins* (S. C.) 890.

§ 2. Qualifications of jurors and exemptions.

*A husband, whose wife is seised in fee of real estate and is the mother of children by him, is a freeholder, and eligible as a juror, notwithstanding Const. art. 10, § 6.—*Hodgin v. Southern Ry. Co.* (N. C.) 413.

§ 3. Summoning, attendance, discharge, and compensation.

*That list for jury was made up by supervisors, and not by jury commissioners, and was canvassed by them in January instead of December as provided by Jury Law of 1902, *held* not to affect the panel.—*Hutto v. Southern Ry. Co.* (S. C.) 445.

Under Va. Code 1904, § 3158, *held* proper to draw out by lot and excuse from service 4 of the panel of 20 jurors.—*Duke v. Norfolk & W. Ry. Co.* (Va.) 548.

Under Va. Code 1904, § 4018, one charged with crime *held* not entitled to complain because a jury summoned for the trial of another was used on his trial.—*Bennett v. Commonwealth* (Va.) 698.

JUSTICES OF THE PEACE.

Presumptions on appeal in action begun in justice's court, see "Appeal and Error," § 21.

§ 1. Rights, duties, and liabilities.

An indictment against a notary public and ex officio justice of the peace for malpractice in office *held* demurrable.—*Hohenstein v. State* (Ga.) 288.

§ 2. Civil jurisdiction and authority.

*A defendant in a justice court which has no jurisdiction over him, who files no plea and makes no defense, does not waive the want of jurisdiction by testifying as a witness in behalf of plaintiff.—*Mauck v. Rosser* (Ga.) 32.

*Where one who had furnished material to a building contractor sued him and the owner of the property in a justice court of the district where the land was located and the owner resided, and the contractor resided in another county and did not plead or appear a judgment against the contractor was void.—*Mauck v. Rosser* (Ga.) 32.

Under acts 1900, p. 53, where a plaintiff in a suit before a justice cites the defendant to answer the complaint in an action on a note, a copy of which is attached to the summons, and the copy stipulates for the payment of \$100 as principal, and 10 per cent. as attorney's fees, the summons being silent as to the notice specified in the act, it is not a suit for attorney's fees, and is within the jurisdiction of the justice.—*Godfree & Dellinger v. Brooks* (Ga.) 938.

Where pleading in an action before a justice against a railroad was to recover double an overcharge for "failing to repay an overcharge within thirty days after demand," it was an action for penalty not within the jurisdiction of the justice.—*Atlanta, K. & N. R. Co. v. Shippen* (Ga.) 1031.

*Under Const. art. 4, § 27, and Revisal of 1905, § 1419, a justice of the peace has no jurisdiction of an action for damages in a sum less than \$200 for breach of a covenant of warranty, the title to the land being involved.—*Brown v. Southerland* (N. C.) 108.

*Action for loss by carrier of jewelry intended for sale in which the amount claimed exceeded

\$50, *held* not within the jurisdiction of a justice.—*Brick v. Atlantic Coast Line R. Co.* (N. C.) 194.

*A justice of the peace *held* to have jurisdiction of an action on a note for \$75 given for the purchase price of land.—*Davis v. Evans* (N. C.) 344.

*A defendant sued in justice's court on a foreign judgment may set up the equitable defense that the judgment was procured through fraud.—*Levin v. Gladstein* (N. C.) 871.

*A defendant in justice's court may interpose an equitable defense.—*Levin v. Gladstein* (N. C.) 871.

*Under Const. art. 4, § 27, and Revisal 1905, § 1420, justices of the peace *held* to have jurisdiction of all actions *ex delicto* where the damages demanded do not exceed \$50.—*Duckworth v. Mull* (N. C.) 850.

*Code 1890, c. 50, § 48 [Ann. Code 1906, § 1999], providing for consolidation of several demands against the same defendant, does not apply where the aggregate amount would exceed the jurisdiction of a justice.—*McDowell County Bank v. Wood* (W. Va.) 753.

*The holder of several notes may maintain separate actions before a justice thereon where the amount of each does not exceed his jurisdiction, and if consolidated they would.—*McDowell County Bank v. Wood* (W. Va.) 753.

§ 3. Procedure in civil cases.

*An entry of service by a constable on a summons issued from a justice's court may be set aside on a traverse of the entry duly filed, but it cannot be collaterally attacked.—*Patterson v. Drake* (Ga.) 175.

*Pleading of plaintiff in a justice's court will be construed most strongly against him.—*Atlanta, K. & N. R. Co. v. Shippen* (Ga.) 1031.

It was no ground for reversal that when defendant's counsel was making his concluding argument before a justice the magistrate allowed plaintiff's counsel to argue as to an authority cited.—*Glenn v. Augusta Drug Co.* (Ga.) 1032.

Where an action is commenced before a justice, and one defendant appears before the return day and waives service and confesses judgment, and the justice does not enter judgment until the return day, it does not render the judgment void.—*McDowell County Bank v. Wood* (W. Va.) 753.

§ 4. Review of proceedings.

Where plaintiff obtains judgment before a justice which is appealed to a jury in the superior court, under Civ. Code 1895, § 4472, if the evidence demands a verdict for defendant, the judge may direct it.—*Callaway & Truitt v. Southern Ry. Co.* (Ga.) 22.

On appeal from a justice to a jury in the superior court, where plaintiff fails to make out a *prima facie* case, it is not error to direct a verdict for defendant.—*Callaway & Truitt v. Southern Ry. Co.* (Ga.) 23.

The court, under the circumstances of this case, *held* not authorized to dismiss the petition for certiorari.—*Ansley v. Farley* (Ga.) 180.

*The losing party in justice's court *held* entitled to appeal to a jury in the justice court, or appeal to the superior court, or bring certiorari.—*Ansley v. Farley* (Ga.) 180.

*An instrument purporting to be a bond on appeal from a justice not signed by the surety is fatally defective.—*Roberts v. Napier Bros.* (Ga.) 914.

*It is essential to an appeal in a justice's court, not in formal pauperis, that the appellant

*Point annotated. See syllabus.

give bond and security, as provided by Civ. Code 1895, §§ 4140, 4458.—*Roberts v. Napier Bros.* (Ga.) 914.

*Where the uncontradicted evidence demanded the verdict rendered in the justice's court, it was not error to overrule petition for certiorari.—*Quaglin v. Benedetto* (Ga.) 938.

*Where plaintiff in a petition for certiorari alleged that her attorney marked his name on the docket of the justice, and the answer of the justice does not verify this statement, the point is not before the court.—*Raymond v. Garden* (Ga.) 944.

*Points in a petition for certiorari not verified by the answer of the magistrate furnish no ground for reversal.—*Raymond v. Garden* (Ga.) 944.

Where an action is brought before a justice to recover possession of land, and defendant appeals, and does not appear and his appeal is dismissed, it is error to affirm judgment for plaintiff, under Code 1906, §§ 2019, 2169.—*Chenowith v. Keenan* (W. Va.) 991.

That the justice after the trial, but before judgment, expressed to an attorney for plaintiff his intention to render judgment for him, but later gave judgment against him, does not constitute good cause for not having obtained the appeal within statutory period.—*McClung v. Price* (W. Va.) 996.

An appeal from a judgment of a justice, granted under Code, c. 50, § 174 [Code 1906, § 2125], after statutory ten days from the date of the judgment, for causes which could not have prejudiced the petitioner if reasonably diligent, is properly dismissed.—*McClung v. Price* (W. Va.) 996.

JUSTIFICATION.

Of homicide, see "Homicide," § 6.

KIDNAPPING.

See "Abduction."

KNOWLEDGE.

Affecting liability of telegraph company, see "Telegraphs and Telephones," § 2.

By master of dangers to servant, see "Master and Servant," § 12.

By master of defects in place of work, see "Master and Servant," § 11.

LACHES.

Affecting particular rights, remedies, or proceedings.

See "Cancellation of Instruments," § 2.

Establishment and enforcement of trust, see "Trusts," § 6.

Proceedings for probate, see "Wills," § 2.

To set aside conveyance affected with usury, see "Usury," § 1.

LANDLORD AND TENANT.

Corporate power as to leases, see "Corporations," § 3.

Lease of lands of infant, see "Guardian and Ward," § 2.

Liability of lessor of railroad for breach of contract of carriage, see "Carriers," § 4.

Liability of lessor of railroad for injuries to passenger, see "Carriers," §§ 5, 6.

Mining leases, see "Mines and Minerals," § 1.

Railroad leases, see "Railroads," § 6.

*Point annotated. See syllabus.

§ 1. Leases and agreements in general.

*If a house be leased for lawful uses, and the circumstances do not show the transaction a cloak to conceal the illegality of the contract, subsequent knowledge by the landlord that the tenant has used the premises for an illegal purpose will not invalidate the lease.—*Kessler v. Pearson* (Ga.) 963.

*The words "grant," "demise," or "lease," in a lease for years, creates a covenant for good title and quiet enjoyment during the term.—*Headley v. Hoopengartner* (W. Va.) 744.

§ 2. Landlord's title and reversion.

Where a landlord entered into a contract with his tenant that when the tenant leaves he is to leave the seed out of 16 bales of cotton on the place, and the landlord sold the plantation and transferred "the within contract to the purchaser," such former owner had no right to recover the cotton seed from his purchaser and transferee in an action of trover.—*Cobb v. Johnson* (Ga.) 935.

§ 3. Terms for years.

*A lease and certain options therein to renew and to purchase the property held terminated by the lessee's failure to give notice of his election to renew or purchase prior to the expiration of the term of the first renewal.—*Atlantic Product Co. v. Dunn* (N. C.) 299.

LANDS.

See "Public Lands."

LAPSE.

Of devise or legacy, see "Wills," § 4.

LARCENY.

Finding of indictment for, see "Indictment and Information," § 1.

§ 1. Offenses and responsibility therefor.

*Where one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him on the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat.—*Welch v. State* (Ga.) 183.

§ 2. Prosecution and punishment.

*An indictment for larceny held to sufficiently describe the property stolen.—*Frederick v. State* (Ga.) 1044.

LAST CLEAR CHANCE.

Application of doctrine, see "Railroads," §§ 10, 12.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 28.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Constitutional Law," § 2.

LEGISLATURE.

Competency of witness in examination by legislative committee, see "Witnesses," § 1.
Power of taxation, see "Taxation," § 1.

LETTERS.

Best and secondary evidence, see "Evidence," § 4.
Cancellation of insurance policy by, see "Insurance," § 5.
Cross-examination of witness as to contents of, see "Witnesses," § 2.
Presumptions as to, see "Evidence," § 2.

LEVY.

Of attachment, see "Attachment," § 3.
Of execution, see "Execution," § 3.

LEWDNESS.

See "Fornication"; "Obscenity."

LIBEL AND SLANDER.

Jurisdiction in general of offense, see "Criminal Law," § 1.
Slander of title as ground for setting aside foreclosure sale, see "Mortgages," § 3.

LICENSES.

For mining, see "Mines and Minerals," § 1.
For sale of intoxicating liquors, see "Intoxicating Liquors," § 1.
For use of streets, see "Municipal Corporations," § 6.
Imposition by municipal corporation, see "Municipal Corporations," § 5.
Injuries to licensees, see "Railroads," §§ 10, 12.
Laws exempting from as unlawful discrimination, see "Constitutional Law," § 7.
Marriage license, see "Marriage."
Restraining revocation of, see "Injunction," § 1.
Special or local laws relating to licensing sale of intoxicating liquors, see "Statutes," § 2.

LIENS.

Estoppel to assert, see "Estoppel," § 2.
Mining liens, see "Mines and Minerals," § 2.
Liens acquired by particular remedies or proceedings.
See "Judgment," § 10.

Particular classes of liens.

See "Mechanic's Liens."
Mortgage, see "Mortgages," § 2.
Vendor's lien on lands sold, see "Vendor and Purchaser," § 3.

Under the facts *held* that there was no preference as between two persons to whom, in a chancery suit, liens were given on lands sold therein.—*Davis v. Roller* (Va.) 4; *Bowman's Ex'rs v. Same, Id.*

LIFE ESTATES.

See "Dower"; "Remainders."
Creation by deed, see "Deeds," § 3.
Creation by will, see "Wills," § 3.

LIFE INSURANCE.

See "Insurance," §§ 6, 9, 13.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Presumptions on appeal relating to, see "Appeal and Error," § 21.

Particular actions or proceedings.

Against personal representatives, see "Executors and Administrators," § 4.
Criminal prosecutions, see "Criminal Law," § 3.
On judgment, see "Judgment," § 13.
Probate proceedings, see "Wills," § 2.

§ 1. **Computation of period of limitation.**

*Where a suit is dismissed and a writ of error is sued out, the statutory period of six months within which a suit which has been dismissed may be renewed does not run while such writ is pending.—*Seaboard Air Line Ry. v. Randolph* (Ga.) 47.

*Since the passage of Acts 1882-3, p. 104, Civ. Code 1895, § 3782, limitations as to debts of a decedent are suspended between the time of his death and the appointment of an administrator, if such period does not exceed five years.—*Hawes v. Glover* (Ga.) 62.

In an action by a purchaser for a deficiency in the quantity of land sold, brought more than three years after the delivery of the deed, the court *held* required to charge as to the principle that the cause of action was barred by Revisal 1905, § 395, subsec. 9, in three years from the time the mistake was discovered or could have been, by the exercise of ordinary diligence.—*Peacock v. Barnes* (N. C.) 99.

*Under Revisal 1905, § 395, subsec. 9, a cause of action for mistake *held* deemed to have accrued at the time the mistake became known, or should have been discovered by the exercise of ordinary diligence.—*Peacock v. Barnes* (N. C.) 99.

*Under Revisal 1905, § 395, subsec. 9, a cause of action for a deficiency in the quantity of land sold by the acre *held* not as a matter of law to accrue at the delivery of the deed.—*Peacock v. Barnes* (N. C.) 99.

A married woman acquiring a right to enter into the possession of real estate prior to the passage of Acts 1899, p. 209, c. 78, amending Code Civ. Proc. §§ 148, 163, by removing the disability of coverture, *held* not within the act.—*Cherry v. Cape Fear Power Co.* (N. C.) 287.

*Right of remaindermen to recover property conveyed by life tenant *held* barred after seven years from life tenant's death.—*Cherry v. Cape Fear Power Co.* (N. C.) 287.

Taxpayers' action to compel county commissioners of S. county to comply with Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, *held* not barred by limitations.—*Jones v. Commissioners of Stokes County* (N. C.) 427.

*An action for damages for negligent construction by railroad of embankment across natural stream may be brought more than six years after construction.—*Lawton v. Seaboard Air Line Ry.* (S. C.) 128.

*Where a person taking title to land, part of the price of which had been paid by another, recognizes his rights, limitations do not run against the person paying such portion of the price.—*Miller v. Saxton* (S. C.) 310.

A decree rendered against the estate of a surety on a bond *held* not rendered invalid by lapse of time, though over 30 years elapsed from the entry of a judgment on the bond until the entry of the decree determining the amount of the liability of the estate of the surety thereon.—*Sipe v. Taylor* (Va.) 542.

*Point annotated. See syllabus.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Effect on limitation of pendency of other proceedings, see "Limitation of Actions," § 1.

Under Code 1887, § 3566 [Va. Code 1904, p. 1903] *held* that a purchaser of land had constructive notice of an attachment thereon.—*Breeden v. Peale* (Va.) 2.

LIVE STOCK.

Carriage of, see "Carriers," § 2.
Injuries from operation of railroads, see "Railroads," § 13.

LOCAL ACTIONS.

See "Venue," § 1.

LOCAL LAWS.

See "Statutes," § 2.

LOCAL OPTION.

Mandamus to compel holding of local option election, see "Mandamus," § 1.
Traffic in intoxicating liquors, see "Intoxicating Liquors," § 2.

LOCATION.

Of county seat, see "Counties," § 1.
Of railroads, see "Railroads," § 3.

LOGS AND LOGGING.

Compromise and settlement of agreement relating to timber, see "Compromise and Settlement."

Exercise of right of eminent domain by logging company, see "Eminent Domain," § 3.

Floating logs in navigable waters, see "Navigable Waters," § 2.

Requirements of statute of frauds as to contracts for sale or removal of timber, see "Frauds, Statutes of," §§ 3, 5.

Restraining cutting of timber, see "Injunction," §§ 1, 2.

Restraining sale of timber, see "Injunction," § 2.

Trespass in cutting and removing timber, see "Trespass," § 2.

Where a deed reserved the timber with the right to remove it at the happening of certain event *held* that the assignee of the reservation was not liable for cutting timber before the happening of such event.—*Ormand Min. Co. v. Bessemer City Cotton Mills* (N. C.) 700.

*A reservation of timber on land, contained in a deed thereto, *held* not affected by a clause written on the deed after delivery, except in so far as the grantee and his assignee were entitled to take timber from the land for mining operations.—*Shenandoah Land & Anthracite Coal Co. v. Clarke* (Va.) 561.

LOST INSTRUMENTS.

*Where it appears from the record of a suit to restore a lost deed that the deed was void on its face, it is error to decree its restoration.—*Poling v. Poling* (W. Va.) 993.

*Point annotated. See syllabus.

LUMBER.

See "Logs and Logging."

LYING IN WAIT.

Homicide by, see "Homicide," § 5.

LYNCHING.

Venue of prosecution, see "Criminal Law," § 2.

MACHINERY.

Liability of employer for defects, see "Master and Servant," §§ 11, 12.

MALICE.

See "Malicious Prosecution," §§ 1, 2, 3.

Element of offenses, see "Homicide," §§ 5, 6.

MALICIOUS PROSECUTION.

Distinguished from abuse of process, see "Process," § 4.

Harmless error, see "Appeal and Error," § 25.
Res gestae, see "Evidence," § 3.

§ 1. **Want of probable cause.**

*An instruction that to constitute malicious prosecution there must be want of probable cause and malice *held* proper.—*Gaither v. Carpenter* (N. C.) 625.

§ 2. **Malice.**

*Evidence of advice of counsel *held* admissible, in an action for malicious prosecution, to rebut malice.—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* (N. C.) 422.

*In an action for malicious prosecution, a definition of malice as a "disposition to do the person prosecuted a wrong without legal excuse" was not prejudicial to plaintiff.—*Gaither v. Carpenter* (N. C.) 625.

*The malice essential to sustain an action for malicious prosecution does not mean personal ill will, but a wrongful act, knowingly or intentionally done, without just cause, constitutes malice.—*Stanford v. A. F. Messick Grocery Co.* (N. C.) 815.

§ 3. **Actions.**

Evidence in an action for malicious prosecution *held* sufficient to go to the jury on the question of probable cause.—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* (N. C.) 422.

*In an action for malicious prosecution, evidence that the jury in the criminal trial were out a considerable time and at first stood seven for acquittal and five for conviction was inadmissible.—*Gaither v. Carpenter* (N. C.) 625.

In an action for malicious prosecution and malicious abuse of process, the submission of an issue *held* improper under the pleadings and evidence.—*Stanford v. A. F. Messick Grocery Co.* (N. C.) 815.

*In an action for malicious prosecution, punitive damages *held* not recoverable in the absence of actual malice.—*Stanford v. A. F. Messick Grocery Co.* (N. C.) 815.

*In an action for malicious prosecution, the jury may allow for a reasonable attorney's fee paid by plaintiff in the case in which he was prosecuted.—*Stanford v. A. F. Messick Grocery Co.* (N. C.) 815.

In an action for malicious prosecution, an instruction as to the effect of a magistrate bind-

ing plaintiff over to court to answer for crime, etc., *held* erroneous.—Stanford v. A. F. Messick Grocery Co. (N. C.) 815.

*In an action for malicious prosecution, certain evidence *held* admissible as substantive testimony.—Stanford v. A. F. Messick Grocery Co. (N. C.) 815.

*Facts essential to be proved to sustain an action for malicious prosecution and an action for malicious abuse of process determined.—Stanford v. A. F. Messick Grocery Co. (N. C.) 815.

MALICIOUS TRESPASS.

See "Trespass," § 3.

MALPRACTICE.

By justice of the peace, see "Justices of the Peace," § 1.

MANDAMUS.

Denial of as bar to other proceeding, see "Judgment," § 8.

To compel settlement of bill of exceptions, see "Criminal Law," § 27.

§ 1. Nature and grounds in general.

*Under Acts 1903, p. 288, c. 233, the court cannot by mandamus compel the holding of a local option election during the year subsequent to the filing of the petition therefor, nor within 90 days of any city, county or general election.—Betts v. City of Raleigh (N. C.) 145.

*Where pending mandamus to compel the holding of a local option election, authorized by Acts 1903, p. 288, c. 233, the right of the relator to exact performance has expired by lapse of time, the writ will be denied.—Betts v. City of Raleigh (N. C.) 145.

*Taxpayers of certain townships in a county *held* entitled to maintain mandamus to compel county commissioners to comply with Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, providing for the application to townships of railroad taxes.—Jones v. Commissioners of Stokes County (N. C.) 427.

*Under Civ. Code 1902, § 1183, mandamus to require county board of education to issue teacher's certificate is not the proper remedy but appeal to the state board of education.—Greenville College for Women v. Board of Education of Greenville County (S. C.) 132.

*The state tax commissioner as relator may bring mandamus to compel an assessor to make an assessment in conformity with law.—State v. Graybeal (W. Va.) 398.

§ 2. Subjects and purposes of relief.

Where defendant was convicted of a felony, but the jury recommended, under Pen. Code 1895, § 1036, that he be punished as for a misdemeanor, which recommendation was approved by the trial judge, it was the duty of the stenographer, who reported the case, under Pen. Code 1895, § 981, to transcribe his notes of the evidence and charge of the court and file the same with the clerk of court, and on refusal so to do mandamus would lie.—Williams v. Copley (Ga.) 917.

§ 3. Jurisdiction, proceedings, and relief.

Where application for mandamus to the ordinary was submitted to the judge, and he denied it, and the evidence introduced sustained the finding, and the law was properly construed, the judgment will not be reversed.—Paulk v. Greer (Ga.) 943.

*Point annotated. See syllabus.

MANDATE.

See "Mandamus."

To lower court or decision on appeal or writ of error, see "Appeal and Error," § 29.

MANSLAUGHTER.

See "Homicide," §§ 1, 6.

MARK.

Signing by, see "Signatures."

MARRIAGE.

See "Divorce"; "Husband and Wife."

In an action for penalty under Revisal 1905, § 2090, for illegally issuing a marriage license without making reasonable inquiry as to the age of relator's daughter, where the evidence was uncontradicted, the question of "reasonable inquiry" was one of law.—Morrison v. Teague (N. C.) 521.

*In an action under Revisal 1905, § 2090, for issuing marriage license for the marriage of relator's daughter under the age of 18 years, without having made reasonable inquiry, *held*, under the evidence, that defendant failed to make reasonable inquiry.—Morrison v. Teague (N. C.) 521.

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

Amendment of pleading in action for injuries to servant, see "Pleading," § 4.

Applicability of instructions to evidence in action for injuries to servant, see "Trial," § 9. Argument and conduct of counsel in action for injury to servant, see "Trial," § 4.

Assignment of wages, see "Assignments," § 2. Employment of infant, see "Infants," § 3.

Harmless error in action for breach of contract of employment, see "Appeal and Error," § 23. Persons liable for injuries to servant caused by operation of railroad, see "Railroads," § 9. Province of court and jury at trial in action for injuries to servant, see "Trial," § 6.

Questions considered on appeal or error in action for injuries to servant, see "Appeal and Error," § 19.

Requests for instructions in an action for injuries to servant, see "Trial," § 10.

Requirements of statute of frauds as to contract of employment, see "Frauds, Statute of," § 2.

Special interrogatories and findings in action for injuries to servant, see "Trial," § 14.

Swindling by employe, see "False Pretenses."

Venue of prosecution for obtaining advances under contract of employment, see "Criminal Law," § 2.

§ 1. The relation.

*In an action for breach of a contract of employment, an instruction that, if plaintiff voluntarily resigned and was paid to the date of his resignation, defendant was under no further liability to him, *held* proper.—Ivey v. Bessemer City Cotton Mills (N. C.) 613.

*Breach of material stipulation in a contract of employment which disables the servant to perform or results in his inability to do so furnishes the master with a legal excuse for the servant's discharge.—Ivey v. Bessemer City Cotton Mills (N. C.) 613.

*In an action for breach of a contract of employment, the burden was on defendant to show a good legal excuse for discharging plaintiff.—*Ivey v. Bessemer City Cotton Mills* (N. C.) 618.

§ 2. Services and compensation.

In a prosecution under Acts 1903, p. 90, for fraudulently procuring advances on the faith of a labor contract, *held* that the presumption of fraudulent intent arising from the fact that money was procured on the faith of the contract and the service not rendered or the money returned, was rebutted and a conviction not authorized.—*Howard v. State* (Ga.) 239.

That the minor told his employer that he had yielded to the command of a stranger to go to work for him, is no excuse in the absence of a showing that he did so under fear of duress rather than with the purpose of defrauding his employer in accordance with a previously formed intent.—*Anthony v. State* (Ga.) 479.

An allegation in an accusation under Acts 1903, p. 90, that defendant obtained from prosecutor an advance, is not sustained by proof that prosecutor paid a debt of defendant to a third person, secured by mortgage, and took a transfer of the mortgage and foreclosed the same.—*Abrams v. State* (Ga.) 497.

Before a prosecution can be maintained under Acts 1903, p. 90, the burden is on the state to show that loss or damage was sustained by the hirer.—*Abrams v. State* (Ga.) 497.

§ 3. Master's liability for injuries to servant—Nature and extent in general.

*An action against a railroad company by an employé for recovery of damages for personal injuries cannot be sustained where a contract was entered into in another state releasing the company from liability; the employé having no cause of action in that state.—*Cannaday v. Atlantic Coast Line R. Co.* (N. C.) 836.

*A contract exempting a railroad company from liability to an employé for negligence is void.—*Cannaday v. Atlantic Coast Line R. Co.* (N. C.) 836.

*The employer of a minor is charged with notice of such lack of capacity as is usual among minors of the same age so far as the minor's age is or should be known to the employer.—*Bare v. Crane Creek Coal & Coke Co.* (W. Va.) 907.

*It is actionable negligence for an employer to place at a dangerous employment a minor who, though instructed, lacks sufficient age and capacity to comprehend and avoid the dangers.—*Bare v. Crane Creek Coal & Coke Co.* (W. Va.) 907.

§ 4. — Tools, machinery, appliances, and places for work.

*The failure of the owner of an industrial plant, operating a railroad, to equip its cars with automatic couplers, *held* negligence.—*Hairston v. United States Leather Co.* (N. C.) 847.

*It is the duty of an employer to exercise ordinary care to provide a reasonably safe place in which an employé is required to work.—*Low Moor Iron Co. v. La Bianca's Adm'r* (Va.) 532.

§ 5. — Methods of work, rules, and orders.

*A rule of an employer established for the safety of the employés *held* abrogated.—*Biles v. Seaboard Air Line Ry. Co.* (N. C.) 512.

§ 6. — Warning and instructing servant.

*An employer *held* required to inform an employé of the danger incident to the work.—

Low Moor Iron Co. v. La Bianca's Adm'r (Va.) 532.

*An employer *held* required to warn an employé engaged in mining ore of the danger to which he would be exposed in doing the work.—*Low Moor Iron Co. v. La Bianca's Adm'r* (Va.) 532.

§ 7. — Fellow servants.

A railroad conductor *held* not guilty of negligence in failing to anticipate that interstate, a trackman, would attempt to cross from a passenger to a flat car just as the two were uncoupled, and in failing to take steps to guard against interstate's injury in so doing.—*Jones v. East Carolina R. Co.* (N. C.) 147.

*The fellow servant act (Priv. Laws 1897, p. 83, c. 56) applies to a manufacturing corporation owning a railroad.—*Bird v. United States Leather Co.* (N. C.) 727.

*Fellow servant act (Revisal 1905, § 2646) *held* to apply to a manufacturer owning and operating in connection with its plant a railroad 12 or 14 miles in length, on which it operates its own cars and engines with its own crews.—*Hairston v. United States Leather Co.* (N. C.) 847.

*Watchman at railroad crossing *held* engaged in another department of labor from fellow servants running a train across the crossing within Const. art. 9, § 15.—*Betchman v. Seaboard Air Line Ry.* (S. C.) 140.

*Under Const. art. 9, § 15, an employé of a railroad company, injured by the negligence of a superior officer *held* entitled to the same remedies as are allowed to other persons not employées.—*Reed v. Southern Ry., Carolina Division* (S. C.) 218.

*A mine boss *held* a vice principal and not a fellow servant of an employé.—*Low Moor Iron Co. v. La Bianca's Adm'r* (Va.) 532.

*A foreman in a stone quarry *held* not to be a fellow servant of the workmen.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

§ 8. — Risks assumed by servant.

*A master *held* not responsible to his servant for injuries sustained because of defects in a tool, when the defects were known to the servant, or could have been known by ordinary care.—*Banks v. J. S. Schofield's Sons Co.* (Ga.) 939.

Under Private Laws 1897, p. 83, c. 56, § 1, 2, a railroad cannot defeat an action for injuries to a brakeman caused by defect in pilot of engine, on the ground that he assumed the risk.—*Biles v. Seaboard Air Line Ry. Co.* (N. C.) 512.

*The defenses of an assumption of risk and contributory negligence *held* not available to defeat an action for injuries to an employé.—*Hairston v. United States Leather Co.* (N. C.) 847.

The rule that an action by an employé for injuries because of the negligence of an employer cannot be defeated by the assumption of risk and contributory negligence *held* to apply only for the protection of an employé injured in the course of his employment.—*Hairston v. United States Leather Co.* (N. C.) 847.

*In an action for an injury to a servant, employed in a quarry, caused by falling rock, *held*, that the risk was not assumed.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

*A minor entering the employment of another assumes the risk of such apparent dangers as he is capable of comprehending and avoid-

*Point annotated. See syllabus.

ing.—*Bare v. Crane Creek Coal & Coke Co.* (W. Va.) 907.

§ 9. — Contributory negligence of servant.

*An employé whose duty calls him at frequent intervals to a place where fellow servants are shoveling coal from railroad cars into a coal bin *held* under no legal obligation to give them notice of his presence.—*Ranford v. Southern Ry. Co.* (Ga.) 183.

*Where a railroad conductor was injured by falling down the steps of a depot platform at night, the railroad company's negligence in failing to light the platform did not absolve him from the obligation of using ordinary care.—*Beard v. Southern Ry. Co.* (N. C.) 506.

*The circumstances under which a violation of a rule by a servant will not preclude recovery stated.—*Haynes v. North Carolina R. Co.* (N. C.) 516.

*A servant attending to his own work in a customary manner was not required to anticipate the negligent act of co-servants.—*Bird v. United States Leather Co.* (N. C.) 727.

*Evidence *held* to show an employé guilty of contributory negligence causing his death.—*Holland v. Seaboard Air Line Ry. Co.* (N. C.) 835.

*Negligence of an employé *held* the proximate cause of the accident resulting in his death.—*Holland v. Seaboard Air Line Ry. Co.* (N. C.) 835.

*Railroad company *held* liable for injuries to watchman at crossing by a careless inadvertence of engineer of moving train.—*Betchman v. Seaboard Air Line Ry.* (S. C.) 140.

*That a servant was guilty of an error in judgment in attempting to pass around a moving train or in stepping out of his way, does not relieve the master from liability unless the conduct of the servant was the proximate cause of the injury.—*Betchman v. Seaboard Air Line Ry.* (S. C.) 140.

*Railroad employé going between cars to couple or uncouple them *held* guilty of contributory negligence under the circumstances.—*Southern Ry. Co. v. Simmons* (Va.) 459.

A railroad employé had the right to presume that the railroad company would conduct its business with reasonable regard to its rules prescribing his duties and with reasonable care for his safety while performing his duties in coupling and uncoupling cars.—*Southern Ry. Co. v. Simmons* (Va.) 459.

§ 10. — Pleading in action for injuries.

*In an action by a servant for personal injuries defense of assumption of risk or contributory negligence must be pleaded to be available.—*Betchman v. Seaboard Air Line Ry.* (S. C.) 140.

*Complaint in action for personal injuries *held* to state a cause of action.—*Burton v. Anderson Phosphate & Oil Co.* (S. C.) 217.

A declaration in an action for personal injuries received by an employé *held* to sufficiently state a cause of action.—*Lane Bros. Co. v. Seakford* (Va.) 556.

In an action for an injury to a servant while employed in defendant's quarry, proof that defendant failed to inspect the quarry was admissible under the declaration charging neglect of defendant to keep its quarry safe.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

§ 11. — Evidence in action for injuries.

*In an action for injuries to a servant, evidence *held* insufficient to show that the gang-

way from which the servant fell was in a defective condition.—*Shaw v. Highland Park Mfg. Co.* (N. C.) 432.

*Injury to servant caused by slipping of plank in gangway *held* to raise no presumption of negligence of employer.—*Shaw v. Highland Park Mfg. Co.* (N. C.) 433.

In an action for the death of a servant certain evidence *held* properly admitted to meet the defense of contributory negligence.—*Haynes v. North Carolina R. Co.* (N. C.) 516.

Evidence examined, and *held* to sustain finding that a servant was not guilty of contributory negligence.—*Bird v. United States Leather Co.* (N. C.) 727.

*The fact that a servant is injured by the failure of the machinery furnished by the master does not raise a presumption of negligence on the latter's part.—*Green v. Catawba Power Co.* (S. C.) 125.

Failure of persons in charge of a train to give notice of approach at a railroad crossing is competent to show negligence in an action by the watchman at that crossing for injuries received.—*Betchman v. Seaboard Air Line Ry.* (S. C.) 140.

In action by servant for personal injuries evidence that he was discharged by defendant for refusal to sign release of damages *held* admissible.—*Young v. Seaboard Air Line Ry.* (S. C.) 225.

*Evidence *held* insufficient to show negligence of railroad causing death of employé.—*Norfolk & W. Ry. Co. v. McDonald's Adm'r* (Va.) 554.

*In an action for causing the death of an employé of a railroad, the burden is on the plaintiff to show negligence of the railroad.—*Norfolk & W. Ry. Co. v. McDonald's Adm'r* (Va.) 554.

*If a master by exercise of reasonable care could have ascertained that the place of work was not safe, that is proof of knowledge on his part.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

In action for injuries to a minor employé resulting in death, evidence *held* sufficient to go to the jury on the question of the minor's negligence.—*Bare v. Crane Creek Coal & Coke Co.* (W. Va.) 907.

*The burden of proving that a minor employé had more than the usual capacity of minors of the same age rests on the employer, and the burden of proving the minor had less than such usual capacity rests on the minor.—*Bare v. Crane Creek Coal & Coke Co.* (W. Va.) 907.

§ 12. — Trial in action for injuries.

An instruction to find for plaintiff if he was injured by the defective condition of a machine at which he was working, *held* not erroneous as eliminating material issues.—*Cotton v. Highland Park Mfg. Co.* (N. C.) 358.

*In an action by a servant for personal injuries, evidence *held* not to require a nonsuit on the ground that there was no evidence of defendant's negligence.—*Hicks v. Naomi Falls Mfg. Co.* (N. C.) 411.

*In an action by a servant for personal injuries, evidence *held* not to require a nonsuit on the ground of contributory negligence.—*Hicks v. Naomi Falls Mfg. Co.* (N. C.) 411.

In an action by a servant for personal injuries, an instruction as to giving warning of a change in the machine used *held* not erroneous as setting up the old machine as a standard of excellence.—*Hicks v. Naomi Falls Mfg. Co.* (N. C.) 411.

*In action for injuries to servant whether he was guilty of negligence *held* a question for

*Point annotated. See syllabus.

the jury.—*Shaw v. Highland Park Mfg. Co.* (N. C.) 433.

In an action for injuries to a railroad conductor, an instruction as to the care required of plaintiff *held* erroneous.—*Beard v. Southern Ry. Co.* (N. C.) 505.

In an action for injuries to a railroad conductor by falling down the steps of a depot platform at night, an error in an instruction *held* cured by a subsequent instruction.—*Beard v. Southern Ry. Co.* (N. C.) 505.

*In an action for injuries to a railroad conductor by falling down the steps of a depot platform at night, whether he was guilty of contributory negligence *held* for the jury.—*Beard v. Southern Ry. Co.* (N. C.) 505.

*In an action against a railroad for injuries to a brakeman, the brakeman *held* not guilty of contributory negligence as a matter of law.—*Biles v. Seaboard Air Line Ry. Co.* (N. C.) 512.

*In an action for the death of a locomotive engineer, *held* a question for the jury whether a rule requiring an engineer to bring his engine under control when approaching a switch, in the absence of a switch light, was in force.—*Haynes v. North Carolina R. Co.* (N. C.) 516.

*Plaintiff *held* entitled to have question of negligence of co-servant submitted to the jury.—*Bird v. United States Leather Co.* (N. C.) 727.

In an action for injuries to a servant, motion for new trial for insufficiency of the evidence *held* properly overruled.—*Reed v. Southern Ry., Carolina Division* (S. C.) 218.

***"Safe and suitable" appliances as used in charge construed.—*Davis v. Northwestern R. Co.* (S. C.) 526.

Instruction as to duty of railroad in furnishing cars for use of its employes *held* proper.—*Davis v. Northwestern R. Co.* (S. C.) 526.

*Instruction as to assumption of risks *held* substantially in the language of Const. art. 9, § 15.—*Davis v. Northwestern R. Co.* (S. C.) 526.

An instruction, in an action for personal injuries received by an employe, *held* to limit the duty of the employer to the exercise of ordinary and reasonable care.—*Lane Bros. Co. v. Seakford* (Va.) 556.

In an action for an injury resulting in the death of a servant while employed in defendant's quarry, *held* that it was for the jury to determine whether or not the negligence of defendant was the proximate cause of death.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

In an action for an injury resulting in the death of a servant while working in defendant's quarry, *held* that it was for the jury to determine whether defendant could, by the exercise of reasonable or ordinary care, have known of the danger to which deceased was subjected.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

*In an action for an injury resulting in the death of a servant while employed in defendant's quarry, *held* that it was for the jury to determine whether or not deceased was guilty of contributory negligence.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

§ 13. Liabilities for injuries to third persons.

*Where a petition alleged that defendant engineer was an employe of defendant company, and they were sued jointly, it was necessary that the liability of the servant should appear; but such liability does appear where the evidence shows that the agent had failed to use reasonable diligence in his duty and

*Point annotated. See syllabus.

such misfeasance resulted in an injury to plaintiff.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

An objection that the court failed to charge the law applicable to a joint action against a master and servant which would authorize a verdict against both jointly is not well taken where this question was fully covered by an instruction more favorable to the defendant than he was entitled to.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

Where the court instructed that plaintiff insisted that the person who did the act on which the action was based was a servant of defendant, which defendant denies, and that the jury were to say what the facts were, is not erroneous as restricting the jury to the question whether such person was in the employ of defendant, and if he was not, that the defendant would not be liable, and if he was, then defendant might or might not be liable.—*Foote v. Kelley* (Ga.) 1045.

*In an action against a railroad for an assault on a servant by a yardmaster, the test as to the railroad's liability for the assault determined.—*Roberts v. Southern Ry. Co.* (N. C.) 509.

§ 14. Interference with the relation by third persons.

Evidence *held* to sustain a conviction for enticing away a servant during the term of his employment.—*Hudgins v. State* (Ga.) 492.

MAYOR.

See "Municipal Corporations," §§ 4, 5.

MEASURE OF DAMAGES.

See "Damages," § 3.

Applicability of instructions to case as to, see "Trial," § 9.

For breach by seller of contract for sale of goods, see "Sales," § 8.

For breach of contract for sale of land, see "Vendor and Purchaser," § 3.

For delay or failure to deliver telegram, see "Telegraphs and Telephones," § 3.

For taking of or injury to property in exercise of right of eminent domain, see "Eminent Domain," § 4.

For wrongful attachment, see "Attachment."

MECHANICS' LIENS.

§ 1. Right to lien.

*Petition by subcontractor to foreclose a materialman's lien on real estate *held* not to set forth a cause of action.—*General Supply Co. v. Hunn* (Ga.) 957.

*Where a materialman furnishes material to a subcontractor, who has no contractual relation with the owners of the realty, he does not thereby acquire a lien.—*General Supply Co. v. Hunn* (Ga.) 957.

§ 2. Enforcement.

*There can be no valid judgment of foreclosure of a materialman's lien in the absence of a valid judgment against the contractor for the price of the material sold to him.—*Mauck v. Rosser* (Ga.) 32.

MEETINGS.

Of stockholders, see "Corporations," § 2.

MEMORANDA.

Required by statute of frauds, see "Frauds, Statute of," § 4.

MENTAL CAPACITY.

Of testator, see "Wills," § 1.

MENTAL SUFFERING.

Element of damages, see "Damages," § 1.
Element of damages for delay or failure to deliver telegram, see "Telegraphs and Telephones," § 1.

MERGER.

Of cause of action in judgment, see "Judgment," § 8.

MILEAGE BOOKS.

Construction of constitutional provisions relating to issuance of, see "Constitutional Law," § 1.
Laws providing for issuance of as denial of due process of law, see "Constitutional Law," § 9.

MINES AND MINERALS.

Adverse possession of minerals in place, see "Adverse Possession," § 1.
Injuries to servants in mines, see "Master and Servant," § 6.
Parol or extrinsic evidence to vary mining contract, see "Evidence," § 10.
Sale of mineral lands of wards, see "Guardian and Ward," § 2.
Time for performance of mining contract, see "Contracts," § 2.

§ 1. **Title, conveyances, and contracts.**
Evidence held to show no such forfeiture of an oil lease by the lessees as would cause the property to revert to the infants.—*Headley v. Hoopengartner* (W. Va.) 744.

*Under the ordinary oil and gas lease the lessee has no vested estate in the oil and gas until it is discovered; but, when found, the right to produce becomes a vested right, and when extracted, the title vests in the lessee, and the consideration paid is rent for the leased premises.—*Headley v. Hoopengartner* (W. Va.) 744.

When an oil lease is given in consideration of one-fifth of one-eighth of all the oil produced as royalty, and the lessor agrees to accept one-fifth of one-sixteenth, he will be estopped to claim more than that amount as against the parties to such agreement and those acquiring an interest subsequently thereto.—*Headley v. Hoopengartner* (W. Va.) 744.

A contract which shows on its face that the subject of sale was a portion of a vein of coal lying partly under a certain tract of land held not to include other veins of coal in said tract which were not known at the time.—*Armstrong v. Ross* (W. Va.) 895.

For injury to land by the escape of natural gas from a well thereon, drilled and abandoned by a lessee for oil and gas purposes, the lessor has a right of action against the lessee.—*Talbot v. Southern Oil Co.* (W. Va.) 1009.

§ 2. **Operation of mines, quarries, and wells.**

*Services in caring for a mining property held to create no lien following the property.—*Morrison v. New Haven & Wilkerson Min. Co.* (N. C.) 611.

MINORS.

See "Infants."

*Point annotated. See syllabus.

MISDEMEANOR.

See "Criminal Law," § 23.

MISREPRESENTATION.

See "False Pretenses"; "Fraud."
By insured, see "Insurance," § 6.

MISTAKE.

Effect on limitation, see "Limitation of Actions," § 1.
Ground for new trial, see "New Trial," § 1.
Recovery of payments made by mistake, see "Payment," § 3.

MITIGATION.

Of damages, see "Damages," § 1.
Of damages for breach of contract of carriage, see "Carriers," § 4.

MONEY RECEIVED.

Recovery of payment in general, see "Payment," § 3.
Recovery of price paid for land, see "Vendor and Purchaser," § 4.

MONOPOLIES.

Grants of privileges or immunities, see "Constitutional Law," § 7.

§ 1. **Trusts and other combinations in restraint of trade.**

*Contract of plaintiff to sell farm machinery only to defendant in a certain territory and by defendant to buy exclusively of plaintiff held not a monopoly in violation of Civ. Code 1902, § 2845.—*Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.* (S. C.) 973.

MORTGAGES.

By husband releasing dower of wife, see "Dower," § 1.

By or to married woman, see "Husband and Wife," § 2.

Competency of witness in foreclosure, see "Witnesses," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

Of personal property, see "Chattel Mortgages."

Of separate property of married woman, see "Husband and Wife," § 2.

Signing by mark, see "Signatures."

Subrogation to rights of mortgagee, see "Subrogation."

Usurious mortgages, see "Usury," § 1.

§ 1. **Requisites and validity.**

*A seal is not necessary to the validity of a mortgage.—*Hawes v. Glover* (Ga.) 62.

*A mortgage is valid as between the parties without any attesting witnesses, and without being recorded.—*Hawes v. Glover* (Ga.) 62.

§ 2. **Construction and operation.**

Civ. Code 1895, § 2727, providing that an unrecorded mortgage is postponed to all other liens prior to record, refers only to liens obtained during the lifetime of the mortgagor.—*Hawes v. Glover* (Ga.) 62.

§ 3. **Foreclosure by exercise of power of sale.**

*Circumstances, surrounding the sale of realty under a power contained in a mortgage, held to show such fraud as to authorize equity to set it aside.—*Davis v. Keen* (N. C.) 350.

Complaint *held* to allege fraudulent disparagement of plaintiffs' title at a public sale so as to justify submission of such an issue without the words "as alleged in the complaint."—*Davis v. Keen* (N. C.) 359.

In proceedings to set aside a foreclosure sale, refusal to order an accounting between the debtor and creditor *held* not error.—*Hamilton v. Stephenson* (Va.) 577.

*The burden of proof that the bidding at a sale on foreclosure of a deed of trust was stifled by an agreement between bidders is on the party alleging the fact.—*Hamilton v. Stephenson* (Va.) 577.

Evidence *held* insufficient to show that land covered by a deed of trust was sold as a whole at a sacrifice instead of in four parcels under an agreement with the debtor.—*Hamilton v. Stephenson* (Va.) 577.

*Land sold on foreclosure of a deed of trust *held* not prematurely sold.—*Hamilton v. Stephenson* (Va.) 577.

§ 4. Foreclosure by action.

*The court in ordering a sale of land under a purchase-money mortgage executed by a husband and wife and a subsequent mortgage executed by the husband alone, *held* entitled to protect the contingent dower interest of the wife in case the land sells for more than sufficient to pay the first mortgage.—*Shakelford v. Morrill* (N. C.) 82.

A consent decree *held* not a contract for the purchase of land by defendant.—*Bunn v. Braswell* (N. C.) 85.

MOTIONS.

Judgment on motion, see "Judgment," § 4.
Relating to pleadings, see "Pleading," § 7.

For particular purposes or relief.

Amendment of pleading for defects in parties, see "Parties," § 2.

Arrest of judgment in civil actions, see "Judgment," § 5.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 22.

Confirmation of report in partition, see "Partition," § 1.

Continuance in civil actions, see "Continuance."

Direction of verdict in civil actions, see "Trial," § 5.

Dismissal or nonsuit on trial, see "Trial," § 5.

New trial in civil actions, see "New Trial," §§ 1, 2.

New trial in criminal prosecutions, see "Criminal Law," §§ 18-21.

Presentation of objections for review, see "Appeal and Error," § 4.

Quashing indictment or information, see "Indictment and Information," § 4.

*A void order is not made valid by lapse of time, and ever remains without effect.—*Kelner v. Cowden* (W. Va.) 649.

MULTIFARIOUSNESS.

In pleading, see "Equity," § 2.

MUNICIPAL CORPORATIONS.

See "Counties"; "Towns."

Grant of rights in street as affecting use as highway, see "Highways," § 1.

Laws relating to extension of corporate limits as encroachment on Legislature, see "Constitutional Law," § 2.

Municipal courts, see "Courts," § 3.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Performance in general of contract for purchase of city bonds, see "Contracts," § 8.
Regulation of railroads, see "Railroads," § 8.
Street railroads, see "Street Railroads."

§ 1. Creation, alteration, existence, and dissolution.

The corporate limits of the city of Gainesville having been prescribed by Acts 1877, p. 163, they would not be contracted by acquiescence of the city council in a survey which marked limits of less extent than those prescribed by the act.—*Martin v. City of Gainesville* (Ga.) 499.

§ 2. Proceedings of council or other governing body.

*Under charter of town of Salem (Acts 1891, p. 746, c. 40, § 70) passage of ordinance for issuance of bonds by five members of board of commissioners *held* sufficient.—Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co. (N. C.) 442.

*A municipal ordinance to be valid must be free from discrimination against the sale or use of articles of lawful trade merely on the ground of the place of their production.—Town of Fulton v. Norteman (W. Va.) 658.

A municipal ordinance declaring it unlawful for any person to bring into the town the dead body of any animal for burial or manufacture into fertilizer, and for any person to bury or manufacture into fertilizer any such body, *held* void to the extent that it forbids the bringing in the body for such purpose, though but for such discrimination it might be valid as a health ordinance.—Town of Fulton v. Norteman (W. Va.) 658.

§ 3. Officers, agents, and employees.

In the absence of authority to deal with the public in behalf of the municipality, the superintendent of a municipal electric lighting plant has no implied power to accept for it a shipment of electric apparatus not consigned to him or the municipality.—Southern Express Co. v. B. R. Electric Co. (Ga.) 254.

Acts 1893-94, pp. 201, 219, c. 205, in so far as it provided for the election of a police justice for the city of Staunton by the city council, *held* repealed by Acts 1906, p. 105, c. 106, from the date the latter act took effect.—Wayt v. Glasgow (Va.) 536.

§ 4. Public improvements.

When the city of Atlanta, under Acts 1897, p. 145, decides to repair street, an abutting owner, after the pavement has been laid, assessment made, and execution issued, cannot contest the illegality of the act of the city in deciding to substitute a new pavement for an old one.—*Draper v. City of Atlanta* (Ga.) 929.

*Abutting owner against whom an execution has issued to collect a paving assessment may, by affidavit of illegality, deny that the whole or any part of the amount is due, but he cannot defeat the execution by setting up a demand against the city.—*Draper v. City of Atlanta* (Ga.) 929.

*A city, having the power to collect assessments for benefits for the cost of an improvement, *held* authorized to assess only such parts of the benefits as will pay for the improvement.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

In the exercise of the power conferred on the city of Asheville by its charter (Priv. Laws 1901, p. 255, c. 100, § 65) to levy assessments for benefits for the cost of public improvements, the board of aldermen *held* required to define the limits of the taxing district.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

*Point annotated. See syllabus.

*A municipality, exercising the power to levy assessments for benefits for a public improvement, *held* required to establish a taxing district within which the improvement is to be made and the benefits assessed.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

The Asheville city charter (Priv. Laws 1901, p. 255, c. 100, § 65), relating to assessments for public improvements, *held* objectionable as authorizing the mayor to arbitrarily impose on such persons as he supposes will be affected by an improvement the cost thereof.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

The Asheville city charter (Priv. Laws 1901, p. 255, c. 100, § 65) *held* to confer on the city the power to levy assessments for benefits for the cost of a public improvement.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

*A municipality possessing only the power to levy taxes for municipal purposes cannot impose taxes on property for benefits for the cost of a public improvement.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

*The Legislature in the exercise of the power to impose taxes may authorize the imposition of assessments on property for benefits for the cost of public improvements.—City of Asheville v. Wachovia Loan & Trust Co. (N. C.) 800.

§ 5. Police power and regulations.

Under charter of the City of Forsyth, Acts 1902, p. 431, a sentence imposed by the mayor for violation of an ordinance cannot be increased or diminished on appeal to mayor and aldermen.—Bell v. City of Forsyth (Ga.) 230.

Where defendant on certiorari after conviction of violation of a municipal ordinance makes a defense that the ordinance was not in effect when the offense was committed he must allege the date of the ordinance or other facts fixing the date of the offense anterior to the date of the ordinance.—Bell v. City of Forsyth (Ga.) 230.

On appeal to the mayor and aldermen in a prosecution for violation of a municipal ordinance evidence as to violation of the ordinance by defendant on one or more days different from those alleged in the accusation is admissible.—Bell v. City of Forsyth (Ga.) 230.

In a prosecution for violation of a municipal ordinance the testimony as to its violation must be restricted to the time after which the ordinance went into effect.—Bell v. City of Forsyth (Ga.) 230.

In the absence of an ordinance fixing a period of limitations to a prosecution for violation of an ordinance, mere lapse of time will not bar such prosecution.—Bell v. City of Forsyth (Ga.) 230.

Where a petition for certiorari fails to state the date of the judgment, and the answer to the writ untraversed shows that more than 60 days had elapsed before the certiorari, the writ should be dismissed.—Evans v. City of Forsyth (Ga.) 490.

Where a petition for certiorari complaining that the judgment was rendered on "the — day of — 190—," and that the petition was presented within 30 days from the judgment, and was duly verified and sanctioned, it was sufficient to show prima facie that the application was brought in due time.—Evans v. City of Forsyth (Ga.) 490.

*Before defendant can be convicted of a violation of a city ordinance, it must be shown that the act alleged was within the limits of the city as prescribed by its charter.—Martin v. City of Gainesville (Ga.) 499.

*Point annotated. See syllabus.

*License to operate slot machines *held* not to excuse violation of Sunday law.—Cain v. Daly (S. C.) 110.

§ 6. Use and regulation of public places, property, and works.

*A city has no right to grant a license to conduct a business in the streets, in a small shop on wheels, which has not been moved for months.—Spencer v. Mahon (S. C.) 321.

*Person taking license to conduct business on the streets revocable at will of council *held* to take subject to such revocation.—Spencer v. Mahon (S. C.) 321.

§ 7. Torts.

*A petition in an action against a municipal corporation for injury to a traveler, *held* to state a cause of action.—City Council of Augusta v. Dozier (Ga.) 234.

*A municipal corporation is not civilly liable for failure to pass health ordinances.—Hull v. Town of Roxboro (N. C.) 351.

*A municipal corporation is not civilly liable for failure to enforce health ordinances duly enacted.—Hull v. Town of Roxboro (N. C.) 351.

Where plaintiff failed to take steps to enforce a city ordinance regulating hogpens, etc., as against his neighbor, he was estopped to claim that his injuries from such pens resulted from the city's failure to enforce the ordinance.—Hull v. Town of Roxboro (N. C.) 351.

§ 8. Fiscal management, public debt, securities, and taxation.

Statement of what must be done to secure action by the city before citizens and taxpayers may maintain a suit to enjoin payment by a city under a contract.—Merrimon v. Southern Pav. & Const. Co. (N. C.) 366.

MURDER.

See "Homicide."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 14.

NAMES.

Description of accused in indictment or information, see "Indictment and Information," § 2. Signatures, see "Signatures."

NAVIGABLE WATERS.

§ 1. Rights of public.

*Citizens of a town adjoining a river, and persons operating crafts thereon, had not such an interest in keeping the river open, different from the public at large, as entitled them to sue to restrain the construction of a bridge as a public nuisance.—Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.

*The owner of a sawmill located on a river *held* to have alleged a sufficient interest in keeping the river open for navigation, different from the public at large, so as to entitle him to sue to restrain the construction of the bridge as a public nuisance.—Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.

Evidence *held* insufficient to show that a contemplated drawbridge over a navigable stream would constitute such a nuisance as to justify a preliminary injunction restraining its construction.—Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.

*A drawbridge over a navigable stream does not constitute a nuisance unless it materially

interrupts general navigation.—*Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.*

*The federal and state governments have power to compel the management of a drawbridge over a navigable stream in the interest of public welfare.—*Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.*

*A state has control of its navigable waters; the authority of the general government being cumulative to protect from interference with commerce.—*Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.*

*Circumstances under which a stream may be regarded as a navigable or floatable one determined.—*Hot Springs Lumber & Mfg. Co. v. Revercomb (Va.) 580.*

§ 2. Riparian and littoral rights.

*One floating the logs in a navigable stream was not liable for injuries to a riparian owner from the piling up of the logs on his land if due and ordinary care was used to prevent injury.—*Hot Springs Lumber & Mfg. Co. v. Revercomb (Va.) 580.*

In an action by a riparian owner against a boom company for injuries to plaintiff's land owing to logs piling up on it the declaration held demurrable for failing to charge acts constituting negligence.—*Hot Springs Lumber & Mfg. Co. v. Revercomb (Va.) 580.*

NAVIGATION.

See "Navigable Waters," § 1.

NECESSARIES.

For infants, see "Infants," § 2.

NEGLIGENCE.

Amendment of pleading in action for, see

"Pleading," § 4.

Causing death, see "Death," § 1.

Compensatory damages for, see "Damages," § 1.

Evidence and assessment of damages for, see "Damages," § 3.

Inadequate or excessive damages for, see "Damages," § 2.

Limitations applicable to actions for, see "Limitation of Actions," § 1.

Province of court and jury at trial in action for, see "Trial," § 6.

Validity of release of cause of action for, see "Release," § 1.

By particular classes of persons.

See "Carriers," § 1; "Municipal Corporations," § 7; "Railroads," §§ 7-14; "Street Railroads," § 2.

Employers, see "Master and Servant," §§ 3-12. Telegraph or telephone companies, see "Telegraphs and Telephones," § 1.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See "Animals"; "Bridges," § 2; "Explosives"; "Navigable Waters," § 2; "Railroads," §§ 7-14; "Street Railroads," § 2.

Production, supply, and use of gas, see "Gas."

Contributory negligence.

Of passenger, see "Carriers," § 7.

Of person injured by operation of railroad, see "Railroads," §§ 10, 11.

Of person injured by operation of street railroad, see "Street Railroads," § 2.

Of servant, see "Master and Servant," §§ 8-12.

*Point annotated. See syllabus.

§ 1. Acts or omissions constituting negligence.

*Instruction defining willfulness held not erroneous.—*Talbert v. Charleston & W. C. Ry. (S. C.) 138.*

*Wantonness is properly defined as conscious failure to observe due care and intentional doing of an unlawful act knowing such act to be unlawful.—*Bussey v. Charleston & W. C. Ry. Co. (S. C.) 163.*

*Recklessness is the equivalent of willfulness or intentional wrong.—*Bussey v. Charleston & W. C. Ry. Co. (S. C.) 163.*

*The care required to prevent the infliction of injury determined.—*Chesapeake & O. Ry. Co. v. Farrow's Adm'x (Va.) 569.*

§ 2. Proximate cause of injury.

*Where a disputed issue is as to the observance of proper care by plaintiff, testimony of negligence in a previous isolated instance is irrelevant.—*Pullman Co. v. Schaffner (Ga.) 933.*

An instruction in a personal injury action which instructs that if the jury find certain facts grouped in an instruction there was no negligence, held erroneous unless all the material elements are included.—*Ruffin v. Atlantic & N. C. R. Co. (N. C.) 86.*

Where a defendant specially pleading contributory negligence as required by Revisal of 1905, § 483, offers evidence in support of the plea, the proper practice is to submit such issue.—*Ruffin v. Atlantic & N. C. R. Co. (N. C.) 86.*

*Where a person guilty of negligence should have anticipated that some injury was liable to happen therefrom, he was liable for the injury which proximately resulted.—*Hudson v. Atlantic Coast Line R. Co. (N. C.) 103.*

*Where a complaint specifies the negligence relied on, plaintiff cannot recover on proof of negligence other than that alleged.—*McCoy v. Carolina Cent. R. R. (N. C.) 270.*

Issues held properly submitted in a negligence case.—*Kimberly v. Howland (N. C.) 778.*

*Definition of contributory negligence held not erroneous.—*Cole v. Blue Ridge Ry. Co. (S. C.) 128.*

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial, in criminal prosecutions, see "Criminal Law," § 20; "Homicide," § 7.

NEW TRIAL.

Costs, see "Costs," § 1.

Failure of court at trial to give written instructions as requiring new trial, see "Trial," § 8.

Necessity of motion for purpose of review, see "Appeal and Error," § 4.

Opening or vacating judgment, see "Judgment," § 6.

Remand by appellate court for new trial, see "Appeal and Error," § 29.

In particular actions or proceedings.

For personal injuries, see "Master and Servant," § 12.

In criminal prosecutions, see "Criminal Law," §§ 18-21; "Homicide," § 7.

On certiorari, see "Certiorari," § 1.

Prosecution for forgery, see "Forgery."

Review of proceedings.

Presumptions on appeal or error, see "Appeal and Error," § 21.

§ 1. **Grounds.**

*Where the charge as to a certain issue was substantially correct, mere lack of verbal precision *held* not ground for a new trial.—*Savannah Electric Co. v. Mullikin* (Ga.) 945.

Where the evidence was susceptible of two inferences a new trial will not be granted because the jury disregarded an instruction applicable to one of them only.—*Hasseltine v. Southern Ry. Co.* (S. C.) 142.

*The question as to the weight of evidence is not for the judge on motion for a new trial.—*Rice v. Lockhart Mills* (S. C.) 160.

*Verdicts *held* properly set aside for misconduct of jury.—*McGill Bros. v. Seaboard Air Line Ry.* (S. C.) 216; *Conner v. Same*, *Id.*

Verdict against one joint tort-feasor and not against the other, against whom evidence was the stronger, *held* not ground for setting aside verdict.—*Ruddell v. Seaboard Air Line Ry.* (S. C.) 528.

*The verdict of the jury should not be disturbed by the trial court unless plainly against the weight of the evidence.—*Black's Adm'r v. Virginia Portland Cement Co.* (Va.) 587.

§ 2. **Proceedings to procure new trial.**

Where no error of law was complained of, and a jury found for defendants, and there was evidence to authorize the finding, there was no abuse of discretion in refusing a new trial.—*Lovelady v. Roberts & McClure* (Ga.) 915.

Remarks of judge on motion for new trial *held* not to show erroneous conception as to his authority.—*Ruddell v. Seaboard Air Line Ry.* (S. C.) 528.

NEXT FRIEND.

For infant defendant, see "Infants," § 4.

NOLLE PROSEQUI.

Of indictment, see "Criminal Law," § 5.

NOMINAL DAMAGES.

For delay or failure to deliver telegram, see "Telegraphs and Telephones," § 3.
For trespass, see "Trespass," § 2.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."
On trial, see "Trial," § 5.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

As affecting particular classes of persons.
See "Master and Servant," §§ 3, 9, 11.
Addressee of telegram, see "Telegraphs and Telephones," § 3.
Co-tenants, see "Tenancy in Common," § 1.
Purchaser from trustee, see "Trusts," § 6.
Telegraph company, see "Telegraphs and Telephones," §§ 1, 2.

Of particular facts, acts, or proceedings not judicial.

Assessment by mutual benefit insurance association, see "Insurance," § 14.

*Point annotated. See syllabus.

Cancellation of insurance policy, see "Insurance," § 5.

Loss insured against, see "Insurance," § 10.

Meeting of stockholders, see "Corporations," § 2.
Presentation of claims against decedent's estate, see "Executors and Administrators," § 3.

Renewal of lease or purchase of land, see "Landlord and Tenant," § 3.

Of particular judicial proceedings.

See "Lis Pendens."

Action or process, see "Process," § 2.

Confirmation of report in partition, see "Partition," § 1.

Motion for judgment, see "Judgment," § 4.

Taking of deposition, see "Depositions."
To enforce vendor's lien, see "Vendor and Purchaser," § 3.

NUISANCE.

Construction of railroad as, see "Railroads," § 5.

Obstruction of navigable waters, see "Navigable Waters," § 1.

Operation of railroad as nuisance, see "Railroads," § 7.

§ 1. **Private nuisances.**

Negligent operation of engines and cars over spur track making the house of adjoining owners less valuable as a residence, *held* a nuisance.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

*Jurisdiction of equity to abate nuisance *held* not taken away by a town ordinance claimed to afford an adequate remedy for any inconvenience suffered.—*Herring v. Wilton* (Va.) 546.

*Barking of dogs *held* to constitute a nuisance which equity will abate by injunction.—*Herring v. Wilton* (Va.) 546.

§ 2. **Public nuisances.**

In a suit to restrain a railroad from erecting a warehouse in a city, on the ground that it would prevent a view of the tracks, *held* that the road should be permitted, by taking certain steps to guard against danger, to avoid a perpetual injunction.—*City of Hickory v. Southern Ry.* (N. C.) 840.

*The state is a proper party to a suit to restrain a public nuisance.—*Pedrick v. Raleigh & P. S. R. Co.* (N. C.) 877.

NUNC PRO TUNC.

Entry of decree in partition, see "Partition," § 1.

OBJECTIONS.

For purpose of review, see "Criminal Law," § 25.

To depositions, see "Depositions."

To rulings at trial, see "Criminal Law," § 11; "Trial," §§ 3, 11.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 5.

OBSCENITY.

It is not necessary in an indictment for using obscene language in the presence of a female, to charge that the language was used of or to another.—*Kelly v. State* (Ga.) 482.

Evidence *held* to sustain conviction for using obscene language in presence of female.—*Kelly v. State* (Ga.) 482.

OBSTRUCTIONS.

Of easements, see "Easements," § 1.

OFFER.

Of proof, see "Trial," § 3.

OFFICERS.

Particular classes of officers.

See "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

Bank officers, see "Banks and Banking," § 1.

Corporate officers, see "Corporations," § 3.

Court officers, see "Courts," § 2.

Highway officers, see "Highways," § 2.

Municipal officers, see "Municipal Corporations," § 3.

State officers, see "States," § 1.

OILS.

Oil leases, see "Mines and Minerals," § 1.

Sale of oil lands of infant, see "Guardian and Ward," § 2.

OPENING.

Judgment, see "Judgment," § 6.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 11.

In criminal prosecutions, see "Criminal Law," § 6.

OPINIONS.

Of courts, see "Courts," § 2.

OPTIONS.

To purchase or sell demised premises, see "Landlord and Tenant," § 3.

ORDERS.

Extending time for amendment of pleading, see "Pleading," § 3.

Granting or refusing injunction, see "Injunction," § 4.

Of court, see "Motions."

Review of appealable orders, see "Appeal and Error."

Setting out legal effect in pleading, see "Pleading," § 1.

ORDINANCES.

See "Municipal Corporations," § 7.

Effect on jurisdiction of equity to abate nuisance, see "Nuisance," § 1.

Municipal ordinances, see "Municipal Corporations," §§ 2, 5.

Regulation of street railroads, see "Street Railroads," § 2.

ORGANIZATION.

Of railroad company, see "Railroads," § 2.

OUSTER.

Of co-tenant, see "Tenancy in Common," § 1.

OYER.

In pleading, see "Pleading," § 5.

*Point annotated. See syllabus.

PALACE CARS.

See "Carriers," § 9.

PANEL.

Jury panel, see "Jury," § 3.

PARDON.

Effect of pardon of husband convicted of crime on right of wife to divorce, see "Divorce," § 1.

PARENT AND CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

Abduction of child, see "Abduction," § 1.

Habeas corpus to obtain possession of child, see "Habeas Corpus," § 2.

Marriage of child, see "Marriage."

Survival of cause of action for injuries to child, see "Abatement and Revival," § 1.

*In order to constitute the crime of abandonment, under Pen. Code 1895, § 114, it is necessary not only that the child should be deserted, but left in a destitute condition.—*Williams v. State* (Ga.) 480.

*Where a right of action accrued to a father for injuries to a minor child, it was in the father, though he may have been injured at the same time, and may have lived only a short time thereafter.—*King v. Southern Ry. Co.* (Ga.) 965.

*For negligent injury to a minor causing loss of services, the right of action is in the father, if alive at the time, under Civ. Code 1895, § 3816.—*King v. Southern Ry. Co.* (Ga.) 965.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 10.

PARTICULARS.

Bill of, see "Pleading," § 6.

PARTIES.

Admissions as evidence, see "Evidence," § 6.

Competency as witnesses, see "Witnesses," § 1.

Death ground for abatement, see "Abatement and Revival," § 1.

Effect on parties of dismissal of part of cause of action, see "Dismissal and Nonsuit," § 1.

In actions by or against particular classes of persons.

See "Infants," § 4.

In particular actions or proceedings.

See "Divorce," § 2; "Mandamus," § 1.

For personal injuries, see "Carriers," § 6.

To restrain nuisance, see "Nuisance," § 2.

Review as to parties, and parties to proceedings in appellate courts.

On appeal or writ of error, see "Appeal and Error," § 3.

To conveyances, contracts, or other transactions.
See "Usury," § 1.

§ 1. *New parties and change of parties.*

*Where a petition in an action of tort is brought against two defendants and no service is perfected upon one, it may be amended by striking therefrom the one not served.—*Seaboard Air Line Ry. v. Randolph* (Ga.) 47.

Interpleaders *held* not entitled to withdraw after the filing of papers having material bearing on the case.—*Morrison v. New Haven & Wilkerson Min. Co. (N. C.)* 611.

§ 2. Defects, objections, and amendment.

*Where the presiding judge had announced orally that he would sustain a motion to dismiss but had not signed any judgment to that effect, an amendment to declaration then tendered was not too late.—*Swilley v. Hooker (Ga.)* 31.

Motion to amend declaration *held* improperly refused.—*Swilley v. Hooker (Ga.)* 31.

*After a petition has been amended by striking therefrom one of the defendants named therein, the ground of demurrer alleging a misjoinder of defendant presents no question for consideration.—*Seaboard Air Line Ry. v. Randolph (Ga.)* 47.

*Where an action by heirs against the administrator for a settlement was pending for years, and there was no objection that the action was brought by them instead of by them on the relation of the state, the objection was waived.—*Mann v. Baker (N. C.)* 102.

*The court may in its discretion allow plaintiffs, suing an administrator for a settlement, to amend so as to make the action one brought by plaintiffs on the relation of the state.—*Mann v. Baker (N. C.)* 102.

PARTITION.

§ 1. Actions for partition.

No exceptions to a report of commissioners in partition having been filed during the succeeding term of court, plaintiff *held* entitled to a decree of confirmation as a matter of law.—*Roberts v. Roberts (N. C.)* 721.

Where a partition proceeding begun in 1887 and transferred to the superior court was regarded as pending, under Acts 1887, p. 518, c. 276, when plaintiff applied for confirmation of the commissioners' report in 1906, defendant was not entitled to a special notice of such application.—*Roberts v. Roberts (N. C.)* 721.

Where plaintiff in partition was entitled to a decree confirming a commissioners' report in 1887, a decree confirming the report entered in term time in 1906 should be considered as entered *nunc pro tunc*.—*Roberts v. Roberts (N. C.)* 721.

Where no exception was filed to the report of commissioners in partition appointed under a consent decree within 20 days after the report was filed, it stood confirmed without formal decree, under Code 1883, § 1896.—*Roberts v. Roberts (N. C.)* 721.

A valuation by commissioners in partition will not be set aside because of the unsecured bid of one not a party to the action, of a material advance.—*Aldrich v. Aldrich (S. C.)* 887.

The circuit court will not set aside the valuation put by commissioners, in partition, on lands to be divided, unless it is so gross and unequal as to warrant an inference of unfair or improper motives.—*Aldrich v. Aldrich (S. C.)* 887.

PARTNERSHIP.

Docket for trial of action for breach of partnership contract, see "Trial," § 1.

§ 1. The relation.

*Agreement construed, and *held* to constitute a partnership.—*Price v. Middleton & Ravenel (S. C.)* 156.

*Point annotated. See syllabus.

PASSENGERS.

See "Carriers," §§ 3-9.

PATENT MEDICINES.

Regulations of interstate commerce, see "Commerce," § 1.

PATENTS.

For public lands, see "Public Lands," § 1.

PAYMENT.

See "Accord and Satisfaction"; "Compromise and Settlement."

Part payment as affecting operation of statute of frauds, see "Frauds, Statute of," § 5.

Restraining payment, see "Injunction," § 2.

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Costs," § 2; "Fines"; "Insurance," §§ 1, 12, 14.

Charges for transmission of telegram, see "Telegraphs and Telephones," § 1.

Municipal debts, see "Municipal Corporations," § 8.

Price of land sold, see "Vendor and Purchaser," § 2.

Township bonds, see "Town," § 1.

§ 1. Application.

*A surety on a bond for a part of the purchase price *held* not entitled to the benefit of the excess of the cash payment over that called for in the contract of purchase.—*Sipe v. Taylor (Va.)* 542.

§ 2. Pleading, evidence, trial, and review.

In assumpsit evidence *held* to sustain plea of payment.—*Kinsey v. Carr (W. Va.)* 1004.

§ 3. Recovery of payments.

*Where plaintiff had been sued as surety on a forthcoming bond on levy of execution on a void judgment, and judgment was rendered against him and the principal by a court which had no legal existence, and he voluntarily paid the amount due, and the first-mentioned judgment was based on a valid debt, it was not error, in an action for money had and received, to enter judgment for defendant.—*Strange v. Franklin (Ga.)* 943.

PENALTIES.

For wrongful issuance of marriage license, see "Marriage."

Jurisdiction of justice of action to recover, see "Justices of the Peace," § 2.

PENDENCY OF ACTION.

Effect as to property involved, see "Lis Pendens."

Effect on limitation of other action, see "Limitation of Actions," § 1.

PERFORMANCE.

Of contract of employment, see "Master and Servant," §§ 1, 2.

Of contract for sale of realty, see "Vendor and Purchaser," §§ 1, 2.

PERSONAL INJURIES.

Particular causes or means of injury.

See "Explosives"; "Negligence."
Operation of railroads, see "Railroads," §§ 10, 11; "Street Railroads," § 2.

Particular classes of persons injured.

Employé, see "Master and Servant," §§ 3-12.
Married woman, see "Husband and Wife," § 3.
Passenger, see "Carriers," §§ 5-7.
Person on or near track, see "Railroads," § 12.
Traveler on highway, see "Municipal Corporations," § 7.
Traveler on highway crossing railroad, see "Railroads," § 11.

Remedies.

Action for loss of services of child caused by, see "Parent and Child."
Amendment of pleading, see "Pleading," § 4.
Applicability of instructions to case, see "Trial," § 9.
Argument and conduct of counsel at trial, see "Trial," § 4.
Bill of particulars, see "Pleading," § 6.
Compensatory damages, see "Damages," § 1.
Construction and effect of instruction, see "Trial."
Evidence and assessment of damages, see "Damages," § 3.
Form and sufficiency of instructions, see "Trial," § 8.
Harmless error, see "Appeal and Error," § 25.
Inadequate or excessive damages, see "Damages," § 2.
Province of court and jury at trial, see "Trial," § 6.
Questions considered on appeal or error, see "Appeal and Error," § 19.
Release of action for, see "Release," § 1.
Requests for instructions, see "Trial," § 10.
Special interrogatories and findings, see "Trial," § 14.
Survival of cause of action, see "Abatement and Revival," § 1.

PERSONAL PROPERTY.

See "Property."

PETITION.

For injunction, see "Injunction," §§ 1, 3.
For relocation of county seat, see "Counties," § 1.

PHYSICIANS AND SURGEONS.

As experts, see "Evidence," § 11.

PLEA.

In civil actions, see "Equity," § 2.
In criminal prosecution, see "Criminal Law," § 5.

PLEADING.

Applicability of instructions to pleadings, see § 9.
Pleadings to sustain judgment, see "Judgment," § 1.

Allegations as to particular facts, acts, or transactions.

See "Accord and Satisfaction"; "Estoppel," § 2.
Statute of frauds, see "Frauds, Statute of," § 6.

In actions by or against particular classes of persons.

See "Brokers," § 2.
Bank officers, see "Banks and Banking," § 1.

In particular actions or proceedings.

See "Divorce," § 2; "Ejectment," § 2; "Equity," § 2; "Injunction," §§ 1, 3; "Negligence," § 2; "Reformation of Instruments," § 1; "Trespass," § 2.

For accounting by personal representatives, see "Executors and Administrators," § 5.

For breach of contract for support of bastard, see "Bastards," § 1.

For breach of warranty, see "Sales," § 8.

For compensation of broker, see "Brokers," § 2.

For death or injuries to servant, see "Master and Servant," § 10.

For injuries from defect in bridge, see "Bridges," § 2.

For injuries to property caused by operation of railroad, see "Railroads," § 7.

For negligence of bank officers, see "Banks and Banking," § 1.

For new trial in criminal prosecution, see "Criminal Law," § 21.

For personal injuries, see "Carriers," § 6;

"Railroads," § 11; "Street Railroads," § 2.

For price of goods, see "Sales," § 7.

Indictment or criminal information or complaint, see "Indictment and Information."

In justices' courts, see "Justices of the Peace," § 3.

On mutual benefit insurance certificate, see "Insurance," § 14.

Pleas in criminal prosecutions, see "Criminal Law," § 5.

To recover price paid for land, see "Vendor and Purchaser," § 4.

Review of decisions and pleading in appellate courts.

Assignment of errors in rulings, see "Appeal and Error," § 16.

Objections to rulings for purpose of review, see "Appeal and Error," § 4.

Scope of review as dependent on issues raised by pleadings, see "Appeal and Error," § 4.

§ 1. Form and allegations in general.

*Where pleadings do not make distinct and positive allegations, but are ambiguous or couched in alternative expressions, they will be given that construction on demurrer which is most favorable to the pleader.—*Baggett v. Edwards* (Ga.) 250.

*Setting out legal effect of rules, orders, and requirements of railroad company in declaration held sufficient.—*Southern Ry. Co. v. Simmons* (Va.) 459.

§ 2. Declaration, complaint, petition, or statement.

*The declaration held required to state facts relied on as constituting a cause of action with certainty so as to be understood by defendant, the jury, and court.—*Lane Bros. Co. v. Seaford* (Va.) 556.

§ 3. Demurrer or exception.

*Where a judge sustained a special demurrer to a paragraph of a petition with leave to amend in 10 days, and no amendment was offered, the petition stood as if no such paragraph were contained therein.—*Blackwell v. Ramsey-Brisben Stone Co.* (Ga.) 968.

Allowing defendant additional time within which to file an amendment to plea held not error.—*Lovelace v. Browne* (Ga.) 1041.

*The court having rendered a judgment sustaining a special demurrer to the plea and allowing time for filing an amendment, a subsequent order extending the time prevented said

*Point annotated. See syllabus.

judgment from becoming conclusive as against the defendants until after the expiration of such time.—*Lovelace v. Browne* (Ga.) 1041.

Effect of ruling sustaining demurrer as res judicata held not to be considered when not presented by pleadings.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

*After sustaining a demurrer to a counterclaim, the allowance of an amendment designed to perfect the same is within the discretion of the trial court.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (S. C.) 768.

*Objection that count of declaration states two separate and distinct causes of action held not to be taken by demurrer.—*Southern Ry. Co. v. Simmons* (Va.) 459.

§ 4. Amended and supplemental pleadings and replender.

*Petition for injuries to servant held to sufficiently allege neglect on the part of defendant so as to authorize an amendment amplifying such allegation as to negligence.—*Blackwell v. Ramsey-Brisben Stone Co.* (Ga.) 968.

Whether or not a paragraph in a petition was subject to the objection that it contained allegations both as to freedom from negligence of the plaintiff and negligence of defendant, where no such objection was made, an amendment amplifying the statement of negligence was germane.—*Blackwell v. Ramsey-Brisben Stone Co.* (Ga.) 968.

*The petition held amendable by addressing it to the superior court of B. county and changing "J. F. Parish" in the second paragraph to "J. F. Davis," under Civ. Code 1895, §§ 5098, 5107.—*Parish v. Davis* (Ga.) 1032.

§ 5. Profert, oyer, and exhibits.

As profert cannot be made nor oyer demanded of an unsealed instrument, such a paper cannot be made a part of the pleadings by the reading of the note as the oyer demanded.—*Anderson v. Prince* (W. Va.) 656.

§ 6. Bill of particulars and copy of account.

*In action for injuries caused by striking of wagon driven by plaintiff by a street car, held not error to refuse to require a bill of particulars.—*Blue Ridge Light & Power Co. v. Tutwiler* (Va.) 539.

§ 7. Motions.

*Where petition contains two or more counts and each sets forth a separate cause of action, plaintiff will not be required to elect.—*Southern Ry. Co. v. Chambers* (Ga.) 37.

PLEDGES.

Holder of note as collateral security as bona fide purchaser, see "Bills and Notes," § 2.

POISONS.

Conviction of offense included in that charged in prosecution for murder by poisoning, see "Indictment and Information," § 6.

Homicide by poisoning, see "Homicide," § 5.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 5.

Regulations as to practice of law, see "Attorney and Client," § 1.

POLICY.

Of insurance, see "Insurance."

*Point annotated. See syllabus.

POLITICAL RIGHTS.

See "Constitutional Law," § 3.

POSSESSION.

See "Adverse Possession."

To sustain action to quiet title, see "Quieting Title," § 1.

To sustain suit restraining trespass on land, see "Injunction," § 2.

POST OFFICE.

Delay of mails as excuse for failure to file brief on appeal or error, see "Appeal and Error," § 17.

Notice by mail of insurance assessment, see "Insurance," § 14.

POWERS.

Creation by will, see "Wills," § 3.

Of attorney, see "Principal and Agent."

Of sale in mortgage, see "Mortgages," § 3.

§ 1. Construction and execution.

*Where the donee of a power of sale, who has no legal interest individually, executes, without reference to the power, a fee-simple deed to land covered by it, the deed held an execution of the power.—*J. A. Middlebrooks & Co. v. Ferguson* (Ga.) 34.

*Where title to land is conveyed to secure a debt, and the instrument is not merely a mortgage, a power of sale for failure to make payment is a power coupled with an interest, and is not revoked by the death of the debtor.—*Baggett v. Edwards* (Ga.) 250.

Execution of a power of sale held not a suit against an administrator, so as to require a delay of 12 months before action can be taken.—*Baggett v. Edwards* (Ga.) 250.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Divorce," § 2; "Ejectment"; "Habeas Corpus," § 2; "Mandamus," § 3; "Replevin"; "Trespass," § 2.

Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Bail," § 1; "Continuance"; "Costs"; "Damages," § 3; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Trial"; "Venue."

Nonsuit, see "Trial," § 5.

Revival of judgment, see "Judgment," § 12.

Verdict, see "Trial," § 14.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law."

For offenses against liquor laws, see "Intoxicating Liquors," § 4.

Procedure in exercise of special or limited jurisdiction.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 3.

Procedure on review.

See "Appeal and Error"; "Certiorari," § 1;
"Exceptions, Bill of"; "Justices of the Peace,"
§ 4; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 1.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," §§ 24-28.

PRELIMINARY INJUNCTION.

See "Injunction," § 4.

PREMIUMS.

Insurance premiums, see "Insurance," §§ 1, 3.

PRESCRIPTION.

Acquisition of rights, see "Adverse Possession," § 1.

PRESENTMENT.

By grand jury, see "Indictment and Information."

Of claims against estate of decedent, see "Executors and Administrators," § 3.

PRESUMPTIONS.

As to husband's agency for wife, see "Husband and Wife," § 2.

As to meeting of stockholders, see "Corporations," § 2.

In civil actions, see "Evidence," § 2.

In criminal prosecutions, see "Homicide," § 5.

On appeal or error, see "Appeal and Error," § 21.

PRINCIPAL AND AGENT.

Admissions by agent, see "Evidence," § 6.

Compensation of agent working without special contract, see "Work and Labor."

Form and sufficiency of instructions as to rights acquired from agent, see "Trial," § 8.

Husband as agent of wife, see "Husband and Wife," § 2.

Parol evidence to explain contract of agency, see "Evidence," § 10.

Agency in particular relations, offices, or occupations.

See "Attorney and Client"; "Brokers."

Corporate agents, see "Corporations," § 3.

Insurance agents, see "Insurance," § 1.

Of telegraph company, see "Telegraphs and Telephones," § 1.

§ 1. Mutual rights, duties, and liabilities.

*Where a person acts as agent without authority, but his acts are ratified, he is entitled to compensation.—Ice v. Maxwell (W. Va.) 899.

*To entitle an agent to recover for services rendered, it is not necessary to show an express request.—Ice v. Maxwell (W. Va.) 899.

§ 2. Rights and liabilities as to third persons.

*A railway company held liable to one who goes to a depot to deal with the depot agent as to matters connected with the business of the company, and is insulted by the agent.—Southern Ry. Co. v. Chambers (Ga.) 37.

*Point annotated. See syllabus.

*Where a depot agent, knowing of contracts of drayman willfully and maliciously refused to deliver to the drayman the goods of contracting merchants, notwithstanding orders to that effect, whereby the drayman was damaged in his business, the railroad company was liable therefor.—Southern Ry. Co. v. Chambers (Ga.) 37.

A buyer held not entitled to refuse to pay the price and retain the goods on the ground that he is entitled thereto upon a prior agreement with the agent of the seller, where such agreement was not disclosed to the seller at the time possession was obtained, and was in no way assented to by him.—Susong v. McKenna (Ga.) 238.

Authority of the clerk of the superior court to collect costs for the sheriff did not include authority to release plaintiff and charge the costs to another.—Board of Education of Tennille v. Kelley (Ga.) 238.

Facts held not to show authority in agent to draw on his principal and have draft cashed.—Bank of Morganton v. Hay (N. C.) 811.

Agreement to sell goods as agent, title to remain in principal, must be recorded, under Civ. Code 1902, § 2655.—Armour & Co. v. Ross (S. C.) 315.

PRINCIPAL AND SURETY.

See "Bail"; "Bonds."

Estoppel of surety on bond to assert lien, see "Estoppel," § 2.

Liabilities of sureties on bonds for performance of duties of office or trust, see "Guardian and Ward," § 4.

Release of lien of judgment against surety, see "Judgment," § 10.

Rights of surety as to payments, see "Payment," § 1.

Subrogation of surety to rights of creditor, see "Subrogation."

Sureties on bonds on appeal from justice's court, see "Justices of the Peace," § 4.

§ 1. Discharge of surety.

A person, becoming a surety for a purchaser at a judicial sale, held bound by the decree confirming the sale, though the contract of suretyship is changed thereby.—Sipe v. Taylor (Va.) 542.

Heirs of surety on being sued for the amount of the surety's liability, held not entitled to escape liability on the theory that the terms of the contract of suretyship were changed without the consent of the surety.—Sipe v. Taylor (Va.) 542.

PRIORITIES.

Of location of railroad, see "Railroads," § 3.

Of mortgages, see "Mortgages," § 2.

PRIVATE NUISANCE.

See "Nuisance," § 1.

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGE.

Effect on limitation, see "Limitation of Actions," § 1.

Of married women, see "Husband and Wife," § 1.

Of witness as to testimony, see "Witnesses," § 2.

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 1.

PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 1, 3.

PROBATE.

Of will, see "Wills," § 2.

PROCESS.

Amendment of, pending appeal, see "Appeal and Error," § 5½.

Effect of appearance, see "Appearance."

Jurisdiction of courts in general as affected by, see "Courts," § 1.

Malicious abuse of process see "Malicious Prosecution," § 3.

In particular actions or proceedings.

For damages for taking of or injury to property in exercise of right of eminent domain, see "Eminent Domain," § 4.

In justices' courts, see "Justices of the Peace," § 3.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Replevin."

§ 1. Nature, issuance, requisites, and validity.

A summons was not invalid because directed "to the defendant," who was named in the caption but not in the body of the summons.—*Glenn v. Augusta Drug Co. (Ga.)* 1032.

Under Revisal 1905, §§ 429, 430, 442, an action must be commenced by issuing a summons except where defendant cannot be personally served, when it must be commenced by the affidavit showing that fact, followed by publication.—*Peters Grocery Co. v. Collins Bag Co. (N. C.)* 90.

*An alias summons held properly quashed because issued after the cause was stricken from the docket.—*Park Land & Imp. Co. v. Lane (Va.)* 690.

When setting aside the default decree held that the court should have set aside the prior decree striking the case from the docket, and this left plaintiff free to sue out an alias summons.—*Park Land & Imp. Co. v. Lane (Va.)* 690.

§ 2. Service.

*To obtain jurisdiction of defendant there must be a legal return of service of process.—*Albright-Prior Co. v. Pacific Selling Co. (Ga.)* 251.

*Revisal 1905, § 442, relating to the service of process by publication, held to require inability to find defendant within the state to be established by affidavit.—*Peters Grocery Co. v. Collins Bag Co. (N. C.)* 90.

Publication notice held to contain sufficient allegations to show a cause of action against defendant.—*Lemly v. Ellis (N. C.)* 629.

Affidavit for order of publication held to set out a cause of action in sufficient compliance with Code, § 218 (Revisal 1905, § 442).—*Lemly v. Ellis (N. C.)* 629.

*Under Code 1904, §§ 3230-3232, in an action for specific performance of a contract to convey land, brought against the vendor's executor and heirs, the nonresident executor was properly served by publication.—*Clem v. Given's Ex'r (Va.)* 567.

*Point annotated. See syllabus.

Jurisdiction of defendant held not obtained where there was no personal service and the substituted service on defendant's wife was not good, though defendant received from her the copy of the summons left with her.—*Park Land & Imp. Co. v. Lane (Va.)* 690.

*Where a return of service of summons is sufficient on its face, facts stated therein as it was the duty of the officer to set forth cannot be put in issue by plea in abatement or motion to set aside a judgment by default.—*Talbott v. Southern Oil Co. (W. Va.)* 1009.

§ 3. Defects, objections, and amendment.

Refusal on conflicting evidence of amendment of return on summons after it had become a matter of record held not to be disturbed.—*Park Land & Imp. Co. v. Lane (Va.)* 690.

§ 4. Abuse of process.

*Malicious prosecution and abuse of process distinguished.—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. (N. C.)* 422.

*Plaintiff in attachment held not liable for abuse of process because of levy on an excessive quantity of property, he not having directed, advised, or encouraged it.—*Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. (N. C.)* 422.

PROCESSIONING.

See "Boundaries," § 2.

PROFERT.

In pleading, see "Pleading," § 5.

PROFITS.

Requirements of statute of frauds as to contract for payment of profits, see "Frauds, Statute of," § 3.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of loss insured against, see "Insurance," § 10.
Of service of process, see "Process," § 2.

PROPERTY.

Constitutional guaranties of rights of property, see "Constitutional Law," §§ 4, 9.

Rules of property as stars decisia, see "Courts," § 2.

Particular species of property.

See "Animals"; "Logs and Logging"; "Mines and Minerals."

Remedies involving or affecting property.

Protection of rights of property by injunction, see "Injunction," § 2.

Transfers and other matters affecting title.

See "Adverse Possession."

Intermixture, see "Confusion of Goods."

Taking for public use, see "Eminent Domain."

The rule as to the right of one deprived of property by actionable fraud to recover the same so long as it can be traced stated.—*Singer Mfg. Co. v. Summers (N. C.)* 522.

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 6.
In criminal prosecutions, see "Criminal Law," § 13.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.
Of death or injury of servant, see "Master and Servant," §§ 9, 12.
Of injury, see "Negligence," § 2.
Of injury from operation of railroad, see "Railroads," § 14.
Of loss or injury from delay or failure to deliver telegram, see "Telegraphs and Telephones," § 2.

PUBLIC DEBT.

See "Municipal Corporations," § 8; "Towns," § 1.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 4.

PUBLIC LANDS.

§ 1. **Disposal of lands of the states.**
An exception in a patent to state land held not invalid for uncertainty of identification.—*East Lake Lumber Co. v. East Coast Cedar Co.* (N. C.) 304.

The recital in the body of a grant from the state, as recorded, of the affixing of the seal of the state held sufficient evidence of its regularity.—*Broadwell v. Morgan* (N. C.) 340.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Criminal Law," § 30.
Fines, see "Fines."

PUNITIVE DAMAGES.

See "Damages," § 3.
Applicability of instructions as to, to case, see "Trial," § 9.
Construction and effect of instruction as to, see "Trial," § 12.
For delay or failure to deliver telegram, see "Telegraphs and Telephones," § 3.
For malicious prosecution, see "Malicious Prosecution," § 3.
Form and sufficiency of instruction as to, see "Trial," § 8.

QUALIFICATION.

Of jurors, see "Jury," § 5

QUANTUM MERUIT.

See "Work and Labor."

QUARANTINE.

Duty of carrier to give notice of to passenger, see "Carriers," § 4.

QUASHING.

Indictment or information, see "Indictment and Information," §§ 3, 4.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 5.
In criminal prosecutions, see "Criminal Law," § 13.

QUIETING TITLE.

Cancellation of instrument in suit to quiet title, see "Cancellation of Instruments," § 1.

§ 1. Right of action and defenses.

*One in actual possession of land under superior title may bring suit to remove a cloud arising from a claim under color of title by another under an inferior adverse title.—*Whitehouse v. Jones* (W. Va.) 730.

*Where in ejectment judgment has been rendered for one of the parties, and the claimant of the adversary title still claims notwithstanding the judgment, the successful owner may sue to quiet title and possession.—*Whitehouse v. Jones* (W. Va.) 730.

*A bill to remove a cloud on the legal title to land cannot be maintained by one out of possession.—*Poling v. Poling* (W. Va.) 993.

§ 2. Proceedings and relief.

Equity, having jurisdiction to remove a cloud, may, as incident to the relief, enjoin the cutting of timber by claimant under the bad title.—*Whitehouse v. Jones* (W. Va.) 730.

RAILROADS.

See "Street Railroads."

Adverse possession of right of way, see "Adverse Possession," § 1.

As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."

Construction and effect of instruction in action for injuries caused by operation of, see "Trial," § 12.

Construction of buildings constituting nuisance, see "Nuisance," § 2.

Construction of constitutional provisions relating to issuance of mileage books, see "Constitutional Law," § 1.

Corporate meeting of stockholders to lease railroad, see "Corporations," § 2.

Denial of mandamus as bar to other proceeding against railroad, see "Judgment," § 8.

Easements of right of way, see "Easements," § 1.

Exercise of right of eminent domain, see "Eminent Domain," §§ 1, 2.

Ground of injunction against railroad company, see "Injunction," § 1.

Harmless error in action for injuries from fire caused by operation of, see "Appeal and Error," §§ 25, 26.

Laws providing for issuance of mileage books as denial of due process of law, see "Constitutional Law," § 9.

Liabilities of for acts of agents, see "Principal and Agent," § 2.

Limitations applicable to action for damages for negligent construction of, see "Limitation of Actions," § 1.

Mandamus to compel application to townships of railroad taxes, see "Mandamus," § 1.

Operation of, as creating nuisance, see "Nuisance," § 1.

Ratification by corporation of lease of railroad, see "Corporations," § 3.

Regulations of interstate commerce, see "Commerce," § 1.

*Point annotated. See syllabus.

Restraining laying of track, see "Injunction," § 4.

Running trains on Sunday, see "Sunday."

Taxation of, see "Taxation," § 2.

Time for performance of contract with, see "Contracts," § 2.

Validity of release for injuries caused by operation of railroad, see "Release," § 1.

§ 1. Control and regulation in general.

A corporation commission *held* not authorized to make any order affecting the running of the trains over the line of a company not a party to the proceedings.—Winchester & S. R. Co. v. Commonwealth (Va.) 692.

§ 2. Railroad companies.

*The failure of the railway company to organize under an act authorizing its organization within the time prescribed therein does not prevent a valid organization thereafter, unless a forfeiture has been declared on proceedings instituted by the state.—Seaboard Air Line R. Co. v. Olive (N. C.) 263.

§ 3. Location of road, termini, and stations.

The successor to the road and franchise or an original railroad company locating and constructing such road is governed as to relocation by the law applying to its predecessor.—Brown v. Atlantic & B. Ry. Co. (Ga.) 24.

*Civ. Code 1895, § 2171, does not authorize a railroad company, organized under the general law, after having constructed and put in operation its road, to tear up a section thereof 19 miles in length and relocate the same.—Brown v. Atlantic & B. Ry. Co. (Ga.) 24.

*A railroad company with power to choose its road between designated termini, after it has exercised its discretion, cannot change its location without express legislative authority.—Brown v. Atlantic & B. Ry. Co. (Ga.) 24.

*Location of union depot ordered by Corporation Commission *held* not to be restrained because beyond the city limits.—Dewey v. Atlantic Coast Line (N. C.) 292.

*Erection of union depot and necessary changes of railroad lines *held* not to be enjoined because causing injury to the business of plaintiffs.—Dewey v. Atlantic Coast Line (N. C.) 292.

Revisal 1905, § 1097, subsec. 3, *held* to confer on railroads the right to make such changes in their line as are necessary to make a union depot erected by order of the Corporation Commission available to the traveling public.—Dewey v. Atlantic Coast Line (N. C.) 292.

*Revisal 1905, § 2573, relating to change of railroad route in city, *held* to apply only where railroad of its own volition contemplates change, and not where change is ordered by Corporation Commission.—Dewey v. Atlantic Coast Line (N. C.) 292.

*Acts of a street railway *held* to constitute a prior location of a right of way between two towns, as against a railroad company seeking to occupy the same right of way.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

*Prior location and adoption of a right of way *held* to determine the right to such right of way as between two corporations.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

A specific right granted by the franchise of a railroad to condemn an abandoned right of way, does not authorize it to condemn an abandoned right of way on which there is a prior location by a street railway.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

*The requirement of Revisal 1905, § 2600, as to the filing of rights of way with the corporation commission, *held* not to require such a filing as an essential to a completed location of a right of way as against another company.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

The entry of an engineer and a survey *held* not essential to a complete location of a well-defined right of way.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

Railroad charter construed, and *held* to authorize the railroad company to cross a river on a bridge constructed not necessarily "above," but "above or near," the town of Washington.—Pedrick v. Raleigh & P. S. R. Co. (N. C.) 877.

Injunction to restrain location of right of way over lands for logging road, *held* properly denied.—Marion County Lumber Co. v. Tilghman Lumber Co. (S. C.) 337.

*Charter of a railroad company and its amendment (Act Feb. 26, 1877, Acts 1876-77, p. 95, c. 110) *held* to authorize it to run to its terminal point either over its own line to be constructed, or over a connecting line.—Winchester & S. R. Co. v. Commonwealth (Va.) 692.

*The duty of running trains to a terminal point, imposed by the acceptance of a charter and its amendment (Act Feb. 26, 1877, Acts 1876-77, p. 95, c. 110) *held* not to be disregarded because such performance would involve a financial loss.—Winchester & S. R. Co. v. Commonwealth (Va.) 692.

§ 4. Right of way and other interests in land.

*Under Revisal 1905, § 388 (Rev. Code, c. 65, § 23), the possession by individuals of the land covered by a railroad right of way *held* not to operate as a bar to, or the basis for a presumption of, abandonment by the railroad of its right of way.—Seaboard Air Line R. Co. v. Olive (N. C.) 263.

Under Priv. Acts 1862-63, p. 30, c. 26, § 9, an owner not applying for the assessment of the value of land taken by a railroad for its right of way within two years after finishing the track *held* to give to the railroad a right of way, though it may continue to construct sidetracks, etc.—Seaboard Air Line R. Co. v. Olive (N. C.) 263.

*Under Rev. Code, c. 61, a grant of a right of way to a railroad company *held* to grant to it an easement in a right of way 100 feet in width.—Seaboard Air Line R. Co. v. Olive (N. C.) 263.

The general power of condemnation in a railroad franchise *held* insufficient to authorize the condemnation of a right of way already located by a street railway.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

Where a railroad company acquires a right of way by use for two years, it also acquires the right to drain such right of way without unnecessary injury to adjoining lands.—Parks v. Southern Ry. Co. (N. C.) 701.

§ 5. Construction, maintenance, and equipment.

In an action against a railroad for injuries from the construction of a spur track, question to be determined *held* to be whether the railroad maintained a nuisance on a lot adjoining plaintiff's lot.—Thomason v. Seaboard Air Line Ry. (N. C.) 198.

§ 6. Sales, leases, traffic contracts, and consolidation.

Acts 1848-49, p. 138, c. 82, incorporating the North Carolina Railroad, *held* to authorize it to make a valid lease of its franchise and prop-

*Point annotated. See syllabus.

erty to another railroad company.—*Hyll v. Atlantic & N. C. R. Co.* (N. C.) 854.

A provision in a railroad lease obligating the lessee not to raise local freight tariffs *held* a covenant, the breach of which did not entail a forfeiture of the lease, but rather an action for damages.—*Hill v. Atlantic & N. C. R. Co.* (N. C.) 854.

*A railroad charter and its amendment (Act Feb. 26, 1877, Acts 1876-77, p. 95, c. 110), accepted by the lessee and practical owner of the road, *held* to require such lessee to run trains to the terminus, though the original company was not able to do so.—*Winchester & S. R. Co. v. Commonwealth* (Va.) 692.

§ 7. Operation—Duty to operate.

In determining damages from operation of railroad, depreciation in value of property, inconvenience, discomfiture, and unpleasantness sustained *held* properly considered.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

Where a jury found that construction and operation of a railroad was negligent, consideration of injuries to furniture in house of adjoining owners from cinders and smoke, *held* proper in determining damages.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

*Negligent operation of engines and cars over spur track making the house of adjoining owners less valuable as a residence, *held* a nuisance.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

*Where a railroad company negligently permitted its cars to run off a spur track and knock down the fence of adjoining owners, the railroad was liable for the damage to the fence.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

*Operation of spur track by a railroad outside its right of way, endangering adjoining owners and their property, *held* a nuisance for which the railroad company was liable.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 198.

Abutting owner's right as against a railroad for injuries caused by its use of its right of way, *held* not affected by an increased use due to consolidation of the company with other companies.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 205.

Complaint *held* in legal effect to allege that the use of tracks by a railroad for the purposes set out therein constitute as a matter of law a wanton and negligent nuisance.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 205.

*Use by a railroad of a right of way *held* not a nuisance though injuring an adjoining owner because of noise, smoke, cinders, and vibration incident to such use.—*Thomason v. Seaboard Air Line Ry.* (N. C.) 205.

§ 8. — Statutory, municipal, and official regulations.

*Act Cong. March 2, 1893, c. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174] *held* to require use of couplers that can be coupled as well as uncoupled, without men going between the ends of the cars.—*Southern Ry. Co. v. Simmons* (Va.) 459.

§ 9. — Companies and persons liable for injuries.

If plaintiff's husband was killed by the negligence of a certain railroad company, it will be responsible whether he was killed on the track of such railroad company or on the track of some other railroad company.—*Seaboard Air Line Ry. v. Randolph* (Ga.) 47.

*A railroad company *held* liable under Acts 1902, p. 1152, for an injury to an employé of its lessee caused by the negligence of the lessee

in operating the road.—*Reed v. Southern Ry. —Carolina Division* (S. C.) 218.

§ 10. — Injuries to licensees or trespassers in general.

*Defendant railroad company *held* guilty of negligence in cutting a car loose on a down grade and sending the same against other cars on the yard track of an oil mills company.—*Hudson v. Atlantic Coast Line R. Co.* (N. C.) 103.

*Intestate, an employé of an oil mills company, killed by being crushed between the rear car on his employer's switch track and a bumping post by the negligence of a railroad company in switching another car onto the track without warning, etc., *held* not guilty of contributory negligence as a matter of law.—*Hudson v. Atlantic Coast Line R. Co.* (N. C.) 103.

*The failure of a railway company to object to persons going into its trains at a station to make purchases from a news agent did not create more than a permissive license to do so.—*Peterson v. South & W. R. R.* (N. C.) 618.

*A railway company *held* not liable to one who went into a train to purchase fruit from a news agent, for his injury resulting from being thrown from a car by the jerking of the train.—*Peterson v. South & W. R. R.* (N. C.) 618.

In a personal injury action, the doctrine of the last clear chance *held* inapplicable.—*Baltimore & O. R. Co. v. Lee* (Va.) 1.

§ 11. — Accidents at crossings.

A petition alleging that plaintiff was killed by the running of a train of defendants by being struck by their engine *held* to state a cause of action.—*Seaboard Air Line Ry. v. Randolph* (Ga.) 47.

*In an action for injuries at a railroad crossing, evidence *held* to require submission to the jury of the issue of defendant's negligence.—*Williams v. Southern Ry. Co.* (Ga.) 948.

In an action for injuries to a pedestrian crossing the track at a pathway used by the public with the knowledge of the railroad company, it was error to charge that it is not lack of ordinary care to fail to keep a lookout for persons on the track not at a public crossing.—*Shaw v. Georgia R. R.* (Ga.) 980.

An instruction to find for plaintiff against either the railroad company or the engineer in charge of its train *held* properly refused as placing on plaintiff a burden heavier than that imposed by law.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

*Whether defendant railroad company and its engineer were negligent in running its train, and whether that negligence was the proximate cause of plaintiff's injuries, was a question for the jury, so that it was not error to refuse to charge that before plaintiff could recover it must appear that the injury was inflicted by the willful misconduct of the defendants.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

An instruction authorizing the jury to infer negligence from a car approaching a crossing without a man on the end of it *held* proper.—*Wilson v. Atlantic Coast Line* (N. C.) 257.

*To kick cars over a much used crossing *held* negligence.—*Wilson v. Atlantic Coast Line* (N. C.) 257.

*A traveler approaching a railway crossing *held* required, on discovering the absence of the flagman, to exercise ordinary care for his own protection.—*Hodgin v. Southern Ry. Co.* (N. C.) 413.

*Punitive damages *held* recoverable under Code 1902, § 2139, on failure to give signals re-

*Point annotated. See syllabus.

quired by section 2132 at a crossing, under allegation that defendant recklessly failed to give them.—*Cole v. Blue Ridge Ry. Co. (S. C.)* 126.

In action for negligently leaving open hole near path, evidence *held* to tend to show reckless negligence.—*Ruddell v. Seaboard Air Line Ry. (S. C.)* 528.

*Whether a traveled way across railroad track was used by public with consent of company *held* for the jury.—*Ruddell v. Seaboard Air Line Ry. (S. C.)* 528.

§ 12. — Injuries to persons on or near tracks.

*If servants operating a train should have anticipated the presence of pedestrians on a part of the track frequently used by the public as a pathway, it was for the jury to say whether it was negligent to run the train at great speed at this place.—*Shaw v. Georgia R. R. (Ga.)* 960.

*A railroad company does not owe the duty of provision to a bare licensee on its tracks.—*Chesapeake & O. Ry. Co. v. Farrow's Adm'x (Va.)* 569.

*A railroad company to avoid injuring a trespasser on its tracks, if his danger be obvious, must use all means consistent with its higher duties to its passengers.—*Chesapeake & O. Ry. Co. v. Farrow's Adm'x (Va.)* 569.

*Licensee on a railroad track *held* charged with knowledge as to the method of shifting cars which had been in constant use for many years.—*Chesapeake & O. Ry. Co. v. Farrow's Adm'x (Va.)* 569.

*Where a licensee on a railroad track was injured by a moving car, the doctrine of the last clear chance had no application, it appearing that defendant's servant on the car did not see deceased, being engaged in the performance of a necessary duty which he could not neglect.—*Chesapeake & O. Ry. Co. v. Farrow's Adm'x (Va.)* 569.

In an action for an injury resulting in the death of a licensee on the railroad track, *held* that defendant was not guilty of negligence.—*Chesapeake & O. Ry. Co. v. Farrow's Adm'x (Va.)* 569.

§ 13. — Injuries to animals on or near tracks.

In an action against a railway company for killing a cow, evidence considered and *held* sufficient to support a verdict for plaintiff.—*Berry v. Southern Ry. Co. (Ga.)* 239.

§ 14. — Fires.

*Negligence of a railroad company in permitting its right of way to remain in a foul condition *held* of itself the proximate cause of the burning of plaintiff's woods by fire communicated from such right of way.—*Knott v. Cape Fear & N. Ry. Co. (N. C.)* 150.

*In an action for loss by fire set out by defendant's locomotive on April 4, 1904, evidence that witnesses had seen sparks flowing from the smokestack of the same locomotive between February and April *held* admissible.—*Knott v. Cape Fear & N. Ry. Co. (N. C.)* 150.

In an action against a railroad company for fire alleged to have been negligently set out, evidence *held* not to show the negligence alleged.—*McCoy v. Carolina Cent. R. R. (N. C.)* 270.

*Railroad company *held* liable for fires caused by the foul condition of its right of way.—*North Fork Lumber Co. v. Southern Ry. Co. (N. C.)* 781.

*Railroad company *held* liable for fires caused by defective locomotives or negligent operation thereof.—*North Fork Lumber Co. v. Southern Ry. Co. (N. C.)* 781.

*Where a fire along a right of way is set out by a locomotive, the burden is on the company to show that such locomotive was equipped with a proper spark arrester.—*North Fork Lumber Co. v. Southern Ry. Co. (N. C.)* 781.

RAPE.

New trial, see "Criminal Law," § 18.

§ 1. Offenses and responsibility therefor.

*Force is an element of rape, but it may be exerted by threats of serious bodily harm.—*Vanderford v. State (Ga.)* 1025.

§ 2. Prosecution and punishment.

*Evidence *held* sufficient to sustain conviction.—*Vanderford v. State (Ga.)* 1025.

*An indictment for rape is not bad for failure to aver that the prosecuting witness is a female.—*State v. Barrick (W. Va.)* 652.

*Questions as to the reputation of prosecutrix for chastity were inadmissible where they did not fix the time of the prevalence of the reputation as before the offense.—*State v. Barrick (W. Va.)* 652.

*In a prosecution for rape, evidence may be taken to prove the general reputation of the prosecutrix, or to show consent, but not to establish lack of credibility as a witness.—*State v. Detwiler (W. Va.)* 654.

RATIFICATION.

By corporation of lease of railroad, see "Corporations," § 3.

Of acts of agent, see "Principal and Agent," § 1.

REAL ACTIONS.

See "Ejectment."

REAL ESTATE AGENTS.

See "Brokers."

REAL PROPERTY.

See "Property."

REASONABLE DOUBT.

Instructions as to, see "Criminal Law," § 14.

REASONABLE TIME.

For payment of fine, see "Fines."

RECEIVERS.

Denial of mandamus on ground of receivership as bar to other action after discharge of receivers, see "Judgment," § 8.

§ 1. Nature and grounds of receivership.

*Equity, on application of a common creditor, is without jurisdiction to appoint a special receiver of the debtor's property on the ground of waste or misappropriation.—*Thompson v. Adams (W. Va.)* 668.

*Before equity will appoint a receiver of a debtor's property, the creditor must have a lien upon or some right to charge the property.—*Thompson v. Adams (W. Va.)* 668.

§ 2. Management and disposition of property.

*A receiver of funds arising from the sale of a debtor's land *held* not entitled to an allow-

*Point annotated. See syllabus.

ance for attorney's fees as against the balance in his hands to which the debtor was entitled.—*Roller v. Paul* (Va.) 558.

Beneficiaries of a fund in the hands of a receiver charged with the duty of investing the same, *held* not required to elect whether they would take interest on the funds or the profits arising out of the receiver's act in purchasing claims against the funds.—*Roller v. Paul* (Va.) 558.

*Under Code 1887, § 3409 [Va. Code 1904, p. 1811], a receiver *held* chargeable only with simple interest on the funds in his hands as such, notwithstanding section 3413 [Va. Code 1904, p. 1812].—*Roller v. Paul* (Va.) 558.

*A receiver of funds arising from the sale of real estate of a debtor on acquiring claims against the debtor, *held* entitled to recover only such sum as he paid for the claims.—*Roller v. Paul* (Va.) 558.

§ 3. Accounting and compensation.

*An agreement between a receiver and a party who is also the purchaser at a sale by the receiver, under which the purchaser is rendered liable for the receiver's compensation, *held* contrary to public policy and void.—*Hall v. Stubb* (Ga.) 172.

RECEIVING STOLEN GOODS.

Finding of indictment, see "Indictment and Information," § 1.

RECORDS.

Estoppel by record, see "Estoppel," § 1.

Of particular facts, acts, instruments, or proceedings not judicial.

See "Deeds," § 2; "Mortgages," §§ 1, 2.

Agreement to sell goods as agent, see "Principal and Agent," § 2.

Of judicial proceedings.

Abstract for purpose of review, see "Appeal and Error," § 11.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 7-15; "Criminal Law," § 27.

REFERENCE.

Appealability of order refusing, see "Appeal and Error," § 2.

§ 1. Nature, grounds, and order of reference.

Respondent in habeas corpus cannot demand reference as matter of right.—*Ex parte Cannon* (S. C.) 825.

REFORMATION OF INSTRUMENTS.

See "Cancellation of Instruments."

§ 1. Proceedings and relief.

*Where an action is brought to reform a written contract, the contract should be set forth in the petition or attached thereto as an exhibit, and the petition should also show the particular mistake, or the fraud and mistake, complained of and how it occurred.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 330.

In a suit to reform a written instrument as a contract between the parties, and also to enforce it, the allegations of the petition must be sufficient for both purposes.—*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.* (Ga.) 330.

Evidence in a suit to reform a deed so as to embrace a certain matter alleged to have been

omitted therefrom by mistake *held* insufficient.—*Caudell v. Caudell* (Ga.) 1028.

REGISTRATION.

See "Deeds," § 2.

REHEARING.

See "New Trial."

REINSURANCE.

See "Insurance," § 13.

RELEASE.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment."

Of particular classes of rights and liabilities.

See "Dower," § 1.

Liability for injuries to servant, see "Master and Servant," § 11.

Lien of judgment, see "Judgment," § 10.

§ 1. Requisites and validity.

*Where a release pleaded as a defense to an action for injuries was void for fraud, plaintiff *held* not bound to return the money received as a consideration as a condition to a pleading fraud in the execution of the release.—*Hayes v. Atlanta & O. Air-Line R. R.* (N. C.) 437.

*A release of a cause of action against a railroad company for injuries *held* void for fraud.—*Hayes v. Atlanta & O. Air-Line R. R.* (N. C.) 437.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 3.
Of evidence in criminal prosecutions, see "Criminal Law," § 6.

RELOCATION.

Of county seat, see "Counties," § 1.

Of railroad, see "Railroads," § 3.

REMAINDERS.

Created by deed, see "Deeds," § 3.

In trust estate, see "Trusts," § 3.

Limitations applicable to action by remainderman, see "Limitation of Actions," § 1.

Under Revisal 1905, § 1590, and independently of the statute, the court *held* authorized to order a sale of land held in trust for the protection of contingent remainders.—*McAfee v. Green* (N. C.) 828.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 29.

Of cause removed from state court, see "Removal of Causes," § 1.

REMEDY AT LAW.

Effect on jurisdiction of equity to abate nuisance, see "Nuisance," § 1.

REMITTITUR.

Of cause on appeal or writ of error, see "Appeal and Error," § 29.

REMOVAL.

Of county seat, see "Counties," § 1.

*Point annotated. See syllabus.

REMOVAL OF CAUSES.**1. Remand or dismissal of cause.**

*Where action is removed to federal court because of diverse citizenship and amount, and dismissed by plaintiff, he can bring an action in state court for such amount as would give it exclusive jurisdiction.—*Young v. Southern Bell Telephone & Telegraph Co.* (S. C.) 765.

REMOVAL OF CLOUD.

See "Quieting Title."

RENEWAL

Of appeal, see "Appeal and Error," § 1.

REPEAL

Of statute, see "Statutes," § 4.

REPLEVIN.

Harmless error, see "Appeal and Error," § 24.
Of property as dependent on ownership and identity, see "Property."

§ 1. Trial, judgment, enforcement of judgment, and review.

In a suit to recover personal property by bail in trover, evidence held sufficient to take the case to the jury.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

In bail trover to recover certain samples sold by plaintiff's traveling salesman, under the evidence, the court could hold as a matter of law that the agent had authority to sell and did sell to defendant and to grant a nonsuit.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

Where, in bail trover, defendant refuses to give a replevy bond, plaintiffs execute a bond for the forthcoming of the property, a judgment after nonsuit against plaintiffs and the bondsmen is not erroneous on the ground that it could not be taken until the matter had been submitted to the jury.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

Verdict in action of claim and delivery held not so indefinite that judgment thereon cannot be enforced.—*Phoenix Furniture Co. v. Jaudon* (S. C.) 308.

REPORT.

Of commissioners in partition, see "Partition," § 1.

REQUESTS.

For instructions in civil actions, see "Trial," § 10.

For instructions in criminal prosecutions, see "Criminal Law," § 15.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

Of contract for sale of goods, see "Sales," § 3.

Of contract for sale of land, see "Vendor and Purchaser," § 1.

Of insurance policy, see "Insurance," § 5.

RES GESTÆ

In civil actions, see "Evidence," § 3.

In criminal prosecutions, see "Criminal Law," § 6.

*Point annotated. See syllabus.

RES JUDICATA.

See "Judgment," §§ 8, 9.

RESTRAINT OF TRADE.

Contract in, see "Contracts," § 1.

Trusts and other combinations, see "Monopolies," § 1.

RESTRICTIONS.

In deeds, see "Deeds," § 3.

RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 6.

RETURN.

Of process in general, see "Process," §§ 2, 3.

Of property sold, see "Sales," § 3.

Of record of proceedings for purpose of review, see "Appeal and Error," § 12.

REVENUE.

See "Taxation."

REVERSIONS.

Of lessor, see "Landlord and Tenant," § 2.

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 24-29; "Justices of the Peace," § 4.

Bill in equity, see "Equity," § 6.

REVIVAL.

Of judgment, see "Judgment," § 12.

REVOCATION.

Of license by municipal corporation, see "Municipal Corporations," § 6.

Of probate of will, see "Wills," § 2.

Restraining revocation of license, see "Injunction," § 1.

RIGHT OF WAY.

See "Easements."

Of railroads, see "Railroads," § 4.

Of street railroad, see "Street Railroads," § 1.

RIOT.

Opinion evidence, see "Criminal Law," § 6.

What one of two joint defendants said in the absence of the other defendant some 30 minutes after the alleged riot held irrelevant.—*Shuler v. State* (Ga.) 496.

*Riot defined.—*Hunter v. State* (Ga.) 1044.

RIPARIAN RIGHTS.

See "Navigable Waters," § 2.

RISKS.

Assumed by employé, see "Master and Servant," §§ 8, 12.

Assumed by passenger, see "Carriers," § 5.

Within insurance policy, see "Insurance," § 9.

ROADS.

See "Highways."

Streets in cities, see "Municipal Corporations," §§ 6, 7.

ROYALTIES.

Under oil lease, see "Mines and Minerals," § 1.

RULE IN SHELLEY'S CASE.

Application to wills, see "Wills," § 3.

RULES.

For government of servant, see "Master and Servant," §§ 5, 9, 12.

Setting out legal effect in pleading, see "Pleading," § 1.

RULES OF COURT.

Briefs on appeal or writ of error, see "Appeal and Error," § 17.

Dismissal of appeal or writ of error, see "Appeal and Error," § 18.

Orders, see "Motions."

SALES.

Acknowledgment of bill of sale, see "Acknowledgment," § 2.

Compensatory damages in action for breach of contract of sale, see "Damages," § 1.

Contracts creating monopoly, see "Monopolies," § 1.

Dismissal before hearing of suit to enjoin sale, see "Equity," § 4.

Execution of power of, see "Powers," § 1.

Harmless error in action for price, see "Appeal and Error," § 24.

On Sunday, see "Sunday."

Regulations of interstate commerce as to sales of patent medicines, see "Commerce," § 1.

Requirements of statute of frauds as to sale of timber, see "Frauds, Statute of," § 3.

Restraining sale, see "Injunction," § 2.

Subjects and titles of statutes relating to sale, of liquors, see "Statutes," § 3.

Sales of particular species of, or estates or interests in, property.

See "Intoxicating Liquors"; "Mines and Minerals," § 1; "Railroads," § 6.

Corporate stock, see "Corporations," § 3.

Land held in trust, for protection of remainder, see "Remainders."

Realty, see "Vendor and Purchaser."

Sales on judicial or other proceedings.

See "Attachment," § 3.

Of property of infant under order of court, see "Guardian and Ward," § 2.

On execution, see "Execution," § 4.

On foreclosure of mortgage, see "Mortgages," §§ 3, 4.

§ 1. Requisites and validity of contract.

*An agreement for the sale of property to be severed from the soil and converted into personality before the title passes is an executory sale of goods, and not of an interest in land.—*Graham v. West* (Ga.) 931.

Where a machine was sold with a provision that on failure to do good work the seller should be notified and given a reasonable time to repair the defects, if defendant gives notice, he could plead in defense to an action for the price a total failure of consideration, if plaintiff failed after a reasonable time to put the

machine in good order.—*International Harvester Co. of America v. Dillon* (Ga.) 1034.

Correspondence between parties to an attempted sale, *held* to show that the minds of the parties did not meet.—*Charles Holmes Mach. Co. v. Chalkley* (N. C.) 524.

§ 2. Construction of contract.

*A contract for the sale of 20,000 bushels No. 2 white corn, bulk, at 50½ cents per bushel, 10,000 bushels to be shipped in February and 10,000 in March, is an entire contract.—*Henderson Elevator Co. v. North Georgia Milling Co.* (Ga.) 50.

*Where contract of sale fixes no time for delivery, performance within reasonable time *held* required.—*Duke v. Norfolk & W. Ry. Co.* (Va.) 548.

§ 3. Modification or rescission of contract.

*Where corn was sold and a portion delivered and paid for, the purchaser cannot rescind where he has used the corn, on the ground that it was inferior in quality to that stipulated for.—*Henderson Elevator Co. v. North Georgia Milling Co.* (Ga.) 50.

Where a contract for the sale of a machine provided that, if it could not be made to work well, the purchaser should return it, merely storing the machine and notifying the seller that it was subject to his order was not a return under the contract.—*International Harvester Co. of America v. Dillon* (Ga.) 1034.

*A seller on the buyer's failure to pay for goods delivered and on his evincing a purpose not to comply with the terms of the contract *held* entitled to rescind and sue for the goods delivered.—*Peters Grocery Co. v. Collins Bag Co.* (N. C.) 90.

A seller *held* entitled to regard the contract of sale as rescinded, and to sue for the goods delivered thereunder.—*Peters Grocery Co. v. Collins Bag Co.* (N. C.) 90.

§ 4. Performance of contract.

*Shipping goods billed to shipper with draft attached *held* a breach of contract.—*Riley v. Carpenter* (N. C.) 628.

Seller *held* entitled to recover damages for breach of contract only in case time fixed by buyer for delivery did not permit reasonable time for performance.—*Duke v. Norfolk & W. Ry. Co.* (Va.) 548.

§ 5. Operation and effect.

*Where goods were sold for cash, to be paid for on delivery, the prepayment of the price being a condition precedent to the sale, the mere fact that the buyer obtained possession did not pass the title to him, the purchase price not having been paid.—*Susong v. McKenna* (Ga.) 236.

§ 6. Warranties.

*If the vendee of corn accepted delivery of inferior corn, and with knowledge of its inferiority caused it to be ground, the vendor will not be answerable in damages for the losses accruing.—*Henderson Elevator Co. v. North Georgia Milling Co.* (Ga.) 50.

*In a contract for the sale of goods, words descriptive of the subject-matter of sale and the time of shipment are ordinarily warranties.—*Henderson Elevator Co. v. North Georgia Milling Co.* (Ga.) 50.

*If there are defects in goods delivered under an express warranty, acceptance with knowledge of the defects is a waiver of the warranty, but, if the defects are not discovered until after acceptance, the buyer may plead them in abate-

*Point annotated. See syllabus.

ment of the price.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

*In a suit for the price of goods sold under an express warranty with plea of partial failure of consideration, the question is whether the goods were of the quality warranted.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

*Where goods of a certain quality were sold, and the buyer ordered another shipment of the same quality, the seller warranted the last shipment to be of equal quality with the first.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

*Where goods are sold under an express warranty as to quality, and they are defective, and the vendee knows it, but accepts the goods, he waives the defect.—*Carolina Portland Cement Co. v. Turpin (Ga.) 925.*

*Where a brick manufacturer sells bricks by sample, it amounts to an express warranty that the brick sold will be of as good quality as the samples submitted.—*Carolina Portland Cement Co. v. Turpin (Ga.) 925.*

§ 7. Remedies of seller.

*Where a vendor delivered corn inferior in quality and in less quantities than stipulated, the vendee, though he had used a portion, may, in an action by the vendor to recover damages for a breach of the contract, recoup damages flowing from the defects.—*Henderson Elevator Co. v. North Georgia Milling Co. (Ga.) 50.*

In an action for the price of goods sold, letters written to plaintiff, signed by a partnership into which the purchaser entered after the sale, and which partnership conducted the business, were admissible.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

*Where a purchaser of bricks by acceptance with full knowledge of a defect therein lost the right of recoupment, in an action for the price, there being no issue left, it was not error to direct a verdict.—*Carolina Portland Cement Co. v. Turpin (Ga.) 925.*

A contract for the sale of a machine construed, and held, that in an action for price the purchaser could not plead that the machine was worthless unless he had complied with the conditions of the contract.—*International Harvester Co. of America v. Dillon (Ga.) 1034.*

*In action for price of a machine sold under a contract of warranty held, that verdict in favor of defendant for the total failure of consideration was unauthorized.—*International Harvester Co. of America v. Dillon (Ga.) 1034.*

One converting to his own use property received in the course of an attempted sale, held liable for its value.—*Charles Holmes Mach. Co. v. Chalkley (N. C.) 524.*

In action on note, given for the purchase of an engine, certain evidence held relevant.—*Strickland v. Phillips (S. C.) 453.*

*On breach by buyer of contract of sale of cross-ties, seller held entitled to recover difference between contract price and cost of making and delivering the ties.—*Duke v. Norfolk & W. Ry. Co. (Va.) 548.*

In action for breach of contract of sale of cross-ties, instruction, as to determination of reasonable time for delivery, held proper.—*Duke v. Norfolk & W. Ry. Co. (Va.) 548.*

§ 8. Remedies of buyer.

*In a suit for the price of goods sold under an express warranty with plea of partial failure of consideration, the question is whether the goods were of the quality warranted, and, if not, to what extent the price is to be abated.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

*If there are defects in goods delivered under an express warranty, acceptance with knowledge of the defects is a waiver of the warranty, but if the defects are not discovered until after acceptance, the buyer may plead them in abatement of the price.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

*Where after acceptance of goods the purchaser discovers that the quality is inferior to warranty, he can plead partial failure of consideration to an action for the price.—*Springer v. Indianapolis Brewing Co. (Ga.) 53.*

Evidence for plaintiff showed that he had, through his factor, who had advanced the necessary funds, paid defendant the price of a mule sold by him under an express warranty, and that there was a breach of such warranty. Held, that the granting of a nonsuit in an action for damages for such breach was error.—*Long v. Mitchell (Ga.) 1033.*

*In action for breach of contract of sale of merchandise, measure of damages held to be difference between contract price and market value at the time and place of agreed delivery.—*Tillinghast, Styles Co. v. Providence Cotton Mills (N. C.) 621.*

*Shipping goods billed to shipper with draft attached held a breach of contract for which buyer was entitled to recover difference between contract price and what it cost him to supply the goods.—*Riley v. Carpenter (N. C.) 628.*

*Measure of damages for failure to carry out contract to deliver goods sold determined.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works (S. C.) 768.*

SATISFACTION.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment"; "Release."

SCHOOLS AND SCHOOL DISTRICTS.

Mandamus to board of education, see "Mandamus," § 1.

SEALS.

On grants of public lands, see "Public Lands," § 1.

On mortgages, see "Mortgages," § 1.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

SEDUCTION.

Argument and conduct of counsel, see "Criminal Law," § 12.

As provocation for homicide, see "Homicide," § 2.

Relevancy of evidence, see "Criminal Law," § 6.

§ 1. Criminal responsibility.

*In a prosecution for seduction under promise of marriage, it is sufficient if the jury can fairly infer that the seduction was accomplished by reason of the promise, giving to defendant the benefit of any reasonable doubt.—*State v. Ring (N. C.) 194.*

In a prosecution for seduction under promise of marriage, where the promise existed before the seduction, the evidence held to show that prosecutrix trusted to defendant's promise when she yielded to his embraces.—*State v. Ring (N. C.) 194.*

*In a prosecution for seduction, evidence held admissible of declaration by defendant giving as a reason for not marrying prosecutrix that

*Point annotated. See syllabus.

he was in trouble with another girl.—State v. Kincald (N. C.) 647.

SELF-DEFENSE.

Justification for homicide, see "Homicide," § 6.

SENTENCE.

In criminal prosecutions, see "Criminal Law," § 23.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 2.

SEPARATION.

See "Husband and Wife," § 4.

SERVICE.

Of case on appeal, see "Appeal and Error," § 10.
Of process, see "Process," § 2.

SERVICES.

See "Master and Servant," § 2; "Work and Labor."

Of child, see "Parent and Child."

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

Amendment of counterclaim, see "Pleading," § 3.
Decision on appeal in general in action involving counterclaim, see "Appeal and Error," § 20.

In action against personal representatives, see "Executors and Administrators," § 4.

In action for price of goods, see "Sales," § 7.
Judgment on by default, see "Judgment," § 3.

SETTLEMENT.

See "Accord and Satisfaction"; "Compromise and Settlement"; "Payment"; "Release."

By executor or administrator, see "Executors and Administrators," § 5.

Of bill of exceptions, see "Exceptions, Bill of," § 1.

SHELLEY'S CASE.

Application to wills, see "Wills," § 3.

SHERIFFS AND CONSTABLES.

Authority of clerk of court as agent for sheriff in collection of costs, see "Principal and Agent," § 2.

Presumptions as to recitals in sheriff's deed, see "Evidence," § 2.

Tax deed by constable, see "Taxation," § 4.

§ 1. Powers, duties, and liabilities.

*The value of the use of property during the time of its attachment may be shown in an action for damages from the attachment by the market value of the use where it was attached, but not by such market value in another city.—Shearer v. Taylor (Va.) 7.

*Point annotated. See syllabus.

*An instruction, in an action for damages from levy of an attachment, that the measure of damages was the rental value of the property, held erroneous in view of evidence that no use of it was contemplated during the time of the levy.—Shearer v. Taylor (Va.) 7.

One held not entitled to recover as damages for attachment of property injury to it during the time of the levy, unless the injury was caused by the defendant.—Shearer v. Taylor (Va.) 7.

In view of evidence in an action for damages for an attachment, held, that an instruction that there could be no recovery, except for such loss as plaintiff herself, and no one else, suffered, should have been given.—Shearer v. Taylor (Va.) 7.

SIGNATURES.

To contract of reinsurance, see "Insurance," § 13.

To insurance policy, see "Insurance," § 2.

*Where a husband signs his wife's name to a mortgage purporting to be executed by her in her immediate presence and by her direction, the effect is the same as if she had signed the mortgage.—Hawes v. Glover (Ga.) 62.

SLEEPING CARS.

See "Carriers," § 9.

SLOT MACHINES.

License to operate in municipal corporation, see "Municipal Corporations," § 5.

Operation on Sunday, see "Sunday."

SPECIAL LAWS.

See "Statutes," § 2.

SPECIFIC PERFORMANCE.

Service of process by publication, see "Process," § 2.

§ 1. Nature and grounds of remedy in general.

*A decree of specific performance could not be based on a contract to furnish sewerage facilities at specified annual rates, but containing no provision fixing its duration.—Soloman v. Wilmington Sewerage Co. (N. C.) 300.

*Specific performance of a contract to furnish sewerage facilities at a specified annual rental held properly denied, there being no mutuality of obligation to continue the service, as between the corporation furnishing the same and the person using it.—Soloman v. Wilmington Sewerage Co. (N. C.) 300.

Equity will enforce specific performance of executory contracts for the sale of real estate according to the true intent of the parties as disclosed by the contract as a whole.—Armstrong v. Ross (W. Va.) 895.

SPEED.

Of street cars, see "Street Railroads," § 2.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STARE DECISIS.

See "Courts," § 2.

STATEMENT.

Of case or facts for purpose of review, see "Appeal and Error," § 10.

STATES.

Control and regulation of navigable waters, see "Navigable Waters," § 1.

Courts, see "Courts."

Legislative power, see "Constitutional Law," § 2.

Public lands, see "Public Lands," § 1.

Restraining nuisance, see "Nuisance," § 2.

§ 1. Government and officers.

*A committee appointed under legislative resolution January 31, 1905, to investigate affairs of state dispensary, can commit a witness for contempt on failure to answer question.—*Ex parte Parker* (S. C.) 122.

The house of Delegates has no authority by its independent action to create a committee of investigation with power to sit during the recess of the Legislature after the close of the season of the Legislature.—*Ex parte Caldwell* (W. Va.) 910, *Ex parte Blizzard* (W. Va.) 913.

STATUTES.

Delegation of legislative power, see "Constitutional Law," § 2.

Judicial notice of laws of foreign state, see "Evidence," § 1.

Laws denying due process of laws, see "Constitutional Law," § 9.

Laws denying equal protection of laws, see "Constitutional Law," § 8.

Laws granting privileges and immunities, see "Constitutional Law," § 7.

Laws impairing obligation of contracts, see "Constitutional Law," § 5.

Laws impairing vested rights, see "Constitutional Law," § 4.

Validity of retrospective or ex post facto laws, see "Constitutional Law," § 6.

Provisions relating to particular subjects.

See "Abduction," § 1; "Appeal and Error," §§ 6, 8, 18; "Attachment," § 1; "Bills and Notes," §§ 2, 3; "Carriers," § 1; "Counties," § 1; "Courts," § 4; "Criminal Law," §§ 2, 19; "Divorce," § 3; "Evidence," § 9; "Exceptions, Bill of," § 1; "Execution," § 6; "Executors and Administrators," § 3; "Habeas Corpus," § 1; "Homestead," § 1; "Homicide," § 6; "Indictment and Information," § 6; "Infants," § 4; "Intoxicating Liquors," § 2; "Judgment," § 7; "Justices of the Peace," § 2; "Master and Servant," §§ 7, 8; "Mortgages," § 2; "Municipal Corporations," §§ 3, 4; "Parent and Child," § 1; "Partition," § 1; "Pleading," § 4; "Process," §§ 1, 2; "Railroads," §§ 3, 6, 8; "Street Railroads," § 1; "Sunday," § 2; "Taxation," § 2; "Towns," § 1; "Trial," §§ 8, 13; "Wills," § 1; "Witnesses," § 1.

Confession of judgment, see "Judgment," § 2.

Statute of frauds, see "Frauds, Statute of."

§ 1. Enactment, requisites, and validity in general.

So much of Act Aug. 10, 1906, relating to license for the sale of liquors in Irwin county, as includes domestic wines, is inoperative, Acts 1904, p. 98, conferring on municipalities the

powers of licensing the sale of domestic wines being a general law; but the act will not be held void in its entirety on this account.—*Glover v. State* (Ga.) 592.

*Entries on Senate Journal as to passage of charter of town of Salem (Acts 1891, p. 729, c. 40) held to comply with Const. art. 2, § 14, and to show that no negative votes were cast.—*Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co.* (N. C.) 442.

*Whenever an act of the Legislature can be so construed as not to conflict with a constitutional provision, it will be so construed.—*Underwood Typewriter Co. v. Piggott* (W. Va.) 664.

*Code 1899, c. 39, § 29, as amended by Acts 1905, p. 445, c. 48 [Code 1906, § 1231], prohibiting county courts from levying taxes in certain years for more than an amount named, is not invalid by the attempted exception of two counties from the operation thereof.—*State v. Braxton County Court* (W. Va.) 382.

*A legislative act containing an illegal exception is not vitiated thereby for want of generality, if, on the elimination thereof, what remains if it had been originally enacted would have been a valid general law.—*State v. Braxton County Court* (W. Va.) 382.

§ 2. General and special or local laws.

Pol. Code 1895, § 421, authorizing a liquor license of \$25, and the provisions of sections 1519, 1535-1538, 1540, and Pen. Code 1895, §§ 431, 433, are to be construed together, and do not prescribe such a general law for the license and the sale of liquors as will preclude the General Assembly from enacting a local law fixing the license fee in a named county.—*Glover v. State* (Ga.) 592.

*The quality of generality in a law is not necessarily precluded by lack of uniformity in the result of its operation throughout the state.—*State v. Braxton County Court* (W. Va.) 382.

*Code 1899, c. 39, § 29, as amended by Acts 1905, p. 445, c. 48 [Code 1906, § 1231], relating to the levy of taxes by county courts, is not a violation of Const. art. 6, § 39, prohibiting the passage of local or special laws in certain cases.—*State v. Braxton County Court* (W. Va.) 382.

§ 3. Subjects and titles of acts.

*The title of Act Aug. 10, 1906, fixing the annual license fee for sale of liquors in a certain county, and providing a penalty for violating the same, is broad enough to provide for a license fee for the sale of such liquor in any quantity.—*Glover v. State* (Ga.) 592.

*The title of Act Aug. 10, 1906, held to express a legislative intent to regulate the sale of liquors in such county, and the territory of incorporated towns located in that county is within the provisions of the act.—*Glover v. State* (Ga.) 592.

§ 4. Repeal, suspension, expiration, and revival.

*Whenever the Legislature passes an act and applies its provisions to the entire territory of a county, inconsistent provisions in the charter of an incorporated town within the county are repealed by implication.—*Glover v. State* (Ga.) 592.

§ 5. Construction and operation.

*A statute composed of several sections relating to the same subject must be considered as a whole in ascertaining the meaning of any one section.—*Peters Grocery Co. v. Collins Bag Co.* (N. C.) 90.

*Point annotated. See syllabus.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Amend. 14, § 1.....	136
Art. 1, § 10, cl. 1.....	382

STATUTES AT LARGE.

1893, March 2, ch. 196, § 2, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]	459
---	-----

COMPILED STATUTES
1901.

Page 3174	459
-----------------	-----

GEORGIA.

CODE 1861.

§ 2744	330
--------------	-----

CIVIL CODE 1895.

2004	254
2007 et seq.	330
2089	24
2171	191
2426, par. 8.	1023
2468	30
2693 (4)	62
2727	1045
§ 2944, 2945.	34
3156	31
3628	175
3630	
3667, Amended by Van Epps' Code Supp. § 6185	916
3782	62
3816	965
4046	1023
4140	914
§ 4446, 4447.	15
4458	914
4472	22
4637	405
4925	1023
5043	238
§ 5214, 5215.	175
5338	499
5526	498
5543	967

PENAL CODE 1895.

§ 70, 71.	489
73	481, 489, 503
114	480
122	402
420	472
420, Amended by Laws 1897, p. 38; Laws 1899, p. 88.	179
§ 428, Amended by Laws 1897, p. 39.	327
§ 431, 433.	592
451	474
453	477
765	471
958	487
981	917
1001	474
1027	178
1036	917
1039	1042
1548	474

POLITICAL CODE 1895.

§ 421	592
§ 520, 524.	924

VAN EPPS' CODE SUPPLEMENT.

§ 6185	916
--------------	-----

CITY CHARTER.

Forsyth. Laws 1902, p. 431	230
----------------------------------	-----

LAWS.

1877, p. 163.	499
1882-3, p. 104.	62
1897, p. 38.	179
1897, p. 39.	327
1897, p. 145.	929
1899, p. 88.	179
1900, p. 53.	916
1902, p. 431, Forsyth City Charter.	230
1903, p. 90.	239, 488, 497
1903, p. 124.	962
1904, p. 98.	592
1905, p. 46.	327, 329
1905, p. 53.	938
1905, pp. 404, 405, §§ 17, 18	915

NORTH CAROLINA.

CONSTITUTION.

Declaration of Rights, § 8	635
Art. 1, § 16.	969
Art. 2, § 14.	442
Art. 4, § 12.	635
Art. 4, § 27.	108, 850
Art. 8, § 1.	820
Art. 10, §§ 1, 2.	285
Art. 10, § 6.	413

CODE.

§§ 148, 163, Amended by Laws 1899, p. 200, ch. 78	287
§ 218	629
§ 589	275
§ 590	709
§ 1896	721

REVISED CODE.

Ch. 61	263
Ch. 65, § 23.	263
Ch. 119, § 15.	784

REVISAL 1905.

§ 39, 41, 93, 94.	193
§ 207, 208.	635
§ 325, 328.	425
§ 388	263
§ 395, subsec. 9.	99
§ 429, 430.	90
§ 442	90, 629
§ 443	86
§ 531	196
§ 536	84
§ 537	625
§ 539	212
§ 554, subd. 2.	625
§ 581	782
§ 591	350
§ 688, 693, 697, 699.	285
§ 717	425
§ 735	969
§ 784	629
§ 981	354
§ 1097, subsec. 3.	292
§ 1138, 1140, 1141.	345

§ 1251, 1279.	296
1419	108
1420	850
1424	108
1590	828
1591	272
§ 1629-1631	275
1631.	84, 106, 629, 709
1822	969
2090	521
2117	365
§ 2173, 2202, 2208.	522
§ 2573	252
§ 2575, 2587, 2599.	210
2600	345
2628	713
2646	847
2676	722
3084	419
3115	705
§ 3127, 3138.	784
3147	722
3233	600
§ 3245, 3269, 3271.	342
3291	722
3358	72
3360	787
3621	722
3622	69
3630	72
3688	210
3698	600
4750, 4809.	717
§ 5150, 5151.	599

CITY CHARTER.

Asheville. Laws 1901, p. 255, ch. 100, § 65.	800
Salem. Laws 1891, p. 729, ch. 40.	442
Salem. Laws 1891, p. 746, ch. 40, § 70.	442

LAWS.

1849-49, p. 138, ch. 82.	854
1854-55, p. 280, ch. 230.	263
1861-62, p. 116, ch. 129.	263
1862-63, p. 27, ch. 26.	263
1862-63, p. 30, ch. 6, § 9	263
1868-69, p. 72, ch. 55.	820
1870-71, p. 94, ch. 43.	722
1887, p. 518, ch. 276.	721
1891, p. 729, ch. 40. Salem City Charter.	442
1891, p. 746, ch. 40, § 70. Salem City Charter.	442
1893, p. 430, ch. 448, § 1. Amended by Laws 1895, p. 182, ch. 131.	427
1893, p. 433, ch. 453.	809
1893, p. 440, ch. 461, §§ 1, 4	600
1895, p. 182, ch. 131, § 2.	427
1897, p. 83, ch. 56.	727
1897, p. 83, ch. 56, §§ 1, 2	512
1901, p. 88, ch. 42.	210
1901, p. 198, ch. 50, § 5. Amended by Laws 1905, p. 932, ch. 770, § 1 (2).	617
1901, p. 255, ch. 100, § 65. Asheville City Charter.	800
1903, p. 288, ch. 233.	145
1903, p. 430, ch. 448, § 1. Amended by Laws 1895, p. 182, ch. 131.	427
1905, p. 323, ch. 277.	354
1905, p. 932, ch. 770, § 1 (2)	617

SOUTH CAROLINA.

CONSTITUTION.	
Art. 1, § 5.....	136
Art. 1, § 18.....	120
Art. 9, § 15.....	140, 218, 526

CIVIL CODE 1902.	
423	309
1183	132
1710	454
1826	762
§ 2132, 2139.....	126
2176	454
2655	315
2845	973
2946	120

CODE OF CIVIL PROCEDURE 1902.	
135	457
147	115
274, 275.....	890
§ 339, 345, 349.....	886

CRIMINAL CODE.	
337	118
501	110

LAWS.	
1902, p. 1152.....	218
1903, p. 1.....	454
1904, p. 441.....	136

VIRGINIA.

CONSTITUTION.	
Bill of Rights, § 5 [Code 1904, p. ccix].....	692
§ 39 [Code 1904, p. ccxvii].....	683
§ 88 [Code 1904, p. ccxxx].....	585
§§ 155, 156 [Code 1904, pp. ccl, cclii].....	692
Const. 156 (c) [Code 1904, p. ccliii].....	572

CODE 1849.	
Ch. 96, § 3.....	585

CODE 1873.	
Ch. 178, § 2.....	585

CODE 1887.	
§§ 2521, 2524 [Code 1904, pp. 1289, 1290].....	564
§ 2920 [Code 1904, p. 699].....	542
§ 2959 [Code 1904, p. 1568].....	2
§§ 3408, 3413 [Code 1904, pp. 1811, 1812].....	558
§ 3566 [Code 1904, p. 1903].....	2

CODE 1904.	
Page ccix	692
Page ccxvii	683
Page ccxxx	585
Pages cclii, ccliii.....	692
Page ccliii	572
Page 468, § 1014a.....	683
Page 699	542
Pages 1289, 1290.....	564
Pages 1811, 1812.....	558
§§ 62, 586a.....	585
2465	681
2902 et seq.....	532
3158	548
§§ 3230-3232	567
§§ 3346, 3349.....	676
3454	682
3577	4
4018	698

LAWS.	
1876-77, p. 95, ch. 110....	692
1879-80, p. 147, ch. 155..	585
1883-84, p. 605, ch. 450..	585
1893-94, pp. 201, 219, ch. 205. Repealed by Laws 1906, p. 105, ch. 106....	536
1904, p. 144, ch. 99 [Code 1904, p. 468, § 1014a]....	683
1906, p. 105, ch. 106....	536
1906, p. 451, ch. 256....	572

WEST VIRGINIA.

CONSTITUTION.	
Art. 6, § 39.....	382
Art. 10, § 7.....	382

CODE 1899.	
Ch. 29, §§ 77, 79. Amended by Laws 1905, p. 820, ch. 35 [Code 1906, § 763].....	398

Ch. 32, § 16 [Code 1906, § 928].....	742
Ch. 35 [Code 1906, §§ 3228-3245]	744
Ch. 39, § 29. Amended by Laws 1905, p. 445, ch. 48 [Code 1906, § 1231]..	382
Ch. 50, §§ 48, 114 [Code 1906, §§ 1999, 2065].....	753
Ch. 50, § 152 [Code 1906, § 2103]	909
Ch. 50, § 174 [Code 1906, § 2125].....	996
Ch. 54, § 30. Amended by Laws 1901, p. 108, ch. 35, § 31 [Code 1906, § 2322]	664
Ch. 83 [Code 1906, §§ 3228-3245]	744
Ch. 121, § 6 [Code 1906, § 3786]	656
Ch. 132, § 1a [Code 1906, § 3993].....	903
Ch. 134, § 5 [Code 1906, § 4036]	1009

CODE 1906.	
7	993
763	398
928	742
1217	999
1231	382
1262	657
§ 1999	753
2019	991
2065	753
2103	909
2125	996
2169	991
2322	664
§§ 3228-3245	744
3786	656
3979	657
3993	903
§ 4036	1009
4055	649

LAWS.	
1901, p. 108, ch. 35, § 31..	664
1905, p. 320, ch. 35.....	398
1905, p. 445, ch. 48.....	382

STAY.

Of sentence, see "Criminal Law," § 23.
Pending appeal or writ of error, see "Appeal and Error," § 6.

STENOGRAPHERS.

Mandamus to stenographer, see "Mandamus," § 2.
Of courts, see "Courts," § 2.

STIPULATIONS.

In insurance policy, see "Insurance," §§ 11, 12.

STOCK.

Corporate stock, see "Corporations," § 1.
Taxation of corporate stock, see "Taxation," § 3.

STOCKHOLDERS.

Of corporations, see "Corporations," § 2.

STREET RAILROADS.

See "Railroads."
Carriage of passengers, see "Carriers."
Restraining interference with right of way, see "Injunction," § 1.

§ 1. Establishment, construction, and maintenance.

Under Revisal 1905, §§ 1140, 1141, specifying requirements of corporate organization, it is no objection to the obtaining of a right of way by a street railway that its capital stock has not been issued, and that no money has been paid thereon.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

Under Revisal 1905, § 1138, defining street railways, it is no objection to the right of such railway to a right of way between two towns that no part of it has been constructed in any town.—Fayetteville St. Ry. Co. v. Aberdeen & R. R. Co. (N. C.) 345.

Matters going to the validity of the incorporation of a street railway held not open to investigation in injunction to determine the right of such company to a right of way as against

*Point annotated. See syllabus.

a rival railroad company.—Fayetteville St. Ry. Co. v. Aberdeen & H. R. Co. (N. C.) 345.

§ 2. Regulation and operation.

*Where the motorman saw that mules driven by plaintiff's intestate were frightened by the car, whether it was his duty to stop to give intestate an opportunity to avoid the accident was for the jury.—Carger v. Macon Ry. & Light Co. (Ga.) 914.

*Declaration *held* sufficient to show duty of street railroad toward plaintiff driving wagon along street, and its breach.—Blue Ridge Light & Power Co. v. Tutwiler (Va.) 539.

Evidence in action for injuries caused by striking of wagon by a street car *held* insufficient to show negligence of street railroad company.—Blue Ridge Light & Power Co. v. Tutwiler (Va.) 539.

*A street railroad company has an equal right with the public to the use of the streets at street crossings.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

*More care is required in operating street cars at street intersections than at other points.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

*Where a street car company fails to give proper warning at street crossings, it is guilty of negligence.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

*It is negligence for a street car company to operate its cars at such speed as not to have them under control as they approach intersecting streets.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

*Where by a valid ordinance street cars are required to be equipped with fenders of an approved make, it is negligence per se to operate such cars without such equipment.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

*A municipal corporation may, within reasonable limits, prescribe the speed at which street cars may be operated over its streets.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

*It is not contributory negligence to attempt to cross a street railway track in front of an approaching car, if the person exercises that care which a reasonably careful person would have exercised.—Ashley v. Kanawha Valley Traction Co. (W. Va.) 1016.

STREETS.

See "Highways"; "Municipal Corporations," §§ 4, 6, 7.

SUBROGATION.

*A purchaser of land sold by order of court to pay debts of a decedent *held* not subrogated to the rights of the creditors.—Peacock v. Barnes (N. C.) 99.

Where a foreclosure under a power of sale in a mortgage was void, the mortgagor or those claiming under him are entitled to have the mortgage debt credited with the amount of the bid at the sale.—Griffin v. Griffin (S. C.) 317.

*Grantee from purchaser at void foreclosure sale *held* subrogated to the rights of the mortgagee to the amount of the purchase money.—Griffin v. Griffin (S. C.) 317.

*A surety liable for only a part of a debt who pays that part is not entitled to be subrogated to the securities held by the creditor, unless the whole demand has been paid.—Sipe v. Taylor (Va.) 542.

*Point annotated. See syllabus.

SUBSCRIPTIONS.

Subscription of written instruments, see "Signatures."

To corporate stock, see "Corporations," § 1.

SUBSTITUTED SERVICE.

See "Process," § 2.

SUICIDE.

Of insured, see "Insurance," §§ 9, 13, 14.

SUMMARY PROCEEDINGS.

Summary judgment, see "Judgment," § 4.

SUMMONS.

See "Process."

SUNDAY.

Licenses by municipal corporation affecting Sunday laws, see "Municipal Corporations," § 5.

*Pen. Code 1895, § 420, as amended by Acts 1897, p. 88, and Acts 1899, p. 88, prohibiting the running of freight trains on the Sabbath, does not apply to a railroad which begins and ends in other states, and which does not run a distance greater than 30 miles in Georgia.—Griggs v. State (Ga.) 179.

Evidence *held* to sustain conviction of railroad superintendent for violation of Penal Code 1895, § 420, forbidding the running of freight trains on Sunday.—Seale v. State (Ga.) 472.

Cr. Code 1902, § 501, providing that no person shall expose to sale any goods whatsoever on the Lord's Day, is not repealed by nonuser or by implication.—Cain v. Daly (S. C.) 110.

Cr. Code 1902, § 501, forbidding sale or exposing for sale of goods on Sunday, applies to slot machines automatically vending wares.—Cain v. Daly (S. C.) 110.

SUPERSEDEAS.

On appeal or writ of error, see "Appeal and Error," § 6.

SUPPLEMENTARY PROCEEDINGS.

See "Execution," § 5.

SUPREME COURTS.

See "Courts," § 4.

SURETYSHIP.

See "Principal and Surety."

SURRENDER.

Of written instrument for cancellation, see "Cancellation of Instruments."

SURVIVAL.

Of cause of action, see "Abatement and Revival," § 1.

SURVIVORSHIP.

Of devisees or legatees, see "Wills," § 3.

SUSPENSION.

Of benefit insurance, see "Insurance," § 14.

SWINDLING.

See "False Pretenses."

TAXATION.

Enactment and validity of statutes relating to, see "Statutes," § 1.
 Limitations applicable to tax payer's actions, see "Limitation of Actions," § 1.
 Mandamus to compel assessment of taxes, see "Mandamus," § 1.

Local or special taxes.

See "Counties," § 1; "Towns," § 1.

Assessments for municipal improvements, see "Municipal Corporations," § 4.

§ 1. Nature and extent of power in general.

*The power of taxation is presumed, until the contrary appears, to remain in the law-making body of the state.—State v. Braxton County Court (W. Va.) 382.

§ 2. Constitutional requirements and restrictions.

Laws 1903, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, requiring railroad taxes in certain townships of S. county to be used for the benefit of such townships until they were reimbursed for railroad subscriptions *held* not to interfere with the uniformity or equality of taxation, nor to impair the integrity of the county.—Jones v. Commissioners of Stokes County (N. C.) 427.

*Courts in construing statutes always presume that double taxation was not intended unless the legislative intent to impose it is clearly manifest.—State v. Graybeal (W. Va.) 398.

§ 3. Levy and assessment.

The value of the real estate owned by banks and trust companies to be deducted in ascertaining the taxable value of their capital stock, surplus, and dividends, under Code 1899, c. 29, § 79, as amended by Acts 1905, p. 320, c. 35 [Code 1906, § 768], is the assessed value.—State v. Graybeal (W. Va.) 398.

A bank owning stock of a corporation which has been assessed with its property, as prescribed by Code 1899, c. 29, § 77, as amended by Acts 1905, p. 320, c. 35 [Code 1906, § 761], and having elected to have its capital stock and surplus assessed to it in conformity with section 79, *held* entitled to have the value of such shares deducted together with the value of its real estate and exempt property, in determining the taxable value of its capital stock, surplus, and undivided profits.—State v. Graybeal (W. Va.) 398.

§ 4. Tax titles.

*Under Civ. Code 1902, p. 423, deed under tax sale by constable who put agent in possession not qualified as deputy sheriff *held* void.—Barrineau v. Stevens (S. C.) 809.

TELEGRAPHS AND TELEPHONES.

Harmless error in action for delay in delivery of telegram, see "Appeal and Error," § 26.

Province of court and jury in action for delay in delivery of telegram, see "Trial," § 6.

Trespass by telegraph company, see "Trespass," § 2.

§ 1. Regulation and operation.

Where a telegraph message is given for delivery to the addressee's son, any negligence by him in delaying delivery is the negligence of the company.—Mott v. Western Union Telegraph Co. (N. C.) 363.

*Telegraph company *held* liable for damages resulting from a failure to catch a train, caused by delay in the delivery of a telegram.—Mott v. Western Union Telegraph Co. (N. C.) 363.

*That the addressee of a telegram resides outside of the free delivery district *held* not to excuse a delay in making an offer of the telegram to him.—Mott v. Western Union Telegraph Co. (N. C.) 363.

*Failure to attempt to deliver a telegram for nearly two hours *held* prima facie negligence.—Mott v. Western Union Telegraph Co. (N. C.) 363.

*Time consumed by a telegraph agent in attending to other duties *held* no excuse for delay in the delivery of a telegram.—Mott v. Western Union Telegraph Co. (N. C.) 363.

*Where a telegraph operator tells the agent of the sender that there would be no extra charge for delivery, it is negligence to fail to make prompt delivery because such extra charges are not prepaid.—Mott v. Western Union Telegraph Co. (N. C.) 363.

*Telegraph company *held* to have no notice that the wife of the recipient was interested in the message sent.—Poteet v. Western Union Telegraph Co. (S. C.) 113.

*A telegraph company *held* liable for delay only to those for whom, or in whose behalf, the message was transmitted.—Poteet v. Western Union Telegraph Co. (S. C.) 113.

Evidence *held* insufficient to show that mental anguish of wife of addressee of message was caused by willful failure to deliver telegram.—Poteet v. Western Union Telegraph Co. (S. C.) 113.

Evidence *held* insufficient to show waiver of time limit for filing claim by telegraph company.—Eaker v. Western Union Telegraph Co. (S. C.) 129.

*Where a telegraph company changed the name of the addressee of a commercial telegram to that of his competitor and delivered the message to him, it is evidence of reckless disregard of the addressee's rights.—Lathan v. Western Union Telegraph Co. (S. C.) 134.

*Evidence *held* insufficient to show willful delay in transmission of telegram.—Mitchiner v. Western Union Telegraph Co. (S. C.) 222.

*Statement of telegraph operator *held* only a promise to transmit with reasonable diligence.—Mitchiner v. Western Union Telegraph Co. (S. C.) 222.

Evidence *held* insufficient to show wanton disregard of duty by telegraph company.—Jones v. Western Union Telegraph Co. (S. C.) 318.

*A telegraph company *held* liable for negligently failing to deliver telegram.—Harrison v. Western Union Telegraph Co. (S. C.) 450.

§ 2. — Evidence in action for negligence.

In an action against a telegraph company for failure to deliver a telegram evidence *held* insufficient to support a judgment for plaintiff.—Planters' Cotton Oil Co. v. Western Union Telegraph Co. (Ga.) 495.

In a suit against a telegraph company for failure to deliver a telegram evidence *held* not to show that the message was delivered for transmission.—Planters' Cotton Oil Co. v. Western Union Telegraph Co. (Ga.) 495.

*Point annotated. See syllabus.

In an action against a telegraph company for delay in telegram announcing plaintiff's coming with the body of her deceased brother, evidence that the trainmen took and set the corpse on the platform in the rain over plaintiff's protest *held* irrelevant.—Hancock v. Western Union Telegraph Co. (N. C.) 82.

*Though negligence of a telegraph company will be presumed from a week's delay in delivering a message, the presumption may be rebutted, and it is not necessary that the rebutting evidence preponderate.—Shepard v. Western Union Telegraph Co. (N. C.) 704.

Fact that mental anguish is presumed to result from a negligent delay in delivering a telegram does not preclude direct proof on that point.—Shepard v. Western Union Telegraph Co. (N. C.) 704.

Evidence in an action against a telegraph company *held* insufficient to charge defendant with knowledge that plaintiff sent the message or might suffer mental anguish if it was unreasonably delayed.—Helms v. Western Union Telegraph Co. (N. C.) 831.

*Where a telegram was not delivered for 27 hours, the jury has a right to infer that the delay was unreasonable.—Eaker v. Western Union Telegraph Co. (S. C.) 129.

Failure to deliver a commercial telegram *held* to authorize recovery of damages on the part of the addressee.—Lathan v. Western Union Telegraph Co. (S. C.) 134.

In an action for damages for delay in telegram whereby plaintiff's wife was for several weeks quarantined in a town subject to small-pox, evidence *held* insufficient to show that such exposure was the proximate result of a failure to deliver the telegram.—Mitchiner v. Western Union Telegraph Co. (S. C.) 222.

Certain evidence *held* inadmissible to show mental anguish of plaintiff's wife by delay in telegram.—Mitchiner v. Western Union Telegraph Co. (S. C.) 222.

*Plaintiff, in an action for failure to deliver a telegram, can show notice to defendant of the purpose of the message.—Jones v. Western Union Telegraph Co. (S. C.) 818.

§ 3. — Damages in action for negligence.

*A telegraph company *held* liable for failure to deliver a message only for such damages as it should have anticipated.—Hancock v. Western Union Telegraph Co. (N. C.) 82.

*A death message *held* not mere notice to the addressee of the hour of interment of her stepson.—Harrison v. Western Union Telegraph Co. (N. C.) 435.

*In an action for a negligent delay in delivering a telegram, the jury should not be guided by "their own feelings" in assessing damages.—Shepard v. Western Union Telegraph Co. (N. C.) 704.

*Telegraph messages *held* not to constitute a contract of sale, so that defendant telegraph company was liable only for nominal damages.—Cherokee Tanning Extract Co. v. Western Union Telegraph Co. (N. C.) 777.

*A person not mentioned in a telegram, and whose interest is not known to the company, cannot recover substantial damages for mental anguish caused by delay in delivery.—Helms v. Western Union Telegraph Co. (N. C.) 831.

Extent of time for which mental anguish was recoverable for delay in delivery of telegram determined.—Mitchiner v. Western Union Telegraph Co. (S. C.) 222.

*Measure of damages for failure to deliver telegram determined.—Jones v. Western Union Telegraph Co. (S. C.) 818.

*An instruction that the jury could award punitive damages for failure to deliver telegram *held* not error.—Harrison v. Western Union Telegraph Co. (S. C.) 450.

§ 4. — Trial in actions for negligence.

In an action for delay in delivering a death message, whether plaintiff suffered mental anguish for which she was entitled to recover *held* for the jury.—Harrison v. Western Union Telegraph Co. (N. C.) 435.

*Refusal of nonsuit in action for delay in delivery of telegram *held* proper under the evidence.—Mitchiner v. Western Union Telegraph Co. (S. C.) 222.

Instruction as to duty of telegraph company to employ competent servants to deliver messages *held* justified by the pleading.—Harrison v. Western Union Telegraph Co. (S. C.) 450.

Instruction in action against telegraph company for delay in delivery of telegram as to waiver of regulations as to business hours by the company *held* not error under the evidence.—Harrison v. Western Union Telegraph Co. (S. C.) 450.

Instruction as to the duty of the jury to award damages in action for failure to deliver telegram *held* not erroneous.—Harrison v. Western Union Telegraph Co. (S. C.) 450.

*Where there was some evidence that damage resulted to plaintiff by reason of the nondelivery of a telegram on Sunday morning, the issue was for the jury.—Harrison v. Western Union Telegraph Co. (S. C.) 450.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

*Evidence *held* not to show such an ouster as would put a co-tenant on notice and furnish a starting point from which prescription would begin to run.—Harriss v. Howard (Ga.) 59.

There can be no adverse possession against a co-tenant until actual ouster, or exclusive possession after demand, or express notice of adverse possession.—Harriss v. Howard (Ga.) 59.

TENDER.

Of fines, see "Fines."

TERMS.

Of leases, see "Landlord and Tenant," § 3.

TESTAMENT.

See "Wills."

TESTAMENTARY POWERS.

Construction and execution, see "Powers," § 1. Creation, see "Wills," § 3.

THEFT.

See "Larceny."

THEORY OF CASE.

Review as dependent on, see "Appeal and Error," § 19.

*Point annotated. See syllabus.

TICKETS.

for carriage of passengers, see "Carriers," § 3.

TIMBER.

see "Logs and Logging."

TIME.

Effect of lapse of time on order on motion, see "Motions."
Lapse of time affecting mandamus proceedings, see "Mandamus," § 1.

For particular acts in or incidental to judicial proceedings.

Amendment of pleading, see "Pleading," § 3.
Amendment of pleadings for defect in parties, see "Parties," § 2.

Writ of certiorari to review prosecution for violation of municipal ordinance, see "Municipal Corporations," § 5.

Commencement of prosecution for violation of municipal ordinance, see "Municipal Corporations," § 5.

Filing of briefs on appeal or error, see "Appeal and Error," § 17.

Payment of fine, see "Fines."

Service of case on appeal, see "Appeal and Error," § 10.

Taking appeal or suing out writ of error, see "Appeal and Error," § 5.

For particular acts not judicial.

Cancellation of insurance policy, see "Insurance," § 5.

Filing claim against telegraph company, see "Telegraph and Telephones," § 1.

Payment of insurance premiums, see "Insurance," § 1.

Performance of contract, see "Contracts," § 2.

Performance of contract of sale, see "Sales," § 2.

Reinstatement of insured, see "Insured," § 14.

TITLE.

Color of title, see "Adverse Possession."

Of statutes, see "Statutes," § 3.

Removal of cloud, see "Quieting Title."

Sufficiency of title of vendor of land, see "Vendor and Purchaser," § 2.

Title of lessor, see "Landlord and Tenant," § 2.

Particular matters affecting title.

See "Ejectment," §§ 1, 2; "Estoppel," § 2.

Trust deeds, see "Trusts."

Particular species of property or rights.

Fee of highway, see "Highways," § 1.

Title necessary to maintain particular actions.

See "Injunction," §§ 1, 2.

TORTS.

Causing death, see "Death," § 1.

Liabilities of particular classes of persons.

See "Municipal Corporations," § 7.

Agents, see "Principal and Agent," § 2.

Employés, see "Master and Servant," § 13.

Particular torts.

See "Conspiracy"; "Fraud"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass."

Abuse of process, see "Process," § 4.

Remedies for torts.

See "Trespass," § 2.

Compensatory damages, see "Damages," § 1.

Harmless error, see "Appeal and Error," § 24.

Jurisdiction of justice of the peace, see "Justices of the Peace," § 2.

*Malicious injury to the business of another will give a right of action to the injured party.—*Southern Ry. Co. v. Chambers* (Ga.) 37.

TOWNS.

See "Counties"; "Municipal Corporations."

§ 1. **Fiscal management, public debt, securities, and taxation.**

Railroad bonds of a certain township having been paid off, taxpayers held not entitled to compel county commissioners of the county to invest taxes derived from a railroad company in such township for the payment of such bonds, under Laws 1896, p. 182, c. 131, § 2.—*Jones v. Commissioners of Stokes County* (N. C.) 427.

TRANSCRIPTS.

As evidence, see "Evidence," § 9.

Of record for purpose of review, see "Appeal and Error," § 12; "Criminal Law," § 27.

TRANSITORY ACTIONS.

See "Venue," § 1.

TREES.

See "Logs and Logging."

Requirements of statute of frauds as to contract for sale of trees, see "Frauds, Statute of," § 3.

TRESPASS.

Applicability of instructions to evidence in action for, see "Trial," § 9.

Injuries to trespassers, see "Railroads," §§ 10, 12.

Issue of adverse possession in action for, see "Adverse Possession," § 3.

Nature and essentials of judgment in general, see "Judgment," § 1.

Restraining trespass, see "Injunction," §§ 1, 2.

§ 1. **Acts constituting trespass and liability therefor.**

Where the return of processioners is made the judgment of the superior court, the true line between the coterminous proprietors is that marked by the processioners, and any invasion thereafter across the line thus established and upon the land of the adjacent owner by the protestant in the processioning proceeding, is a trespass.—*Martin v. Patillo* (Ga.) 240.

§ 2. **Actions.**

In trespass against a telegraph company, where defendant denied any appropriation of plaintiff's land, a charge stating this, but adding, "or if they have appropriated any of it, it is a very small amount," held erroneous.—*Postal Telegraph-Cable Co. v. Kuhn* (Ga.) 967.

In trespass for digging holes on plaintiff's land and erecting telegraph poles, a charge that, if defendant erected its line along a public highway, the plaintiff could not recover, "unless the right of way that he talks of, 20 feet wide, would reach over and beyond the public road," held erroneous.—*Postal Telegraph-Cable Co. v. Kuhn* (Ga.) 967.

*Point annotated. See syllabus.

In trespass for digging holes and erecting telegraph posts on plaintiff's land, a charge that it is for the jury to determine whether the right of way of the telegraph company would reach out over the public highway was erroneous as leading the jury to believe that if some right of way extended over the road there might be a recovery.—*Postal Telegraph-Cable Co. v. Kuhn* (Ga.) 967.

*Where defendant entered on plaintiff's land and dug holes and erected telegraph posts, plaintiff would be entitled to nominal damages if no special damages were shown.—*Postal Telegraph-Cable Co. v. Kuhn* (Ga.) 967.

*An allegation in trespass for the cutting and removing of timber from plaintiff's land "to his great damage" held to entitle plaintiff to recover the value of the timber and any damages for any injury done to the land.—*Davis v. Wall* (N. C.) 350.

§ 3. Criminal responsibility.

*An indictment for willful trespass on land will lie against an employé of a railroad and logging company, though an injunction to restrain the trespass would have been denied.—*State v. Wells* (N. C.) 210.

A conviction for willful trespass under *Revised N. C. 1905*, § 3688, held not authorized without a consideration of defendant's bona fide claim of right to enter.—*State v. Wells* (N. C.) 210.

TRESPASS TO TRY TITLE

See "Ejectment."

TRIAL.

See "New Trial"; "Reference"; "Witnesses." Assignment of errors in rulings, see "Appeal and Error," § 16.

Contributory negligence of passenger as question for jury, see "Carriers," § 7.

Estoppel to allege error in rulings, see "Appeal and Error," § 20.

Exceptions to rulings for purpose of review, see "Appeal and Error," § 4.

Harmless error in rulings, see "Appeal and Error," §§ 24, 26.

Instructions as to adverse possession, see "Adverse Possession," § 3.

Objection to rulings at trial for purpose of review, see "Criminal Law," § 25.

Review of discretionary rulings, see "Appeal and Error," § 22.

Review of rulings as dependent on motion for new trial, see "Appeal and Error," § 4.

Review of rulings as dependent on record on appeal or writ of error, see "Appeal and Error," § 14.

Proceedings incident to trials.

See "Continuance."

Entry of judgment after trial of issues, see "Judgment," § 5.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 3.

Trial of actions by or against particular classes of persons.

See "Brokers," § 2; "Sheriffs and Constables," § 1.

Bank, see "Banks and Banking," § 2.

Telegraph company, see "Telegraphs and Telephones," § 4.

Trial of particular civil actions or proceedings.

See "Malicious Prosecution," § 3; "Negligence," § 2; "Replevin," § 1; "Trespass," § 2.

For assault by servant, see "Master and Servant," § 13.

For breach of contract, see "Sales," § 7.

For breach of contract of carriage, see "Carriers," § 4.

For compensation of broker, see "Brokers," § 2.

For damages for delay or failure to deliver telegram, see "Telegraphs and Telephones," § 4.

For damages for taking of or injury to property in exercise of right of eminent domain, see "Eminent Domain," § 4.

For death of servant, see "Master and Servant," § 12.

For personal injuries, see "Carriers," § 6; "Master and Servant," § 12; "Railroads," §§ 11, 12; "Street Railroads," § 2.

For price of goods, see "Sales," § 7.

For use of property by sheriff, see "Sheriffs and Constables," § 1.

In justices' courts, see "Justices of the Peace," § 3.

On insurance policy, see "Insurance," § 13.

Probate proceedings, see "Wills," § 2.

Suits in equity, see "Equity," § 5.

To recover bank deposit, see "Banks and Banking," § 2.

Trial of criminal prosecutions.

See "Abduction," § 2; "Criminal Law," §§ 7, 8-11; "Homicide," §§ 2, 5, 6; "Vagrancy," § 1.

For maintaining gaming house, see "Gaming," § 1.

For offenses against liquor laws, see "Intoxicating Liquors," § 4.

§ 1. Dockets, lists, and calendars.

Suit for damages for breach of partnership contract held to be tried in equity.—*Price v. Middleton & Ravenel* (S. C.) 156.

§ 2. Course and conduct of trial in general.

*Unless defendant by his pleadings admits plaintiff's cause of action and relies on affirmative defense, he is not entitled to open and reply.—*Leesville Mfg. Co. v. Morgan Wood & Iron Works* (S. C.) 768.

§ 3. Reception of evidence.

*It was not error to overrule an objection on the ground that the evidence was illegal, which went to the whole of the evidence and did not point out the inadmissible portion.—*Martin v. City of Gainesville* (Ga.) 499.

*Where either party introduces a document, the opposite party may read as evidence introduced by the party who offers it so much of the balance as is relevant.—*Crawford v. Roney* (Ga.) 499.

*Where a question was asked and on objection rejected, counsel should be allowed to show what the witness would answer, and it is within the discretion of the court to cause the jury to retire and allow the witness himself to state what his answer would be.—*Holland v. Williams* (Ga.) 1023.

*Where the answer to a question objected to might or might not be competent, it was the duty of the trial judge to ascertain what was expected to be proved, or the answer the witness would give, before excluding the question.—*Hicks v. Hicks* (N. C.) 106.

An objection to evidence which assumes facts in dispute under the pleadings is properly overruled.—*Armour & Co. v. Ross* (S. C.) 315.

*An objection to evidence as irrelevant is properly overruled, where the objection failed to specify the ground thereof.—*Armour & Co. v. Ross* (S. C.) 315.

§ 4. Arguments and conduct of counsel.

Refusal to permit counsel to comment on discrepancy between testimony and former state-

*Point annotated. See syllabus.

ment of plaintiff *held* under the circumstances not ground for reversal.—*Southern Ry. Co. v. Simmons* (Va.) 459.

In action for injuries to railroad employé, remarks of counsel in argument *held* improper.—*Southern Ry. Co. v. Simmons* (Va.) 459.

§ 5. Taking case or question from jury.

A verdict should not be directed unless there is no conflict in the evidence, and that introduced demands a particular verdict.—*Home Ins. Co. of New York v. Chattahoochee Lumber Co.* (Ga.) 11.

Where there was some conflict in the evidence as to actual possession after foreclosure, or to what extent, or for how long held, it was error to direct a verdict for defendant.—*Harriss v. Howard* (Ga.) 59.

*Where the evidence did not sustain the allegations of the declaration, and the plaintiff was not entitled to have the case submitted to the jury, the proper judgment was one of nonsuit, rather than a dismissal on the pleadings and evidence.—*Hughes v. Georgia Ry. & Electric Co.* (Ga.) 229.

*That the evidence is conflicting in immaterial matters does not render direction of a verdict erroneous where by giving the opposite party the benefit of the most favorable view of the evidence the verdict against him is demanded.—*Skinner v. Braswell* (Ga.) 914.

*Where there was some evidence which would have authorized the jury to find for plaintiff, the court erred in granting a nonsuit.—*Connelly v. Connelly* (Ga.) 918.

Where a petition sets forth a cause of action against all of the defendants, and one fails to answer, a nonsuit should not be rendered in his favor.—*Caudell v. Caudell* (Ga.) 1028.

*Where evidence was introduced authorizing the jury to find for plaintiff, it was not error to refuse to direct a verdict for defendant.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

*On a motion for a nonsuit or direction of a verdict for defendant, the evidence of plaintiff must be accepted as true.—*Biles v. Seaboard Air Line Ry. Co.* (N. C.) 512.

*When the issue in an action at law involves the question whether an oral promise is original or collateral and the verdict of the jury for either party would not be set aside as against the weight of the evidence, the question is for the jury.—*Johnson v. Bank* (W. Va.) 394.

§ 6. Instructions to jury—Province of court and jury in general.

*Where the negligence claimed was based on the existence of a low place in a railroad track, it was error for the judge in his charge to assume that there was such a low place.—*Atlantic & B. Ry. Co. v. Hattaway* (Ga.) 21.

*In an action for an assault, remarks of court *held* an intimation of an opinion that the case was one for the allowance of damages, and error.—*Holland v. Williams* (Ga.) 1023.

*In an action for delay in a telegram, a request to charge that, if the jury believed the evidence of certain witnesses testifying concerning the law of another state, they should assess plaintiff's damages at 25 cents, *held* misleading.—*Hancock v. Western Union Telegraph Co.* (N. C.) 82.

An instruction in an action against a carrier for injuries to a passenger *held* not erroneous as a charge on the facts.—*Caldwell v. Atlantic Coast Line R. Co.* (S. C.) 131.

An instruction as to the duty of a master to furnish a safe place and proper appliances for

a servant is not a charge on the facts.—*Rice v. Lockhart Mills* (S. C.) 180.

An instruction setting forth the acts of negligence charged in the complaint and referring to them as alleged is not a charge on the facts.—*Rice v. Lockhart Mills* (S. C.) 180.

§ 7. — Necessity and subject-matter.

Where an instruction is a correct statement of the respective contentions of the parties on a given point, it was not a good assignment of the error thereon that the court failed to charge what would be the legal effect of a finding by the jury that plaintiff's contention was true.—*Foot v. Kelley* (Ga.) 1045.

*In reading to the jury, as part of the charge, Civ. Code 1896, §§ 2944, 2945, defining loans, it was not error, in the absence of a request, to fail to explain the meanings of the terms "specie," "in kind," and "for consumption," as used in such sections.—*Foot v. Kelley* (Ga.) 1045.

§ 8. — Form, requisites, and sufficiency.

*Failure of the court to reduce its entire charge on the law to writing when requested, as required by Revisal 1905, § 536, *held* to require a new trial.—*Sawyer v. Roanoke R. & Lumber Co.* (N. C.) 84.

Revisal 1905, § 536, requiring written instructions on request, *held* not to require the recapitulation of the evidence to be in writing.—*Sawyer v. Roanoke R. & Lumber Co.* (N. C.) 84.

Instructions should conclude by directing the jury to answer the issue submitted as they find the facts.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

An instruction in an action against a carrier *held* not erroneous as advising the jury to give punitive damages.—*Caldwell v. Atlantic Coast Line R. Co.* (S. C.) 131.

Instructions as to rights acquired by purchaser from agent of property intrusted to him by his principal, title to remain in principal until sold, construed, and *held* not conflicting.—*Armour & Co. v. Ross* (S. C.) 315.

§ 9. — Applicability to pleadings and evidence.

Where there are two counts in a petition, an instruction on worldly circumstances applicable as to one and not to the other should inform the jury that such circumstances are to be considered as to one only.—*Southern Ry. Co. v. Chambers* (Ga.) 87.

*In an action by a passenger for injuries a certain instruction *held* erroneous.—*Savannah Electric Co. v. McElvey* (Ga.) 192.

A new trial will be granted where the charge of the judge fails to give the defendant the benefit of a theory of the defense which was sustained by the evidence introduced in his behalf.—*Susong v. McKenna* (Ga.) 236.

*In trespass against a telegraph company on plaintiff's land, it was error to charge that a telegraph company in condemnation proceedings take a right of way 20 feet wide, erect their posts, and clear off the timber, where there was no evidence to authorize it.—*Postal Telegraph-Cable Co. v. Kuhnen* (Ga.) 967.

An instruction defining the measure of damages in an action for personal injuries *held* not objectionable because not applying the law to the facts.—*Ruffin v. Atlantic & N. C. R. Co.* (N. C.) 86.

*Punitive damages *held* not allowable where merely negligence was pleaded and proved.—*Wilson v. Atlantic Coast Line* (N. C.) 257.

*Point annotated. See syllabus.

*An instruction in an action for personal injury *held* erroneous because embodying matters not in issue.—*Baltimore & O. R. Co. v. Lee* (Va.) 1.

*Instruction that if railroad employé was guilty of contributory negligence, the jury must find for defendant unless conductor had knowledge of his dangerous position, and could have prevented the accident, *held* erroneous, under the evidence.—*Southern Ry. Co. v. Simmons* (Va.) 459.

*Instructions, where the question of fact is in issue on conflicting evidence, directing the jury to determine such question from a part only of the material evidence, *held* erroneous.—*Johnson v. Bank* (W. Va.) 394.

§ 10. — Requests or prayers.

*Where the court in its general charge gave appropriate instructions as to material issues, if fuller instructions were desired a written request was necessary.—*Savannah Electric Co. v. Mullikin* (Ga.) 945.

*Where the charges as a whole cover the issues, if more specific instructions are desired they should be requested.—*Holland v. Williams* (Ga.) 1023.

*New trial will not be granted for refusal to charge as requested, when the request is substantially covered by the charge given.—*Southern Ry. Co. v. Reynolds* (Ga.) 1039.

*Where a charge covers the issues, it is sufficient in the absence of a request for more specific statement of plaintiff's contentions.—*Foot v. Kelley* (Ga.) 1045.

*If a party desires more definite instructions on any issue, he must make a special request for them, or he cannot be heard to complain of the indefiniteness of the instructions on appeal.—*Ives v. Atlantic & N. C. R. Co.* (N. C.) 74.

*Omission of the court to charge on a particular subject is not error, where no request for a special instruction was made.—*Marable v. Southern Ry. Co.* (N. C.) 355.

*Failure to request an instruction as to the insufficiency of evidence *held* to preclude a raising of such question on motion to set aside the verdict.—*Pardon v. Paschall* (N. C.) 365.

*In an action for injuries to an employé caused by the breaking of a chain, evidence *held* to authorize an instruction to find for defendant if chain was not crystallized.—*Isley v. Virginia Bridge & Iron Co.* (N. C.) 416.

*Plaintiff cannot complain of the omission of the court to charge on any of his contentions where he did not present them by prayers for special instructions.—*Gaither v. Carpenter* (N. C.) 625.

*Failure to instruct in an action for injuries to a servant on a certain point in the absence of a request so to do *held* not error.—*Rice v. Lockhart Mills* (S. C.) 160.

*One offering an instruction is entitled to have it given in his own language, if it correctly propounds the law, where there is evidence to support it and where it is not misleading.—*Morrison v. Fairmont & C. Traction Co.* (W. Va.) 669.

§ 11. — Objections and exceptions.

*A general exception to the entire charge is not well taken where the whole charge is not erroneous.—*Foot v. Kelley* (Ga.) 1045.

*Alleged failure of the court to sufficiently state the evidence and explain the law cannot be raised on objection after verdict.—*Davis v. Keen* (N. C.) 359.

Where a party objected to an instruction, and made the objection the subject of a bill of exceptions, the failure to object to a subsequent instruction embodying the same principle did not impair his right to rely on the exception taken.—*Baltimore & O. R. Co. v. Lee* (Va.) 1.

§ 12. — Construction and operation.

*An instruction authorizing the jury, without speaking of proximate cause, to find on certain facts that defendant's negligence caused plaintiff's injury, *held* required to be considered with the instruction immediately preceding on proximate cause.—*Wilson v. Atlantic Coast Line* (N. C.) 257.

*In view of the charge immediately preceding, *held*, that the jury would not be considered to have inferred from an instruction in action for being struck by a car at a crossing that it was the court's opinion that defendant had treated plaintiff as an outlaw.—*Wilson v. Atlantic Coast Line* (N. C.) 257.

*Error of a charge in fact authorizing punitive damages *held* not cured by the court, on being requested to charge that punitive damages might be allowed, saying it would charge they must not be allowed.—*Wilson v. Atlantic Coast Line* (N. C.) 257.

§ 13. Custody, conduct, and deliberations of jury.

*Under Revisal 1905, § 537, it was proper for the court to permit the jury to take written instructions with them on retirement at the request of one of the jurors.—*Gaither v. Carpenter* (N. C.) 625.

*The court's omission to include plaintiff's request which had been given with the instructions sent to the jury room *held* waived by plaintiff's failure to call the court's attention thereto and except at the time, as required by Revisal 1905, § 554, subd. 2.—*Gaither v. Carpenter* (N. C.) 625.

§ 14. Verdict.

*Where a judge found that the findings in the verdict were inconsistent; that one of the issues found was unsustained by the evidence, and that the damages were insufficient, he properly set the verdict aside.—*Jarrett v. High Point Trunk & Bag Co.* (N. C.) 338.

When a judge sets aside a verdict, he should state in the record whether it is done in the exercise of his discretion or for errors of law.—*Jarrett v. High Point Trunk & Bag Co.* (N. C.) 338.

The superior court judges cannot reduce a verdict without the consent of the party in whose favor it was rendered.—*Isley v. Virginia Bridge & Iron Co.* (N. C.) 416.

In an action for injuries to an employé, the submission to the jury of a question as a separate issue *held* proper.—*Hairston v. United States Leather Co.* (N. C.) 847.

§ 15. Trial by court.

*Where findings were made in favor of defendant, if he was dissatisfied therewith he was bound to except thereto at the time.—*Mathews v. Fry* (N. C.) 787.

§ 16. Waiver and correction of irregularities and errors.

*Admission of evidence that plaintiff had wife and child dependent on him *held* not cured by instructions as to measure of damages.—*Southern Ry. Co. v. Simmons* (Va.) 459.

TROVER AND CONVERSION.

Conversion by carrier, see "Carriers," § 1.

*Point annotated. See syllabus.

TRUST COMPANIES.

Taxation, see "Taxation," § 3.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Charitable trusts, see "Charities."

Combinations to monopolize trade, see "Monopolies," § 1.

Construction in general of deed in trust, see "Deeds," § 3.

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Creation by will, see "Wills," § 3.

Effect of trust on limitation, see "Limitation of Actions," § 1.

Sales of lands held in trust for protection of remainder, see "Remainders."

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Creation, existence, and validity.

Evidence *held* to establish a resulting trust in land.—*Miller v. Saxton* (S. O.) 310.

*Payment of purchase price of land may be shown by parol.—*Miller v. Saxton* (S. C.) 310.

§ 2. Construction and operation.

The power of sale reserved in a deed creating a trust construed, and *held* to apply to a beneficiary's right to sell her interest in the property.—*Cherry v. Cape Fear Power Co.* (N. C.) 287.

A conveyance of trust property by husband and wife *held* to give the purchaser the beneficiary's interest, so that his possession to the date of her death was lawful.—*Cherry v. Cape Fear Power Co.* (N. C.) 287.

A deed construed, and *held* that the legal title descended on the grantee's death to his heirs, subject to the trusts declared in the deed.—*McAfee v. Green* (N. C.) 828.

A deed construed, and *held* to pass to the grantee the legal and equitable estate in fee.—*McAfee v. Green* (N. C.) 828.

Trust deed construed, and *held* to pass an equitable estate in fee simple to the beneficiary.—*Morgan v. Morgan* (W. Va.) 389.

Where property was left in trust, with power in the beneficiary to sell, and she and her husband conveyed to her son all the interest of said beneficiary and her husband in the land conveyed, it passed an equitable estate in fee to the son.—*Morgan v. Morgan* (W. Va.) 389.

Where under a deed of trust an equitable estate in fee simple passed to the beneficiary, she had full power to convey such estate by deed in which her husband joined, without the intervention of the trustee.—*Morgan v. Morgan* (W. Va.) 389.

§ 3. Appointment, qualification, and tenure of trustee.

The appointment of a trustee on the death of the trustee named in a deed, to hold the legal title to preserve contingent remainders created by the deed, *held* authorized.—*McAfee v. Green* (N. C.) 828.

§ 4. Management and disposal of trust property.

*A court may direct a trustee to sell the trust estate at a private sale, where such a sale is promotive of the interests of the parties.—*McAfee v. Green* (N. C.) 828.

*Point annotated. See syllabus.

§ 5. Execution of trust by trustee or by court.

Grantee of land *held* to have acquired full legal and equitable title, and not to hold it in trust for one of the grantors.—*Smith v. Moore* (N. C.) 275.

Where a beneficiary under a trust deed having an equitable estate in fee simple conveyed the same, the grantee in such conveyance is entitled to a conveyance by the trustee of the legal title to the land.—*Morgan v. Morgan* (W. Va.) 389.

§ 6. Establishment and enforcement of trust.

*Where there had been no settlement between a trustee and a beneficiary, a claim by the beneficiary is not barred by laches.—*Miller v. Saxton* (S. C.) 310.

*Where a trustee under an express trust uses the trust property in violation of the trust in the purchase and conveyance of land to another, who has notice thereof, it creates a constructive trust in such third person, and laches will apply in favor of such person.—*Newman v. Newman* (W. Va.) 377.

*The defense of laches, though not applying, as a general rule, to an express trust, applies to a constructive trust.—*Newman v. Newman* (W. Va.) 377.

UNDERTAKINGS.

See "Bonds."

UNDUE INFLUENCE.

Procuring making of will, see "Wills," §§ 1, 2.

UNITED STATES.

Control and regulation of navigable waters, see "Navigable Waters," § 1.

Courts, see "Removal of Causes."

USAGES.

See "Customs and Usages."

USURY.**§ 1. Usurious contracts and transactions.**

*Even if an assignment of salary earned was part of a contract for a usurious loan and void, the right to set up the usury and have the assignment declared void would rest only with the assignor, his personal representatives, and privies.—*Western Union Telegraph Co. v. Ryan* (Ga.) 21.

*Evidence *held* not to show usury.—*Bennett v. Best* (N. C.) 84.

*The making of periodical settlements between debtor and creditor, the bringing in of new items of debit, and the calculation of interest on past due amounts, *held* not to constitute usury.—*Hamilton v. Stephenson* (Va.) 577.

*Delay for three years after payment of a debt and interest in suing to set aside a conveyance, the sole consideration of which is usurious interest, does not bar relief.—*Davisson v. Smith* (W. Va.) 466.

*A conveyance of land as usurious compensation for the use of money, will be set aside in equity.—*Davisson v. Smith* (W. Va.) 466.

*Where a conveyance of land as compensation for the use of money borrowed is collateral to the loan, and notes for the money lent

have been paid in money, the value of the real estate will not be treated as a credit on the debt or the interest as of the date of the conveyance, and the borrower in action to set aside conveyance limited to a recovery in money.—*Davison v. Smith* (W. Va.) 466.

*In the enforcement of statutes for suppression of usury, there is no restraint on the power of the courts to treat principal and collateral transactions entered into with intent to evade the law, as a single transaction.—*Davison v. Smith* (W. Va.) 466.

*As the statute of the state nullifies usurious contracts only to the extent of the illegal interest, when payment of such excess, or agreement to pay has been made, wholly collateral to the principal transaction, a proceeding for relief may be limited to the collateral payment or conveyance.—*Davison v. Smith* (W. Va.) 466.

*One who purchases land subject to an usurious trust debt, and assumes payment of the same as part consideration for his purchase, cannot be relieved from the usury.—*Stuckey v. Middle States Loan, Bldg. & Const. Co.* (W. Va.) 996.

VACATION.

Bill of exceptions signed during vacation as part of record on appeal or error, see "Appeal and Error," § 8.

Of judgment, see "Judgment," § 6.

Of judgment in garnishment, see "Garnishment," § 1.

VAGRANCY.

Evidence held to sustain conviction of vagrancy.—*Glover v. State* (Ga.) 403.

*One who strolls about in idleness, with no lawful purpose, and who is a habitual loafer, who is able to work, but has no property, and no regular income, held a vagrant, within the Penal Code 1896, § 453, par. 3.—*Carter v. State* (Ga.) 477.

Evidence held to sustain a conviction of vagrancy.—*Carter v. State* (Ga.) 477.

On trial for vagrancy it was charged in one count that defendant was a "professional gambler living in idleness," held not error to refuse to charge that the gist of the offense was failure or refusal of defendant to work when necessary to support him.—*Simmons v. State* (Ga.) 479.

VALUE.

Limits of jurisdiction, see "Appeal and Error," § 2; "Justices of the Peace," § 2.

Of property for taxation, see "Taxation," § 3.

VARIANCE.

Between affidavit and writ of garnishment, see "Garnishment," § 1.

VENDOR AND PURCHASER.

See "Sales."

Assumption by purchaser of usurious debt, see "Usury," § 1.

Compromise and settlement of agreements relating to lands purchased, see "Compromise and Settlement."

Consideration in general of contract for sale of realty, see "Contracts," § 1.

Effect of lis pendens on purchaser of land, see "Lis Pendens."

Effect of mistake in quantity of land sold on limitations, see "Limitation of Actions," § 1.

Parol or extrinsic evidence to vary contract for sale of land, see "Evidence," § 10.

Purchasers at sale of trust property, see "Trusts," §§ 2, 4, 5.

Purchasers at tax sale, see "Taxation," § 4. Requirements of statute of frauds, see "Frauds, Statute of," §§ 3, 4.

Restraining breach of contract for sale of bond, see "Injunction," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. Modification or rescission of contract.

Refusal of the vendee in an executory contract of sale of real estate to perform, but with an offer to perform in accordance with the vendee's own erroneous interpretation of the contract, does not entitle the vendor to rescission.—*Armstrong v. Ross* (W. Va.) 895.

To work a release of a contract of sale of real estate, a refusal to perform must be unequivocal and absolute, and acted upon as such by the party to whom the broken promise was made.—*Armstrong v. Ross* (W. Va.) 895.

§ 2. Performance of contract.

*Where land has been sold and conveyed by the tract, in the absence of actual fraud, no recovery can be had by the purchaser for deficiency in quantity.—*Kendall v. Wells* (Ga.) 41.

*Under a contract for the sale of real estate, the purchase to be made unless title was legally insufficient, the purchaser cannot demand a perfect record, title or refuse to pay because a deed was not attested so as to entitle it to record.—*Cowdery v. Greenlee* (Ga.) 918.

*It is not necessary that a note given for a part of the price of land should contain a description of the land or refer on its face to the deed.—*Davis v. Evans* (N. C.) 344.

A lost or mislaid deed in a vendor's chain of title held not a defect therein.—*Sutton v. Davis* (N. C.) 844.

Vendee in possession held not entitled to a reduction from the price of the value of a building on the property, destroyed by fire before delivery of the deed and payment of the price.—*Sutton v. Davis* (N. C.) 844.

Where a purchaser of land seeks an abatement of the price for a deficiency in quantity, the burden is on him to establish such deficiency.—*Ward v. Moore* (W. Va.) 743.

§ 3. Remedies of vendor.

After a prospective purchaser under an executory contract had objected to the title and declined to perform for specific reasons assigned, he cannot, in a suit for breach of the contract, urge additional objections to title.—*Cowdery v. Greenlee* (Ga.) 918.

*On refusal of purchaser to perform, the measure of damages is the difference between the contract price and the market value of the land.—*Cowdery v. Greenlee* (Ga.) 918.

Under Code 1899, c. 132, § 1a (Ann. Code 1906, § 3993), providing that a decree for the sale of land shall be advertised in a newspaper in the county where the land is situated, in a suit to enforce a vendor's lien, retained in deed which conveyed timber on tracts situated in different counties, the decree should provide for publication of the notice of sale in all the counties.—*Gaulley Coal Land Ass'n v. Spies* (W. Va.) 903.

§ 4. Remedies of purchaser.

In an action by a vendee to recover for alleged deficiency in quantity of the land conveyed, the declaration must show want of knowledge by the vendee at the time of the

*Point annotated. See syllabus.

sale and what opportunity he had for knowledge.—*Kendall v. Wells* (Ga.) 41.

VENUE.

Of criminal prosecutions, see "Criminal Law," § 2.

Review of discretionary rulings relating to, see "Criminal Law," § 29.

§ 1. Nature or subject of action.

A complaint construed and held that under the allegations thereof, the cause of action was properly removable to another county, where the personal property, in controversy, was situated.—*Edgerton v. Edgerton v. Games* (N. C.) 145.

VERDICT.

Directing verdict in civil actions, see "Justices of the Peace," § 4; "Trial," § 5.

In civil actions, see "Trial," § 14.

In criminal prosecutions, see "Criminal Law," § 17.

Review on appeal or writ of error, see "Appeal and Error," § 23.

Setting aside, see "New Trial," § 1.

VESTED REMAINDERS.

Creation, see "Wills," § 3.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 4.

VETERANS.

Laws relating to confederate veterans as unlawful discrimination, see "Constitutional Law," § 7.

VICE PRINCIPALS.

See "Master and Servant," § 7.

VILLAGES.

See "Municipal Corporations."

WAIVER.

See "Estoppel."

Of objections to particular acts, instruments, or proceedings.

See "Appearance"; "Depositions."

Defects in goods sold, see "Sales," § 6.

Defects in parties, see "Parties," § 2.

Error waived in appellate court, see "Appeal and Error," § 27.

Irregularities and errors at trial, see "Trial," §§ 13, 16.

Of rights or remedies.

See "Insurance," § 10.

Filing claim by telegraph company, see "Telegraphs and Telephones," § 1.

Forfeiture of insurance, see "Insurance," § 14.

Regulations by telegraph company, see "Telegraphs and Telephones," § 4.

WARDS.

See "Guardian and Ward."

WARRANTY.

On sale of goods, see "Sales," §§ 6, 8.

*Point annotated. See syllabus.

WASTE.

Ground for appointment of receivers, see "Receivers," § 1.

WATCHMAN.

At crossings as fellow servant of trainmen, see "Master and Servant," § 7.

WATERS AND WATER COURSES.

See "Navigable Waters."

As boundaries, see "Boundaries," § 1.

WAYS.

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," §§ 6, 7.

WEAPONS.

Use of, in commission of homicide, see "Homicide," §§ 1, 6.

WELLS.

Oil or gas wells, see "Mining and Minerals," § 1.

WIDOWS.

Dower, see "Dower."

WILLS.

See "Executors and Administrators."

Charitable bequests and devises, see "Charities."

Comparison of writing in will contest, see "Evidence," § 5.

Competency of witness in will contest, see "Witnesses," § 1.

Construction and execution of powers, see "Powers," § 1.

Devise as color of title, see "Adverse Possession," § 2.

Execution on estates created by will, see "Execution," § 1.

Harmless error in probate proceedings, see "Appeal and Error," § 24.

Restraining suit to recover property devised, see "Injunction," § 2.

§ 1. Requisites and validity.

On caveat to will on ground of undue influence, age of testator and his mental and physical condition held to be considered.—*Linebarger v. Linebarger* (N. C.) 709.

*In will contest on submission of special issue as to undue influence by devisee, his declarations held admissible.—*Linebarger v. Linebarger* (N. C.) 709.

*In will contest, evidence as to declarations by decedent as to undue influence held admissible.—*Linebarger v. Linebarger* (N. C.) 709.

*Declarations of testator held insufficient to prove undue influence invalidating will.—*Linebarger v. Linebarger* (N. C.) 709.

§ 2. Probate, establishment, and annulment.

*Burden of proving that will had been revoked and that revocation had been found in secure place held to be on contestant.—In re *Shelton's Will* (N. C.) 705.

Evidence as to declarations of testator as to how he was going to leave his property, made before date of purported revocation on margin of will, held inadmissible.—In re *Shelton's Will* (N. C.) 705.

*Under Revisal 1905, § 3115, evidence of declarations of testator tending to show that he did not write alleged revocation on margin of will *held* admissible.—In re Shelton's Will (N. C.) 705.

In probate proceedings, answer of jury to issues admitted by court *held* not ambiguous.—In re Shelton's Will (N. C.) 705.

*In will contest, evidence *held* to authorize submission to jury of special issue as to whether a certain devisee exerted undue influence over testator.—Linebarger v. Linebarger (N. C.) 709.

*The attempt to prove a will in 1857 in accordance with Rev. St. c. 122, § 6, in effect January 1, 1856, does not affect a probate in 1906 which complies with the requirements of Revisal 1905, § 3127, cl. 3.—Steadman v. Steadman (N. C.) 784.

*A will *held* entitled to be proved 50 years after testator's death.—Steadman v. Steadman (N. C.) 784.

*Under Rev. Code, c. 119, § 15, the probate of a will *held* invalid.—Steadman v. Steadman (N. C.) 784.

§ 3. Construction.

Will construed, and *held* that the trust created was executory during the life of the wife under Civ. Code 1895, § 3156, and she took no vested legal interest in any of the property and could not in her individual capacity convey any by deed.—J. A. Middlebrooks & Co. v. Ferguson (Ga.) 34.

In a devise to children as a class by way of remainder, children in esse at the death of the testator take vested interests.—Irvin v. Porterfield (Ga.) 946.

In an executory devise to children as a class, the class is fixed by the condition that existed at the death of the testator, and the interest of any dying before distribution vests in their heirs.—Irvin v. Porterfield (Ga.) 946.

*Will devising the use, benefit, and profit of testator's property, *held* to pass a fee under the rule in Shelley's Case.—Perry v. Hackney (N. C.) 289.

A will construed, and *held* to give to devisees an estate in fee in view of Revisal 1905, § 3138.—Steadman v. Steadman (N. C.) 784.

A testator's gift *held* a gift not to a class but to individuals.—Kent v. Kent (Va.) 564.

*A will must be construed according to the law of the state where testator died and the will was probated, his executors qualified, and his estate distributed.—App v. App (Va.) 672.

*In a suit to construe a will, testator's parol declarations *held* inadmissible to show his intention in making the provision in controversy.—App v. App (Va.) 672.

*In a suit to construe a will, evidence that testator was 84 years old when he made the will, and that his children were past middle life, *held* inadmissible to show that testator could not have contemplated the contingency of his surviving any of his children.—App v. App (Va.) 672.

Under Pennsylvania law, where testator bequeathed his estate to his children in equal shares, directing that, if any child died without leaving surviving children, his share should pass to the survivors, the will vested a fee in such children as survived testator.—App v. App (Va.) 672.

*Will construed, and *held*, that the widow did not take an absolute fee estate, but only a life estate in trust for the benefit of the children.—Newman v. Newman (W. Va.) 377.

*Point annotated. See syllabus.

§ 4. Rights and liabilities of devisees and legatees.

*Under Code 1887, §§ 2521, 2524 [Va. Code 1904, pp. 1289, 1290] interest conveyed by a lapsed devise contained in a residuary clause *held* regarded as intestate property.—Kent v. Kent (Va.) 564.

WITNESSES.

See "Depositions"; "Evidence."

Absence of ground for continuance in criminal prosecutions, see "Criminal Law," § 7.

Experts, see "Evidence," § 11.

Opinions, see "Evidence," § 11.

Review of discretionary rulings in examination of witnesses, see "Appeal and Error," § 22.

§ 1. Competency.

Where one of two joint obligors on a note gives a mortgage to secure it, and after his death the mortgagee sues to foreclose, a surviving co-obligor on the note is a competent witness, if, when he testifies, the note as to him has been barred by limitations.—Hawes v. Glover (Ga.) 62.

*A witness *held* to have no legal interest in the event of a suit within Revisal 1905, § 1631, and competent to testify to a transaction with the intestate of a party.—Bennett v. Best (N. C.) 84.

*Widow *held* not disqualified by Revisal of 1905, § 1631, to testify in an action to recover dower as to whether she left her husband's home of her own volition, or by reason of facts amounting to legal compulsion.—Hicks v. Hicks (N. C.) 106.

*Under Code, §§ 589, 590 (Revisal 1905, §§ 1629, 1631), testimony of plaintiff in action against widow to set aside deed to her husband as to statements by his attorney in his presence *held* inadmissible.—Smith v. Moore (N. C.) 275.

*A witness *held* not disqualified by Revisal 1905, § 1631, from testifying against the representative of an insane person concerning any personal communication or transaction with such person.—Lemly v. Ellis (N. C.) 629.

*Under Revisal 1905, § 1631 (Code, § 590), wife of contestant of will *held* not incompetent to testify as to declarations of decedent.—Linebarger v. Linebarger (N. C.) 709.

In an examination by a committee appointed by the Legislature to investigate the affairs of the state dispensary, an answer to a question as to whether a person had stated to witness that he had corrupt dealings with the state dispensary could not be excluded on the ground that it would violate the implied confidence of a private conversation.—Ex parte Parker (S. C.) 122.

Where defendant died pending the taking of depositions after defendant's deposition had been taken as an adverse witness, plaintiff *held* disqualified to testify by Code 1904, § 3346.—Puckett v. Mullins (Va.) 676.

*Code 1904, § 3349, providing that, if an original party to a prosecution has been examined and dies, his testimony may be admitted and the other party may testify concerning the same transactions, *held* applicable only when the deceased party has been examined in his own behalf.—Puckett v. Mullins (Va.) 676.

§ 2. Examination.

*It is not an abuse of discretion, when applicable in response to requests from counsel,

to instruct a witness that he need not answer a question tending to incriminate himself.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

*Where, on direct examination, a certain question is answered and counsel examines the witness on other matters, it is in the discretion of the court to refuse to allow the same question to be asked on the redirect.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

*Where a party calls the opposing party and examines him, it is in the discretion of the court to refuse to prohibit counsel for the party so called from asking leading questions on the cross-examination.—*M. H. Lauchheimer & Sons v. Jacobs* (Ga.) 55.

The competency of evidence is to be determined by the substance of the witness' answer, rather than by the form of the interrogatory.—*Hicks v. Hicks* (N. C.) 106.

*Where certain letters received by plaintiff were not produced but plaintiff admitted the correctness of certain copies defendant was entitled to ask plaintiff on cross-examination regarding the contents of the letters.—*Beard v. Southern Ry. Co.* (N. C.) 505.

§ 3. Credibility, impeachment, contradiction, and corroboration.

Where a witness testified that certain corporate stock was not worth more than 50 cents on the dollar, entries of a book showing that the stock had been sold at par were not competent to contradict him.—*Lemly v. Ellis* (N. C.) 629.

*Point annotated. See syllabus.

WORK AND LABOR.

Estoppel to deny rendition of services, see "Estoppel," § 2.
Liens for work and materials, see "Mechanics' Liens."

*An agent working without a special contract held entitled to a reasonable remuneration.—*Morrison v. New Haven & Wilkerson Min. Co.* (N. C.) 611.

WRITS.

See "Process."

Particular writs.

See "Certiorari"; "Execution"; "Habeas Corpus"; "Injunction"; "Mandamus"; "Replevin."

Certiorari to justice of the peace, see "Justices of the Peace," § 4.

Writ of error, see "Appeal and Error."

WRONGFUL ATTACHMENT.

See "Attachment," § 4.

WRONGS.

See "Torta."

YEAR.

Agreements not to be performed within one year, see "Frauds, Statute of," § 2.

Estates for years, see "Landlord and Tenant."

TABLES OF SOUTHEASTERN CASES

III

STATE REPORTS.

VOL. 125, GEORGIA REPORTS.

Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.	Ga. Rep.	S. E. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	53	814	72	54	77	205	53	592	281	54	123	406	54	121	543	54	625
2	53	815	82	54	195	205	54	193	286	54	122	407	54	121	551	54	626
3	53	808	83	54	197	206	53	1032	287	54	160	408	54	95	552	54	643
4	53	579	83	54	73	213	53	610	291	54	180	413	54	84	553	54	538
5	53	809	85	54	76	223	53	591	291	54	181	415	54	967	559	54	539
6	53	815	88	54	197	223	54	65	293	54	180	428	53	960	562	54	540
7	53	809	89	53	580	226	53	1017	295	54	180	428	54	82	562	54	638
8	53	767	96	54	74	233	53	1018	296	53	959	430	54	89	571	54	637
9	53	815	97	54	195	230	53	592	296	54	127	435	54	97	577	54	677
10	53	815	97	54	195	230	53	592	296	54	127	435	54	97	577	54	677
11	53	804	98	54	74	231	54	183	299	54	128	438	54	187	579	54	106
12	53	806	101	53	607	234	54	145	300	54	124	441	54	99	584	54	82
13	53	767	101	53	819	235	54	186	302	54	108	442	54	90	589	54	62
14	53	579	103	53	607	237	54	143	307	54	122	444	54	103	617	54	64
15	53	811	108	54	68	238	53	1002	310	54	120	447	54	102	618	54	85
16	53	810	108	53	607	238	54	190	316	54	119	450	54	147	629	54	653
17	53	810	107	53	606	239	53	1002	316	54	188	451	54	98	630	54	730
18	53	767	109	53	589	240	53	1002	319	54	177	454	54	623	637	54	732
19	53	807	109	53	606	240	54	125	326	54	173	459	54	98	642	54	735
20	53	807	118	53	589	243	54	124	328	54	148	460	54	105	645	54	646
21	53	809	113	54	184	247	54	139	336	54	176	468	54	139	649	54	650
22	53	766	114	53	589	248	54	192	338	54	189	467	53	959	655	54	648
23	53	807	115	53	583	250	54	142	341	54	152	468	54	140	655	54	678
24	53	809	117	54	66	252	54	190	349	54	174	472	54	147	657	54	678
25	53	806	117	54	194	254	54	144	353	54	168	475	54	673	658	54	643
26	53	807	121	53	591	255	54	144	354	54	113	478	54	530	663	54	653
27	53	564	123	53	583	256	54	188	361	54	151	483	54	91	663	54	679
28	53	807	123	54	194	259	54	191	363	54	157	485	54	145	671	54	663
29	53	759	123	53	1027	262	54	187	368	54	110	489	53	959	676	54	753
30	53	808	123	53	1024	265	54	167	373	54	155	489	54	621	677	54	711
31	54	202	145	53	1026	266	54	168	376	54	117	491	54	537	697	54	354
32	53	767	148	54	193	267	53	959	377	54	157	495	54	536	699	54	706
33	53	818	149	53	1011	268	54	166	379	54	116	495	54	538	710	54	626
34	54	196	153	53	1008	269	54	171	382	53	959	496	54	355	783	54	723
35	53	816	159	53	1004	270	54	164	383	54	118	496	54	618	736	54	749
36	53	583	159	54	98	270	54	171	384	53	958	500	54	356	739	54	667
37	54	196	167	53	1013	276	53	958	385	53	980	502	54	356	740	54	661
38	54	195	168	53	1003	277	54	167	385	54	92	510	54	532	740	54	666
39	53	817	172	53	1019	277	54	171	386	53	959	514	54	360	741	54	661
40	58	1038	184	53	1013	278	54	173	386	54	90	515	54	674	741	54	666
41	53	810	191	53	1024	279	54	172	388	54	135	520	54	620	742	54	724
42	54	71	193	54	69	281	54	162	393	54	132	523	54	534	743	54	662
43	54	195	198	53	608	281	54	172	400	54	123	529	54	736	745	54	636
44	54	197	203	53	1031												

VOL. 125, GEORGIA REPORTS.

	Page		Page
Adams v. State (53 S. E. 804).....	11	Atlanta & W. P. R. Co. v. Georgia Ry. & Electric Co. (54 S. E. 753).....	798
Adams v. Williams (54 S. E. 90).....	430	Atlantic Coast Line R. Co. v. Baxter (53 S. E. 959).....	407
Albany & N. Ry. Co. v. McCarthy (54 S. E. 193).....	205	Atlantic Coast Line R. Co. v. Strickland (54 S. E. 168).....	352
Allen v. Lawson (54 S. E. 176).....	336	Atlantic Coast Line R. Co. v. Taylor (54 S. E. 622).....	454
Allen & Holmes v. Powell (54 S. E. 137).....	438	Atlantic, V. & W. R. Co. v. McDilda (54 S. E. 140).....	468
Anderson v. Goodwin (54 S. E. 679).....	603	Atlantic & B. Ry. Co. v. Bowen (54 S. E. 105).....	460
Anderson v. Kirby (54 S. E. 197).....	62	Atlantic & B. Ry. Co. v. Cobb (53 S. E. 591).....	121
A. R. King & Co. v. Georgia Ry. & Electric Co. (54 S. E. 756).....	827	Atlantic & B. Ry. Co. v. Cordele (54 S. E. 155).....	373
Armor v. State (53 S. E. 815).....	3	Atlantic & B. Ry. Co. v. Howard Supply Co. (54 S. E. 530).....	478
Arnold v. Carter (54 S. E. 177).....	319		
Athens Electric Ry. Co. v. Jackson (54 S. E. 626).....	551		
Atlanta Terminal Co. v. American Baggage & Transfer Co. (54 S. E. 711).....	677		
Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co. (54 S. E. 736).....	529		

55 S.E.

(1143)

